BOOK REVIEWS

REVUE DES LIVRES

Canadian Conflict of Laws. Volume 2: Choice of Law. By J.-G. CASTEL. Toronto: Butterworths. 1977. Pp. 791. ($60.00)

In the June issue of the *Canadian Bar Review* for 1976, I reviewed Volume One of this treatise and pointed out the great need for such a work, previously lacking in Canada, at least for the common law provinces. My judgment then on Volume One was:[1]

> This book is a work of thorough and distinguished scholarship in which the author succeeds with the task he set himself, namely, to provide a treatise on the conflict of laws that is based on Canada, and which reaches out from this base to take proper account of the wider considerations of relevant international and comparative jurisprudence.

I am glad to report that Volume Two is up to the same standards, and thus brings to distinguished completion the plan the author set himself, except for Quebec, the special position of which in many respects will be the subject of Volume Three. My generally favourable comments in the earlier review of Volume One, and the reasons given for them, being likewise applicable to Volume Two, need not now be repeated. Accordingly, I restrict myself here to some general description of the scope of Volume Two, and certain incidental comments about particular points.

Volume Two does have an "Introduction" of about fifty pages that deals with some theoretical matters of general concern, and which does in fact add to some of the theoretical analysis found in Volume One. The vested rights theory and the local rights theory for choice of law problems come in for some detailed attention, and the views of Professors Currie, Cavers and Ehrenzweig are noted again. Nevertheless, the author makes clear his preference for traditional methods in the area of choice of law. He says:[2]

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[1] (1976), 54 Can. Bar Rev. 455, at p. 459.

[2] P. 30.

> In Canada the courts should not feel ashamed to use the traditional methodology of jurisdiction-selecting rules to solve conflict of laws cases. The centuries old process has resisted many assaults and on the whole, proved quite successful. To say that the courts choose a law without considering how that choice will affect the controversy is not accurate. The lawyer representing one side or the other in a case characterizes the problem in such a way that it will, by virtue of the relevant conflict of laws rules, ultimately call for the application of a law supporting his client's contention. Obviously, he has examined the contents of the potentially applicable laws before presenting his characterization to the court. Similarly, before endorsing this characterization and applying the law which it calls for, the court will examine the contents of all the potentially applicable laws. If the court feels that it would lead to an unjust result to apply the law called for by the suggested characterization, it will reject such characterization, or use other techniques such as renvoi, public policy and so on in order to apply a different law and reach a different result. Characterization is not a purely mechanical process. If more than one characterization is available for a set of facts, the choice between the characterizations may turn upon the court's desire to achieve justice in the particular case or preference for one rule of law over another.

Also, since Volume One was published, some leading judgments have been rendered bearing on the relation of conflict of laws and Canadian constitutional law. Their significance is discussed by the author, and a brilliant new essay on the subject by Professor M. T. Hertz is footnoted.[3]

With the introduction out of the way, we find Volume Two divided into three parts—Law of Persons, Law of Property, and Law of Obligations. The author makes the point that, for most of the subjects involved under the first two of these headings, he deals not only with issues of choice of law, but also with related issues of the jurisdiction of courts and recognition of foreign judgments. The better arrangement of materials is to deal with these three things together—for instance for divorce or nullity. Indeed the arrangement is almost inevitable. It is true that jurisdiction of Canadian courts and recognition of foreign judgments formed a large part of Volume One, but this was (except for maintenance orders) restricted to money judgments, usually in commercial matters, and to enforcement proceedings. Part Three of Volume Two deals with principles for the choice of law in actions characterized as contractual or tortious, in the course of which most money judgments arise in the first place.

As I noted in connection with Volume One, this Volume also makes it clear that increasingly in Canada, constitutional law and conflict of laws interpenetrate and interact. Moreover, and apart from federal constitutional questions, statutory interventions to define choice-of-law principles are on the increase. In addition to covering the common law materials, Dr. Castel traces with care both constitutional developments and statutory changes.

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[3] The Constitution and the Conflict of Laws: Approaches in Canadian and U.S. Law (1977), 27 U. of T.L.J.1.

Some examples of this from Parts One (Persons) and Two (Property) are: the definitions of domicile and residence under the Canadian Divorce Act of 1968, the extra-provincial force of custody orders both in connection with divorce and apart from divorce, the recognition and registration of foreign corporate persons in the various provinces, and the situs of company shares. Especially in connection with corporations, the author's extensive footnotes are a guide to the numerous provincial and federal statutes that are in some way applicable. The same comments can be made of the chapters on administration of estates and succession to property on death. In addition, the author notes some provisions of the Ontario Family Law Reform Bill,[4] which did not become law until some time after his book was published. Nevertheless, in his chapter on matrimonial property, he looks ahead to the prospective impact of the proposed legislation in conflict of laws.

There is a change of pace when one comes to Part III, the principles for choice of law in the fields of contract and tort. Concerning these obligations in the common law provinces, we are still very much under the historic judge-made law with a minimum of statutory interventions. So, at times, we find Canadian courts moving with the main currents of change developing in the high courts of Britain and the United States.

Here too there is another development. Especially in the field of torts and the conflict of laws, we find that the Hague Conference on Private International Law (of which Canada is now a member) has been quite active. There are now Hague Conventions on Traffic Accidents (1968) and on Products Liability (1972). As Dr. Castel tells us, "In 1970, the Conference of Commissioners on Uniformity of Legislation in Canada recommended for enactment by the provinces and territories a uniform Conflict of Laws (Traffic Accidents) Act which is based on the Hague Convention."[5]

This prospective internationalism provides an appropriate note on which to close this review. I add only that Castel's two-volume treatise is an essential reference work for the libraries of law schools, law professors and practicing law firms. Also, the author has prepared an abbreviated edition for students at a much reduced price.[6]

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[4] S.O., 1978, c. 2.

[5] P. 654.

[6] Introduction to Conflict of Laws (1978), pp. 189 ($12.50).

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The Canadian Legal System. By GERALD L. GALL. Toronto: Carswells 1977. Pp. xi. 316. ($11.95)

The Canadian Legal System is a welcome addition to Canadian legal literature which has been notably lacking in scholarly texts discussing and critically analyzing our legal system.

Virtually every law school, and at least some undergraduate programmes, offer a course designed to provide students with an overview of legal philosophy, legal history, the roles of lawyers and judges, fundamental doctrines of law and our institutions of dispute resolution. However, until the publication of Professor Gall's book, there simply was no sophisticated Canadian text available that was suitable for this audience.

Professor Gerald Gall discusses a wide range of topics in what is generally a clear and readable style. Unfortunately, and perhaps somewhat inevitably in this reviewer's opinion, he has been only partially successful in his attempt to cover such a broad spectrum in depth for a varied audience. Professor Gall acknowledges the dilemma presented by the different levels of knowledge required by, for example, the casual reader, the sophomore university student, and the law student when he refers to the "tremendous problems"[1] he faced in structuring the content of his book particularly in light of the fact that no other Canadian alternatives exist.

Professor Gall has wisely chosen to chart a different course from most of the English and American materials in the field. The former tend to concentrate on providing introductions to a number of specific areas of law while devoting only cursory attention to the role of law and the legal system in the opening chapters.[2] American legal scholars have been concerned largely with the development of collections of cases and essays rather than the creation of textual materials.[3]

Professor Gall indicates the rationale for his book by stating:[4]

> It is necessary that all persons working within the legal system possess a responsible awareness of the nature of the system, of the institutions within the system, of the roles expected of those persons manning these institutions, and of the judicial attitudes which bind all of the foregoing together into a single, complex, functioning entity. That entity is the legal process in Canada. And it

[1] P. v.

[2] See, *e.g.*, P.S. James, Introduction to English Law (9th ed., 1976), which devotes approximately eighty per cent of its 498 pages to discussions of constitutional, criminal, welfare, contracts, torts, property, trusts, family, succession, and taxation law. The same approach is taken by A.R. Everton in Law as a Liberal Study (1969).

[3] See, *e.g.*, B.D. Fisher, Introduction to the Legal System (2nd ed., 1977), and J.J. Bonsignore, *et al.*, Before the Law: An Introduction to the Legal Process (1974).

[4] P. 2.

> is the essential task of students of the law to examine, understand and critically appraise this process.

