BOOK REVIEWS

REVUE DES LIVRES

Criminal Law Precedents. Two Volumes. By DAVID WATT. Toronto: The Carswell Co. Ltd. Pp. 858. ($115.00)

These volumes contain well drafted precedents for initiating and responding to most of the procedural issues which are likely to arise in criminal litigation. In addition, appendices contain the rules passed by the courts of appeal, superior courts of criminal jurisdiction and courts of criminal jurisdiction in each of the provinces and territories of Canada in the exercise of the authority conferred upon such courts by section 438 of the Criminal Code.[1] Chapters 1 to 11 contain 583 pages of precedents dealing with the issue of warrants, procuring the attendance of witnesses, judicial interim release, wire-tapping, pre-trial and trial procedure and evidence, dangerous offenders, appeals of both summary and indictable offences and extraordinary remedies. This material is made easily accessible by detailed tables of contents and helpful finger-tip index sheets which bring the user quickly to the appropriate area of interest.

This is the first attempt to produce a comprehensive set of precedents for use in Canadian criminal procedure and the author and publisher are to be congratulated for undertaking the enterprise and carrying it through to execution in such a competent manner.

The precedents go far beyond the forty-four forms which appear in Part XXV of the Code in four quite different ways. First, the ambit of these precedents stretches into other legislation such as the Canada Evidence Act,[2] the Narcotic Control Act,[3] the Food and Drugs Act[4] and the Juvenile Delinquents Act.[5] Second, forms appended to the Criminal Code are not slavishly copied but intelligent re-drafting has occurred

[1] R.S.C., 1970, c.C-34.
[2] R.S.C., 1970, c.E-10.
[3] R.S.C., 1970, c.N-1.
[4] R.S.C., 1970, c.F-27.
[5] R.S.C., 1970, c.J-3.

where, for example, the Code form fails to deal with some of the issues arising out of the section on which it is based.[6] Mr. Watt's precedents contain notations where he has departed from the Code forms and he succinctly explains his reasons for having done so. Third, inventive drafting has been undertaken to provide a comprehensive set of precedents in areas such as wire-tapping and extraordinary remedies where the practitioner experiences greatest difficulty in drafting suitable documentation or in reacting to initiatives taken by opposing litigants. Fourth, where our procedure appears to have no express provision to indicate the nature of the evidence which should be tendered on a particular application, Mr. Watt makes useful suggestions to close the gaps. Examples of this are, the type of supporting material which might accompany a summary application to examine things seized and detained under a search warrant[7] and the appropriate affidavits or evidence which might support certain applications for review of a release order[8] or review of a detention order[9].

These precedents will be useful both to prosecutors and defence lawyers and to busy law offices where, though they may exist somewhere in the files, no attempt has ever succeeded in collating, indexing and updating them. Where they will be indispensable, however, will be to practitioners whose experience has never provided exposure to the many types of procedural activity covered by these materials. With a few amendments to deal with particular cases, they can clearly serve the needs of a practitioner engaged, at a sophisticated level, in almost every aspect of the criminal justice process.

The loose-leaf format is clearly designed to assist in the process of keeping these precedents current and one looks forward to further notations from Mr. Watt as experience, in practice, with these particular formulations provides opportunities for him to offer further guidance to the profession.

ALAN GRANT*

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[6] See s. 443(1) and Form 1, in the Criminal Code, *supra*, footnote 1.

[7] Crim. Code, *supra*, footnote 1, s. 446(5).

[8] *Ibid.*, s. 457.6.

[9] *Ibid.*, s. 457.5.

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Reshaping the Criminal Law. Essays in Honour of Glanville Williams. Edited by P.R. GLAZEBROOK. London: Stevens & Sons. 1978. Pp. xii, 492. ($33.15)

Textbook of Criminal Law. By GLANVILLE WILLIAMS. London: Stevens & Sons. 1978. Pp. xl, 973. ($26.50)

This collection of essays was undertaken to mark the retirement of Glanville Williams from the position of Rouse Ball Professor of English Law in the University of Cambridge and the contributors will need no introduction to those interested in criminal law and the administration of criminal justice. Sir Rupert Cross, J.C. Smith, Brian Hogan, Edward Griew, D.W. Elliott, Michael Zander, W.R. Cornish, Nigel Walker, Colin Howard, Norval Morris, Martin Friedland and John Ll.J. Edwards amongst many others, have contributed. The content of the writing spans historical perspectives, classical substantive law problems, procedural-evidential issues, sentencing theory and correctional practice.

It should be made clear that this book is not anecdotal, any temptation to make gratuitous references to the person in whose honour it has been written having been thoroughly resisted. Thus a teacher and writer who, in the words of Lord Edmund-Davies in his foreword, "has made great and enduring contributions to the study and development of English law" is rewarded by a testimonial in which the authors have attempted to make solid contributions to the fields which Glanville Williams himself has graced with his scholarly talents from his first published casenote in the *Cambridge Law Journal* (*circa* 1933).

There is a great deal in this collection of essays to be read and enjoyed by those who admire the type of doctrinal analysis which Glanville Williams, himself, has elevated to an art form. Indeed, those looking for evidence of vitality in modern criminal law exposition could be forgiven for saying that the very eminence of Williams in the field has spawned too many pale imitators and contributed, to some extent, to a reduction in the intellectual energy being expended on producing for this generation the fresh insights which their mentor produced for his. It is a pleasure, therefore, to note that both of the Canadian contributions tackle central dilemmas in the administration of criminal justice. Martin Friedland looks at the manipulation of the legislative process in "Pressure Groups and the Criminal Law"[1] and John Edwards pursues the difficulties of political interference in the prosecutorial function in "The Integrity of Criminal Prosecutions—Watergate Echoes Beyond the Shores of the United States"[2]. These essays go some way towards openly facing the close connection between political power and criminal law enforcement at both the legislative and executive

[1] P. 202.

[2] P. 364.

levels. For this reader they provide a healthy balance to the essays concentrating on doctrinal analysis and procedural issues. The result is a well-rounded collection of essays which should provide hours of pleasure for criminal law *aficionados* and many others as well.

The apparently limitless energy and imagination of Glanville Williams is given no better testimony than the fact that, when his colleagues are busily writing essays in tribute to his retirement from a chair at Cambridge, he in turn is engaged in producing a major new work within a quite original framework. His latest tome, *Textbook on Criminal Law*, is unlike previous law books in that each section starts at an elementary level in question-answer format and then proceeds by degrees towards more difficult issues. This approach is assisted by the use of different type-heads so that one soon realizes that the larger the type the more general is the treatment of the topic. The text then proceeds to increasingly smaller type—and correspondingly more detail. The general reader knows immediately when to jump over a section, the more specialized reader continues on until his curiosity is satisfied or the limits of his understanding (or his eyesight) are reached.

All of the general part of the criminal law is here, together with the major non-consensual substantive offences. The aim is to provide a teaching tool but practising lawyers will find it of very great use as well. The major question is: does it work? After some initial irritation with the intelligent interlocutor's quizzing of the master,—a format designed "to enliven the discussion" and in which the questioner is allowed "to talk naturally, and indeed racily"[3] this reviewer was slowly convinced that the substantive content shines through and that the method of presentation does not detract from it. Whether it enlivens the presentation will have to be answered by "the general reader" for whose particular needs it was fashioned. Certainly a book of this size and complexity would normally dissuade any but the most dedicated general reader from pursuing its contents very far and the new format may prove to be a significant innovation in publishing law texts for an audience at quite disparate levels of prior knowledge.

These genuflections to the general reader should not, however, mislead the scholar or practitioner. All who have been impatiently waiting for the much delayed third edition of Glanville Williams, *Criminal Law: The General Part*, can be assured that, although this pearl is still promised as "in preparation" in the publisher's list, much of the content of this new *Textbook of Criminal Law* will suffice for all but the most demanding of Williams' followers. It is a prodigious work in the light of which most other textbooks in the field, by comparison, must pale. It is a pity that Canadian criminal law is diverging more and more from English law, not because the former should not find its own

[3] Preface, p.v.

formula to meet essentially Canadian needs (which it should) but because it will inevitably reduce the number of occasions when Glanville Williams' views will be relevant. Even given the tendency of the two systems to diverge, however, this book will make an excellent addition to any criminal lawyer's bookshelf. Indeed, pending the appearance of the third edition of the *Criminal Law: The General Part*, one is tempted to say, an *essential* addition.

