

BOOK REVIEWS

REVUE DES LIVRES

Canadian Criminal Evidence. By P. K. McWILLIAMS. Agincourt: Canada Law Book Ltd. 1974. Pp. civ, 703. (\$40.00)

The Law of Evidence in Civil Cases. By JOHN SOPINKA and SIDNEY N. LEDERMAN. Toronto: Butterworths. 1974. Pp. xxi, 637. (\$50.00)

Although their styles differ markedly, in some ways *Canadian Criminal Evidence* and *The Law of Evidence in Civil Cases* complement one another and both will undoubtedly find a place in the libraries of Canadian legal practitioners. Canadian legal writers, with a few notable exceptions, have simply been compilers of cases and marshallers of precedent. McWilliams' *Canadian Criminal Evidence* follows closely this tradition, and can aptly be described as resembling a collection of obscurely related quotations and headnotes arranged vertically. No new insights into the ideologies or social forces that lead to the development of the rules are revealed; no new theories or rationales for particular evidentiary concepts are put forward; no critical analysis of existing doctrine is undertaken; no new developments or directions in Canadian evidence law are suggested; indeed, seldom is a principled or even a factual reconciliation of conflicting case authorities attempted. McWilliams makes no claims that his book was written to achieve any of these purposes. In the preface he states that the book was written to assist the Bench and Bar by providing a convenient reference to and digest of cases on criminal evidence. The book will undoubtedly be of value to those practitioners who are interested in the question "Is there a case on point?" or the more sophisticated "How many?", and who for one reason or another are unable or too lazy to search the digest for evidence cases. It will not be condemned by practising lawyers as academic.

McWilliams collects cases under approximately 1,100 headings and sub-headings, arranged, in terms of the policies that underlie the rules of evidence, in no apparent order. Indeed the book looks very much like an energetic lawyer's note book to which

new materials are added simply by creating a new heading or sub-sub-heading. No attempt is made to integrate the materials into a systematic whole. While this method of organizing the materials makes evidence law appear as a rag-bag containing a multifarious collection of unrelated rules, it will permit a lawyer with an admissibility problem to use a word descriptive of the matter in dispute, for instance, tape recording, certificate, previous conviction, or documents found in possession of the accused, and quickly find some cases dealing with the same matter. The arrangement should be extremely useful to a lawyer who does not know for sure whether he has a problem relating to hearsay, authentication, best evidence, relevancy, opinion testimony, privilege or character evidence. As a repository of references to Canadian criminal cases, *Canadian Criminal Evidence* is likely very nearly definitive, and apparently it was not intended to be anything more than that.

The purpose of the Sopinka and Lederman book on the law of evidence in civil cases is not as modest. The authors assert in their preface that they hope their book "will shed at least some faint ray of light on the subject". Thus presumably they were not content to produce another mere digest of evidence cases. They intended to reconcile and to integrate cases, to state the relation of particular decisions to other holdings upon the point, and to uncover unifying principles in the clutter of decisions on Canadian civil evidence law. In short, one can assume from the preface that they undertook the task of presenting this area of the law as a comprehensible whole. Given the paucity of critical writing on Canadian evidence law upon which the authors had to build,¹ their efforts must be adjudged to be, in large part, a success.

The chapters on hearsay, best evidence and privilege are all developed in a similar manner and are particularly well done. The chapter on hearsay, for instance, begins with a short discussion of the history and rationale of the hearsay rule. A definition of hearsay is proposed and the authors suggest an analysis for viewing hearsay problems which is based on the difficulties of weighing testimonial proof that the rule was intended to minimize. The authors then undertake a careful analysis of each exception

¹ Indeed the excellent materials prepared by Professor Stanley Schiff of the University of Toronto, entitled *Evidence in the Litigation Process*, and as yet, unfortunately, unpublished, was the only current Canadian material before this text which treated Canadian evidence law as a unified body of knowledge.

to the hearsay rule that is applicable to civil cases. The discussion of each exception begins with a brief statement of the exception, followed by an analysis, which usually takes into account the results of modern theory, of the reasons given for the exception. The factors that must be present before a declaration qualifies within a particular exception are then individually reviewed and the cases reconciled. Where Canada has borrowed legislation from the United States, notably with respect to the admissibility of business records, the leading American cases are cited and explained. It is a treat to see well-reasoned American cases woven into the text, rather than a line-up of the same tired old English cases. Indeed since Canadian common law rules of evidence are almost identical to the American rules, it is unfortunate that American cases are not cited even more frequently. However, perhaps their absence can be explained as being a concession to the profession which at times does not seem to realize that the United States is a common law jurisdiction,² that some of the greatest judges in the common law world have graced its Benches, and that modern English evidentiary jurisprudence, and consequently Canadian jurisprudence, is largely founded upon United States jurisprudence. Indeed, it is rather unfortunately founded on American jurisprudence as it was one hundred years ago, before the brilliant analysis of Thayer, Wigmore, Morgan and others had its effect on the case law.³ Finally, the authors critically evaluate the hearsay exceptions in terms of the principles presently underlying the rule. Thus not only is case reconciliation undertaken, but also the more challenging task of systematization.

² McWilliams, in the preface to his book, states that he did not "hesitate to draw upon many excellent decisions in recent years coming from England and other common law jurisdictions". However, he cites only a handful of American decisions, and then the citation usually follows a quotation from Wigmore, or some other authority, where the author cites the cases cited by that authority.

³ The most influential English evidence treatise in the late nineteenth and early twentieth century was Taylor on Evidence, the last and 12th edition of which was published in 1931. Taylor in the preface to his first edition stated, "The following work is founded on 'Dr. Greenleaf's American Treatise on the Law of Evidence' ". Indeed so closely did it follow the form and substance of Greenleaf that Thayer felt it should have been called "Taylor's Greenleaf". Thayer, *Bedingfield's Case — Declarations as a Part of the Res Gestae*, in *Legal Essays* (1908), p. 207, at p. 210, n. 1. The subsequent editions of Taylor wholly ignored American developments brought about by the writings of Thayer, Wigmore and others. Consequently, until only very recently English jurisprudence was being premised, in large part, upon an analysis of evidentiary principles developed by an American from American cases decided before 1842.

Undoubtedly, future judicial developments in this area of the law will be influenced by the authors' analysis.

Unfortunately, this high standard of legal analysis is not maintained throughout the book. In places this work too degenerates into a citation of cases strung together under arbitrary headings. Practitioners might find these parts of the book a useful mine out of which to dig cases, but they will not be of much assistance to them in attempting to understand the rules, their inter-relationships, or in constructing creative arguments out of the chaos created by the case authorities. For instance, under the major heading Relevancy are found such disparate subheadings as Collateral Facts, Opinion and Previous Proceedings, none of which have anything more to do with relevancy than any other doctrine of evidence law. Under The Use of Character Evidence to Prove a Fact in Issue, the authors discuss five ways of impeaching the credibility of witnesses. In a chapter called Documents, the principles of evidence that apply to documents are often obscured and confused. Indeed much of the discussion found earlier when the authors are dealing with the hearsay exceptions and the best evidence rule is repeated in a different form in this chapter. Since authentication is the only principle of evidence law that relates to documents and that had not yet been discussed in the book, one might have expected the authors to confine the chapter to this problem.

Given the time and energy that must have gone into producing these books, they undoubtedly deserve a more detailed appraisal than I have thus far given them. However, the urge to make any further remarks about the authors' interpretation of the cases, or the content and organization of their books, is far overshadowed by a sense of despondency evoked by the fact that the books had to be written at all.

When will we be candid enough to admit that like many other legal phenomena the law of evidence is dead? Provincial courts, where over ninety per cent of criminal cases are tried, only function as well as they do because trial judges, often more practical and sensible than their appellate court brothers, have in large part ignored the rules. When an eager counsel presses an objection to exclude evidence most trial judges, again sensibly, perhaps embarrassed by the charade, ignorant of the complications of the rules, or more likely curious about the evidence that counsel is trying to keep out and conscious of their responsibility to make a just determination of the case, admit the evidence subject to the objection. While the drama of the ritual involved in invoking the rule of evidence may entertain the counsel, an

impartial observer would be justified in questioning its practical significance. I am reminded of a conversation with a Provincial Court judge, who by general consensus conducted one of the better courts in the province, in which he remarked that he had been doing justice for twenty years and was proud of the fact he did not know one rule of evidence. The rules are apparently not often applied in civil trials either. The authors of *The Law of Evidence in Civil Cases* justified limiting their book to civil trials on the ground of the "discrimination of rule-application between criminal and civil trials".⁴ Presumably they mean the rules are applied even less frequently in civil trials.

In appellate courts the case authorities are so conflicting on most points that they are largely self-cancelling. However, more importantly, as anyone who reads the books under review with an open mind must realize, the whole of what is called the law of evidence is in fact little more than a word game played by lawyers and judges who have become so entrapped into their own jargon that they have forgotten the reasons for the rules and the ultimate objectives of the system. Recourse to such word mongering has too often been, as Mr. Justice Cardozo called recourse to rules of thumb, "a lazy man's expedient for ridding himself of the trouble of thinking and deciding".⁵

Sopinka and Lederman in places gallantly attempt to rationalize the irrational. If their arguments are used by counsel and move a court to adopt a less irrational position on some point of evidence their book will have served a useful purpose. Both of these books could serve a much more significant purpose if, now that the conflicting cases, the artificial categories, and the word games are all before us, they lead us to exhume and perform a post-mortem on the corpse of the law of evidence, and then to rebury it along with its ghost which now haunts us from the grave.

Lawyers often apotheosize the rules of evidence by making indefinite references to ubiquitous rules and cases that supposedly embody the experience and wisdom of the ages.⁶ Hopefully one

⁴ P. 3.

⁵ Cardozo, *What Medicine Can Do for the Law*, in *Law and Literature and Other Essays* (1931), p. 92.

⁶ McWilliams in his preface states that the rules have "great strengths" and "have been proved over the years to be the bulwarks of our liberty". He further states that "There is much of the law of evidence which should most assuredly be preserved". P. vi. Sopinka and Lederman, while frankly recognizing the need for reform of the rules of evidence, assert that any legislative reforms "will have to incorporate many of the existing principles". P. ix.

day when one of these lawyers is frantically searching through his *Canadian Criminal Evidence* to see if he can find a case on point some wise and honest judge will lean over and exclaim: "who cares!" He will then decide the fate of the offered proof by making a simple judgment based on the few principles that underlie any rational adjudicative process and that are often obscured in these books beneath a myriad of cases.

NEIL BROOKS*

* * *

Assessment of Damages for Personal Injury and Death. By HAROLD LUNTZ. Sydney: Butterworth Pty Ltd. 1974. Pp. xxxii, 350. (No Price Given)

This is an outstanding book: it is certainly one of the best monographs on any branch of the law of tort that has appeared in the common law world in the last thirty years. This must have been a particularly difficult book for the author to write for not only is the subject he has chosen to write about an intrinsically complicated one but the author feels that the whole system of common law damages should be jettisoned in favour of periodic benefits paid on a no-fault basis. Indeed, one gets the impression that Mr. Luntz would be very happy if there were no need for successive editions of his book.