To further his purpose he has written this book as a text covering most of the key elements necessary for a proper study of the Canadian legal system. *The Canadian Legal System* includes chapters on: (1) Nature of Law; (2) The Sources of Law; (3) The British Legal System; (4) The Constitutional Basis of Legislative and Judicial Authority; (5) The Institutions: The Role of Courts in Canada; (6) Hierarchy of Federal and Provincial Courts and Division of Responsibility; (7) The Role of Judges and Lawyers; (8) The Doctrines of Precedent and Stare Decisis; (9) Principles of Statutory Interpretation; (10) Natural Justice in the Administrative Process; and (11) New Directions.

All of the material contained within these eleven chapters is extremely useful even though there is insufficient content to promote the critical appraisal by students sought by Professor Gall.

An example of this drawback is apparent in the first chapter in which the nature of law is discussed only from the standpoint of the dominant schools of jurisprudence.

Positivism, realism and natural law are surveyed in three pages, while sociological and Marxist theories of law pass without comment. The fundamental debates of Hart-Fuller and Hart-Devlin are omitted. Although the imaginary case of the *Speluncean Explorers*[5] is used to illustrate some of the classic contradictions in legal philosophy, no comparison is made to the actual situation which confronted the English courts in *The Queen* v. *Dudley and Stephens*.[6]

While the chapter on the British legal tradition is effective in discussing the reception of English law in Canada, it also suffers from an abbreviated handling of the origins of the common law and equity and the differences between the civil law and common law systems.

A similar criticism may be made of chapter four, which contains an excellent summary of the British North America Act, the distribution of powers, the constitutional basis of the judiciary, and key constitutional law concepts. Once again certain critical doctrines, such as the "rule of law" and parliamentary supremacy receive only passing comment. Here, as elsewhere, Professor Gall provides a number of recommended sources for further reading. Although this is very valuable it does not fully compensate for insufficient discussion in the text.

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[5] L.L. Fuller (1949), 62 Harv. L.Rev. 616.

[6] (1884), 14 Q.B.D. 273.

The Canadian Legal System is far more effective in its treatment of the hierarchy of the courts, the role of judges, the standards of conduct required of lawyers, the doctrines of precedent and *stare decisis*, and statutory interpretation. One cannot but wonder, however, why Professor Gall chose to illustrate the operation of *stare decisis* primarily in regard to the questions of whether or not the Supreme Court of Canada is bound by its own earlier decisions or by the pre-1949 decisions of the Privy Council. This matter no longer appears to be a subject of controversy.[7]

Professor Gall uses an extract from the Income Tax Act to acutely demonstrate the problem of complex statutory language. Although an outline of the three traditional canons of statutory construction follows, it is unfortunate that the reformulation developed by Professor Driedger is not included.[8] In addition, the list of presumptions applied by the courts in statutory interpretation is not complete.[9] More importantly, this discussion gives the reader the impression that the process of statutory interpretation is a completely objective one, somewhat akin to a science. An analysis of how many of the presumptions are directly contradictory[10] and how judicial attitudes influence the selection and application of the rules of interpretation would be a useful addition.

Several of the areas discussed by Professor Gall would be of greater interest to readers if more background information was provided. The administrative process for resolving disputes and rendering decisions is discussed without any data outlining its growth and without detailed comment as to why this development has occurred.

The flavour of the running battle between tribunals, the courts and legislatures is lacking. The training and career options of lawyers is mentioned, yet we are not told what types of law or careers

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[7] The following decisions of the Supreme Court of Canada are of relevance on this point: *Brant Dairy Co. et al.* v. *Milk Commission of Ontario et al.* (1972), 30 D.L.R. (3d) 559, at pp. 586-587; *R.* v. *Paquette* (1976), 70 D.L.R. (3d) 129, at p. 135; *R.* v. *Hill* (1975), 6 N.R. 413, at pp. 417-424 and 431 (reconfirmed on this point in *R.* v. *Hill (No. 2)* (1976), 7 N.R. 373, at pp. 377-385, 391 and 393); *Government of Canada* v. *McNamara Construction (Western Ltd) et al.* (1977), 13 N.R. 181, at p. 188; *Capital Cities Communications Inc. et al.* v. *Canadian Radio-Television Commission et al.* (1978), 18 N.R. 181, at p. 199; *Keizer* v. *Hanna & Buch* (1978); 19 N.R. 209, at p. 212; *Re Agricultural Products Marketing Act et al.* (1978), 19 N.R. 361, at pp. 367-368 and 422-423.

[8] E.A. Driedger, The Construction of Statutes (1974), pp. 67 and 81-82.

[9] Maxwell on the Interpretation of Statutes (12th ed., by P. St. J. Langan, 1969).

[10] An excellent analysis and diagram is made by Karl Llewellyn in Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Construed (1950), 3 Vand. L.Rev. 395.

lawyers choose or who lawyers are. The appointment process of judges is considered in detail, but without any mention of the widespread concern over political influence in the selection of judges or administrative tribunal members.

Professor Gall has included a number of useful diagrams, charts and quotations to illustrate some of the more complex subjects in his book. One wishes only that more were used, such as, for example, a diagram of the British court system. It would also be helpful if more questions and legal problems were posed to the reader. A more detailed discussion of the leading cases used as illustrations would be a welcome addition, as an account of the context in which they arose and the legal issues raised in them often seems to be lacking.

Professor Gall considers law as representing "the only opportunity to achieve international peace and progress, domestic tranquility, and major advancements in the quality of life".[11] Perhaps this overly grand view of the role of the law and the legal system in society explains his non-controversial approach to discussing the Canadian legal system. By ignoring the weaknesses, failures and injustices he offers the reader an artificial image of our legal system that will not enhance critical analysis nor promote necessary change.

In spite of the criticisms of *The Canadian Legal System* outlined by this reviewer, it is a useful and worthwhile addition to the legal literature. Many of the perceived shortcomings could be easily resolved through an expansion and revision for the second edition. The overall quality of the text warrants such action. Its weaknesses in no way overshadow its strengths. Professor Gall is to be particularly commended for the considerable care that he has taken in making the book as current as possible, as is evidenced by his discussion of the "judge's affair" and the new Canadian Human Rights Act.[12] Attention is also given to recent developments such as law reform, the delivery of legal services, and advertising by lawyers to name just a few.

It is to be hoped that Professor Gall has plans for a new edition for the near future.

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[11] P. vi.

[12] S.C., 1976-77, c. 33.

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Essays on Abortion. By K. W. CHEUNG. Windsor, Ont.: University of Windsor Printshop. 1977. Pp. 116. (No Price Given)

The controversy over abortion continues to rage. According to Statistics Canada, the number of therapeutic abortions in Canada is rising each year. The major antagonists, those who favour abortion and those who do not, are increasingly becoming more organized and more politicized. In his Preface, the author posits that the extreme, polarized debate on the abortion issue is a dialogue among the deaf, thereby making it harder for concerned individuals "to obtain clarity on the issues".[1] The author's "sole objective is to set aside the rhetoric and emphasize the complex underlying issues".[2] This is an admirable objective, but unfortunately the author has in general failed to achieve it. Although he has, with no difficulty, avoided the rhetoric, he has failed to discuss, let alone emphasize, many of the "complex underlying issues".[3] In addition, he has not given sufficient emphasis to those "underlying issues" which he does discuss[4] and he has placed too much emphasis on matters which are not really "underlying issues".[5] Failure to achieve his objective, however, does not mean that there is nothing of value in these essays.

The book is composed of a one page Preface, a Table of Contents (mistakenly labelled as an Index), and six essays or chapters, which the author calls "sections". Section 1 deals with the author's reduction of the basic, underlying issues to three principles: the sanctity of life, the sanctity of freedom of choice and the sanctity of the supremacy of societal interests over individual interests. Section 2 deals with the history of abortion legislation in Canada. Section 3 deals with the applicability of the referendum or plebiscite process in resolving the abortion issue. Section 4 deals with the legal status of the foetus, especially in the areas of property and tort law. Section 5 deals with the Bill of Rights ramifications of the abortion

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[1] Preface.

[2] *Ibid.*

[3] For example, there is virtually no discussion of the complex anthropological, cultural, social, economic, religious, philosophical, psychological or scientific aspects of abortion. The essays are almost exclusively legal in a narrow sense of that word. In fact, the author does not even refer to certain other Canadian books which cover a broader range of these issues. See, *e.g.*, E. Kremer and E. Synan ed., Death Before Birth: Canada and the Abortion Question (1974).