ALAN GRANT*

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Exclusion Clauses in Contracts. By DAVID YATES. London: Sweet & Maxwell. 1978. Pp. 197. (£2.85)

This book demonstrates that exception clauses are repeatedly used in modern business as contractors seek to limit their responsibility in the face of performance impediments. Manufacturers employ exclusion clauses in order to escape responsibility for defects in their products. Carriers use exclusion clauses with the aim of limiting their liability in the event of transportation difficulties. While bailees adopt exclusion clauses as a means of restricting their culpability for damage to goods held in storage.[1] Thus, exclusion clauses have evolved into an effective device for reducing the effects of performance risks upon the promisor's business affairs. At the same time exclusion clauses have grown into one of the most litigated arenas of English law.

Writing in a concise style, Mr. Yates establishes that exception clauses are not implicitly prohibited in law. As a product of consensual relations, they are both acceptable in many business circles and enforceable in law. What contractors agree upon is a reflection of their free will, their bargain and their *consensus ad idem*, even when one party excludes his liability in terms of the contract. Yet the binding force of exception clauses becomes suspect in the absence of "true" free will, in instances of "unbargained" contracts and among "unequal" contractors. David Yates shows that, in such cases, English courts have grown increasingly willing to confine the scope of exception clauses for reasons of public policy, good morals, and most recently, the doctrine of fundamental breach.[2] Judges have fostered "justice" on the assumption that exception clauses sometimes violate the "essence"

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[1] Yates makes reference to other types of exclusion provisions contained in clauses governing arbitration, liquidated damages, accepted perils and "promissory" warranties in insurance contracts (see pp. 23-29). However, clauses that except the promisor from liability for breach constitute the kernel of exclusion terms (see pp. 22-23).

[2] Pp. 118-181.

or "object" of the promisors' obligations. In addition, legislators have entrenched the right of courts to restrict the parameters of exclusion clauses, most recently in terms of the Unfair Contract Terms Act.[3]

As a research vehicle, this little book provides useful references to principles of law, to leading cases and to salient determinations of English judges. The author also deals briefly with the "economic justification" for, the contractual force of, and the methods of constructing exception clauses.[4] However, the work does *not* penetrate the superstructure underlying exception clauses. It does not depict the manner in which exception clauses differ in nature and significance according to the form of the contract, the intent of the parties and the character of their business venture. A contractor may need an exception clause to protect himself in the event of severe risks in the market which devastate his commercial interests. In the alternative, he may demand an exception clause by virtue of his superior bargaining position, his market dominance and his control over contract drafting. Thus, there are degrees of bargaining disparity prevailing between contractors. Moreover, businessmen have disparate levels of risk perception and differing abilities to sustain the effects of disruptions in performance. Most importantly, there is a need to scrutinize the nature of the agreement itself in its particular trade environment in order to assess the credibility of the exception clause and the relative need for legal controls over limitations of liability.

This book is valuable as a first step in researching the law on exception clauses. However, for deeper insight into the intricacies of exception clauses and the econo-legal controls governing their use, this book does not displace more classical scholarship on the subject.

LEON TRAKMAN*

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Introduction to Conflict of Laws. By MICHAEL T. HERTZ. Toronto: The Carswell Co. Ltd. 1978. Pp. xv, 131. ($7.50, paper)

In this useful little book, Professor Hertz gives us both less and more than his title implies. We are not introduced to the conflict of laws in all

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[3] 1977, c. 50. The Act establishes that exception clauses must be "fair and reasonable . . . having regard to the circumstances which will, or would reasonably . . . have been known or in the contemplation of the parties when the contract was made" (s. 11(5)). It does little to elucidate what standards of fairness and reasonableness the courts should apply in the circumstances. Instead judges are left to utilize an *ex post facto* test of responsibility, based on judicial perceptions of acceptable and unacceptable conduct, rather than upon the manifest behavior of the parties.

[4] Pp. 7-9, 9-13 and 74-101 respectively.

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its parts, because large sections of the substantive law, particularly in the field of choice of law, are not referred to at all. What we are given is a discussion, in reasonably elementary terms but quite far ranging in scope, of conflict of laws methodology. In each of the three main subdivisions of the conflict of laws—jurisdiction, foreign judgments, and choice of law—the author outlines the kind of traditional rules that are currently followed by our courts, and then subjects these rules to the policy-oriented analysis that has been built up over the last few decades by scholars, mainly those in the United States. The best known result of these scholars' efforts has been the introduction of methods of choice of law that are "rule-selecting" as opposed to "jurisdiction-selecting", and that operate by taking into account the legislative policies of the states whose rules are in question, the relationship of these policies to the factual circumstances of the case, and other "choice-influencing" considerations. Professor Hertz is concerned to show that this kind of analysis is valuable when dealing with issues of local jurisdiction and the recognition of foreign judgments, as well as being the proper approach to questions of choice of law. Dealing in this way with the whole range of the conflict of laws, in the compass of a short book, serves to bring home the unity of the subject, something that is often lost from view in more extensive treatises.

To keep the discussion from swelling beyond the bounds of an introduction, some sacrifices have been made. The traditional (that is, existing) rules are sketched very briefly, where they are sketched at all, and novices may occasionally be misled. For example, we read[1] that any foreign judgment, including a foreign divorce, has to meet certain criteria, the first of which is that it "must be a judicial judgment". That is clearly not so where divorces are concerned; non-judicial divorces, such as the Moslem *talaq*, have been recognized in a number of reported cases. The flat statement[2] that a failure to give notice of the proceedings to the defendant in a foreign lawsuit is a breach of natural justice, and therefore a defence to enforcement of the judgment, is also much too wide. Notice may have been waived previously by contract, and even where notice has not been waived, the courts have been very reluctant to hold that the failure to give notice renders the judgment unenforceable in the absence of some kind of fraud.

The new rule-selective choice of law methods are also pruned of some of their problems and refinements. There is no discussion of the difficulty that a court may face in determining the policy underlying a foreign legal rule, particularly where, as in Canada, the court's rules of evidence limit its recourse to information about the background of a

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[1] P. 64.

[2] P. 72.

particular item of legislation. The "better law" notion introduced by Professor Leflar, and taken up by several courts in the United States, is not mentioned. *Babcock* v. *Jackson*[3] is labeled[4] as a "grouping of contacts" case, and described in a way that suggests that the court did not examine the relevant policies underlying the competing legal rules, and did not recognize the possibility that different issues in "the tort" might have to be solved by rules taken from different laws; in fact, the majority opinion discussed both these points. We are also spared the vagaries of the way *Babcock* v. *Jackson* has been applied in later cases, vagaries displayed even in a series of cases before the same court that decided *Babcock* (the New York Court of Appeals) involving the same problem (the application of "guest statutes" to car accidents).[5]

Professor Hertz's book, like the policy-oriented conflict of laws analysis that he takes as his theme, raises many more questions than it answers. We are made to see clearly that a host of considerations are, in principle, relevant to deciding issues of local jurisdiction, recognition and enforcement of foreign judgments, and choice of law; but then we are left hanging. How are all these concerns to be articulated in rules? Should we, in fact, eschew all rules in favour of case-by-case decisions? The author does not—and, in the scope of a book of this kind, could not—commit himself on such issues. On choice of law, for example, he tells us that "interest analysis", which focuses on the interests and policies of the states whose rules may be applied, is central to the problem, but that other factors, like the protection of justified expectations, may also be relevant; he does not make clear how all the relevant factors can be related to one another, but puts forward section 6 of the *Second Restatement*[6] (which does not relate them very successfully either) as a suitable model; he admits that section 6 is easy to criticize, but suggests that it is a giant step forward from the traditional rules; Canadian courts, he concludes, should take that sort of step in the years ahead.[7] Should we have rules at all? "To the extent possible, one must try to arrive at a happy medium between formal rules and *ad hoc* adjudication."[8] Professor Hertz cannot be faulted for leaving it to the reader to think about these problems for himself—a generation's work has not produced agreement on them even among scholars—but a student without much background in the subject may well find himself bewildered by so much flux and change, and turn with relief to more "traditional' expositions. This "introduction" should not be the first, or the last, thing he reads on the conflict of laws.

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[3] (1963), 191 N.E. 2d 279 (N.Y. Ct App.).

[4] P. 102.

[5] Compare *Dym* v. *Gordon* (1965), 209 N.E. 2d 792; *Tooker* v. *Lopez* (1969), 249 N.E. 2d 394; and *Neumeier* v. *Kuehner* (1972), 286 N.E. 2d 454.