If there is an aspect of the law of damages which has not been extensively and acutely discussed, I have not been able to find it. Whether he is dealing with the rule in *Brunsdan v. Humphrey*,¹ the rule in *B.T.C. v. Gourley*,² the collateral source rule, actuarial methods of computing damages and many other topics, the author is always clear, exhaustive and forceful.

All this does not mean that I would agree with all of Mr. Luntz's recommendations. Thus, in a "no-fault world", Mr. Luntz would abolish the private action for damages for assault and battery but the reasons he gives for this recommendation are not convincing. He argues that punitive damages do not make sense in a world of liability insurance. This is true, but presumably, in a no-fault regime liability insurance will be a thing of the past. Alternatively, even with liability insurance, there is no reason why

* Neil Brooks, of Osgoode Hall Law School, York University, Toronto.

¹ (1884), 14 Q.B.D. 141.

² [1956] A.C. 185.

the insurance should be held to cover awards of exemplary or punitive damages. Finally, there is no need to fear that the wrongdoer will be punished twice. It should be possible within a single proceeding to make sure that the wrongdoer only pays one penalty and it should be possible to divide that penalty between the victim and the State.

Although the question is a very difficult one, I am unable to share Mr. Luntz's support of *B.T.C. v. Gourley*.³ Insurers do not pay tax on the sums they retain under *Gourley*. This seems particularly difficult to justify when the law (certainly in Canada and the United Kingdom) already gives very generous tax treatment to insurers. It is hard to justify this amount of generosity, unless one can be fairly certain that premium rates would be significantly lowered. There is another aspect to the problem: at present awards for damages do not take inflation into account. If the plaintiff in *Gourley* had had £37,720 (instead of £6,695) to invest, this would have given greater protection against the ravages of inflation. Mr. Luntz would argue that the way to deal with the inflation problem is for the courts to expressly take this into account in assessing damages. This idea obviously has merit but until that change is accomplished, I would favour the pre-*Gourley* law.

I would also—given the present fault regime—not tamper with the collateral benefits principle which the author would like to have totally removed from the law, even to the extent of deducting (at least some) charitable gifts from the victim's damages. The author delivers a devastating broadside at *Bradburn v. G.W. Railway*.⁴ Although it is true that the reason given by the court in *Bradburn* in support of the rule, namely, that the insured had paid his premiums, is weak, I would not make the parallel which the author makes between property and personal injury insurance. In the former case, even with the revenue-producing property, there is not usually present the problem of measuring *continuing*⁵ loss which arises in all cases of serious personal injury. Again my fear is that with the refusal on the part of the courts to take into account inflation and given also their reluctance to use actuarial tables, that the level of damages will be inadequate to compensate victims even for their economic losses during the period of their disability. I should add that even in a "no-fault

³ *Ibid.*

⁴ (1874), L.R. 10 Ex. 1.

⁵ My emphasis.

world", I would see no objection to, for example, unions purchasing group accident insurance, the effect of which might put employees in a better position financially while injured than while working.

The law of damages relating to personal injury is, of necessity, in a thoroughly unsatisfactory state. All too often one is forced at the present time not to choose the "best solution" (because it is unavailable) but rather the "least bad" alternative.

Occasionally, I have differed from Mr. Luntz in my choice of the "least bad" solution but this is not to deny that he has written a book of the first-rank. I am certain that it will come to be so regarded, both by academics and by the legal profession throughout the Commonwealth.

R. A. HASSON*

* * *

Cases and Materials on Criminal Law and Procedure. Fourth Edition. Edited by M. L. FRIEDLAND. Toronto: University of Toronto Press. 1974. Pp. xv, 1021. (\$25.00)

The first thing one notices about the new edition of Professor Friedland's well-known casebook on criminal law and procedure is that there has been a vast increase in size over the last edition, from 701 pages to 1021 pages—a not inconsiderable expansion for a set of materials which, unlike its major competitor,¹ purports to deal only with the general principles of criminal law and does not contain chapters on the better known substantive offences such as murder, assaults, theft and fraud. This said, however, the increase in coverage has been very well used indeed so that this volume, which sells at a special student price, is almost certainly the best casebook in the field available to Canadian law teachers. Indeed, the great improvements over the third edition come as something of a surprise on account of the very modest preface to this new edition which tends to place emphasis on the fact that the basic structure has remained the same. While this is true, the expansions and additions are such that this work now stands on its own as a very complete treatment of the subject area and the usual law teacher's desire to supplement with further personal

* R. A. Hasson, of Osgoode Hall Law School, York University, Toronto.

¹ D. A. Schmeiser, *Criminal Law: Cases and Comments* (2nd ed., 1973).

distributions to students can now be, thankfully, resisted without loss of pedagogic effect.

Quite apart from obviously new material such as bail procedures and wire-tapping legislation, much of which shall have to await further development by case-law, many of the well-known areas have been strengthened. This is so, for example, in omissions (with an excellent note from Macaulay and the Indian Law Commissioners of 1837 to remind us that the discovery of "new" solutions may, on occasion, be little more than a re-discovery of excellent legal scholarship from the past) and automatism (by the challenging re-arrangement of provocation within this title to force us, if we can, to distinguish the two phenomena which, on the facts of a given case, can be somewhat closer than the very different legal results which follow a finding of one or the other, would indicate). That a successful plea of provocation only reduces murder to manslaughter while a successful claim of automatism results in the accused going totally free has been judicially dealt with, to date, by what Schroeder J.A., in the Ontario Court of Appeal,² has described as a "wholesome skepticism" towards the automatism defence. But is this enough? There is no doubt that insanity, provocation and automatism create difficult problems within the general principles of criminal liability and this new arrangement certainly highlights the dilemma.

The remarks which follow are some samples of the experience gained with this edition which I used recently in teaching a course in elements of criminal law and procedure in the Centre of Criminology Certificate Programme at the University of Toronto.

Is it correct to say, as the author does,³ that offences over which the magistrate has absolute jurisdiction cannot (sic) be tried by indictment? It is true that offences under section 483 of the Criminal Code will, in practice, almost invariably be tried by a magistrate (Provincial Court judge) but section 485(1) makes it clear that the magistrate can, if he wishes, send such cases for trial following a preliminary inquiry and, more generally, section 426 makes it clear that every superior court of criminal jurisdiction has jurisdiction to try *any* indictable offence.⁴ In addition,

² *R. v. Szmusiak* (1972), 8 C.C.C. (2d) 407.

³ P. 3.

⁴ For an application of this, see *R. v. Holliday* (1974), 26 C.R.N.S. 279 (Alta C.A.).

the excellent schematic⁵ depicting the appellate routes for both summary and indictable offences could be strengthened by changing the description of trials of indictable offences by magistrates under Part XVI of the Code from "Summary Trial" to simply "Trial by Magistrate" since the current description causes needless confusion with summary trials under Part XXIV which are subject to a quite different procedure and appellate hierarchy from Part XVI trials.

The section on certainty in the law contains, understandably, an excerpt from Cartwright J. in *Frey v. Fedoruk*⁶ in which it is made clear that conduct likely to result in a breach of the peace (in this case the actions of a "peeping tom") was no offence in Canada. This is all very well as far as it goes, but leaves students with a somewhat incomplete view of the law in this area because the casebook does not go on to mention the powers of justices to bind people over to be of good behaviour—as might well be the fate of a "peeping tom".⁷ Thus a defendant in Canada, it seems, may content himself that the law is too certain to convict him of such a vague offence, but not so insipid that, for similar conduct, it cannot require him to find sureties for his good behaviour and send him to prison if he fails or declines to do so!

The topic of morality and the criminal law⁸ raises, of course, the whole question of whether, and to what extent, criminality and immorality can or should be co-extensive. Students today tend to be somewhat restive with a discussion which emphasizes, as the casebook does, the narrow areas of homosexuality and abortion in this connection. It seems that one of the penalties of the Judeo-Christian culture is the tendency to regard immorality *per se* and sexual immorality in particular as synonymous. In an age where political expedience and crime have sometimes become blurred and where our consciousness of the ill-defined nature of the boundary between successful business practice and "price-rigging", environmental pollution, false advertising and the manufacture of unsafe products has been heightened by daily revelations in our newspapers, it is clearly time to trade off extra coverage in such well-tilled fields as homosexuality and abortion for some asexual considerations in this area.

⁵ P. 8.

⁶ [1950] S.C.R. 517, casebook, p. 151.

⁷ See *Mackenzie v. Martin*, [1954] S.C.R. 361 which held that common law preventive justice was in force in Ontario and neither the sections of the Criminal Code dealing with this subject (now ss 745 and 746) nor any other section interfered with this jurisdiction.

⁸ Ch. 4.

The law of attempt has always been an area much loved by law professors and much hated by students who have had to grapple with such imponderables as legal and factual impossibility. That this edition went to press before the House of Lords case of *Haughton v. Smith*⁹ could be included (other than as a footnote¹⁰) was a great misfortune, since, although the case could have been decided on classic *Percy Dalton*¹¹ lines, their Lordships have been tempted by way of *obiter dicta*, into casting great doubt on the "empty pocket" attempted theft cases which, until now, we all thought we understood.¹² Can stolen corned beef, although recovered by the police, be allowed to continue to its destination so that the recipients, though not guilty of possessing stolen goods, may be convicted of the "attempt"? The House of Lords would say "No" but the *obiter* now raises a host of new problems. It looks as if the future of generations of criminal law examiners and examinees is secure! Although this chapter worked very well in class, my students were mystified by the inclusion of a section on *agents provocateurs* under "attempts".¹³ Would this subject not be better dealt with in one of the sections in Chapter 2 on police powers, investigation or discretion? In addition, the *Bainbridge* case¹⁴ would be much more appropriately classified under "aiding and abetting" rather than "Incitement", especially since, on the facts, Bainbridge would appear to have played only a minor preparatory role in the criminal enterprise and certainly incited no-one. Far from being a user of others he seems, himself, to have been used.

Chapter 8, entitled The Mental State: Requirements of Culpability, is one of the best in the book making judicious use of United States, English and Canadian material. In particular my students found the ordering of the cases to show the various meanings which the courts have given to "intent" very illuminating. The old case of *Dunbar*,¹⁵ although short, is very instructive and looks set fair for reconsideration by the Supreme Court

⁹ [1974] 2 W.L.R. 1.

¹⁰ P. 339.

¹¹ *R. v. Percy Dalton (London) Ltd* (1949), 33 Cr. App. Rep. 102 (C.C.A.).

¹² An excellent note appears in [1974] Crim. L.R. 305 in which Prof. J. C. Smith, the "High Priest" of the legal and factual impossibility dichotomy is forced to look again at all of the stalwart work he has done in this field stretching back to (1957), 70 Harv. L. Rev. 422.