[4] For example, the critical issues raised in Section 1 concerning the three sanctities are dealt with in too brief a fashion.

[5] For example, it is hard to accept the author's contention that Section 2 (an historical summary of the Canadian abortion legislation) or Section 3 (the applicability of the referendum and plebiscite process for the abortion controversy) are the real "underlying issues" in the abortion controversy.

controversy, discussing the right to privacy argument as it arose and was accepted by the United States Supreme Court in the cases of *Roe* v. *Wade*[6] and *Doe* v. *Bolton*,[7] and as it arose and was rejected by the Supreme Court of Canada in the *Morgentaler* case.[8] Section 6 is a previously published, case comment[9] on the *Wade* and *Bolton* decisions.

In his Preface, the author neglects to inform potential readers about the content of the six sections, or about their relationship to each other, or why these six topics were selected rather than hundreds of other aspects of the abortion controversy. In addition, the author's purpose is even more obscured by not stating for whom this book was written. He suggests at one stage that it is for "concerned individuals"[10] to help them formulate their own position on the abortion question, yet the content of the essays and the writing style are not directed to the concerned layman. As noted above, the content is almost exclusively legal. In addition the author uses "legalese" with no explanations for the lay reader. For example, the reader will find undefined expressions such as *lapsus legae*,[11] *mens rea*,[12] *prima facie*,[13] *ultra vires*,[14] the rule against perpetuities,[15] legacy,[16] intestate,[17] devised,[18] consensus *ad idem*,[19] *tort*,[20] *puncton* [*sic*] *temporis*,[21] *ratios*,[22] and dictum.[23] Legal commentators such as Bracton, Coke and Blackstone are referred to as if they are household names for every reader.[24]

Section 1 is the author's best effort at achieving his objective of eliminating rhetoric and replacing it with a new framework to help

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[6] (1973), 410 U.S. 113.

[7] (1973), 410 U.S.179.

[8] (1975), 53 D.L.R. (3d) 161 (S.C.C.).

[9] (1973), 51 Can. Bar Rev. 643.

[10] Preface.

[11] P. 21.

[12] *Ibid.*

[13] *Ibid.*

[14] P. 40.

[15] P. 58.

[16] *Ibid.*

[17] *Ibid.*

[18] P. 59.

[19] P. 60.

[20] P. 61.

[21] P. 75.

[22] P. 84.

[23] P. 89.

[24] *E.g.*, p. 20.

clarify the complex, underlying issues. The author acknowledges that the abortion controversy is not readily amenable to one-dimensional thinking since it involves medical, legal, sociological, psychological, philosophical and religious aspects. He suggests that the controversy may be better understood by examining the conflict which it creates among "the three sanctities" which, according to the author, "represent in essence a distillation of some of the basic values of mankind in society".[25]

An attempt to analyze the abortion controversy by reference to these basic values is an interesting and valuable approach. Unfortunately, the analysis which the author provides is too brief,[26] too simplistic and too incomplete.[27] The conflict which the abortion issue raises concerning the first value, sanctity of life, is the conflict between the mother's life and the foetus' life. The critical issue is whether the foetal life is human life and, if so, at what stage it becomes human life on the continuum from conception to birth. The author provides no information, principles or criteria for defining humanness in relation to foetal life.[28] If foetal life is human, it is arguable that abortion is only justifiable when the sanctity of maternal life and foetal life are in irreconcilable conflict but not when maternal interests other than life, such as economic well-being or physical or mental health, are balanced against foetal life. The well recognized legal and moral notions of self-defence and necessity justify abortion in the former case, but not the latter. The only way to avoid this conclusion is to state that all human life is not

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[25] P. 2.

[26] Approximately 6½ pages.

[27] For example, the author concludes: "Within this framework [of the three sanctities] those individuals whose values and beliefs enable them to decide in favour of abortion are free to obtain the best possible medical services; whilst those individuals whose values and beliefs oppose abortion can simply ignore the available services. . . . To deny others the availability of abortion is to deny that other group their freedom of choice." P. 8. This conclusion totally ignores the critical issue of whether foetal life is human life and deserving of the full protection of the law. The weakness of this argument has been recently commented upon as follows: "Thus the argument that anyone who doesn't approve of abortion need not avail himself of it is, once we understand that a human life is at stake, '. . . as shallow as that of Chief Justice Roger B. Taney who, in handing down the infamous *Dred Scott* decision of 1857, commented that no one who objected to slavery was obliged to own slaves.' " Campbell, Abortion Law in Canada: A Need for Reform (1977-78), 42 Sask. L. Rev. 221, at p. 240. See also Lenhardt, Abortion and Pre-Natal Injury: A Legal and Philosophical Analysis (1974), 13 Western Ont. L. Rev. 97, at pp. 98-105.

[28] In this regard, see the very useful article by Krimmel & Foley, Abortion: An Inspection into the Nature of Human Life and Potential Consequences of Legalizing its Destruction (1977), 46 Cincinnati L. Rev. 725 and the many references cited therein. See also E.-H. Kluge, The Practice of Death (1975), ch. 1; Campbell, *op. cit.*, *ibid.* pp. 232-238; Lenhardt, *op. cit.*, *ibid.*, pp. 105-111; and Death Before Birth, *op. cit.*, footnote 3, pp. 55-89.

of equal value and thus is not deserving of equal protection. Such a principle has obvious pitfalls. If the foetus is human, but is not entitled to the full protection of the law, then how about the badly deformed infant, the mentally retarded, the physically handicapped, the senile or the mentally ill person, or perhaps even racial or religious minorities, or the poor or the uneducated? What criteria are to be used to measure the quality of human life, what classifications of human life are to be created, and who shall determine the criteria and the classifications?

The sanctity of individual freedom of choice is used to support the mother's claim to the right to decide what to do with her body, including the right to terminate a pregnancy. But this claim can not be answered until it is decided if foetal life is human and whether, even if it is human, all human life is of equal value. The answers to these questions will determine whether society has a moral obligation to protect foetal life. This is in effect the third sanctity—the supremacy of societal interests over individual interests. However, the author states this sanctity in much wider terms than I have suggested above. He states: "In every instance the regulation [of abortion] should be imposed only where the interests of that society *qua* society are affected and only where the purpose is the greater good of the society."[29] The author does not acknowledge or examine the limits, if any, of this underlying, utilitarian philosophy. More importantly, he does not suggest any guidelines for determining what aspects of the abortion controversy involve a societal interest and how differing societal interests and individual interests are to be weighed.

In Section 2, the author summarizes the history of abortion legislation. He notes that the common law did not prohibit abortion prior to quickening, which was the time at which the woman could feel the foetus move, normally during the fifth month. It was not until Lord Ellenborough's Act of 1803 that abortion prior to quickening became a crime. The author notes that "[e]conomic historians have argued that the rapid industrialization which took place in the period, particularly in England, gave the State an incentive to act to maintain or to increase the population".[30] The author agrees that it was industrial exploitation, not humanitarian or puritanical reasons which led to this stricter law on abortion. Unfortunately the author does not pursue this interesting thesis or refer the reader to any of the historians who have made this argument. In particular, the author makes no reference to the recent Canadian book, *Compulsory Parenthood* by Dr. Wendell Waters in which the author very carefully documents a similar historical

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[29] P. 8.

[30] P. 19.

thesis.[31] Dr. Waters' book also deals very skillfully with many social, medical and moral aspects of abortion. Equally surprising is the author's failure to refer the reader to Professor de Valk's very helpful books on the recent history of abortion in Canada.[32]

The absolute prohibition on abortions continued in Canada from the enactment of Lord Ellenborough's Act in 1803 until new abortion legislation was enacted in 1969. The old legislation did not expressly authorize medical, therapeutic abortions. Although therapeutic abortions were commonplace, the physician's actual immunity lay not in the express provisions of the law but rather in the non-enforcement of the law. The 1969 legislation authorizes therapeutic abortions if a therapeutic abortion committee believes that "the continuation of the pregnancy of such female person would or would be likely to endanger her life or health".[33]

After summarizing the details of the 1969 legislation, the author makes a few, brief comments on the operation of this legislation. However, he makes no mention of the Committee on the Operation of the Abortion Law (also referred to as the Badgley Committee). The Badgley Committee was appointed by the Privy Council in September, 1975 and they rendered their *Report*[34] in January, 1977 (which may well have coincided with the time of printing of this book). The *Report* contains a wealth of information on abortion practices in Canada. In addition, the author has not referred to the annual reports by Statistics Canada on therapeutic abortions.[35] The author's comments on the operation of the abortion legislation are not wholly consistent with the data available from these two sources.