[6] American Law Institute, Restatement of the Law, Second: Conflict of Laws 2d (1971).

[7] Pp. 115-123. [8] P. 117.

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Family Violence: an International and Interdisciplinary Study. By JOHN E. EEKELAR and SANFORD N. KATZ, with an Introduction by ANTHONY STORR. Toronto: Butterworths. 1978. Pp. vii, 572. ($17.95)

It may be unsettling to some to hear the family, one of society's most cherished institutions, described as "the most violent of all civilian institutions"[1], but a consideration of the material presented in this volume demonstrates that this description is not inappropriate. The book consists of a collection of papers from experts in a number of fields, and from different countries, dealing with the nature and causes of violence within the family, and considering a variety of legal, medical and social responses to the problem of family violence. Each chapter is written by a different author, and as a result this book tends to be disjointed and lacking in cohesiveness in some places, while in others it is unduly repetitious. It cannot be viewed as an authoritative text, but rather as a reference source. It can be of use to students and scholars in a number of disciplines, including law, and to policy makers. The legal practitioner may find only a small amount of material which can be directly applied, but may find insights which will assist him in understanding and dealing with cases involving violence between members of the same family unit.

Perhaps the greatest value of this book is the multiplicity of perspectives provided on a group of related social and legal problems, broadly described as "family violence". The diversity of viewpoints arises in part due to the international and interdisciplinary nature of the selection of papers, but also because of different perspectives of individuals in the same discipline and country. Taking an interdisciplinary approach provides the lawyer with increased understanding about the nature of a problem and promotes the realization that in many situations, a legal solution may not be the only or the best solution to a problem. The law is only a single social resource, and the nature and consequences of its employment must be carefully considered. There may be situations when the effect of invoking a legal response will be counter-productive, at least for the individual being "protected". One chapter in the volume,[2] by a Canadian, concerning the education of various professionals who deal with family violence, stresses that lawyers must understand the work done by other professionals, and be prepared to collaborate with them; the process of education must involve both the acquisition of knowledge and skills and the development of appropriate attitudes and ideals.

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[1] Murray Strauss, Wife Beating: How Common and Why, p. 41.

[2] Paul Haveman, Professional Education and the Violent Family, pp. 231-238.

The areas of family violence dealt with in this book include interspousal assaults, child abuse, sibling violence and incest. It is instructive to be able to compare the problems associated with each of these phenomena, involving as they do close emotional, psychological and physical ties of the "aggressor" and the "victim". Intervention can in effect punish the victim equally with the aggressor. The desirability of preserving a viable family unit often makes some form of treatment a favoured response, in the hope that all in the family will benefit.

Providing a selection of papers from a number of different countries allows the reader to realize that violence is a problem in families throughout the world, though the nature may vary considerably with the social and cultural structure of a society. The author of one chapter[3] suggests that in Asian countries where the norm is a large multigenerational family, rather than our nuclear family, there is less of a problem with the abuse of young children by a parent who may feel frustrated and alienated; on the other hand the physical and emotional neglect of children who do not "belong" to a family, such as step-children or illegitimate children, is a very serious problem. Another chapter[4] studies ancient Roman law concerning the treatment of children. At one time the *pater familias* had complete control over the life of his child, including the right to take its life; over the centuries the Roman concept of *patria potestas* "dwindled to a right of reasonable chastisement".[5] The standard of unacceptable family violence is culturally defined with different societies deeming different types of behaviour as worthy of formal social or legal intervention.[6] The presentation of solutions to problems of family violence developed in different countries could be most helpful. Unfortunately, much of the material about legal and social systems other than our own, about two-thirds of the book, seems to presuppose considerable knowledge about foreign legal systems or is overly descriptive and insufficiently analytical. Mention is made in this review of all the chapters by a Canadian author.

Though the editors should have been more selective in their choice of papers, they have provided helpful summaries of the essays to aid less robust readers. As an Appendix[7] to the book, Sanford Katz, an American law professor, presents a draft of his Model Act to Free Children for Permanent Placement, with commentary. One of

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[3] Tahmir Mahmood, Child Abuse in Arabia, India and the West: Comparative Legal Aspects, pp. 269-280.

[4] M.C. Olmesdahl, Parental Power and Child Abuse: An Historical and Cross-Cultural Study, pp. 253-268.

[5] P. 257.

[6] Suzanne K. Steinmetz, Sibling Violence, p. 460.

[7] P. 537.

the most interesting articles in the volume is the Introduction, written by Anthony Storr, who maintains:[8]

> . . . that violence within the family is not a category apart: that it is an exaggeration of aggressive tensions of a normal kind which are to be found in every home; and that we shall only understand violence if we also understand something about the ordinary aggressive impulses which operate within us all.

Storr traces the patterns of aggression towards parents and siblings maintaining they are inherent in the process of the child's development of an independent personality.

The editors divide the book into five parts. The first two deal with interspousal violence, the next two with child abuse, and the last with a variety of topics, including child suicide, sibling violence, and incest.

One of the first chapters,[9] by an American sociologist, considers the incidence, nature and causes of spousal violence. The author concludes that there is at least one incident of violence in one half of all marriages; although women are more frequently victims, "husband-beating" is a common phenomenon. The next essay[10] explores the psychological motivations of the battering husband and the battered wife. A Family Court judge from Ontario argues in one chapter "that the mass media, especially television, promotes norms and values legitimizing and reinforcing violence in the home".[11] Chapters[12] in this portion of the book deal with legal responses to spousal violence in Britain, the United States, France and Canada. Two American law professors, Parnas and Boskey[13] take opposite positions on the use of criminal law in dealing with the problem; the former argues that no therapy methods have proven effectiveness and that criminal sanctions can prevent violence through deterrence, while the latter feels that a legal response can not usefully be employed in most cases. Joanna McFadyen, of the Law Reform

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[8] P. 1.

[9] Strauss, *op. cit.*, footnote 1.

[10] Richard A. Makman, Some Clinical Aspects of Inter-Spousal Violence, pp. 50-57.

[11] Lucien A. Beaulieu, Media, Violence and the Family: A Canadian View, pp. 58-68, at p. 58.

[12] Michael D. Freeman, The Phenomenon of Wife Battering and the Legal and Social Response in England, pp. 73-109; Susan Maidment, The Law's Response to Marital Violence: A Comparison between England and the U.S.A., pp. 110-140; Marie-Theresa Meulders, La violence au sein du couple: ébauches de réponses juridiques en droit continental, pp. 141-187; Raymond Parnas, The Relevance of Criminal Law to Inter-Spousal Violence, pp. 188-192; Joanna McFadyen, Inter-Spousal Rape, The Need for Law Reform, pp. 193-198; and James Boskey, Spousal Abuse in the United States: The Attorney's Role, pp. 199-207.

[13] Pp. 188 and 199.

Commission of Canada[14] advocates the removal of the offence of rape from the Criminal Code, and its replacement by a new offence of sexual assault, which should apply to married and unmarried men and women alike. Three chapters[15] describe programmes developed in various different cities, Regina, London (Ontario) and New York, which provide immediate counselling for families facing domestic crises, particularly those involving spousal violence and child abuse. The two Canadian projects have extensive connections with the local police forces, links which are apparently extremely valuable.

The first of the chapters[16] in the portion of the book dealing with child abuse is written by Albert Solnit, the noted American psychiatrist[17]. He argues that the relationship of the parent and child is extremely complex, with elements of love, but also elements of fear and resentment; thus it is very difficult to define concepts such as emotional or psychological neglect. A later chapter[18], by a Danish pediatrician, continues to explore the psychological make-up of the abusing parent, explaining the importance of bonding at the time of birth and the problems which may arise when a parent expects a child to bring happiness and comfort; an explanation is offered for the often observed fact that children who were abused tend to abuse their children when they become parents. Two chapters[19] consider whether abusing parents should be dealt with in a medical or a legal setting. Barbara Chisholm, of the Canadian Council on Children and Youth, argues persuasively that the appropriate response depends on the circumstances of the case, and the amenability of parents to treatment, but that "if hard choices must be made about 'working with the parents', the child's claims to emotional and physical integrity must come first".[20] A number of chapters[21] consider the

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[14] Pp. 193-198.

[15] Garry L. Bell, Interspousal Violence: Discovery and Reporting, pp. 208-215; Peter Jaffe and Judy Thompson, The Family Consultant Service with the London (Ontario) Police Force, pp. 216-223; and Barbara Cohn Schlacet, Rapid Intervention with Families in Crises in a Court Setting, pp. 224-230. The London project is also discussed by Walter Johnson and Judy Thompson, Child Abuse: The Policemen's Role: An Innovative Approach, pp. 428-437.