¹³ P. 340.

¹⁴ P. 350.

¹⁵ (1936), 67 C.C.C. 20 (S.C.C.), casebook, p. 413.

of Canada on the question of the availability of the defence of duress to "participants" in crime who have been coerced by the principal offenders. In a case which was recently before the Ontario Court of Appeal,¹⁶ the majority view in *Dunbar* was given an almost statute-like interpretation by the court which denied the defence to an accused who claimed to have been coerced into being the "getaway" driver in a robbery, an offence expressly excluded from the operation of such excuse by section 17 of the Criminal Code. There may be much to be said for the dissent of Crocket J. in *Dunbar* who would excuse persons who lacked a "common intention".¹⁷ This clearly recognizes that there are special circumstances surrounding the involvement in crime of persons *other* than those who, at common law, would have been described as principals in the first degree, that is, the more remote from the crime, the more need for *mens rea* in its classical sense or, put another way, the more remote from the crime the less application should there be of constructive or notional intent. Hopefully, future editions of Friedland may be able to include a longer, more closely argued judgment on this point than *Dunbar* currently gives us and *Paquette* will present the Supreme Court of Canada with just such an opportunity.

One or two editorial aspects could be improved in future editions, for instance, the result in the *Quick* case¹⁸ reads "Appeal Dismissed" instead of "Appeal allowed and conviction quashed" and more generous spacing on page 151 would make it clearer where the excerpt from an article by Dr Mewett ends and an editorial note leading into the excerpt from *Frey v. Fedoruk*¹⁹ begins. But these are quibbles. In accordance with the now expected high standard of the University of Toronto Press, this casebook is very finely finished and solidly bound—a not inconsiderable feature in an era where one sees more and more students struggling with self-destructing casebooks only five or six weeks into a semester.

As a final comment I would only question, whether fourteen years after the enactment of the Bill of Rights, it is still proper that this potentially important topic in the field of criminal law and, more particularly, criminal procedure, should only have attained the meagre status of "Supplementary Materials" at the end of the book. Is it not time for an organized chapter on the

¹⁶ *R. v. Paquette* (1974), 5 O.R. (2d) 1.

¹⁷ Now s. 21(2).

¹⁸ P. 644.

¹⁹ [1950] S.C.R. 517.

Bill of Rights using some of the more enterprising lower court decisions which have made use of its provisions, such as *Littlejohn*²⁰ and excerpts from the growing Canadian literature on the subject as it relates to criminal procedure?²¹

ALAN GRANT*

* * *

International Criminal Law. Cases, Notes and Materials. Second Revised Edition. By SHARON A. WILLIAMS and J.-G. CASTEL. Toronto: Osgoode Hall Law School, York University. 1975. Pp. xiv, 980. (\$22.00).

In recent years, books containing cases, notes and materials have come into increasing use in law schools. One of the noted Canadian promoters of such publications has been Professor J.-G. Castel whose collections of cases, notes and materials on public international law and conflicts of law are well known. Professor Castel and Miss Sharon A. Williams have now collaborated to produce the second revised edition of a monumental publication entitled *International Criminal Law. Cases, Notes and Materials*.

To the outsider, the topic of international criminal law may appear to be a somewhat esoteric one, conjuring up, as it does, visions of the Nuremberg trials, war crimes and the crime of genocide. However, the book under review is concerned not only with the criminal law of the international community, but also, in very great detail, with the extra-territorial application of Canadian or some foreign criminal law.

The first part of the book is devoted to Canadian law and Canadian jurisdiction over offences containing a foreign element. Under the heading of jurisdiction and the criminal law there is coverage of such topics as conduct within the territory; effect within the territory of conduct outside the territory; conduct of citizens outside the territory; harm caused to a citizen outside the state's territory by an alien (passive personality principle); the protection of certain vital state interests; and the protection of certain universal interests in the case of harm no matter where committed by an alien. Under the same heading are found cases, notes and materials on the questions of enforcement in the territory of another state and immunities from criminal jurisdiction.

²⁰ [1972] 3 W.W.R. 475.

²¹ Ch. VII. See W.S. Tarnopolsky, *The Canadian Bill of Rights*, (2nd rev. ed., 1975), esp. bibliography, pp. 415-418.

* Alan Grant, of Osgoode Hall Law School, York University, Toronto.

In dealing with international crimes, the book refers to a wide range of topics such as crimes against peace, war crimes, crimes against humanity, piracy, protection of submarine cables, international terrorism, interference with civil aviation, slavery, servitude, traffic in persons and prostitution, narcotic drugs, obscene publications, counterfeit money and illicit export of cultural property.

An important part of the volume is concerned with international judicial co-operation. After examining the general principles of this topic, the authors proceed to consider the question of international judicial assistance in criminal matters under such headings as illegal arrest; extradition, rendition and the notion of "political crime"; deportation as a substitute for extradition; rogatory commissions; helping foreign courts; affidavits; co-operation in the preparation of trial, service of documents, notification of acts and similar matters; recognition of foreign criminal judgments and *res judicata*; effect of foreign criminal record; right of appeal where appellant is to be tried in a foreign court for the same offence, and foreign amnesty. After considering the work of international police co-operation as carried on through Interpol, the authors then look at the future in terms of a possible international *habeas corpus* and an international criminal court.

The book contains many useful bibliographical notes as well as extracts from judgments, law review articles, treaties and conventions. In addition, the book includes a lengthy selected bibliography of a general nature as well as detailed selected specialized bibliographies which are associated with each important topic. There is also a table of cases.

The co-authors of the second revised edition of *International Criminal Law. Cases, Notes and Materials* are to be congratulated on having produced a book which, although prepared primarily for the use of students taking the course or seminar on international criminal law offered at Osgoode Hall Law School of York University and at the Faculty of Law of the University of Toronto, merits a much wider circulation. The book constitutes an important and realistic contribution to the growing volume of materials on the subject of international criminal law.

GERALD F. FITZGERALD*

* Gerald F. FitzGerald, of the Department of Justice, Ottawa. This review was prepared in a personal capacity.

International Extradition and World Public Order. By M. CHERIF BASSIOUNI. Leiden: Sijthoff; Dobbs Ferry N.Y.: Oceana Publications Inc. 1975. Pp. xix, 630. (\$27.50 U.S.)

Recent speeches by police and governmental representatives reflect a growing concern about international co-operation in the field of law-enforcement. This concern has been generated by the increase in crime, both violent and white-collar, aggravated by the ease with which international travel facilitates the escape of a wanted accused. Among the proposals that have been put forward to cope with this situation has been a call for an international multilateral convention on extradition. There can be no doubt that those advocating this and similar proposals, for example, the establishment of an international criminal court, are primarily concerned with maintenance of the rule of law and judicial enforcement of the criminal process. Professor Bassiouni, who has long been associated with writings on international criminal law, is equally devoted to upholding the rule of law, but his new work on *International Extradition and World Public Order* has a somewhat different thrust.

He points out that world public order today is very much interested in the promotion of human rights—although some might argue this concern has been buried in a mass of ideological agitation for self-determination of peoples—and his emphasis is therefore very much on the position of the individual fugitive and his protection, rather than on the rights of states seeking to enforce their criminal jurisdiction. He contends that, by and large, the bilateral system which now prevails is inadequate, since extradition is not really a pressing issue and treaties in this field tend to receive a low priority; moreover, many countries have found their extradition statutes to have become out of date and frequently abrogate all their treaties while considering a new statute; in addition, as with other treaties, extradition is affected by controversy concerning the effect of war on treaties, and even more so by the contentions of new states which often maintain that these treaties are not among those to which the new entity succeeds.¹ Many of these problems would, he feels, be avoided if there were a multilateral treaty, particularly if there were also an international tribunal to which a fugitive could appeal if what the author regards as internationally protected human rights were infringed in the course of extradition proceedings.² In Professor

¹ Pp. 15-18.

² Pp. 574-575.

Bassiouni's view, extradition is based on the common interest in "combatting common forms of criminality as part of the larger framework of preservation of minimum world order",³ and "WORLD PUBLIC ORDER: Is 'order' oriented to that which affects mankind and is brought into being by the collective action and interaction of all constitutive forces of the various world authoritative decision-making processes", and "ORDER: The product of a system of action and interaction, having a value-oriented goal for the purpose of a value-realization".⁴

The learned author is of opinion that "adherence to the rule of law [including respect for the rights of the individual] is the ultimate safeguard and guarantee for the survival of mankind",⁵ although he concedes that, even with modern beliefs in the importance of human rights, "concern for the individual will remain the least considered" of the factors involved in extradition from the point of view of minimum world order.⁶ Those who advocate a new concept of minimum world order invariably are to be found among the opponents and condemners of imperialism, but it is with some surprise that one notes Professor Bassiouni's bald condemnation of capitulations and concessions as "outrageous abuses" of colonialism,⁷ without any reference to the problem of barbaric legal practices against which these were frequently the only protection. From the point of view of the fugitive, asylum is probably his greatest protection against administrative abuse, even though it is also frequently the recourse of the scoundrel and the means by which a state of refuge indicates its attitude towards the political practices of the state of flight. The author is, therefore, much taken with the problem of asylum, although it is submitted that at times he appears to confuse the right of the refuge state to hand a fugitive back with the right of the individual to asylum,⁸ and he likewise tends to draw unnecessary parallels between instances of rendition without extradition with illegal border crossings and seizure of fugitives.⁹

As to the right of asylum, Professor Bassiouni has to concede that states exercise discretion in this field, but he asserts that the

³ P. 567.

⁴ P. 46.

⁵ P. 48.

⁶ P. 567.

⁷ P. 91.

⁸ E.g., p. 124, and see reference to *The Ahlers case*, unreported, *ibid.*,

⁹ Pp. 174-175.

right has become part of customary international law. Thus he states, "asylum provisions in constitutions, treaties and domestic legislation are binding on the very states who adopt them even though that state has discretionary application. Furthermore, when states choose to follow a given practice and that practice is pursued consistently and is relied upon by its intended beneficiaries, it creates rights in favor of such third party beneficiaries and is thus sufficient to be binding upon those states and can thus qualify as customary international law",¹⁰ and he elevates this "right" into "part of those general principles of international law recognized by civilized nations which, under Article 38 of the Statute of the International Court of Justice, constitutes a source of international law".¹¹ Nevertheless, he repeats frequently that in the United States, and much of the substantive law is considered from the standpoint of United States practice, the whole process of extradition as well as that of asylum stems from treaty and in the absence of treaty the United States does not consider itself as legally bound in any way. This is not the only instance in which the author allows his views *de lege ferenda* (written by him *de lege ferenda*) to ignore the realities of the *lex lata*. Is it true that the principle of *non-refoulement* is part of international law;¹² or that immigration laws are no longer subject only to municipal law "in light of several treaties and other sources of international law which govern the right of refugees and supersede municipal law";¹³ that "racial discrimination" is within the scope of international criminal law;¹⁴ that a requested state will deny a request for extradition on the basis that the municipal criminal law of the requesting state conflicts with a norm of international law, and does the requested state consider whether the jurisdiction of the state arises under international law;¹⁵ can one really say that "customary international law requires the condition of double criminality as to all bases of extradition",¹⁶ or that "The requirement of double criminality is found in treaties . . . , it is in the municipal laws and judicial practice of most states and is *therefore* deemed part of customary international law",¹⁷ especially when it

¹⁰ Pp. 98-99.