Section 3 deals with the possible use of the referendum or plebiscite to resolve the abortion controversy in Canada. The author uses the word referendum to refer to a procedure which puts an issue to the people in such a manner that the people's answer results in a binding, legislative solution. The author uses the word plebiscite to refer to a procedure which puts an issue to the people only to

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[31] (1976). Dr. Waters' thesis includes more than industrialization and weaves in other historical facts, particularly the threat of war and the loss of power by the Catholic Church.

[32] A. de Valk, Morality and Law in Canadian Politics: The Abortion Controversy (1974); A. de Valk, The Unfinished Debate: The Abortion Issue in Contemporary Canadian History (1974) (this is only a pamphlet summary of the above noted book); and A. de Valk, Lang, Lalonde, Trudeau, Turner: Abortion (1975).

[33] Criminal Code, R.S.C., 1970, c. C-34 as am., s. 251(4)(c).

[34] Report of the Committee on the Operation of the Abortion Law (1977). See also Harris & Tupper, A Study of Therapeutic Abortion Committees in British Columbia (1977), 11 U.B.C. L. Rev. 81.

[35] See, *e.g.*, Statistics Canada, Therapeutic Abortion 1973, Catalogue No. 82-211.

ascertain their views but not to obtain a binding, legislative solution. The author notes that the referendum is seen by some as an intrusion on the legislative powers of elected members of Parliament. The author reviews the constitutionality of government by referendum and he concludes that the federal government has clear constitutional powers to provide for a referendum and that the provincial governments—although the point is less clear—probably have constitutional power to provide for a referendum if they are careful to provide for participation by the Lieutenant-Governor in the enactment of the resultant legislation. Both legislatures may initiate a plebiscite. The author then summarizes the difficulties of using the referendum process for the abortion question. These difficulties are as follows: details of the regulatory scheme may be too complex to spell out in a referendum; the social and psychological effects of free abortion may not emerge in the public consideration; the voter turn-out for a referendum may be too low; undue pressure may be put on the public by special interest groups; abortion tends to evoke emotional, rather than rational responses; and the wording of the ballot may be instrumental in determining the outcome. For the above reasons, the author concludes that the referendum is not a good way to resolve the abortion issue. The author then examines the plebiscite process and finds it has all the advantages of the referendum, but none of its disadvantages. The author concludes that "[t]he plebiscite appears to be the best mechanism available for encouraging a country-wide debate".[36] The author then provides a model statute, based on the 1898 and 1942 Plebiscite Acts,[37] for a plebiscite on the abortion issue.

In general, this section is an interesting and valuable contribution. The author's discussion of the constitutional implications of a referendum could have been strengthened by reference to an earlier, lengthy discussion of this issue.[38] Greater reference to the wealth of American experience with the referendum would also have been useful.[39]

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[36] P. 45.

[37] The Prohibition Plebiscite Act, 1898, 16 Vict., c. 51, and The Dominion Plebiscite Act, 1942, 6 Geo. VI, c. 1.

[38] Scott, Constituent Authority and the Canadian Provinces (1966-67), 12 McGill L.J. 528.

[39] See, *e.g.*, McPhail & Tucker, Interest Group Activities and the Public Opinion Process: A Case Study of a Liquor Referendum (1968), 20 S. Carolina L. Rev. 749; Comment, Application of the Equal Protection Clause to Referendum-made Law, [1972] U. Ill. L.F. 408; Olson, Limitations and Litigation Approaches: The Local Power of Referendum Courts — A Michigan Model (1972), 50 J. Urban L. 209; Diamond, California's Political Reform Act: Greater Access to the Initiative Process (1975), 7 Southwestern U.L. Rev. 453; Stewart, Law of Initiative Referendum in Massachusetts (1977), 12 New Eng. L. Rev. 455.

Section 4, which is the longest section, examines the legal rights of the unborn child before, at and after birth. The author argues that examination of this issue is of great importance because "[t]he degree to which, in any given jurisdiction, the law recognizes uterine rights and remedies must necessarily predict the legal attitude which that jurisdiction will take"[40] on the abortion issue. I would not have thought that this is necessarily so. It seems quite possible for various branches of the law—property, tort, or criminal law—each of which has developed separately, to treat foetal matters differently.

In any event, the author summarizes in two pages the long-established, property and inheritance rights of the unborn child. He then notes the lack of protection which generally exists in family law and criminal law to safeguard the foetus from abuse and assaults (other than abortions) and notes that this is inconsistent with laws which prohibit abortions. The bulk of section 4 is reserved for an analysis of the law of tort as it relates to actions for pre-natal injuries. The author refers to the law in Canada, England, other Commonwealth countries, and the United States, where the greatest number of developments seem to have taken place. It is a little surprising that there was not more analysis given to *Duval* v. *Seguin*,[41] the only recent Canadian case on pre-natal injuries, and that the author's footnotes do not record the fact that the decision was affirmed by the Ontario Court of Appeal. The author's discussion of American law seems to stop around 1969, and is consequently quite out-of-date.[42] For example, the author says that the courts have thus far declined to recognize actions for wrongful life. That was true prior to 1971, but it is no longer the case.[43] There have been other significant advancements recently such as the unborn plaintiff's right to sue for a tort committed prior to conception.[44]

Apart from the above comments, the reader should find this chapter interesting and helpful.

Section 5 reviews the constitutional and civil rights issues which were discussed in recent court decisions. The author

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[40] P. 57.

[41] [1972] 2 O.R. 686, aff'd (1973), 1 O.R. (2d) 482. For some comments on this case, not referred to by the author, see Samuels, Injuries to Unborn Children (1974), 12 Alta L. Rev. 266 and Weiler & Cotton, The Unborn Child in Canadian Law (1976), 14 O.H.L.J. 643.

[42] For more recent information, see generally Comment, Legal Duty to the Unborn Plaintiff: Is There a Limit? (1978), 6 Fordham Urban L.J. 217, and Note, Wrongful Birth in the Abortion Context — Critique of Existing Case Law and Proposal for Future Actions (1976), 53 Denver L.J. 501.

[43] See Note, Wrongful Birth . . ., *op. cit.*, *ibid.*

[44] For a discussion of these, see Comment, Legal Duty to the Unborn Plaintiff . . ., *op. cit.*, *ibid.*

summarizes the *Roe* v. *Wade*[45] and *Doe* v. *Bolton*[46] decisions, wherein the Supreme Court of the United States struck down statutes which limited a woman's right to an abortion in the early months of pregnancy. The court held that a woman's right to an abortion was protected through her constitutional right of privacy. It also held that a right of privacy does exist under the constitution even though the constitution does not explicitly mention such a right.

The author then notes that the implied Bill of Rights theory which developed in Canada prior to 1960[47] may provide a vehicle for establishing an implied right to privacy in Canada which could be applied to the abortion issue. The author then summarizes the Supreme Court of Canada's rejection of such constitutional arguments in the *Morgentaler* case.[48]

As the reader may observe, this chapter is mainly a convenient summary of the constitutional arguments raised in these Supreme Court decisions. It is not analytical or critical. More detailed discussions of these issues in both the American and Canadian context are not referred to but are available elsewhere.[49]

The last section is a previously published, case comment[50] on the *Roe* v. *Wade*[51] and *Doe* v. *Bolton*[52] decisions. To a certain extent this section is repetitive of section 5 since the author reviews the

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[45] *Supra*, footnote 6.

[46] *Supra*, footnote 7.

[47] See *Reference Re Alberta Statutes*, [1938] S.C.R. 100; *Saumur* v. *City of Quebec*, [1953] 2 S.C.R. 299; *Switzman* v. *Elbling*, [1957] S.C.R. 285.

[48] *Supra*, footnote 8.

[49] On the issue of an implied Bill of Rights, *see*, *e.g.*, Gibson, Constitutional Amendment and the Implied Bill of Rights (1966-67), 12 McGill L.J. 497, and the references cited at n. 5 therein. For a more recent discussion of the implied Bill of Rights theory, see Bushnell, Freedom of Expression — The First Step (1977), 15 Alta L. Rev. 93.