[16] Albert J. Solnit, Child Abuse: The Problem, pp. 243-252.

[17] See in particular, Joseph Goldstein, Anna Freud and Albert J. Solnit, Beyond the Best Interests of the Child (1973).

[18] J. Vesterdal, Psychological Mechanisms in Abusing Parents, pp. 290-294.

[19] Eli H. Newberger, The Medicalization and Legalization of Child Abuse, pp. 301-317; and Barbara A. Chisholm, Questions of Social Policy — A Canadian Perspective, pp. 318-328.

[20] P. 327.

[21] Bernard Dickens, Legal Responses to Child Abuse, pp. 338-362; Annemaree Lanteri and Susan Morgan, Some Legal Aspects of Child Abuse in Australia, pp. 363-381; M.J. Grebler and G. Deschamps, Aspects juridiques des sévices à enfants

legal aspects of child abuse in various countries including a helpful survey of issues and responses by Bernard Dickens, of the Faculty of Law at the University of Toronto. A member of the Royal Canadian Mounted Police[22] explores the role of the police in dealing with child abuse, noting the considerable discretion the police have in this type of case and suggesting a concern with treating and preventing the problem rather than simply punishing abusing parents. The French have an interesting approach to the detection of child abuse[23]; to be eligible for the universal child support payments, the equivalent of Canadian Family Allowance, a child must be presented for twenty free health visits before he is six. One chapter[24] describes an innovative Dutch facility which takes the whole family unit into a residential treatment facility when child abuse occurs; this approach recognizes that child abuse can best be effectively treated in the context of a familial relationship. It is unfortunate that there is no description in this volume of Child Abuse Committees,[25] which are being commonly found in Canadian cities.

The final part of the book considers "Special Aspect of Family Violence". This part is the least cohesive in the volume. There are chapters dealing with child suicide[26] and violence of children towards siblings.[27] A Canadian study[28] of adolescents who kill members of their families suggests that such acts are a response to intolerable social pressures within the family and could often be prevented through early diagnosis and treatment. The book concludes with a somewhat repetitious quartet of articles[29] on the law of incest, in France, Britain, Canada and Belgium. A Canadian psychiatrist[30] advocates the removal of incest as an offence from the Criminal Code, and except for cases involving children or violence,

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en France, pp. 382-404; and Gisela Zenz, Legal Aspects of Child Abuse in the Practice of Custody Courts in the Federal Republic of Germany, pp. 405-416.

[22] R. Holmes, The Police Role in Child Abuse, pp. 417-427.

[23] Grebler, p. 382.

[24] Rob van Rees, Five Years of Child Abuse as a Symptom of Family Problems, pp. 329-337.

[25] See *e.g.*, Jean Webb, Survey of Community Management Programs, [1978] Ont. Med. Rev. 12.

[26] M. Rood de Boer, Child Suicide, pp. 441-459.

[27] P. 253.

[28] Bruno M. Cormier, *et al.* Adolescents Who Kill Members of the Family, pp. 466-478.

[29] J.P. Peigne, L'inceste: problèmes posés et point de vue d'un juge, pp. 479-486; Anthony Manchester, Incest and the Law, pp. 487-517; Ingrid Cooper, Decriminalization of Incest — New Legal-Clinical Responses, pp. 518-528; and Patrick Senaeve, Incest in Belgian Criminal Law, pp. 529-536.

[30] Ingrid Cooper, *ibid.*

argues that the problem should be dealt with by treatment rather than punishment.

The legal scholar or practitioner should find this book worthwhile reading, but should not expect to find too much that can be directly applied in a Canadian legal context. A serious omission is the lack of consideration given to the difficult tactical and ethical problems facing lawyers in cases involving family violence.

NICHOLAS BALA*

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Bakke, DeFunis, and Minority Admissions. By ALLEN P. SINDLER. New York, N.Y.: Longman. 1978. Pp. xi, 358. ($12.50 U.S.)

In recent years in both the United States and Canada, the number of persons seeking admission to medical schools and law schools has greatly exceeded the number of available places, with the result that admission has become highly competitive among applicants. Since possession of a degree from a recognized school is generally a condition of the right to practice either of these professions, this admission competition governs, not only the few years of life involved in obtaining a certain education, but also the pursuit of a life-time career.

The criterion that has come to play the largest role in selecting successful applicants, particularly in the case of the law schools, is a demonstration of prior academic achievement. This is measured on the basis of marks achieved in previous university level studies and by scores achieved on standardized tests specific to each profession.

In the United States this period of heavy competition for access to the medical and legal professions has coincided with a period of major effort at the integration of certain minority groups, primarily Blacks and Chicanos, into all aspects of American life. For a variety of reasons resulting from the relative lack of such integration in the past, members of these same minorities as a group suffer a significant handicap in terms of the normal criteria used in judging the competition for places in schools of law and medicine.

In order to fulfill the commitment to integration, medical schools and law schools in the United States have adopted programmes of preferential admissions for these minority groups. Under such programmes, members of minority groups are admitted on the basis of criteria which differ at least in degree and sometimes in kind from the criteria applied to other applicants. Since the use of such different criteria is related, whether openly or not, to the status of the individual

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as a member of a minority, preferential admissions programmes involve discrimination based on race.

Since discrimination based on race is the very thing that integration is seeking to eliminate, an obvious dilemma arises in these circumstances—is discrimination based on race in favour of members of a minority acceptable when discrimination based on race against members of a minority is unacceptable? Since the legal foundation of the movement to integration in the United States is the constitutional concept of equal protection and due process, the dilemma has constitutional implications which push the issue into the judicial forum.

Anyone who follows at least the major news events in American constitutional litigation will have heard of the *DeFunis*[1] and *Bakke*[2] cases in which this dilemma was placed before the United States Supreme Court. For anyone interested in learning more about these cases, whether they are already familiar with them and American constitutional law, or are simply curious about the issue and would like to examine these cases without having to take a crash course in American constitutional law, Allan P. Sindler's *Bakke, DeFunis, and Minority Admissions* is highly recommended.

Sindler uses a narrative style which makes the book eminently readable. He intertwines a basically factual account of the individual circumstances and developments in the two cases with a thorough review of the policy issues underlying them. The cases of Marco DeFunis, a non-minority law school applicant refused admission by the University of Washington, and Allan Bakke, a non-minority medical school applicant refused admission by the University of California at Davis, are each traced from their pre-litigation efforts to gain admission, through the various stages of litigation, to the respective decisions of the United States Supreme Court.

Sindler presents the issues by way of a critique upon the arguments presented during litigation and upon the judgments rendered as the cases proceeded through the courts. This approach tends toward a certain repetitiveness since basically the same issues were involved at each stage in each case. On the whole, however, Sindler chooses one appropriate point for the full development of each issue and avoids excessive repetition. To some extent this gives a slightly piecemeal character to the presentation of the issues. The legally-trained reader in particular may miss having a concise and logically marshalled summation of the argument by way of an introduction or conclusion. Sindler does provide summations of the main issues at other appropriate points in the text.

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[1] *DeFunis* v. *Odegaard* (1974), 94 S. Ct 1704.

[2] *Regents of the University of California* v. *Bakke* (1978), 98 S. Ct 2733.

The fact that Sindler is a political scientist, and not a lawyer, has perhaps helped to make this a book that someone relatively uninitiated into American constitutional law can follow. Yet even political scientists in the United States often tend to assume that their readers are well-versed in the intricacies of their country's constitutional law. For the most part, Sindler avoids this pitfall. Although it is hardly a primer on the relevant aspects of American constitutional law, Sindler's book contains enough explanation of the main concepts involved to enable a reader of reasonable intelligence to understand the issues, even if one is previously unfamiliar with them.

At the same time, this is not a superficial review of the *DeFunis* and *Bakke* cases. Sindler has carefully researched the background of the two cases and has thoughtfully analysed the policy issues. Anyone intending to study these cases or the underlying policy dilemma in the future will find Sindler's book a valuable source work.

There are a few sections, principally in Sindler's critique of the Supreme Court judgments, where the argument is difficult to follow. Perhaps Sindler does not feel as comfortable dealing with issues in a legal perspective and is therefore hesitant about attempting to elucidate such issues. Although this involves only a relatively small part of the book and does not detract greatly from it, it might have been better if Sindler had accepted the logical implications of his general thesis that the question of minority admissions is essentially one of policy, rather than law, and simply avoided any attempt at legal criticism.