¹¹ P. 100.

¹² P. 102.

¹³ P. 134.

¹⁴ P. 269.

¹⁵ Pp. 270-272.

¹⁶ P. 326.

¹⁷ P. 325, italics mine.

is pointed out in the very next sentence that since the United States only grants extradition in the event of a treaty so providing, "the requirement [of double criminality applies] only when its existence can be derived from a treaty"?

In so far as a fugitive may contend that he is exempt from extradition because his offence was political, the learned author agrees with those who maintain that "international crimes" should not be protected by this exception,¹⁸ and he includes within this rubric hijacking, kidnapping of internationally protected persons and racial discrimination,¹⁹ and he asserts that "humane considerations, and inducements to foreign exiles, defectors, or fugitives, should not overthrow concern with punishability of those who have also committed common crimes and international crimes".²⁰ Perhaps at this point it is worth mentioning that in ancient Greece immunity and protection were first granted to Olympic athletes.²¹ There can be little argument with Professor Bassiouni when he reminds us that a distinction should be drawn between an "ideological offence" and an "ideologically motivated offender", for "the character of the offence emanates from the social interest it seeks to preserve while the characterization of the actor's conduct stems from a differing individual perception of the social interest".²² He believes that the object of extradition proceedings is entitled to "ideological self-preservation", but "this theory . . . is not advanced as a means to warrant or justify lawlessness, or anarchy, but is intended to relate an otherwise nebulous concept, which has been the subject of nefarious political manipulations, to the sphere of a legally or judicially manageable theory of law".²³ Nevertheless, he states that "if fundamental human rights are seriously violated by an institutional entity or a person or persons wielding the authority of the state and acting on its behalf without lawful means of redress or remedy being made available, then the responsibility of the individual, whose conduct was necessitated by the original transgression by reason of his need to redress a continuing wrong, is justified or mitigated and, therefore, warrants a denial of extradition".²⁴ Since the transgressor acting on the basis of political motivation will also contend

¹⁸ P. 417.

¹⁹ P. 421.

²⁰ P. 427.

²¹ P. 88.

²² P. 378.

²³ Pp. 415-416.

²⁴ P. 413.

that his opposition is but an expression of his fundamental human rights, I fail to understand how this can be anything but an acknowledgement of a right to indulge in lawlessness and anarchy.

Enough has been said to indicate that I found Professor Bassiouni's views provocative, stimulating and controversial. While I am aware of the difficulties involved in preparing a "camera-ready" manuscript, I doubt whether I have ever come across a text so full of misprints, omissions, incomplete sentences, wrong spellings and careless attributions as is this work. To have listed them would have been a major task. It is to be hoped that if Professor Bassiouni ever brings out a second edition he will correct these errors and thus render his work even more acceptable than it is.

L. C. GREEN*

* * *

Crimes Against Internationally Protected Persons: Prevention and Punishment. By LOUIS M. BLOOMFIELD and GERALD F. FITZGERALD. New York: Praeger Publishers. 1975. Pp. xviii, 272. (\$18.50)

In recent years terrorists seem to have favoured the kidnapping of diplomatic agents and other persons entitled to special protection under international law as a very effective method to achieve their political objectives. It is necessary to view such actions in the overall context of violence on the part of terrorists against "aircraft . . . aviation facilities and foreigners [not subject to special protection] in countries where guerilla groups [are] active",¹ and to identify the legal norms which have been adopted to maintain international peace.

The United Nations Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, adopted without objection by the General Assembly at New York on December 14th, 1973,² "marks an important step forward in the battle against worldwide terrorist activities".³ This is so because the kidnapping of a diplomat immediately and most dramatically involves international law principles. International customary law as codified by the Vienna Convention on Diplomatic Relations 1961⁴ recognizes the special

* L. C. Green, University Professor, University of Alberta, Edmonton.

¹ P. xiv.

² (1974), 13 Int. Leg. Mat. 41.

³ P. v.

⁴ (1964), 500 U.N.T.S. 95, art. 29, 1966 Can. T.S. No. 29.

status of diplomatic agents and their inviolability.⁵ This universally accepted norm forms the legal basis for the 1973 New York Convention. Although it was argued by a few States opposed to the adoption of a new Convention that the Vienna Convention gave sufficient protection to diplomats, fortunately this view did not prevail. Kidnapping as a method for gaining publicity for a political cause as well as the ensuing embarrassment to the receiving state, had certainly not been envisaged or provided for by the drafters of the Vienna Convention. Thus, a new Convention was needed to face the problem specifically.

Although Mr. Bloomfield and Dr. FitzGerald stress that it is too soon to critically assess the Convention, they have endeavoured to discuss "the ill to be cured—namely, terrorism" and the "legal tool—namely, the New York Convention".⁶ This they have done admirably by assembling in compact form significant background materials on the New York Convention which indeed facilitate research for those interested in this important subject.

In Chapter I, the authors provide a historical survey of attacks against internationally protected persons which serves the useful purpose of outlining some of the sundry terrorist activities that have occurred in the past and emphasizes the important point that "terrorist attacks against internationally protected persons and property have not been confined to any one area, but are global in scope and character".⁷ They suggest that while the 1973 Convention "is not a perfect solution, even in the legal sense, [it nevertheless] should help to set a precedent for the adoption of even broader measures to combat terrorism through international cooperation".⁸

Chapter II summarizes the present law applicable to the inviolability and protection of heads of state and heads of government, diplomatic agents, consular officials, members of special missions, representatives to intergovernmental organizations, and international officials.⁹

⁵ L. Green, *The Nature and Control of International Terrorism* (1974), 4 *Israeli Yearbook on Human Rights* 134, at p. 160.

⁶ P. v.

⁷ P. 26.

⁸ P. 27.

⁹ Art. 1(1)(a) of the New York Convention provides that an "internationally protected person" means a Head of State, including any member of a collegial body performing the functions of a Head of State under the Constitution of the State concerned, a Head of Government or a

Chapters III and IV deal respectively with the need for a Convention on prevention and punishment and the work on the preparation of the New York Convention itself. Chapter V contains a compilation of the legislative background to the Convention and gives an article by article analysis which is extremely useful and thought provoking.

It is interesting to note when one studies the Convention that the drafters have, to a great extent, used the Hague and Montreal "anti-hijacking" Conventions¹⁰ as models. This is strikingly apparent in the embodiment of the principle *aut dedere aut punire*, which is basic to the whole Convention.¹¹ The theory upon which this principle rests is that the alleged offender must face justice and thus he must be extradited or be prosecuted locally. The problem that remains to be solved involves the determination of the minimum international standard for the treatment of such offenders. If the terrorist is present in a State sympathetic to his cause that is a party to the Convention there is the possibility that excessive leniency will prove an obstacle to the proper working of the Convention.¹²

The Convention will enter into force following the deposit of twenty-two ratifications or accessions with the Secretary-General of the United Nations.¹³ Canada, signed the Convention and intends to ratify it. Before this is done, amendments to the Criminal Code contained in bill C-71¹⁴ have to be enacted. The adoption of the principle *aut dedere aut punire* in Canada will mean a further exception to the territorial principle which forms the basis of Canadian criminal jurisdiction¹⁵ since bill C-71 would

Minister of Foreign Affairs, whenever any such person is in a foreign State, as well as members of his family who accompany him. Art. 1(1)(b) specifies the requirements in order that certain other persons may fall within the category of "internationally protected persons". A general formulation was decided upon in order to give the broadest possible coverage. See p. 65.

¹⁰ Hague Convention for the Suppression of Unlawful Seizure of Aircraft (1970), 1972 Can. T.S. No. 23; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (1971), 1973 Can. T.S. No. 6; Can. Crim. Code, R.S.C., 1970, c. C-34, as am, ss 6(1) (1.1), 76.1, 2 and 3.

¹¹ Art. 7. See p. 96. Also Hague Convention, *ibid.*, art. 7 and Montreal Convention, *ibid.*, art. 7.

¹² Green, *op. cit.*, footnote 5, at p. 166.

¹³ Art. 17.

¹⁴ Criminal Law Amendment Act, Crim. Code, ss 2, 6, 381.1, 387.1, 1st reading, July 17th, 1975.

¹⁵ Crim. Code, *supra*, footnote 10, s. 5(2).

give Canadian courts jurisdiction to try persons in respect of offences committed outside Canada against internationally protected persons.

Of great significance is the resolution of adoption of the New York Convention¹⁶ by the General Assembly. It is unique because the General Assembly decided that the resolution shall be published together with the Convention. This is an entirely new procedure which resulted from a compromise concerning the inclusion of a provision on self-determination in the resolution rather than in the Convention itself.¹⁷

As the authors have emphasized the Convention is not perfect. It is, however, impossible to achieve perfection when a text is produced on such a controversial subject by so many States. One reason they suggest why the Convention is acceptable is that it covers a "restrictive range of acts against specified persons, namely, internationally protected persons".¹⁸ States will only be willing to bind themselves where conventions have "clearly defined parameters".¹⁹

Whatever the criticisms that can be levied at the New York Convention, it is apparent that the Tokyo, Hague and Montreal Conventions which were aimed at terrorism in the civil aviation field, have demonstrated "the wisdom of the piecemeal approach to problem-solving".²⁰ The present Convention is yet another piece to fit in the "jigsaw" of the combat against international terrorism. Although it is premature to state that the Convention will be an unqualified success, it can most certainly be said to be a remarkable achievement, which albeit not entirely ensuring the elimination of attacks against internationally protected persons, will most certainly contribute to the development of a body of international law to thwart terrorism.

The Appendix presents to the reader a complete picture of the present state of international law relevant to the scope of the Convention and generally to the subject of international terrorism. This is followed by a useful up to date selected bibliography.

Mr. Bloomfield and Dr. FitzGerald claim that they have merely presented their work in a convenient form for ease of

¹⁶ U.N. Doc.A/Res/3166 (XXVIII).

¹⁷ Para. 4.

¹⁸ P. 145.

¹⁹ *Ibid.*

²⁰ P. 146.

reference. This and more they have done. They have analyzed and annotated the materials and have presented in a single volume a helpful guide to the Convention that is indispensable not only to those with a particular interest in internationally protected persons, but also to international lawyers in general as well as students of world affairs.

SHARON A. WILLIAMS*

* * *

Discretion to Disobey: A Study of Lawful Departures from Legal Rules. By MORTIMER R. KADISH and SANFORD H. KADISH. Stanford: Stanford University Press. 1973. Pp. X, 241. (\$8.95 U.S.)