For a pre-Morgentaler discussion of both the constitutional and Bill of Rights arguments, see Picher, The Invalidity of Canada's Abortion Law — Section 251 of The Criminal Code (1974), 24 C.R.N.S. 1. See also Maksymiuk, The Abortion Law: A Study of R. v. Morgentaler (1974-75), 39 Sask. L. Rev. 257.

For an excellent note on the recent abortion decisions of the highest constitutional tribunals of Canada, Germany, France and United States, see Glenn, The Constitutional Validity of Abortion Legislation: A Comparative Note (1975), 21 McGill L.J. 673.

For an excellent critique of the constitutional issues raised in the American decisions, see Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade (1973), 82 Yale L.J. 920. See also Byrn, An American Tragedy: The Supreme Court on Abortion (1973), 41 Fordham L. Rev. 807.

[50] *Supra*, footnote 9.

[51] *Supra*, footnote 6.

[52] *Supra*, footnote 7.

court's reliance on the right to privacy, although the explanation is fuller in this section than in the previous one. This section could have been improved if the author had updated this case comment to take into account the significant developments which have occurred since its original publication in 1973.[53]

From a technical point of view, this collection of essays is disappointing. The quality of the printing is poor[54] and from the inordinate number of spelling mistakes there appears to have been no proof-reading of the manuscript.[55] The form, the numbering and the spacing of sub-headings are inconsistent from one essay to the next.[56] The form of the footnoting is inconsistent[57] and sometimes incomplete.[58] The essays are not inter-related or cross-referenced.[59] Some portions have been repeated verbatim in more than one essay.[60] The writing style is sometimes awkward.

To conclude, this collection of essays on abortion deals with various legal aspects of the subject. The essays tend to be summaries more often than critiques, but from this point of view they should provide useful information for the reader, although some of the

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[53] For example, there is a section discussing the applicability of *Roe* v. *Wade* and *Doe* v. *Bolton* in Canada, but this section has not been updated to take into account the Supreme Court of Canada's view of those cases in the subsequent decision in *Morgentaler*.

[54] For example, the ink has sometimes run, leaving words slightly blurred. The footnote numbers are frequently set too high, thereby overlapping with the text of the line above. The spacing between lines is sometimes inconsistent.

[55] The spelling mistakes are too numerous to list. In addition, many are glaringly obvious such as "georgraphical" (p. 2), "qualifites" (p. 3) and "consideraing" (p. 3).

[56] Compare, for example, sections 1 and 2.

[57] The inconsistencies relate to the information provided, the order in which it is listed, and the abbreviations and form used.

[58] See, *e.g.*, p. 82, n. 73 and p. 98, n. 25 where no citations are provided for cases. For cases, the year and the court are frequently not included in the footnotes. Likewise, for books, the author's initials and the year and country of publication are often not given. This makes location of such books extremely difficult. See, for example, p. 55, n. 22, "Scott, Public Referenda, p. 315", the existence of which I could not verify although I had the Cumulative Book Index searched back to 1949. To undertake such a search with no idea of the date of publication is very time consuming.

[59] When the author touches on a point in one section, he does not let the reader know that the same point is dealt with more extensively in a subsequent section. *E.g.*, p. 6, n. 49 is dealt with in Section 3.

[60] Compare the bottom of p. 9 and the top of p. 10 with p. 115, n. 50. See also the repetition in the text at p. 22, accompanying n. 4 with p. 35, n. 4. On the other hand, in Section 2 dealing with plebiscites, no mention is made of a Plebiscite Bill on Abortion (Bill C-40, January 15th, 1973) yet this Bill is later referred to in Section 6, n. 49.

information is outdated or incomplete. On the technical side, this collection of essays is seriously deficient.

GERRY FERGUSON*

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Psychiatry on Trial. By MALCOLM LADER. New York: Penguin Books. 1977. Pp. 202. ($2.50 U.S.)

Although concepts of psychiatry vary according to jurisdiction, the practical differences by and large can be reduced to a question of emphasis. According to Lader, the relativism of psychiatric definition of disease, and the range of professional judgment which exists with respect to diagnosis and treatment, separates psychiatry from more traditional medicine and raises some disturbing issues. Paramount in the author's mind is psychiatry's association with established power. The broadness with which psychiatrists in America and the Soviet Union diagnose schizophrenia might well involve certain notions of deviancy to which the respective cultures have committed themselves. The fact that such judgments emanate from places of higher learning perhaps only proves that psychiatry is no different than other professions in rationalizing its relation to the existing power structure. For example, Lader observes that the Institute of Psychiatry in Moscow is highly dependent on the state's ideology, and in turn influences the provincial centres in the Soviet Union. Lader writes that social deviancy in that country is regarded as an illness, and that psychiatry has been functioning as a handmaiden to spurious punishment of perceived dissidents.

Because of his fear of psychiatric abuses, Lader strongly supports the distinction between therapeutic and custodial measures. He states that psychiatry's responsibility is to exercise therapy and to avoid the undertaking of custodial roles. One is puzzled, therefore, to see Lader's comment which occurs later in the text that psychiatry is not at the stage of being able to deliver exact diagnoses and precise remedies and thus should not discard its traditional mantle of having to look after the chronically ill and handicapped. But the very reason psychiatry has refrained from incarcerating involuntarily committed patients is that it has increasingly felt uncomfortable in the role of *parens patriae* and has chosen, in the name of civil liberties, to force the legal system to declare in an open and direct fashion the terms and conditions under which the mentally ill will be denied their freedom. On the matter of "dangerousness", Lader is aware that

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psychiatry does not hold a predictive crystal ball. Psychiatry is thereby vulnerable, for as Lader admits, it is unable to establish a relationship between act and insanity, and moreover, is ineffective in curing abnormality. Thus, Lader shows that psychiatry can be exploited by being used as the disposal unit for unmanageable offenders. What is lacking in his analysis is a critical historical or sociological overview of what has caused this state of affairs which is recurrent in all of the major western states in one form or another.

In developing his chapter on Psychiatry and the Law, Lader does turn to history to identify the process which theoretically has polarized law and psychiatry. But despite the fact that Lader correctly notes that history has had a profound impact on the conception of the "mad" and the "bad", his investigation does not extend beyond the conventional wisdom that law is judgmental whereas psychiatry is preoccupied with illness or treatment. Somehow Lader appears to be unsure where to situate psychiatry in its relationship to the political and legal communities. On the one hand, it is attractive to push psychiatry in the direction of the medical model and to treat it as a failed body of science entirely separable from the burdens of moral, legal and political values. On the other hand, if psychiatry is to be properly described as a humanistic profession, then it is equally attractive to see its role as a potential humanizer of legal-social judgments. Despite these two models, Lader appears to want to maintain his options on psychiatry's function. But that is precisely why the issue of psychiatry's relationship with law now stands in an abrupt crisis. In order to gain a true understanding of the interaction between the professions it may be necessary at this point to assess why the professions seem at once to be at odds, while they are increasingly also in apparent collusion with respect to meting out social sanctions. Is it in the very nature of psychiatry that it has by implication an ideological substratum, the social-therapeutic ideal, which, indeed, is a political statement of sorts? If this is so, it may ironically be that psychiatry should activate its political sensibility in order to avoid political manipulations, arising because it chooses to remain in the naive and misleading situation of proclaiming its total lack of politics. To take a stand on this controversy, in my view, requires turning again to history to establish the basis upon which psychiatry and law have evolved their unhappy marriage. This should include an assessment of the senses in which psychiatry behaves politically. One of the difficulties with the Lader text is that it uses politics in the univocal sense of connoting distortion of science or humanism. In fact, it would be more productive to see that psychiatry is politicized, now and for the foreseeable future. If the discussion then moves in the direction of value systems, it would remain to discover what it is about our different legal and political systems that creates distortions

and suppressions of liberty. Although Lader over-simplifies, he does attempt in a brief space to comment on the cultural variables affecting legal systems. This portion of the book is very interesting, for it sheds light on the practical problems of value confrontation affecting law and psychiatry. Lader is on the right track when he exposes psychiatry's subjection to the overt will of the state. But when psychiatry retreats from such repressive activity, what then remains; a value free science or a politicized body of medicine that lacks the courage to state its principles in an act of political and social courage?