While minority admissions itself is not as significant an issue in Canada as in the United States, the underlying problem of how to allocate the scarce resource of a professional medical or legal education is equally a cause for concern here. In the United States the lack of prior academic achievement among minority groups has already posed a barrier to integration in a number of other areas. As a result, in view of the high priority placed upon the objective of integration, there has been a concerted scrutiny of the justification of allocating positions in society on the basis of prior academic achievement.

Less than a generation ago many individuals became lawyers and doctors without having to demonstrate the level of prior academic achievement now being demanded in Canada and, at least in the case of non-minority applicants, in the United States. In the absence of evidence that individuals who entered these professions under lower academic standards in the past have proven anything other than fully competent, the validity of allocating the positions available at present on the basis of prior academic achievement would seem open for examination.

Sindler does raise the question. However, he jumps rather rapidly to the conclusion that, because the academic standards being applied

reasonably predict the individual's chances of high marks in professional school, they are a valid criteria for allocation of access to professional school and hence to a professional career. This falls far short of the thorough scrutiny to which the trend towards academic meritocracy in these professions might be subjected. In effect, Sindler assumes the validity of academic meritocracy once the individual has been admitted to professional school. Once this assumption is made, any questioning of the use of prior academic achievement as the main admissions criteria is little more than a formality. From the Canadian viewpoint, it is disappointing that Sindler did not draw more heavily upon the American experience in other areas to examine fully the fundamental validity of allocating access to certain professions on the basis of high academic achievement.

One of Sindler's main themes is the inability of the judicial system to cope effectively with a public policy issue where public opinion is sharply divided. While legal disputes raising such issues can be developed through litigation over constitutional interpretation, the constitution provides no easy answer. Ultimately the result is likely to be a court which is as sharply and inconclusively divided as the public in general. The four, one, four decision of the United States Supreme Court in the *Bakke* case illustrates this. While Canada's Supreme Court has provided us with ample demonstration of this same problem in the past, it is useful to be shown that the production of such a result may be caused by the nature of the decision-making system, and is not necessarily a sign of peculiar indecisiveness in our own court.

In short, Sindler's book is a readable and informative tale about the workings of the American judicial system in an area of current controversy which can be read both to gain a better understanding of that controversy and to gain insight into the ability of a judicial system to deal with such a controversy.

R.W. KERR*

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The Sociology of Law: a Conflict Perspective. By CHARLES E. REASON and ROBERT M. RICH. Toronto: Butterworths & Co. 1978. Pp. 475. ($9.95)

This joint American-Canadian project offers itself as "a much needed alternative to current sociology of law books".[1] In place of the traditional enquiry into the functional and structural properties of law, the authors claim to have collected together twenty-one essays

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[1] P. v.

which provide a multi-national and multi-ideological perspective on the phenomenon of law in its social, economic and political context. Great attention is focused upon the subtle and intimate relationships that dominate this field of study and the products and results of such relationships: theory and practice, law and social change, social facts and social values, and legal action and social structure. The success of such a venture is mixed at best. There is a mélange of quality which runs from the balanced and penetrative observations of M.R. Goode's article to the unconvincing unorthodoxy of Piers Beirn's paper. Nonetheless, the selection is very catholic in taste and represents no obvious underlying prejudice.

The collection is divided into six sections, with each section being prefaced by a short survey of the arguments and ideas contained in the selected essays. The first part, "The Meaning of Law", concerns itself with the fruitless search for an acceptable and accurate definition of law. Malcolm M. Feeley treads familiar ground and puts forward a watered-down and unacknowledged Hartian critique of law as a species of command.[2] He does go on, however, to suggest an improved, if unremarkable economic perspective on the workings of the law. Richard Quinney and Issac D. Balbus both take a more radical line and arrive by slightly different routes at a Marxist theory of law.

The second part, "Jurisprudence and Sociology", revives the perennial debate over the affinity, if any, that exists between societal facts and societal values and whether it is logically possible to derive one from the other.[3] Donald J. Black suggests that it is essential to assemble a value-free sociology of law which can be applied to any political variety of a legal system. Nonetheless, he simultaneously maintains that values have a role to play in social science and makes the dubious assertion that to do otherwise would be "to confuse the origins and uses of a scientific statement with its validity. The fact that scientific statements are influenced by values does not make them value statements".[4] Philippe Nonet takes an entirely contrary view. He holds Black's arguments to be "loose, inconsistent and uninformed"[5] and believes that, if sociology of law is to play an effective and instructive role, it must address itself to the problems and influence of values in the workings of the legal system. He outlines the central tenets of the "Berkeley Program"[6] as a method and means by which to fulfill such a purpose.

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[2] See H.L.A. Hart, The Concept of Law (1961), pp. 18-76.

[3] This question has plagued all aspects of philosophical enquiry. For an interesting examination of its effect on legal philosophy, see P. Sinha, The Fission and Fusion of Is-Ought in Legal Philosophy (1975), 21 Vill. L. Rev. 839.

[4] P. 103. [5] P. 117.

[6] This is not meant to refer to any settled school of thought, but is meant to

In the third section, "The Sociology of Law: Competing Paradigms", there are three attempts to apply recent developments in the conflictual approach to social theory to the study of law. Robert M. Rich provides an impressive catalogue of paradigms of law extracted from the writings of the major legal theorists. William J. Chambliss and Austin T. Turk drift into drawing up an unoriginal Marxist model of law and society which casts man as a basically active, yet historically conditioned individual.

In the fourth part of the collection, "Law and Socio-political Structure", the contributors analyse, to varying degrees of sophistication and persuasiveness, the complex relationship between law and the socio-political structure in which it operates. Many colourful and interesting insights are brought out across a wide spectrum of different ideologically aligned systems as far apart as China and the United States of America. These five essays, especially those by Harold E. Pepinsky, represent the most rewarding and praiseworthy section of the book.

The penultimate part, "Law, Order and Social Change", examines the subtle uses to which law can be put to bring about social change. W.H. McConnell has written a disturbing piece on the plight of political activists, such as the Rosenbergs, Angela Davis and Alexander Solzhenitsyn, who take a stand against the prevailing political authority and outlook. He reaches the provocative conclusion that "the quality of a political culture [can] be measured by its tolerance of dissent".[7] Haywood Burns chronicles the suppression of black Americans and demonstrates how law can be used as an obstacle to reform. On a similar line, Charles E. Reasons tries to show the way in which the traditional colonial approach to native problems continues to thwart the drive towards full recognition of native culture and rights. James F. Petras, alighting upon the predicament of Chile, explains how law was manipulated by the economically powerful and resulted in the collapse of the democratic government. Finally, M.R. Goode, in an article first published in this *Review*,[8] makes a most revealing investigation into the Law Reform Commission of Canada and seeks to unearth the crucial, yet unavowed social policies that underlie its work. He astutely points out that, by accepting the existing value of present-day Canadian society, it compromises the very reason for its existence:

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convey a mood and a posture taken up by a number of academics who were at one time colleagues at Berkeley; see J. Skolnick, The Sociology of Law in America: Overview and Trends (1965), 12 Soc. Prob. 4; J. Carlin and P. Nonet, The Legal Profession (1908), 9 Encyclopedia of Social Sciences 66; P. Selznick, Sociology and Natural Law (1961), 6 Nat. L. Forum 84.

[7] P. 348.

[8] (1976), 54 Can. Bar Rev. 653.

> Behind [their observations] lies a wealth of undisclosed and undiscussed assumptions about the nature of Canadian society. . . . The failure to question must result in severe doubts being cast upon the worth of the philosophical approach embraced by the Commission, and the recommendations which flow from that approach. Indeed, failure to question and failure to recognize the true bases of current political criminological debate, and the consequent adoption of the existing social environment as a whole, results in the Commission accepting the status quo in substance of the social order and all that it implies.[9]

The final section, "The Sociology of Law and Social Praxis", addresses an issue of increasing contemporary significance for the sociologist, namely, that of the real and the very fertile reciprocation of theory and practice. In a perspicacious, if jargon-laden essay, threaded together by its support for Weber's action theory, Clive Grace and Philip Wilkinson make plain the need for a new approach and methodology in the sociology of law. Building on the foundational work of C. Wright Mills,[10] Barry Krisberg attempts to meet such a request and formulates a five-point plan of action in developing such an alternative methodology. He makes the valid conclusion that the sociologist of law must not be content with the mere written dissemination of his ideas; "we each have special constituencies which command our strongest dictated commitment. The choice of the format or the expression of our ideas ought to be dictated by the relationship of those ideas to practice".[11] In a contribution of doubtful quality, Piers Beirne strikes a discordant note by claiming that the central tenets of Marxism, especially its utilisation of empirical research as a tool for social change, are incompatible with a true sociology of law.