Obligation is the architectonic problem of law for without obedience legal systems, regardless of their aesthetic appeal, will atrophy and die. At least this has been the traditional view of thinkers committed to the life and spirit of law and even of those philosophers who have treated law as the handmaiden of higher political ideals. Thus Socrates, who considered law to be only a second best instrument of rule, was reluctant to sanction publicly conscientious disobedience to law, even though he believed such disobedience to be philosophically justifiable. Subsequent justifications for the defiance of law advanced with qualifications in the seventeenth century, and the appearance in the nineteenth century for the first time of doctrines of civil disobedience, have had one thing in common—they have been based on criteria external to law.

What makes *Discretion to Disobey* a provoking and significant addition to jurisprudential and the general literature of obligation is that the discussion of rule departure in the case of officials, and disobedience in the case of citizens, proceeds from the assumption that both the humanity and vitality of law is best served by a legal system which incorporates internal criteria that legitimate considered infractions of law. This is of course a startling proposition for jurists more concerned with order than with justice; which is not to suggest that the two are mutually exclusive. But as the authors point out a realistic survey of the American legal system, and for that matter *mutatis mutandis* the Canadian legal system as well, demonstrates that officials for long have operated under *de facto* criteria of legitimated rule departure. Few would argue

* Sharon A. Williams, Osgoode Hall Law School, York University, Toronto.

that officials were better advised to operate differently. Thus police officers selectively enforce the law, prosecutors selectively prosecute selectively arrested parties, juries occasionally determine both fact and law, and needless to say, courts are recently known to ignore jury verdicts.

Official discretion to depart from rules is treated as a function of varied role behaviour. Not only do officials expectably depart from the rules but as the authors argue persuasively "rule departures may on occasion be necessary if one is to be a good soldier, a good doctor, a good employee, and so on".¹ A legal system can formally accept rule departure if it is justified under legal propositions of merit and appropriateness which can be shown to be relevant to a given role-end. On the other hand, disobedience by citizens to mandatory rules can be justified in a legal system which possesses four general conditions:

- (1) a legitimating norm to be applied by a legal official;
- (2) the norm must relieve the citizen of the liability to punishment;
- (3) the norm must not merely serve to qualify the rule but must formally justify disobedience; and
- (4) the citizen must be able to make a colourable appeal to the norm.

Given a legal system with these conditions, the authors go on to suggest and explain three specific legitimating norms: the norm of validity, the norm of the lesser evil, and the norm of justifiable non-enforcement.

The result is no radical manifesto calling for the casual disruption of legal order but rather a reasoned critique of proven legal institutions, themselves the product of profound historic change. The somber call for legitimated rule departure gains cogency from the prudent judgment that: "No legal system other than one built solely on force can function without general acceptance among its citizens of the obligation to comply with the rules. But as the circumstances widen in which the citizen may deem his obligation to comply overcome on his own estimate of the force of some potentially legitimating norm, the functioning of that sense of obligation is put in jeopardy."²

¹ P. 30.

² P. 173-174.

Of this it may be said that there is a good possibility that Canada and the United States have passed the peak of their material prosperity and that citizens can no longer contemplate realistically the diversions of luxurious living. A reorientation of social values underway for some time has been accompanied by growing demands for qualitative social change. The inundation of North American law schools with admission applications suggests that the law will be the main instrument of that change. Historically, the pressure on legal systems has always been slightest in periods of material expansion and excess. Which is to say that qualitative and by implication conscientious social demands, will be placing greater stress on legal institutions. How those institutions respond to this stress depends in no small way on how seriously the legal community addresses itself to the question of lawful rule departure. To be sure, the incarceration of persons of demonstrated moral stature who are in the forefront of principled social change, has rarely contributed to order or to the legitimacy of legal systems. The dialogue begun by Kadish and Kadish offers society more productive means for dealing with the relatively few individuals concerned with but not intimidated by legal authority.

PAUL L. ROSEN*

* * *

Legal Aspects of Mental Retardation. By R. H. WOODY. Springfield, Illinois: Charles C. Thomas. 1974. Pp. xiv, 127. (No Price Given)

This book was not written for lawyers, and lawyers not accustomed to books by psychologists may find strange its method of exposition. They may for example be surprised to see so much of the text consisting of quotations from other writers (though many common law judgments are constructed on these lines), and surprised again that an authority as recent as 1953 is "antiquated". And they will not find what most lawyers would expect, namely a criticism of lawers' attitudes towards psychologists and psychiatrists: the author keeps his plentiful criticisms for his own side, particularly for the psychiatrist who feels insulted by cross-examination. The book is not in psychological jargon, and a lawyer will be able to understand it as well as any other layman.

The sub-title of the book, "A Search for Reliability", indicates dissatisfaction with the "reliability" (meaning consis-

* Paul L. Rosen, of the Department of Political Science, Carleton University, Ottawa.

tency) of all dealings with the mentally retarded, beginning with the assessment of retardation and particularly the estimation of their intelligence quotient. The author remarks that this is the most generally accepted way of evaluating a mentally retarded person, but that "astute professionals do not endorse this practice". From which it follows that generally professionals are not astute—a conclusion borne out by descriptions of their activities in other parts of the book. There is for example the story of a group of professionals who voluntarily entered a mental hospital pretending to be disordered: the retarded inmates realised that they were phoneys, but the hospital staff did not.

In accordance with the usual practice in this area considerable space is given to the definition of mental retardation—"unreliable" because there are many definitions, each supported by reputed authority and all different. What Dr. Woody means by retarded is: afflicted by a marked intellectual deficit and by an inability to cope with the environment. It is the inability to cope that calls for special measures from society, but others besides retardates are unable to cope: this is perhaps the reason why a good deal of space is given to the mentally sick, apologetically and despite the title of the book. The mentally retarded and the mentally sick are different not only in the nature of their trouble but also in what can be done about it, so that the only common characteristic (inability to cope) would seem to be secondary in importance, except as indicating that something must be done.

One of the reasons why "unreliable" labelling is undesirable is that the modern habit of collecting and comparing statistics becomes more obviously an exercise in futility than is the case with other subjects of such "research"; but that is not a legal question. The areas where labelling has legal consequences are three: school placement (and analogously the "treatment" of adults); the appointment of guardians to the property or to the person of an adult (including often enough institutionalisation); and criminal sentencing. In each of these fields unreliable labelling is apt to be disastrous because the authorities charged with consequential action find themselves relieved from the need to think if they rely on the labels—particularly on a numerical intelligence quotient which later testing often fails to confirm. The authorities considered are almost entirely American, and although much of what is said is equally applicable to Canada, important matters are not.

Dr. Woody does not tell us much about school placement, except by reference to the well-known line of cases in which the

courts have compelled school authorities to make provision for mentally retarded children under the "equal protection" amendment to the United States constitution—which we do not have in Canada. He might have added that the courts do not merely make abstract orders, but compel the authorities to propose a scheme which the court will approve and the execution of which it will be vigilant to control; but he discusses a case where the same practice was applied to a hospital to which an adult retardate was sent compulsorily for "treatment". In deciding whether to approve a scheme the court is of course wholly dependant on the (probably "unreliable") expert advice which it receives on the nature of the disorder in question and the suitability of the treatment (including schooling) proposed. Dr. Woody takes it for granted that treatment exists (including psychotherapy) which can improve the condition of an adult retardate.

The appointment of guardians, far more importantly than the question of the right choice of person, involves a decision that the "ward" needs in his own interest to be deprived of his legal powers or of his freedom. Dr. Woody approves an opinion that this determination should "remain a judicial function", mainly because of the publicity and consequent accountability of judicial proceedings in contrast with the confidentiality and total absence of accountability of a panel of medical "experts". But again the court is dependant on its expert advice, and it is unusual for a court to question such advice unless there is a conflict.

In criminal courts the spotlight falls not so much on retardates as on the mentally sick; and considerable space is given to the latter in this connection. A whole chapter is (very properly) given to demonstrating the lack of evidence of any significant connection between retardation and criminality; but the fact that the accused is retarded ought at least to make a difference to his sentence, once that fact is established—again by expert evidence. A lawyer would have liked to see some examples of the sort of difference this does in fact make.

But Dr. Woody is not a lawyer. He is a crusader for a better understanding of the retarded and for better treatment for them, at present obstructed by lack of this understanding. Even a lawyer, if he is prepared to take him as he comes, will find much of background value in this book, and will be provoked to fit his own legal experience to the human considerations here set out.

J. A. CLARENCE SMITH*

* J. A. Clarence Smith, of the Faculty of Law (Common Law Section), University of Ottawa.

Medical, Moral and Legal Issues In Mental Health Care. Edited by FRANK J. AYD. Baltimore: Williams and Wilkins. 1974. Pp. xii, 220. (\$14.85)

Since John Brydall of Lincoln's Inn wrote *The Law relating to Natural Fools, Mad-Folks, and Lunatick Persons*¹ in 1700, the interaction of law and psychiatry has been recorded in numerous texts. Until very recent years, however, legal regard for the mentally defective tended to centre upon their criminal liability, management of their property, their detention in the public defence and compulsory sterilization statutes. The concept that they as individuals have legal rights by virtue of being involuntary psychiatric patients received little recognition. In particular, their right to treatment, to freedom from severe and irreversible procedures by way of therapy and from subjection to experimentation has been established only in the course of the last decade, under equal protection provisions of the United States' constitution. In April 1974 the sixth annual Taylor Manor Hospital (Baltimore, Maryland) Scientific Symposium undertook to investigate recent developments in psychiatric patients' rights, and to identify important unresolved issues. This instructive and challenging volume presents the twelve participants' papers.

Considerable attention is given to the District Court's landmark decision in *Wyatt v. Stickney*,² although from a legalistic standpoint it is perhaps regrettable that papers, particularly the major paper by Morton Birnbaum³ were prepared before delivery of the mainly (but not entirely) affirmative judgment of the Fifth Circuit Court.⁴ Birnbaum brings out the wider dimensions of the case in noting⁵ that the principle of the involuntary patient's right

¹ The first "Collection (methodically digested) of such Laws, with the Cases, Opinions, and Resolutions, of our Common Law Sages, as do properly concern the Rights of all such, as are wholly destitute of Reason: Some whereof are become so by a perpetual Infirmary, as *Idiots* or *Fools* *Natural*: Some, who were once of good and sound Memory, but by the Visitation of God, are deprived of it, as Persons in a high Degree, Distracted: Some, that have their lucid Intervals, (sometimes in their Wits, sometimes out), as Lunatick Persons: And some, who are made so by their own Default; as Persons overcome with Drink, who during the time of their Drunkenness, are compared to Mad-Folks". See R. Hunter and I. Macalpine, *Three Hundred Years of Psychiatry 1535-1860* (1963), p. 278.

² (1971), 325 F. Supp. 781 (M.D. Ala.).