There is no doubt that forensic psychiatry has been, in various guises, a sad reflection of the anti-libertarian dimensions of dissimilar legal systems. We need to draw the line between soft and hard abuses of power. To this end, Lader turns his attention to the Soviet Union, which in his perspective is qualitatively the most serious violator of liberties. Lader believes that the Soviet social system stems from a set of cultural variables which have made it inevitable that oligarchy conquered revolution. The party, as a monolithic instrument of social regulation, has limited independent action and thought to a degree that has left little room for even benign dissent. Even though we should hesitate to judge the Soviet Union by western standards, Lader is compelled to state that at a certain level human rights must transcend national boundaries. He goes on to review contemporary Soviet psychiatrists' participation in forensic assessment and trial proceedings although he restricts his analysis to a select number of individuals who are already familar to informed western readers. Lader's argument is straightforward. An important resource for his purposes is material published by the United States Senate Committee on the Judiciary.

In addition, there is an abundant literature in North America about the divergence of opinion in forensic assessments. So extreme is some of the criticism that there is a school of opinion that holds that psychiatrists should not only be banished from the courtroom, but also from any procedure which could affect a legal determination. Lader does not wish, from his earlier remarks, to whitewash non-Soviet psychiatry. His concern, however, is to deal with paradigms of extreme denials of liberty and distortions of psychiatry. Even if we are to fully acknowledge that psychiatry is an embryonic science and cluttered with moral paraphernalia, we must, in Lader's opinion, isolate the denigration of forensic psychiatry and bring the perpetrators of this to trial. The Western press has heard a great deal about Plyushch and Bukovsky in the last few years. Dissidents have been maligned by their doctors for harbouring reformist delusions and have been subjected to drug treatments of a serious nature. Lader suggests that the ploy of the Soviet authorities has been to avoid an

actual trial of dissidents by declaring the "patient" unfit to plead his case. This is extremely perilous since the normal rules pertaining to criminal procedure are suspended.

We might ask why it is that Soviet authorities have chosen the forensic route when prisons afford a natural locus for punishment? Lader believes that there are a number of motivating forces behind the Soviet pattern. It is convenient to dismiss heretical statements as lunacy, and to simplify legal proceedings when insanity is a factor. Moreover, one must consider the impact of a declaration of insanity on an individual and the toll exacted on his credibility and morale after an extended period of incarceration in a psychiatric facility.

There are many pressures which a political system can bring to bear on psychiatrists to ensure their acquiescence to the state interest. Psychiatry in the Soviet Union is a public matter and the consequence of objecting to the state bureaucracy is overwhelming. The claims that can be brought forward about delusions and the paranoid personality of the patient are so vague, that Lader claims they are patently unreliable. Psychiatric opinions go unchallenged, and the rights of patients found in special psychiatric hospitals are to all intents and purposes non-existent; their lives being governed by ministerial regulations. In the Soviet Union, Lader states that these special psychiatric hospitals are under the direction of the Internal Security Forces (MVD).

Lader reviews events leading up to the World Psychiatric Congress of 1971. Since that time, disputes have occurred within that organization about its jurisdiction and responsibility. The substance of his account is that impartial observers have concluded that there has been questionable categorization of dissidents as mentally ill in the Soviet Union.

Psychiatry on Trial was published on the eve of the World Congress convened in Hawaii in 1977. The result of that meeting was a rebuff to the Soviet forensic contingent. This has produced a strong negative reaction from the Soviets, who claim that condemnation of them has been one-sided. In my view, the debate between Western and Soviet psychiatry can now be advanced only if the parties are prepared to write honestly and directly about the specific relationship of psychiatry to law in their social and legal milieux. This will necessitate a reassessment of the reasons why psychiatry enters the legal process where it does, and of the realistic alternatives available to psychiatrists within this process. Soviet psychiatrists must be prepared to discuss with their critical colleagues some of the areas where they themselves have professional and ethical concerns. Indeed, there is no reason for Soviet psychiatry to expect to avoid sharp criticism of its practices when this has been the pattern of the

past decade in North America. Civil libertarians, for example, attack psychiatry in almost all its forms of practice. It would be a pity if this pressing controversy about psychiatry's role and function in relation to the legal process were reduced to ideological rhetoric.

DAVID N. WEISSTUB*

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Felony and Misdemeanor: A Study in the History of Criminal Law. By JULIUS GOEBEL. Philadelphia: University of Pennsylvania Press. 1976. Pp. xlv, 455. (No Price Given)

This is a reprint of a book first published in 1937 and is one of a series on medieval history published or re-issued by the University of Pennsylvania Press. Many of the books are of interest to legal historians; these include studies of the Burgundian Code and the Lombard Laws, and three volumes of Henry Charles Lea's excellent study called *Superstition and Force* which examines the duel, the oath, the ordeal and torture.

Julius Goebel intended *Felony and Misdemeanor* to be the start of a trilogy on the history of English criminal procedure but the Second World War and other historical pursuits prevented completion.

In an introductory essay, Edward Peters pays tribute to this remarkable scholar who took great pains to examine the history of the law in the broadest possible perspective. *Felony and Misdemeanor* is a difficult book because it presumes much knowledge in the reader and also shows the remarkable depth and breadth of Goebel's research and scholarship.

This re-review can hardly say anything new or original about *Felony and Misdemeanor* because it was very fully and favourably reviewed forty years ago by scholars much better-equipped to assess its many good qualities.[1] Instead, I would like to spend more time on the ideas and work of the legal historian Goebel, who died five years ago.[2]

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[1] *E.g.* Jolliffe, Book review (1938), 38 Col. L. Rev. 1039; Riesenfeld, Book review (1938), 26 Cal. L. Rev. 405; Kantorowicz, Book review (1938), 11 Camb. L. J. 446; Plucknett, Book review (1938), 54 L.Q. Rev. 295. All commented that Goebel may have been a little harsh in his criticism of his protagonists in the peace debate. Riensenfeld and Kantorowicz complained that Goebel's scholarship suffered from an almost impenetrable density so that occasionally the footnotes on philology and medieval historical sources tend to create an imbalance.

[2] See Smith, Julius Goebel, Jr. — A Tribute (1973), 73 Col. L. Rev. 1372, for a biographical sketch of his life.

Goebel's greatest contribution was to correct the impediments under which legal history had suffered. First, legal history, particularly in Germany had suffered from large generalizations which were not supported by equal development in cultural studies and anthropology. Secondly, German legal history too frequently imposed a nineteenth century standard of historical and anthropological change on the very different societies of the early medieval period. A final disadvantage, as Peters shows (in his Introduction to this reprint) was "the authority of the legal profession . . . which tended either to surround legal history with the arcana of professional discourse or to satisfy itself with a perfunctory 'historical introduction' to internal principles of contemporary law wholly without reference to changing concepts of historical interpretation".[3] Goebel, in his usual pungent style, also commented on lawyers' history as a ritual, which has become "a matter of mechanical gesture, bereft of all piety, pervaded with pettifoggery"[4] and said that there were too many who being "untouched by any sense of historical values, they treat the growth of doctrine as something projected on a horizontal plane of rational manipulation unmindful of its perpendicular support in time or circumstance".[5]

Goebel also questioned the reverence in which judicial pronouncements were held and the "intellectual tyranny" which they exert:

> It is a truism that to know the common law, its history must be known. Our courts, however, seek enlightenment on the past chiefly in the judgments of their predecessors. These judgments are rarely treated as single but complex assessable facts, for the mass of relevant data of which they are merely parts is usually ignored. In consequence, the antecedent judicial opinion is elevated to a status of preposterous importance as a source. Worse than this, the pronouncement of the bench . . . becomes authoritative as history. . . . The fine gilding of rationalization conceals the inherent flaws, but it can never avert the peril that bad history may in turn make bad law.[6]

Holdsworth seemed to disagree when he said that a little bad history is not too high a price to pay for certainty in the law.[7] Perhaps the justices in the school integration case in the United States Supreme Court would agree[8] but at least one English judge has

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[3] Peters, "Ex parte Clio", p. xiv.

[4] Goebel, p. xxxiii.

[5] *Ibid.*

[6] P. xxxiv.

[7] See generally, Parker, The Masochism of the Legal Historian (1974), 24 U. of T. L. J. 279, at p. 288.