Despite certain pretensions to the contrary, this sociological perspective on law is likely to remain as alien to the lawyer as any other. Often speaking in the obscure and foreign tongue of the academic sociologist, this book is most certainly published with the sociologist as opposed to the lawyer in mind. Nevertheless, it does draw together a representative selection of work in this field and contains a number of useful bibliographies. Furthermore, the lawyer who has the enthusiasm and patience to wend his way through this sizeable and dense publication will be rewarded with some revealing and powerful insights into the complex social framework and environment in which law operates and, more particularly, into the workings and concerns of the sociologist's mind.

ALLAN C. HUTCHINSON*

[9] Pp. 392-393.

[10] He maintained that, for sociology to progress and step beyond the complacency of traditional sociology, it was vital to develop a "humanistic" approach; that is, to demonstrate and explore the link between men at large and the powerful historical forces which created existing social conditions. History and man are the central strands of any social enquiry: see The Sociological Imagination (1959).

[11] P. 467.

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The English Legal System. Sixth Edition. By A. K. R. KIRALFY. London: Sweet and Maxwell. 1978. Pp. xxvii, 297. (No Price Given)

The reviewer who takes his job seriously is often confronted with a difficult choice: does he review the book as written, or the book that was not written? This choice is rendered more difficult when the absence of an explanatory preface compells reference to a publisher's blurb for details as to the author's purpose and his justification for writing. A further complication arises when the blurb for a sixth edition bears little resemblance to the author's preface for the first. Hence, one reads:

> This comprehensive introduction to the legal system sets law in its historical and procedural framework before examining court proceedings in detail. No prior knowledge of law is assumed in a work designed to cater both for candidates on full-time degree courses and those from other disciplines who require an understanding of the subject. . . . Written to a formula of long-established popularity, *Kiralfy* serves a variety of readers. It provides a firm grounding for those in the English legal system, in law for professions such as banking and accountancy, and in English law for foreigners.[1]

In the face of such an advertisement, one may legitimately wonder if he is in the presence of a substantial monograph rather than a 281 page primer.

The English Legal System certainly purports to be comprehensive in scope. A first theme, the history of English law and law courts, is examined in eighty pages. A second topic, sources of law, is treated in fifty. By far the bulk of the book, one hundred and twenty pages, is devoted to outlining criminal and civil procedure, including civil appeals. Finally, in ten pages the author reviews arbitrations, administrative tribunals and military courts, and concludes with twenty pages of discussion on costs, legal aid, the legal professions and evidence. Although obviously superficial and incomplete, this format seems to have found (subject to minor variations) almost universal acceptance in the trade.[2] Yet the discerning reader must surely apprehend several defects and substantive errors given such an organisation; *The English Legal System*, unfortunately, bears out these apprehensions.[3]

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[1] See the publisher's blurb on the back cover of the paperback edition.

[2] See for example, Phillips and Hudson, A First Book of English Law (7th ed., 1977); Walker and Walker, The English Legal System (4th ed., 1976); Rudd, The English Legal System (1962); Gall, The Canadian Legal System (1977); David, French Law (1972); Derham, Maher and Waller, An Introduction to Law (3rd ed., 1977). Other primers of the same type which differ to a greater degree are Cross and Hand, The English Legal System (5th ed., 1971); Smith and Keenan, English Law (5th ed., 1975); O'Keefe and Farrands, An Introduction to New Zealand Law (3rd ed., 1976).

[3] The sixth edition, like the fifth, is essentially an update of the fourth edition (1972). In that work the author stated "The present edition of this work has been

Although this sixth edition is very similar to its immediate predecessor, it differs from the fifth edition in one important respect. Kiralfy has excised a three page introduction in which the nature of law was discussed. This modest introductory provided a meaningful starting point for the reader by raising perennial issues such as law and morals, the certainty of rules, sanctions, and civil disobedience. One may disagree with the author's implied answers to such questions, but the necessity of posing them cannot be doubted. By eliminating this introduction Kiralfy has removed an important first referent for the reader. Nowhere in the subsequent text is this omission remedied, with the result that the book never develops the coherence required of an introductory manual.

In this sixth edition's first chapter the author discusses "divisions of English law", these being postulated as case law and statute, civil and criminal law, subdivisions of criminal law, subdivisions of civil law, and equity. How the author came to these divisions, why they are promulgated and what importance they may have is left unexplained.[4] Moreover, the divisions or categories suggested raise several questions. For example, one wonders if the difference between case law and statute is really of the same genus as that between civil law and criminal law? Or, how does one characterise the reported decisions of administrative tribunals? Again, are the only subdivisions of criminal law felony and misdemeanor or indictable and non-indictable offences as the author suggests? What category is reserved for regulatory offences created by delegated legislation? Finally, to what end is civil law said to be divided only into contract and tort, real property and personal property? Does a family lawyer or an estates lawyer not practice law?

In any discipline, the justification for drawing distinctions lies in the fact that, if carefully chosen, these contribute to explanation and elucidation of complex interrelations. If anything, however, those set out by Kiralfy hinder understanding. By failing to provide reasons for his choices the author implies that law can be compartmentalized and that compartmentalization is inherent in and necessary to English law. Since no attempt is made to explain why

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considerably rewritten, with the object of eliminating duplication and refinements and producing a shorter and more readable book. . . . The text on the history of the judicial system has been replaced by a short summary, and a note on the law of evidence takes the place of the more detailed treatment in former editions, since evidence is a university discipline itself. The treatment of administrative courts and military courts has also been cut down to prevent duplication with works on public law. . . . The book is principally intended for students taking an introductory course in the first year of law at a university."

[4] It should be noted that most of the texts cited in footnote 2 also postulate the same divisions without explanation.

any distinctions are propounded the reader is likely to adopt a mechanistic view of law which he feels he can commit to memory much like the student of chemistry memorizes the Periodic Table of Elements.

In chapter two English legal history is reviewed. Most of this chapter is devoted to a history of the civil law including forms of action, trepass and case, covenant, debt, assumpsit and consideration, uses, trusts and mortgages. To the extent that a student requires a brief history of substantive law, he should probably turn to the author's other works.[5] For this chapter is replete with overgeneralisations necessitated by its brief compass, and in places is potentially misleading. Uncritical, almost deterministic *ex post facto* justifications for such anachronisms as fault-based civil liability, the bargain theory of contract, the feudal doctrine of estates in land and the residual effects of the bifurcation of the judicial system into Common Law and Chancery seem to underlie the entire discussion.

An important part of any introductory book on law is that which treats what have come to be known as sources of law. Kiralfy, however, devotes less than fifty pages to this topic: twenty-three to precedent, twenty-four to legislation, one page to the impact of European Economic Community membership and just four lines to custom. The definition of sources of law, like all definitions should be one of convenience: how well does the definition measure up as an explanatory device? Although the author himself does not advance any criterion of inclusion, (and consequently one wonders exactly what he means by source of law) traditionally it is said that these are authoritative categories of norms which must be taken into account by a judge in his decisions.[6] Despite the fact that even this restricted definition is open to question,[7] the book treats only some entries which would appear on such a list. For example, delegated legislation, administrative precedents, judicial customs, works of authority and general principles of the common law are passed over. Surely a primer on the English legal system today should not be wedded to the ideas of Jeremy Bentham and John Austin without explanation.

Even with the topics treated at length (precedent and legislation) there are serious flaws. By failing to recognize that deference to precedent is merely a part of the legal process of justification, but

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[5] Especially Kiralfy, Potter's Historical Introduction to English Law (4th ed., 1958).

[6] Paraphrasing Hart, The Concept of Law (1961), ch. VI.