³ Ch. 8, *The Right to Treatment: Some Comments on Its Development*, pp. 97-141.

⁴ *Sub nom. Wyatt v. Aderholt* (1974), 503 F. 2d 1305.

⁵ P. 123.

to treatment, upon the details of which successive courts have elaborated, was not in issue as such. The defendants, led by the Alabama Mental Health Commissioner, conceded at the outset that patients had such a right. The way in which the right had been observed in Alabama had made it more illusory than real, but commentators have overlooked this preliminary admission: the first admission in litigation by state mental hospital personnel that patients have the right to be treated, and not simply be detained and pacified.

The admission in principle was, however, a prelude to the defendants' denial of particular elements of the right, and judicial confirmation of these elements by reference to closely detailed quantitative standards took the courts into the interstices of mental hospital management. Imposing such requirements as at least eighty square feet of floor space per patient (100 square feet for single rooms) and ten square feet per patient for dining room area, one toilet for each eight patients with one tub or shower for each fifteen patients, a hospital temperature not exceeding 83°F nor falling below 68°F,⁶ and for every 250 patients a total of 207.5 employees in thirty-five different job categories,⁷ took the courts far beyond the routine general prescription of standards, and almost into the practise of medicine, or at least into the realm of hospital administration.

One contributor actually makes the accusation that judges have come to undertake the practise of medicine, but not in the *Wyatt* context. In chapter six, S. I. Shuman considers *Kaimowitz v. Michigan Department of Mental Health*,⁸ in which he appeared for the defence. This celebrated lower court decision dealt in great depth with the ability of an involuntary patient to consent to psychosurgery. A contemporary target for bioethical concern, psychosurgery tends to be regarded as a therapy by its advocates and an experiment by its opponents,⁹ but however it may be characterized, it is agreed that it is an irreversible surgical procedure affecting the brain designed to influence behaviour and personality. The three-man court in *Kaimowitz* found the procedure to be insufficiently supported scientifically by animal

⁶ (1972), 344 F. Supp. 373, at pp. 381-382.

⁷ *Ibid.*, at pp. 383-384.

⁸ (1973), 42 U.S.L.W. 2063, Mich. Cir. Ct Wayne Cty July 10th, 1973.

⁹ On possible criteria and legal effects of the distinction, see Bernard M. Dickens, *What Is a Medical Experiment?* (1975), 113 Can. Med. Assoc. J. 635.

studies and human studies, and to involve too unfavourable a risk-to-benefit ratio for an involuntary patient; the patient's purported consent in the case was held ineffective as inadequately free, and inadequately informed. Shuman contests neither the wisdom of the decision, nor the court's ability to decide the particular case, but doubts the claim of the courts in principle "to undertake the management of virtually a whole field of medicine",¹⁰ and protests against the misuse of medical witnesses to which he alleges such an undertaking would lead.

From a less committed position, William J. Curran also devotes himself to *Kaimowitz*, and its challenge to the assumptions that patients, or prisoners, or others in a controlled environment, can give free consent to medical treatment or research, and that risk can be undertaken in projects of no direct benefit. Curran's paper typifies the wide-ranging and probing nature of the contributors' approach, and in his paper of considerable legal value he optimistically surveys the practical potential of current research guidelines.

Space precludes mention of comparably analytical papers, but Jonas Robitscher's tracing of legal decisions establishing the legal substance of the patient's right to treatment is of notable erudition,¹¹ and Jerome J. Shestack's brief contribution "Psychiatry and the Dilemmas of Dual Loyalties"¹² warrants attention. He points to the tension between the ideals of the doctor-patient relation and of service to the psychiatrist's institutional employer, and questions whether professional psychiatrists are sufficiently self-analytical to perceive that they are caught in a conflict-of-interest position. Thus, release on parole of a violent or sexual offender may be justifiable measured by his pacific acceptance of the prison regime and release of contemporaries, but repetition of his offence upon release might expose the institution, and the psychiatrist, to massive blame and political demands for a more repressive system. Shestack asks "Whom does the psychiatrist represent? The patient? The institution? The community? His own career?"¹³ Unfortunately, he does not sufficiently pursue his idea of using the adversary model of litigation to safeguard the patient's interests in receiving a psychiatric classification that is unaffected by the psychiatrist's institutional motivations.

¹⁰ P. 63.

¹¹ Ch. 9, *Implementing the Rights of the Mentally Disabled: Judicial, Legislative and Psychiatric Action*, pp. 142-178.

¹² Ch. 2, pp. 7-17.

¹³ P. 10.

The papers in this volume focus on mental health care from different perspectives, and were not intended necessarily to be compatible with each other. Thus, solutions proposed to their problems by representatives of one interest-group may create the problems that face another interest group. Shestack, for instance, would find his dilemma of the psychiatrist's dual loyalties aggravated by Park Elliott Dietz's solution to divergencies he identifies between the mental health and criminal justice systems.¹⁴ Dietz proposes that the systems be integrated, to eliminate the paradox that some deviants are processed by the state as offenders, and are incarcerated as punishment and not treated, while others are to be treated as mentally ill, detained for their own advantage and offered treatment modalities to correct their behaviour. He asserts that "any involuntary treatments which are believed to be justified in the case of the mentally ill should be equally justified in the case of criminal offenders".¹⁵

Explanatory of this thinking is a perception of Alfred M. Freedman's that "the redefinition of lack of adequate health care from a misfortune to an injustice is indicative of a major social movement".¹⁶ Such a movement is possible only in societies aware of their relative wealth and requiring a standard of social justice in its deployment. Whether such a social movement has occurred in Canada is worthy of consideration. Adoption of national health insurance may indeed reflect just such a Canadian movement, recognizing a right to health as a legitimate social claim. The Health Services and Social Services Act of Quebec, for instance, explicitly proclaims that "Every person has the right to receive adequate, continuous and personal health services . . . taking into account the organization and resources of the establishments providing such services".¹⁷ It may be doubted, however, whether such an enactment would lead present Canadian courts to speak in *Wyatt v. Stickney* terms, providing a yardstick for measuring the adequacy of therapy and imposing quantitative requirements upon governmental systems of mental health care.

Nevertheless, the papers collected in this volume raise a series of highly relevant questions, not simply about Canadian psychiatric care, but also about the legal context of individual treatments. Their somewhat uneven intensity gives a variety of

¹⁴ Ch. 12, *Mental Health, Criminal Justice and Social Control*, pp. 204-210.

¹⁵ P. 209.

¹⁶ Ch. 5, *The Redefinition of Psychiatric Treatment*, pp. 37-47.

¹⁷ S.Q., 1971, c. 48, s. 4.

pace that makes this an attractive book, which will repay both straight reading and selective reference through its helpful index.

BERNARD M. DICKENS*

* * *

World Patent Law and Practice: Patent Statutes, Regulations and Treaties. By JOHN P. SINNOTT. New York: Mathew Bender. 1974. Pp. 1650. (\$147.50)

Mr. Sinnott's book is intended to meet a long-felt and hitherto unsatisfied need. While there are many excellent books on the patent laws of various countries, they are by their nature unsuited to the needs of patent practitioners who frequently require quick answers to foreign patent questions. On the other hand, while there are some excellent manuals from which one can very easily find information on the patent requirement of practically all countries, they are suitable only for dealing with the commoner and simpler situations that one encounters in practice. Frequently, one must refer to the original statutes and rules of practice.

Mr. Sinnott's work is actually a compilation of the patent statutes and rules of some forty-eight countries and territories, accurately translated into English where necessary, together with full English texts of the Paris Convention, the Pan-American Convention, and the Patent Cooperation Treaty. The result is an easily accessible source of information, ease of access being enhanced by an excellent index.

The book is in loose leaf form, and in three volumes, and the author contemplates quarterly supplements both for the purpose of keeping the text up to date and for the purpose of adding the translated statutes of additional nations in response to reader interest. Indeed, the initial supplements have included recent revisions of the relevant material for the United States and Italy, plus new material for Denmark, the Federal Republic of Germany, Italy, Poland, Switzerland and the Soviet Union, together with appropriate index revisions.

G. P. ORLEANS*

* Bernard M. Dickens, of the Faculty of Law, University of Toronto.

* G. P. Orleans, patent agent, Toronto.

The Protection of the Environment and International Law. Edited by A. C. Kiss. Leiden: Sijthoff. 1975. Pp. 650. (Dfl. 70.00; \$30.50.)

This volume consists of the four written reports—and the discussion thereon—presented to the 1973 colloquium on *The Protection of the Environment and International Law* organized by the Hague Academy of International Law.

The opening paper is by Professor Goldie and comprises a general view of international environmental law, with particular reference to its capabilities, trends and limits. He points out that customary international law allows states to pollute or otherwise destroy the environment to the limit of their technological ability,¹ subject only to the law of nuisance or *abus de droit* in so far as the infringement of the sovereign rights of a neighbour are concerned. In fact the *Trail Smelter Arbitration*² figures in the Index no less than thirty-two separate times, with three of these entries running three pages or more. Professor Goldie implies that this decision may be taken as marking the beginning of the principle of good-neighbourliness in international law.³ It may be recalled that when explaining the reasons for Canada's amendment of its acceptance of the compulsory jurisdiction of the World Court, Prime Minister Trudeau indicated that the concept of the free seas owed its origin to the interests of commercial sea-going states and had become somewhat out of line with current needs. He might well have seen a manuscript of Professor Goldie's paper, for the latter points out that the present rules were born when the sea served as the main means of communication, with fishing as an economic activity, in a world committed to *laissez faire* beliefs. "Today, on the other hand, the oceans are being seen . . . as valuable repositories of resources, as zones of protection, and as subjects of coastal States' exclusive claims and competences. They are coming to partake of some, at least, of the socio-economic significance of the unsettled dry land territories of the period of colonisation. Indeed, some areas appear to be developing that attribute of property, scarcity value."⁴ Although he recognizes that a coastal state must have the right to abate impending injury, Dr. Goldie holds that any such measures must fall short of a resort to force and he does not agree with those who would argue that the self-defence article in

¹ P. 29.

² (1931-1941), 3 U.N.R.I.A.A. 1905.

³ Pp. 30, 66 *et seq.*; see, also, Kiss, p. 156, Gaja, p. 360.

⁴ P. 38.

the Charter of the United Nations can be invoked in aid.⁵ He therefore advocates treaty formulation of the right of abatement, and he regards the *Trail* decision as important for the régime it established, illustrating that the "irreducible minimum of the relevant general principles of law" is the strict liability imposed upon Canada,⁶ a principle which seems to have been followed in later cases, including the *ex gratia* payment made by the United States to the Japanese victims of nuclear testing accidents⁷ and which is gradually finding its way into the treaties aimed at controlling pollution of the environment.