[8] Kelly, Clio and the Court: An Illicit Love Affair, [1965] Sup. Ct Rev. 119.

recently shown that law and policy could become more rational and just with some proper historical investigation.[9]

Goebel also warned us that we would find no assistance in the writings of the systematic jurists who,

> . . . oblivious of the fact that the fruit of a transcendental history may be a revealed jurisprudence, they are embarrassed only by what cannot be disciplined into their systems.[10]

Instead, we need an enlightened historical research which is an "inquiry animated by a lively appreciation of the law as a cultural phenomenon, conducted with critical detachment and tolerant of sources other than those in docket or opinion book".[11] He also had some advice for law reformers; he hoped that they would "perceive that a thorough understanding of the historical antecedents of their problems can be of substantial aid in determining what should be rooted out and what should be preserved".[12]

When he examined the previous history of criminal procedure, Goebel complained of the narrowly conceived history which was "accurate in detail but unreliable in generalization and unintegrated with the social and political life of the period".[13] He had the more specific complaint that the English legal historians' most baleful influence was found in "the transplantation of the notions of folkpeace and King's peace into early English law as the basic point of departure in our criminal procedure".[14] This was partly due to the Victorian cult of Anglo-Saxonism.[15] *Felony and Misdemeanor* rectifies this and other misconceptions.

Maine had said that the history of the law was secreted in the interstices of procedure. Goebel also wanted to show the historical importance of procedure; its vitality, he said, "lies less in its relative stability of form than in its responsiveness to change in respect of function".[16]

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[9] See the dissenting judgments of Lord Diplock in *Hyam* v. *D.P.P.*, [1975] A.C. 55 and *Regina* v. *Knuller (Publishing etc.) Ltd.*, [1973] A.C. 436. Compare a less satisfactory "historical" examination by Lanham, "*Larsonneur* Revisited", [1976] Crim. L. Rev. 276, which raises more historical problems than it solves.

[10] P. xxxv.

[11] *Ibid.*

[12] P. xxxvii.

[13] P. xxxviii.

[14] P. xi.

[15] P. 2. Holdsworth, History of English Law, vol. II (1923), p. 146 said "England probably had little to learn from Normandy itself, from Norman institutions and Norman law". Compare the appreciation of the Frankish pedigree of English law in Brunner, Entstehung der Schwurgerichte (1872), pp. 127-131.

[16] Goebel, p. 1.

One of the most important themes in Goebel's book was his insistence that the concept of the peace had been exaggerated or, at least, had intruded into the history of Anglo-Saxon and English legal institutions too early. Goebel argued that this misconception was partly due to the attribution of statehood to primitive organisations which were not much more than family tribes. Goebel claimed that the notion of an overall peace—or King's peace—can only be recognised with the reign of William the Conqueror.[17] He also said:

> . . . the crown in Henry I's time has a law which is not feudal, and the content of this law we believe was built up by the Conqueror and his sons by ordinance and by the maintenance of a monopoly over criminal procedure to the sole use of the crown.[18]

Closely related to the "peace" notion is the question of outlawry and feud. Goebel contended that the premature "peace" advocates wanted to give general credence to outlawry as a manifestation of a breach of the "peace", when outlawry was only of limited application. Goebel added:

> If outlawry is merely withdrawal of legal protection, *i.e.* essentially a negative concept, then it is difficult to construe a general duty to pursue and a right or duty to destroy property. Even under the "shoot-on-sight" theory, there is no rational explanation offered as to why an outlawry of property is involved so that it could be destroyed. The whole theory smells of the briefcase.[19]

Goebel showed that English law owes much to Frankish law, and that the evolution of procedure and jurisdiction was not a simple progression from folk-peace to royal criminal courts. The relative power of the church and of the local barons, the immunities granted by the ducal authority and the inter-relationship of land tenure and jurisdiction over wrong-doing were variables which did not accommodate a uniform development.

Historians of crime for later periods have become increasingly interested in the use of the criminal law as an instrument of public order.[20] These themes were explored by Goebel in his excellent introductory chapter "The Foundations of Early Law Enforcement".

In discussing the world of the Germanic tribes, Goebel observed that there was "reason to doubt whether there is originally involved at any point any conception of 'public' order (excepting the few

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[17] P. 296.

[18] P. 409.

[19] P. 100, n. 117.

[20] *E.g.* Hay, Property, Authority and the Criminal Law, in Hay *et al.*, Albion's Fatal Tree: Crime and Society in Eighteenth Century England (1975), p. 17.

cases, like treason or desertion) either in the sense of a state guaranteed by law or at least in the sense that such a guarantee was the aim of primitive regulation. If there is any concept of public order it is very vague and has its limits in social rather than legal implications''.[21]

He suggested that instead of a notion of public order originally evolving from ''peace'' or outlawry, ''the evolution of procedure for pacific settlement offered opportunities for the piling up of minute interferences with the parties' freedom of action that in the end would add up to a substantial measure of control in the interest of public order without destroying the idea that a misdeed was essentially the concern of the kinsman on the two sides''.[22]

The private aspect of what we would call criminal justice remained pre-eminent until the Crown stepped in to cope with two serious situations which are equally familiar to us a milennium later—the thief and the professional malefactor.

With the idea of an official interest in some kinds of crime came the duty imposed upon the citizen to report those kinds of wrong-doing which could not be subjected to private revenge except in cases of necessity. Then follows the idea of the inquest. Goebel commented: ''. . . the judge's privilege of questioning and the inquest's duty of answering tended to increase the state's initiative and to strengthen the authority already asserted''.[23]

The state only gradually took an initiative in punishment. At first it simply exercised supervision over execution which was still carried out by the aggrieved party or kin. The state eventually appropriated this function not as much to control the physical punishment but to assert public order (and make a profit) by means of confiscation of property. Once again, we must remember that in the ninth, tenth and eleventh centuries, this assumption of anything like a central authority is a very precarious power because frequently local barons were too unruly to be brought to order. Only the Normans were able to achieve this as a permanent arrangement from which evolves the English law of felony and misdemeanor.

GRAHAM PARKER*

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[21] P. 19.

[22] P. 24.

[23] P. 77.

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International Criminal Law. Third Revised Edition. By SHARON A. WILLIAMS. Downsview: Osgoode Hall Law School, York University. 1978. Pp. 950 ($20.25 paperbound)

Acts of terrorism during the last few years have increased the demand in various quarters for the establishment of an international criminal court. While the international climate at present tends to make such suggestions somewhat artificial and romantic, this does not conceal the fact that there have been numerous efforts on the international level, often duplicated and given effect to on the national plane, to create a somewhat disjointed and uncoordinated international criminal law. To try and find the materials which relate to this legal system is, however, a task which is beyond the competence of most practitioners and would take an untold length of time for the ordinary international lawyer, even one who spends his time in an ivory tower with the services of a flock of graduate research students at his disposal.

One can only admire, therefore, the energy and service provided by Dr Sharon Williams in her determination in compiling this the third edition of her *International Criminal Law*, the appeal of which extends far beyond that of her class in the subject at Osgoode Hall Law School. In the American, more than in the English tradition, this casebook is made up not only of judicial decisions but it also reproduces national, particularly Canadian legislation, as well as relevant General Assembly Resolutions, United Nations debates on such matters as the Entebbe raid, international conventions, and where necessary even unratified agreements like the 1977 Geneva Protocols on Humanitarian Law in Armed Conflicts which Canada has signed, but not, yet ratified, or the League of Nations Convention on Terrorism which was ratified only by the Empire of India. In addition to all this material, the author has provided fairly comprehensive bibliographies for most of her entries. She has thus saved many of us untold hours of depressing search.

As in her previous editions, Professor Williams has divided her compilation between the national and international competences, and has collected her material under the rubrics: Jurisdiction and the Criminal Law, with the emphasis on, but by no means limited to, Canada; International Crimes; International Judicial Cooperation; International Police Cooperation, reminding us that Interpol has been transmogrified from a non-governmental to an intergovernmental organization, and she states that "in this capacity of a true international public service, it must act in conformity with international law". Perhaps now, therefore, it will be willing to co-operate in the search for war criminals, an activity it has refused to undertake in the past. Finally, she has a short section devoted to the future,

dealing with such matters as international *habeas corpus* and an international criminal court.

If any criticism is to be made of this edition, it relates to the publication itself. It is unfortunate that since the work is in typescript, there is no break in the pages and from section to section. Where the bibliography is concerned, this means that it is almost impossible to separate one entry from the next. Hopefully, these defects will be corrected if and when a regular commercial version of this most useful compilation becomes available. From the point of view of substance, one can only thank and congratulate Professor Williams on her industry and her generosity to students and colleagues.