[7] For example, see the items listed by Patterson, Jurisprudence (1953), pp. 212-243.

does not touch the process of discovery in decision-making,[8] Kiralfy offers a misleading (if traditional) concept of *ratio decidendi*.[9] By failing to offer a teleology of interpretation the author gives the impression that internal aids to construction, presumptions of intent and the canons of statutory interpretation are merely convenient weapons in the practitioner's armory, to be employed where appropriate.[10]

The author then passes to a lengthy review of criminal and civil procedure. Although this writer has but a sketchy understanding of the procedural technicalities of English law and is not really competent to evaluate the accuracy of these chapters in their particulars, some general comments can be made. First, despite the detailed explanation of matters such as the writ, appearances, pleadings, discovery and trial, Kiralfy reserves only three paragraphs for a discussion of what could be called the theory of adversarial adjudication. If anything helps to explain the complex of procedures and role limitations on judges and counsel which are fundamental to common law civil procedure, it is this concept of the adversary system. Secondly, surely it is incumbent upon the author to note that much of English criminal law is uncodified and to trace the implications of this fact. For institutions such as the jury, procedures such as preliminary inquiries or bail, and presumptions such as the requirement of *mens rea* or proof beyond a reasonable doubt take on a different character when viewed from this historical (and still accurate) perspective. How the initiate to English law is to understand procedure simply by reading a chronology of the criminal and civil processes escapes this writer's understanding.

The closing part of the book deals with various other aspects of the English legal system. In chapter nine, two pages are set aside for a discussion of administrative tribunals. Even though it is heartening that the phenomenon of administrative law is mentioned, Dicey would be proud that only the judicial or *quasi*-judicial aspects of such bodies receive attention. One almost has the impression that, whatever else they may be, constitutional arrangements and non-judicial administrative activities are not law and form no part of the English legal system. The work's final chapter, a hotch-potch treatment of costs, legal aid, the professions and the law of evidence occupies twenty pages of text. Perhaps the most important and interesting topic here discussed is the legal profession. Legal

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[8] A more detailed explanation of this point is contained in Llewellyn, The Common Law Tradition (1960), pp. 178-199.

[9] Kiralfy seems to adhere to Goodhart's theory of the *ratio decidendi*; see pp. 73-76.

[10] I have discussed this problem in detail in (1977), 27 U.T.L.J. 119, at pp. 126-130.

education, canons of ethics, the role of the profession in law reform and the intricacies of the profession's division into solicitors and barristers all would be worthy of detailed treatment. Certainly an important aspect of understanding a legal system is understanding its principal *dramatis personae*. Yet less than three pages are accorded to this subject.

Much of what is wrong with *The English Legal System* can be explained in terms of misleading impressions caused by omissions of the nature outlined above. But it is not clear to me that the simple inclusion of this material would substantially improve the book. In many respects, where this work seems to go wrong most seriously is in its underlying premises.

First, given its intended audience, *The English Legal System* assumes too much knowledge about the social functions of law and the dynamics of the legal process. The fact that a Canadian lawyer does not require an explanation of the adversary system, or can supply the missing links in the discussion of sources of law should not be taken as proof that a Continental lawyer, an accountant or even a first year law student in the United Kingdom is similarly capable. On the other hand, for the individual who is sufficiently familiar with the common law to interpolate these ideas, most of the text is trite. Much like the law teacher who expects his students to assimilate the great premises of the law as they are secreted through the interstices of the cases, Kiralfy appears to believe that an understanding of the English legal system (or any legal system for that matter) can be gained simply by a mastery of definitions and facts. By passing over the living aspects of the law—social pressures, the legislative law reform process and the influence of a creative judiciary—the book presents a picture of a fossil: not an ongoing system, but an historical relic.

Secondly, one is likely to finish this book with the view that all "law" happens in courts. Kiralfy's failure to advert to the administrative process has already been noted. It is unacceptable that a work parading as an introduction to English law should be nothing more than an introduction to private law — especially non-statutory private law. But more importantly, *The English Legal System* shows no awareness of how much law is not connected to the litigation process. Phrases such as "the law in books vs. the law in action" reflect significant realities about the effect of social processes; the importance of custom in commercial and matrimonial affairs cannot be discounted; open-ended standards such as "the reasonable man" are proof that much of our law depends on practice. Without offering any justification whatever, the author has adopted a positivistic view of law which, although resplendent in its simplicity, can be seen by

any lawyer to bear little relation to the actual operation of the English legal system.

A third underlying defect is not as much a defect in this book as a defect in books of this genre. Even granting that there are substantial differences in the teaching of law between Canada and the United Kingdom[11] one still wonders what role these primers are expected to play. Too superficial to serve as a text in any course, too eclectic to serve as a general guide to substantive law, too unsophisticated to raise jurisprudential problems in any meaningful fashion, they occupy a no-man's-land in legal publishing. Yet the plethora of such texts and their manifest success[12] would belie this reviewer's strictures.

Often reviewers of basic works about their own legal system fail to appreciate how much of their personal understanding they read into the author's discussion. It is only when one has the opportunity to evaluate an introduction to a foreign legal system that these tacit additions become explicit. If Kiralfy's *The English Legal System* can be read profitably by a Canadian, it is only because of this underlying knowledge of the common law which makes facts about the organisation of English courts or the technicalities of procedural law meaningful. It may be that this is enough to recommend the book to some readers, but on balance one wonders both how this sixth edition will prove useful to any of its intended audiences, and why the first five editions have been so successful.

R. A. MACDONALD*

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Selected Writings. By OTTO KAHN-FREUND. London: Stevens & Sons. 1978. Pp. xv, 381. (No Price Given)

In 1976 the Editorial Committee of the *Modern Law Review* decided to produce a selection of some of the essays of Sir Otto Kahn-Freund. He had been a Professor at the London School of Economics, having joined the staff of that school in 1936 as an Assistant Lecturer, prior to becoming Professor of Comparative Law at Oxford in succession to the first holder of that Chair, Professor

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[11] The difficulty experienced by transfer students from the United Kingdom at the Faculty of Law, University of Windsor highlights the significance of these differences.

[12] The fact that most of the English primers cited in footnote 2 have run to many editions confirms the success of this type of text.

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Lawson. In the very first year of his tenure at the London School Economics, Sir Otto was one of the initiators of the *Modern Law Review*; subsequently, he was a member of the Editorial Committee. This volume, to which an editorial introduction was written by Martin Partington, currently on the Faculty at the School, is a fitting tribute to the life and work of Kahn-Freund. He was initially a stranger to England, being, in fact, a refugee from Hitler's Germany. As such he provides yet another example of the folly of that political regime, which denied to Germany the services and loyalty of so many gifted and distinguished people in all walks of life. The man who, in his youth, was forced to seek a home, protection and a new way of life in a foreign country, albeit that he had learned to speak English prior to his departure from his native land, ended by becoming one of the pillars of English legal and academic life. Retired though he may be, he is still an active and vital figure. No one would dispute the suitability of such a publication. Nor would anyone deny to Sir Otto the recognition of his importance that is inherent in its appearance.

The contents of this book, selected from a voluminous output from 1929 to 1977, in several languages—all of which is itemized and presented systematically in a bibliography at the end—comprise various writings in the four major areas in which Sir Otto has been interested during the course of his career: labour law, family law, conflict of laws, and comparative law (as well as a lesser, but stimulating piece on legal education). The chosen essays come from a variety of sources: the *Modern Law Review* itself, the *British Journal of Sociology*, the *Industrial Law Review*, *Transactions of the Grotius Society*, the *Law Quarterly Review*, and several books to which Sir Otto contributed chapters, such as *Law and Opinion in England in the Twentieth Century*, a collection of essays by different authors along the same lines as Dicey's earlier, singlehanded, and deservedly more famous volume about the nineteenth century. These variegated writings, drawn from such diverse publications, that in themselves signify the manifold interests of the author, reveal several important features of the life, career and abilities of the man being honoured.

In the first place, there is his eclecticism. This takes two forms. He is concerned with a number of different, indeed contrasting areas of the law. At the same time he is concerned with the content of these different areas as expounded by the legal systems of a number of countries. Most of us experience enough difficulty becoming knowledgeable in English (or if it be preferred, Canadian) law. Kahn-Freund is not only an English lawyer, by adoption; he is also a German lawyer, by initial training, and a French lawyer, added to which his original civil law background makes it understandable that

he should also be acquainted with the legal systems of other European countries and parts of the world, such as Japan, which have derived their law from one or other of the modern European civil law codes. Furthermore, as a common lawyer, he has more than a smattering of American law, notably in the fields of labour and family law—as reference to the comparative essay on English and American law[1] conclusively indicates. And he has a familiarity with Roman law that scarcely any of the North American scholars possess (not only to their shame, but also to their disadvantage when it comes to an understanding and appreciation of legal principles). Kahn-Freund, then, is a Jack of several legal trades; and a master of all of them. These essays contain much that is informative of the law that appertains in the various countries mentioned above, as well as an acutely perceptive analysis of the ways in which those different systems compare in their approach to the same sort of legal problem, whether it be matrimonial property, the adjudication of industrial disputes, or the liability of a parent to his child, to give only a few examples of the topics discussed at various places in these essays.