While Professor Goldie's paper is most useful for the summary it provides of the rules under customary law and the trends and proposals in a variety of treaties, it is at times difficult to read: "As with nuclear and outer space activities, so also the laying of submarine pipelines and the undertaking of many other artifacts creating economies of a scale requiring technological virtuosity, including the further development, possibly to the point of hypertrophy, of giant tankers, the outer limits of scientific and engineering knowledge are quickly reached."⁸ On a more positive note, however, few would disagree with Dr. Goldie's hope that the Stockholm Principles evolved at the 1972 Conference on Human Environment "stand as announcement that the world community has assumed responsibility for the global environment. They constitute the starting point for the development of a future body of international and transnational environmental law".⁹

The remaining three papers delivered at the Colloquium are somewhat inter-related. Professor Kiss is concerned with legal problems of air pollution, Professor Jacques-Yvan Morin with marine pollution and Professor Gaja with river pollution, and all seem to approach their problem on a somewhat similar basis as the definition proposed by Professor Goldie during one of the discussions: "The introduction by human agency of substances or forms of energy into the environment in sufficient quantities so as to result in such deleterious effect as harm to living resources, hazards to human health, interference with such primary producing economic activities as farming and fishing, impairment of the quality of the air and rainfall and other precipitation, unnatural

⁵ Pp. 40 *et seq.*

⁶ P. 71.

⁷ Pp. 72-73; see, also, Morin, p. 345.

⁸ P. 79.

⁹ P. 142.

mists, snowfields, rivers, lakes, soil and sea and the reduction of amenities and interference with the legitimate uses of the environment or any part or element of it."¹⁰ Each has, of course, adapted these broad outlines to the area with which he is concerned, as may be seen from the opening sentence of Professor Kiss's introduction,¹¹ or Professor Morin's adoption of the view of the Joint Group of Experts on the Scientific Aspects of Pollution,¹² while Professor Gaja uses a somewhat shorter, less technical and more functional expression: "an alteration in the quality of the water which makes it 'less suitable for any of all the purposes for which it was suitable in its natural state'."¹³ Perhaps one of the most striking comments by any of the contributors is the statement by Professor Kiss that there is really not enough "hard law" to warrant a proper exposition of the law concerning air pollution, although as he says there has been a lot of writing and a lot of talk, all of which really amounts to drawing attention to problems.¹⁴

The sum total of the written reports and of the discussion is to provide a comprehensive survey of the existing law on the subject of pollution, both from the customary and the conventional point of view,¹⁵ and to indicate the trends which are now developing with the greater realization of global interest in protection of the environment. As to the latter, it is important to bear in mind Professor Gaja's comment that in "current practice in drafting resolutions on principles of international law, one or more—sometimes conflicting—principles are asserted, and in order to attain a large majority little attempt is made to give guidance in situations of conflict",¹⁶ and the situation is not helped by the apparent unwillingness of so many states, both old and new, to have recourse to the services of the World Court. At the same time, one must remember that, somewhat different from the internal position, international legal concern with the environment is fairly recent,¹⁷ and so criticism at the absence or paucity of dogmatic legal rules may be somewhat misplaced and the environmentalists may perhaps have to agree to make haste slowly.

L. C. GREEN*

¹⁰ P. 408.

¹¹ P. 146.

¹² P. 243.

¹³ P. 371, citing a 1958 Study of Water Pollution Control Problems in Europe.

¹⁴ P. 236; see, also, Morin, p. 347.

¹⁵ See, e.g., Morin, pp. 312-352.

¹⁶ Pp. 367-368.

¹⁷ Kiss, p. 618.

* L. C. Green, University Professor, University of Alberta, Edmonton.

An Outline of Food Law (Structure, Principles, Main Provisions). Legislative Studies no. 7. By ALAIN GÉRARD. Rome: Food and Agricultural Organization of the United Nations. 1975. Pp. viii, 105. (No Price Given)

Food is a very topical subject nowadays. A great variety of people from many nations are asking numerous questions about its production, distribution and consumption. Surprisingly, lawyers are not noticeably part of this international enquiry. Their lack of interest does not reflect the social importance of food. Can it be doubted that food is quite as significant to human life as shelter. Yet, while property law is almost too deeply established for some of the public's satisfaction, lawyers do not have any category or conception of food law. Mr. Alain Gérard's study for the Food and Agricultural Organization, *An Outline of Food Law (Structure, Principles, Main Provisions)*, is therefore both timely and pioneering.

To his credit, the author is not afraid to start out his study by hypothesizing a conceptual basis for food law. Such an attempt, as framed by his second chapter entitled "The Domain of Food Law", is to be welcomed. Unfortunately, the author has severely limited the function of food law to the regulation of food transactions. He is content to explore food problems affecting the protection of public health and the promotion of fair trading.

Put into a Canadian legal context, the author's concept of food law is the domain of the federal Food and Drugs Administration and little more. Such well-known legal machinery as marketing boards, price controls, agricultural subsidies, freight regulations, plus all the work of the Ministries of Agriculture and of Fisheries, not to mention the multitude of international agreements on foreign trade, all impinge significantly upon the law affecting food yet find no place in the author's study. That there is more to food law than food purity and fair dealing, every farmer, every freight handler, and every housewife will bear witness. For more than two thirds of the world, problems of adequate production and distribution of any foods are primary to issues of their quality control. As the author remarks: "The objective domain of food law should include in principle all operations occurring in the chain of food production."¹ In light of this awareness, it is regrettable that he has inexplicably curtailed the domain of his study.

¹ P. 10.

Within the established limits of his study, the author does provide a broad-sweeping review of his subject. As entitled, the study "outlines" every imaginable aspect of form, content and organization of food standards, and all procedures of national and international creation, application and enforcement of food controls. After the third chapter introducing "The General Form of Food Law", the author devotes four chapters to regulation of the quality of food and one to its public presentation. He includes useful descriptions of the work of the Codex Alimentarius Commission, discussing its approach to food standardization and the contents of its standards. He explains clearly the interrelation of national and international food regulations, and describes the processes of establishing standards internationally and then applying them nationally. Chapter 8, on "The Regulation of Food Labelling and Presentation" is a particularly thorough description of the issues involved in the public offering of food.

Three later chapters consider public controls on the sale of food and the final one concerns the civil rights of consumers. These sections of the study contain a much higher proportion of strictly legal discussion already widely known to administrative lawyers. The author has included a short bibliography that is very useful to an involved reader who needs to pursue certain aspects of food law more thoroughly after his introduction to the subject by this study.

The bulk of the study is not so much a conceptual synthesis as a basic description of the state of food law. It proceeds to explore the scope of the defined subject and to systematize the issues exposed. The author's description is not merely a comparative analysis of existing national regulations. References to national controls are only made in passing by way of examples to illustrate the categorization of issues being elaborated. The text maintains a nice balance in the characterization of issues facing lawyers between the legal, social and scientific contexts of food production and consumption.

Such a study is a well executed and valuable basic addition to the sparse literature on food law. National lawyers not conversant with international forms and processes will find it especially useful as more and more model international food standards are imported into domestic legal systems. Government lawyers, especially legal draftsmen, new to food law will find the study particularly important. It will provide them with a very thorough outline of their new field of responsibility and its difficulties. It

will greatly aid their initial understanding of the interdisciplinary implications in the making and maintenance of food controls.

HUGH M. KINDRED*

* * *

The Case Law of the International Court. Vol. VII A & B, 1971-1972. Edited by EDVARD HAMBRO and ARTHUR W. ROVINE. Leiden: Sijthoff. 1974. Pp. xvii, 991. (Dfl. 170)

If one were to judge the International Court of Justice merely by the length of its case list, the impression would be gained that its contribution to the enunciation and development of international law could not be very rich. During 1971 and 1972, for example, the court delivered only one advisory opinion and one judgment, the former concerning the legal consequences of the continued presence of South Africa in Namibia (South West Africa) despite the Resolution of the Security Council of 1970 declaring such presence to be illegal,¹ and the latter a technical problem concerning the competency of the International Civil Aviation Organization relating to Pakistan's right to overfly India after termination of the hostilities arising from the latter's support of Bangladesh.² That such a measuring rod of the value and significance of the court is wrong is clear from Volume VII of the analytical series of the *Case Law of the International Court* compiled by Hambro and Rovine.

As with the earlier volumes they have based their approach on a division of the body of international law into four parts—sources, subjects, pacific settlement, conflicts—and then subdivided these portions further into a total of twenty-five chapters, made up of a number of subheadings, indicating the wide scope of the judicial contribution to the application and understanding of international law. The substance of the work consists of extracts from the actual decisions of the court, indicated by lines drawn in the margin, and from the separate concurring and

* Hugh M. Kindred, of the Faculty of Law, Dalhousie University, Halifax, N.S.

¹ *Legal Consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council Resolution 276 (1970)* [1971] I.C.J. Rep. 4 — 345.

² *Appeal Relating to the Jurisdiction of the I.C.A.O. Council*, [1972] I.C.J. Rep. 2 — 179.

dissenting opinions of the individual judges. While, in this way, one is able to secure an overview of the role of the court as a whole, it is important to bear in mind that it is only the opinions of the court as such that are authoritative. Nevertheless, since the Statute of the International Court includes the teachings of jurists among the "sources" of international law, the statements of the individual judges are important for the part they play in indicating trends and what constitutes *opinio juris*. This becomes very clear if one looks at such matters as discrimination, apartheid or human rights in the present volume, and follows up these extracts by the cross-references to the earlier volumes which the editors have thoughtfully provided.

Apart from the general value of the work, the *Case Law of the International Court* enables the reader to see almost at a glance exactly what function the court has played in any one year on any specific aspect of international law, while at the same time estimating the extent to which the individuality—or nationality—of any particular judge may be of significance.

L. C. GREEN*

* * *

Commonwealth International Law Cases. Vols 1 and 2. Edited by CLIVE PARRY and J. A. HOPKINS. Dobbs Ferry, N.Y.: Oceana Publications Inc. 1974. Pp. 504, 497. (\$40.00 each)

Despite the activities of the World Court, the European Court of Human Rights and the Court of the European Communities, and the increasing network of international treaties, there are still vast areas of international law which have only been defined by national courts, while the real meaning of a treaty is sometimes only to be found by reference to the interpretation afforded to it by such courts. Since, in accordance with the theory of sovereignty, all states are considered by international law to be equal, it might be assumed that the judicial practice of every state, at least as illustrated by its highest courts, is of equal worth and significance. However, realism dictates that the decisions of a maritime state are likely to be more important on law of the sea matters than are those of a landlocked state or of a state with little or no merchant fleet and no experience of maritime war. In the same way, it is clear that the consistent judicial practice of an "old" state is likely to be more significant than that of a "new" state, although one cannot ignore the fact that, on many issues, the

* L. C. Green, University Professor, University of Alberta, Edmonton.

modern United Nations has a tendency to afford more attention to the views of the "young" rather than the "old", as evidenced, for example, by such matters as state rights, expropriation, anti-colonialism, and the like.