L. C. GREEN*

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Release and Repatriation of Prisoners of War at the End of Active Hostilities. By CHRISTIANE SHIELDS DELESSERT. Zurich: Schultess Polygraphischer Verlag. 1977. Pp. xv, 225. (No Price Given)

Although, at least since the nineteenth century, state practice "accepted the principle that the prisoner of war was not a criminal, but merely an enemy whose detention or liberation affects the interest of the Detaining State alone [, with] the assumption that captivity was only a temporary and necessary deprivation of liberty during the duration of hostilities"[1] to prevent him from taking any further part in active hostilities, it was made clear after the Second World War that some countries were not prepared to release their prisoners immediately upon the cessation of hostilities. This was particularly true of large numbers of Germans held by the Soviet Union.[2] The Red Cross organization, as well as a number of western countries, were sufficiently concerned by this fact that they stipulated in article 118 of the 1949 Geneva Convention on the Treatment of Prisoners of War that "Prisoners of war shall be released and repatriated without delay after the cessation of active hostilities".[3]

As is so often the case with international instruments, particularly those of a humanitarian character, their application depends on

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[1] P. 2.

[2] P. 63.

[3] P. 70.

the goodwill of the states called upon to apply them, and frequently disputes arise as to the exact interpretation of the provisions in issue. The situation at the end of the Korean and Vietnamese wars reflects this fact, and Dr Shields Delessert's monograph, which was a doctoral thesis prepared for the University of Geneva, provides a careful analysis of the provision, as well as including an interesting account of the history of prisoners of war and of their treatment. By the time of Vattel, "discrimination between belligerents as to the applicable law was no longer possible",[4] while Montesquieu maintained that "the only right that war gives over a captive is to secure his safe-keeping and prevent him from doing harm".[5] These views gained general acceptance, and by the nineteenth century the basis of the modern law had developed, including the principle that prisoners were to be treated alike, so long as they had not broken any rules of law. In fact, in those days the problem of discrimination was not even looked upon as real. Now, unfortunately, as a result of Nazi practice, it has become necessary to stipulate for equal treatment without discrimination, while the ideologies that have developed in the name of national liberation have caused the latest Geneva Conference on Humanitarian Law to embody as a principle the old rule of the "just" belligerent, denying to "mercenaries" the right to be treated as prisoners of war for they are no longer to be considered as combatants (Protocol I, art. 47), while members of "national liberation movements" are (Art. 1).[6]

Be this as it may, there still remains the problem of what is meant by "cessation of active hostilities", especially as the modern practice is to slide into a non-fighting posture, with the possibility of future resumption of military operations. When there is a peace treaty, as there was at Westphalia in 1648, for example, it is simple to provide for early repatriation.[7] But peace treaties, despite those with Italy and the other Axis powers, seem to have become things of the past. There is none with Germany. The Soviet Union has not signed a treaty with Japan, and there is none between Israel and her Arab neighbours. In so far as Germany and Japan are concerned, there are really no problems, for in neither case is there a possibility of hostilities being resumed. With the Middle East, we tend to be faced with intervals in the fighting, and there have already been allegations by both sides of non-repatriation, the argument often being put forward that active hostilities are only in a state of suspension. Dr Shields Delessert argues, however, that the issue of

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[4] P. 25.

[5] P. 29.

[6] P. 42.

[7] Pp. 47 *et seq.*

cessation is a question of fact.[8] She points out that in the Middle East the practice seems to be to hold those captured in individual incidents until after the next major round,[9] but there is much to be said for her suggestion of an arbitrary time-limit, and her contention that "an isolated incident does not mean *per se* a resumption of active hostilities. Hence, if prisoners were taken during such an incident . . . they should then be released, since there is no real military necessity for keeping them in a situation which remains basically one of non-armed conflict. . . . [However,] more or less serious incidents may be a prelude to full-scale fighting. Moreover, there may be cases of practically continuous hostilities".[10]

What has to be remembered is that, broadly speaking, "nearly every rule to be found in the Geneva Conventions has as its background the harsh legacy of the [Second World W]ar. Unfortunately, when provisions are formulated in direct response to a specific situation, their interpretation remains contingent on that situation"[11]. "The truth of this statement is brought home with great clarity by the debate concerning repatriation. The experience of 1945, with recent disclosures or allegations concerning the method of repatriating Soviet personnel in allied hands, indicates that prisoners were expected to return home and this seems to be the basis of article 118." The language, however, is ambiguous, for the word "and" in this context is not necessarily cumulative. If it were, the position of a prisoner not wishing to be repatriated would be such that, in order to satisfy the commitment to repatriate, he would have to be held in detention, and the provision would be somewhat self-contradictory.[12] This was the problem at the end of the Korean war, and will always present itself when ideologies conflict, and will be the case even more so today now that wars for national liberation are by Protocol I to be considered as international conflicts. Since the purpose of the Geneva Conventions is humanitarian, and that on prisoners is for their protection with article 118 aimed at their early release, one cannot argue that release and repatriation are necessarily coterminous, for "release may allow for a more favourable régime and a greater freedom of movement, but it does not imply in any way a reduction of a prisoner's conventional benefits".[13] The twofold obligation prevents a detaining power from avoiding its responsibilities towards prisoners by turning them loose without any

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[8] P. 97.
[9] P. 109.
[10] P. 110.
[11] P. 207.
[12] P. 167.
[13] P. 176.

provision for their care. At the same time, "release and repatriation are directed against provisional release followed by re-arrests without the benefit of prisoner of war status".[14]

Normally, prisoners of war are released into the custody of their own military authority, under whose law they have remained throughout their captivity, and who may well investigate their prior conduct and institute proceedings therefor.[15] Since deserters are not usually sent back, it would seem to follow "that a prisoner who refuses repatriation should not be sent to his country".[16] In fact, to send him there would run counter to the modern humanitarian trend which is found in recent extradition treaties, in those relating to refugees, and some in the field of international criminal law, and which is increasingly finding its way into national legislation. In accordance with the principle of *non-refoulement*, which some would argue has hardened into a principle of international law, persons should not be sent to a country where they are likely to suffer because of their race, colour, language or beliefs, be they religious or political. There can be no doubt that prisoners refusing repatriation and forcibly returned would suffer. This is already recognized in the Geneva Convention on Civilians and there is much to be said in favour of the argument that all humanitarian conventions should be interpreted in the light of overriding principles of human rights. The learned author draws attention to the attractiveness of a simple amendment to article 118 which would serve this end, so that no prisoner could be returned against his will, but emphasizes that this might well open the door to major abuses by the Detaining Power.[17] She proposes, therefore, a Model Agreement to cover the problem, with supervision by neutrals so as to avoid both forcible repatriation as well as forcible detention.

The author's study is a fascinating analysis and indicates the potential for differences and controversy in a single article of a high-sounding humanitarian convention. How much more complex, therefore, will the position be if and when Protocol I to the Geneva Conventions comes into force, for this is loaded with provisions reflecting current ideological differences, even though it has ignored the problem with which Dr Shields Delessert concerns herself.

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[14] *Ibid.*

[15] P. 195.

[16] P. 185.

[17] P. 198.

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Lehrbuch des Strafrechts, Allgemeiner Teil. Third Edition. By HANS-HEINRICH JESCHECK. Berlin: Duncker & Humblot. 1978. Pp. 838, xliii. (DM 58.00)

The amendments to the general part of the German Penal Code came into force on January 1st, 1975. This prompted Professor Jescheck to rewrite his manual of penal law of the Federal Republic of Germany (general part). The introduction deals with the aims of penal law and the basic concepts in its sphere of application. The book is then divided into three parts. Part one is concerned with penal law in general, including its sources and jurisdiction. Part two covers the notion of an offence including violation of law, guilt, defences, preparation, attempt, negligence (by commission and omission), and parties to an offence. The last part deals with the consequences of an offence, including punishment, disabilities, forfeitures, correctional and security measures, sentencing, statute of limitations and rehabilitation of the offender.

The book contains an extensive bibliography, a list of relevant statutes, international agreements, foreign statutes, historical statutes and drafts which are cited therein, an excellent index and a very handy list of abbreviations. The footnotes contain a wealth of information including the writings of German and many foreign authors. Furthermore, the title of each chapter is followed by a list of bibliographical references to the subjects studied in the chapter.

This book is recommended as an excellent reference source. Not only does it provide the readers with a very thorough analysis of the law presently in force but it also refers to various schools of thought and to drafts of statutes. On the whole, it is a very well organized manual characterized by precision and clarity of exposition.

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