The British Commonwealth and Empire has by reason of its recent development made a major contribution to the increase in the number of new states, but to a great extent these states have not, from the point of view of international legal experience, come onto the world scene completely untrained. Before independence they had local judicial bodies which had already been called upon to decide issues which had an international flavour, and the existence of the Judicial Committee as a supreme appellate tribunal helped to create consistency. The traditions and practice of these colonial tribunals are to a great extent serving as guides and precedents for the new states. Dr. Parry and his colleague, as well as the International Law Fund, are to be congratulated on undertaking an enterprise, the purpose of which is to bring together in ten volumes a fairly comprehensive collection of decisions on international law throughout the Commonwealth. As a matter of convenience, it was decided to omit decisions which relate to the technicalities of extradition and immigration control, and in due course it will be interesting to see exactly what this entails. At the same time, aware of the dangers of duplication, especially as most persons and libraries likely to purchase this series of *Commonwealth International Law Cases* will also possess the *International Law Reports* it was resolved to omit the majority of cases reported in full in the latter series. As the preface points out, *Madzimbamuto v. Lardner-Burke*¹ would virtually require a volume to itself. On the other hand, *Wong Man On v. The Commonwealth*² only takes up ten pages and helps to complete the collection of decisions affecting mandated territories. It is therefore included in volume 2.³ It is to be hoped that this selectivity will be liberally interpreted, so that we may have such decisions as *Puerto Rico and Hernandez*⁴ as well as *Federenko*.⁵ Perhaps, too, in spite of the technicalities

¹ [1967] A.C. 645, 39 Int. L.R. 39.

² (1952), 86 C.L.R. 125.

³ P. 414.

⁴ [1973] 1 O.R. 60, 30 D.L.R. (3d) 260, 8 C.C.C. (2d) 433 and procedural questions, [1972] F.C. 1076, 30 D.L.R. (3d) 613, 8 C.C.C. (2d) 442, rev'd (1974), 41 D.L.R. (3d) 549, 14 C.C.C. (2d) 209 (S.C.C.).

⁵ (1910), 17 C.C.C. 268.

involved, such extradition cases as *Collins*⁶ or *Brooks*⁷ or *Novick*⁸ will not be excluded.

The first two volumes of the series are concerned with the international personality of states, including such matters as sovereignty and independence—*Re Incampe*⁹ in which the Supreme Court of Nova Scotia denied extradition to the Saar Basin at the request of France, even though protection abroad of its inhabitants was entrusted to France by the League; foreign state as plaintiff—*U.S.A. v. Motor Trucks Ltd*¹⁰ concerning the right of a foreign state to sue and its liability to answer on a counterclaim; recognition of foreign acts of state—including decisions from Ontario and British Columbia, as well as the *Laane and Baltser* decision in both the Exchequer Court¹¹ and the Supreme Court¹² and the three decisions in *U.S.A. v. Harden*,¹³ though all five were included in the *International Law Reports*; and a number of other matters on which there have been no Canadian decisions. The final chapter of volume 2 is concerned with recognition, but only three early decisions from Hong Kong have been included. No doubt volume 3 will continue the story.

While there is, as yet, no index—perhaps the detailed table of contents makes this omission acceptable—volume 2 already includes a consolidated table of cases. In addition, an editorial note is added to those decisions where it is relevant giving the citations in the *British International Law Cases*, also edited by Dr. Parry, of those cases cited in the course of the judgment. For practitioners who may be confronted with a case involving international law, the new series will facilitate their task in finding relevant decisions of their own courts, as well as those of other Commonwealth jurisdictions which might be of persuasive authority. In addition, the *British International Law Cases* will enable them to present any Commonwealth tribunal with a complete picture of the practice of the Commonwealth on the issue involved, as reflected in judicial practice.

L. C. GREEN*

⁶ (1905), 10 C.C.C. 80.

⁷ (1934), 54 C.C.C. 334.

⁸ (1960), 128 C.C.C. 319.

⁹ (1928), 49 C.C.C. 386.

¹⁰ (1922), 52 O.L.R. 262.

¹¹ [1948] Ex. C.R. 435.

¹² [1949] S.C.R. 530.

¹³ [1963] S.C.R. 366, (1963), 44 W.W.R. 630, 41 D.L.R. (2d) 721; (1961), 30 D.L.R. (2d) 566; (1961), 35 W.W.R. 654 (B.C.S.C.); (1962), 36 D.L.R. (2d) 602; (1962-63), 40 W.W.R. 428 (B.C.C.A.).

* L. C. Green, University Professor, University of Alberta, Edmonton.

An Essay on a Contemporary Jurisprudence. By PETER BRETT.
Sydney: Butterworth Pty Ltd. 1974. Pp. ix, 99. (\$5.00)

The late and lamented Professor Brett made a great contribution to the teaching of law in Australia. His published work, moreover, reflected highly upon the standard of scholarship amongst the academic lawyers in that country and set an example that merits following elsewhere. Unfortunately, his death has cheated us of the many good things which he would surely have written in the future, leaving us with his books about criminal law and this, his ultimate contribution, a slim, but stimulating little publication.

His purpose is stated at the outset. "...[J]urisprudence has . . . run itself into the ground and badly needs a fresh start. My object is to give it an initial push."¹ And he sums up at the end in this wise: "In short, our major tasks are two. We must stop repeating, as supposedly established knowledge, what we now know to be wrong; and we must continue to search for new and better understanding. This essay is intended to be a first step along the road."² Between these first and last statements a great deal is comprehended in a short space. He begins by surveying the main earlier schools of juristic thought, natural law, positivism, the historical school and the sociological school (referring to the American and Scandinavian realists as providing a "methodology" rather than a school of legal thought—a crushing, if legitimate comment). All these he subjects to criticism designed to reveal their essential inability to explain adequately the nature and activities of law. The problem is, he tell us³ that theories of jurisprudence, other than the theory of the historical school, and for that matter, the underlying theories of most specific fields of law, "are referable to a world-view that springs from the science of the eighteenth and early nineteenth centuries". This mechanistic or deterministic approach has led us to our present inability, as jurists, to explain the law and, more importantly, to permit its rational, intelligent, and satisfactory future development. The chief reason for this is that the older world-view has been "shattered beyond repair", scientifically speaking. A different world-view is emerging and this must modify legal thinking, as well as many other fields of thought.

Having explained what is wrong, and why, Professor Brett goes on to expound his application of "systems theory" and the

¹ P. 2.

² P. 87.

³ P. 26.

search for new *Gestalts*. Employing the language, ideas, and thinking of such writers as Popper and Lorenz, he formulates his theory as follows:⁴

I wish . . . to propound that legal systems may be considered as open hierarchical systems, "living" in an environment of and interacting with these other normative systems that control human behaviour.

His theory, then, is for open, not closed (the positivist thesis) systems of law: for what might even be called a "biological", even "ecological" theory of jurisprudence. What would be the effect of "regarding a legal system as an open system of social regulation"? It would have consequences for law reform.⁵ It would have consequences in relation to judicial interpretation of statutes.⁶

From this simple statement of the doctrine or theory, (or should it be called an "approach"?), Professor Brett proceeds to a consideration of the process of judicial decision, in the light of his notion of the search for a *Gestalt*.⁷ This in many respects is the core of his argument: he is concerned with describing, in effect, how the courts should deal with new problems, and how they should view their role in relation to earlier decisions. In a case-law system (and perhaps it should be remembered that this is what Professor Brett is really discussing—which, perhaps limits the relevance of his "contemporary jurisprudence"), since so much depends upon judicial decisions, a satisfactory theory of law must take this problem into account, and should enable judges to disentangle themselves from embarrassing precedents while at the same time providing them with a logical, judicial justification for the "infractions" they are committing (or, in more blunt language, enabling them "to have their cake and eat it"!). What Professor Brett has stated, if I have understood him correctly, is a theory by which judges can simply "review", in the sense of "look again at", the whole social, economic, moral, political, biological, and so on, situation whenever changes have occurred that make desirable a new attitude to the law or a particular rule of doctrine. Perhaps a simple common lawyer may be forgiven, but I thought that this is virtually what the judges, or some of them, did at least in England and Australia (perhaps even—though this is less usual or likely to occur—in Canada). Be that as it may, the passage is worth reading, if only to see Lord

⁴ P. 40.

⁵ Pp. 44-45.

⁶ Pp. 46-49.

⁷ Pp. 49-71.

Atkin's famous speech in *Donoghue v. Stevenson*⁸ described as a clear expression by a judge of his search for a *Gestalt* among the existing data.

The final portion of the essay is concerned with the legal system's picture of human behaviour. What Professor Brett is discussing are such issues as the nature of an act in law, the notion of foresight, and the problem of evidence, especially the way evidence is viewed or reviewed in appellate courts. In brief what is being suggested is that the attitude of the courts, in terms of analysis of concepts and application of principles, is founded upon outmoded ideas, and should be altered to take into account newer discoveries, and theories, of behaviour. If the author is suggesting that certain things now done by courts need revision, the response should be a plea of *nolo contendere* (if it is permitted to employ this archaic, but obviously fruitful, expression in this context). If, from these few, but interesting examples, the author is attempting to construct a new view of law, there is greater scope for debate.

While accepting that Professor Brett has produced some interesting, valuable, insights into present day problems, I am unable to respond with complete fervour to his proposition that what he is propounding is a "new" view of jurisprudence. He shows great familiarity and understanding of some modern philosophical and psychological theories, which may themselves be subject to debate: and he has cleverly and skilfully utilized them to produce or support his views on law. But is this enough to substantiate the twin argument that: (i) all the old views are wrong and do not solve the problems, and (ii) this newer outlook, if indeed it really be new, has the answers, which are introduced but not completely explored and analysed in this essay, which is understandable, since this is only a preliminary sketch, not a full-blown *exposé*? In this respect, I would point out that, for the most part, Professor Brett is concerned with what might be called "classical" problems in jurisprudence, namely, precedent, judicial interpretation of statutes, acts and intentions, and so forth. Are these really the problems today? Are they really the issues which call for new jurisprudential thinking?

Modern law seems to be less judge-oriented, more centred upon what legislatures, administrative boards and governmental or corporative agencies are doing. Given this current background, what relevance, save marginally, are the traditional, old-fashioned problems of jurists, and the time-honoured disputes between the

⁸ [1932] A.C. 562.

schools of thought as to law, legal concepts, the purposes of law? Perhaps this is the changed situation that should form the basis for a new jurisprudence, rather than scientific and philosophical or psychological developments. We may need a new jurisprudence: and it was extremely sensitive and intelligent of Professor Brett not only to suggest this but also to endeavour to undertake an attempt at its formulation. The question remains, however: is Professor Brett's version the answer to our current difficulties both practical and theoretical? Readers of this short, but interesting essay will be grateful to the late Professor Brett for his critical approach and his stimulating ideas. But they may still be left searching for a new jurisprudence.

G. H. L. FRIDMAN*

* G. H. L. Fridman, of the Faculty of Law, University of Western Ontario, London, Ont.