Secondly, there is his command of the English language. He has style. He has an aptitude for a well-turned phrase, that illuminates the subject, and fastens the reader's attention in a manner that ensures interest and perception. Consider, for instance, these few sentences culled from different parts of the book. "There is—and perhaps must be—a gaping gulf between the world of the dogmatic lawyer and the world of the sociologist." "Enhanced publicity for the law has been the battle-cry of all law reformers from Gnaeus Flavius to Bentham: provisions for 'workshop publicity' of social legislation help to break up the monopoly of legal knowledge." "The 'fair wages clause' has begun to play the role that the 'fundamental law' used to play in the Middle Ages. Small wonder that we are in a dilemma whether to describe the task of the Industrial Court as legislative or as judicial. Legislation by adjudication—is it a new and original contribution to the conceptual arsenal of jurisprudence, or is it a revival of the most ancient form of law-making known to mankind?" "The law, however, is concerned with the marginal case. This is where empirical social scientists and lawyers so often fail to understand each other". "Rubbing shoulders with economists and sociologists, political scientists and social anthropologists is a healthy exercise for a political lawyer." "In short, it seems to me that it is the *nobile officium* of the academic lawyer to do that which the practising lawyer has rarely the time to do." "I say again: it is in the nature of law that its devotees are forever condemned to live in a pre-Baconian world." ". . . insofar as there is such a thing as a 'science of law' it is a speculative and not

[1] Ch. 13.

an empirical science. In class and in the examination the question is not: 'How would the *court* decide?' but 'How would *you* decide?' " The would-be writer on legal subjects, whether he be practitioner or academic, can glean much from reading these essays as to the importance of clear exposition, critical analysis, enlightening language, acutely fashioned comment. Kahn-Freund, even when discussing the most complex of legal issues, is never obscure. He never obfuscates; on the contrary, he clarifies and reveals. His language and sentence structure are simple and straightforward. As befits a man who constantly stresses the functional aspects of law, his methods of expression are themselves extremely functional. His purpose is to explain, to illuminate, to draw attention to comparisons and differences with a view to suggesting what is right and what is wrong with the law that he is examining. This aim he achieves with a high degree of success. Read, for instance, his masterly account of English matrimonial property law: in a short compass he provides the reader with a complete picture of the English situation (as it was when the essay was first written). Read his Unger lecture on "Matrimonial Property. Where Do We Go from Here?" It is a model of how a critical, imaginative piece of legal writing should be put together, whether or not one agrees with his ideas, and in particular his concept of "family assets" which has been rejected by some jurisdictions, including England, even though, in others for instance, Ontario, it appears to have been incorporated indirectly if not directly, into the current legal system. So, too, with the two lectures towards the end of the book: one his inaugural lecture as professor at Oxford, on "Comparative Law as an Academic Subject", the other given at the London School of Economics by way of being a farewell to that institution after his transition up the Thames, containing his "Reflections on Legal Education". They are written with a simplicity of style, but at the same time a grasp of complex issues of law and policy, that are both enviable and worthy of emulation.

These essays just referred to, as well as the others, reveal the third characteristic to which I should like to draw attention. This is Kahn-Freund's breadth of reading, knowledge and understanding. On every page of this book there is clear evidence of the extent and depth to which his learning go. He can cite a German statute with as much ease as a decision of the English Court of Appeal. He has works of scholarship in several languages at his fingertips. Classical authors on law, economics, sociology or philosophy are as much in, as well as on his mind as are the case-law of the common law world or the statutory provisions of both the common law and civil law systems. He is concerned with *lex ferenda* as much as he is with *lex lata*. He understands and appreciates the historical and social reasons for law as well as he grasps the technical bases for it. In this regard his writings are a model for any aspirant. It is insufficient to know

what the law is; what must also be understood is how and why the law came to be what it is; and whether it should remain so, and why or why not. All this comes out very clearly in the pages of this book. Look, for example, at the essay on public policy in the English conflicts of laws.[2] Here is a discussion of, *inter alia*, the doctrine of *Phillips* v. *Eyre*,[3] that well-known, indeed infamous decision that is at the root of the modern law of delictual liability in the conflict of laws in England, Canada and other common law states (but not the jurisdictions of the United States of America), in which is made apparent the true basis for the decision as well as its true foundation in the earlier case of *The Halley*[4] in 1868. The entire essay is a study in the influence of legal and political policy upon the formulation of conflicts rules and doctrines. Look, also, at the essay on matrimonial property in England, where the social, economic and political factors that have underlain the way that law has grown and developed are stated with particular clarity and force, and are utilized as a basis for analysis and criticism. The very first chapter in the book, the essay on labour law for the book that was based on the paradigm of Dicey's original *Lectures on the Relations Between Law and Public Opinion*,[5] is more than an outline of the current labour law in England in 1959 when the work was published. It is a successful attempt to relate what had happened, up to that date, in England with respect to the law regulating employment and labour relations to the way in which trade unions had grown and had behaved over the years since Dicey first wrote. What interests Kahn-Freund is not just, or simply, the law on a particular topic: it is the interrelation between the social underpinning of that law and the law itself.

That comment brings me to the next significant feature to be examined. Kahn-Freund's early training in Germany clearly inculcated in him a willingness and an ability to look at law from the sociological point of view. He was brought up with a background of interest in, and appreciation of the social aspects of law and the legal system, which, in itself, has put him in a rather different class of legal academic from many of his English contemporaries (even if his American and European colleagues were more attuned to his way of thinking about the law and legal problems). Not for Kahn-Freund the "neutral" juristic outlook of the average English lawyer, an outlook which many have considered to be arid and unprofitable (as well, perhaps, as being incapable of justification or acceptance, since law can never be "neutral", and neither can jurisprudence). There can be little doubt that

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[2] Ch. 9.

[3] (1870), L.R. 6 Q.B. 1.

[4] (1868), L.R. 2 P.C. 193.

[5] (2nd ed., 1962).

this knowledge of sociology and its impact upon legal thought help to provide Kahn-Freund with insights that many others lack. At the same time, however, it may be suggested, albeit hesitantly, that overmuch emphasis on sociological approaches to law can lead an author, even one as sensitive and perceptive as Kahn-Freund, into error, or, perhaps better put, into certain overconfident or oversimplified thinking. One of the myths of our time, one that, in a way has been fostered by Kahn-Freund, though not only by him, is that the regulation of labour issues by law will promote industrial peace, at least as long as the law that is evolved and enacted is founded upon the facts of industrial life. It may be suggested that this has not proved always and in every way to be a valid proposition. On the other hand, as a passage in the very interesting essay on "Intergroup Conflicts and Their Settlement" shows,[6] even Kahn-Freund was not always blind in respect of the problems, or inclined to ignore what might happen despite government of them by more organized legal rules and doctrines. Throughout, however whether the subject under discussion is labour law, matrimonial or matrimonial property law, comparative law, or something else, Kahn-Freund places particular emphasis upon the social aspects of law and the need to understand those aspects if the law itself is to be understood, and especially if the law is to be changed and improved. He is a realist, in the best sense of that expression, not necessarily in the unfortunate sense which has become attributed to it by association with American jurists of the past few decades, which, perhaps, has resulted in the denigration or deterioration of a perfectly valid, useful English word much as has happened in more recent years with the word "gay"! To Kahn-Freund it is impossible to look at one part or segment of the law, even of one particular aspect of the law, without examining other, related parts, which are connected by the social purposes to be served thereby. In the lecture on "Comparative Law as an Academic Subject", for example, he has this to say at one point: "No study of the law of family maintenance on a comparative basis is worth its name, unless family allowances, social insurance benefits, income tax reliefs, as well as parental rights in infants' property are taken into account." He clinches the argument with another lapidary phrase: "In comparative law it is the destiny of boundary stones to be kicked aside." Kahn-Freund, it is hardly surprising in the light of what has just been said, has been in the forefront of those who have sought to make sociological studies more relevant to law. His reasons and justification for this can be seen most explicitly in the closing pages of his lecture on legal education (which should be compulsory reading for all legal academics—and University administrators and practitioners of the law who are often critical of what goes on in law faculties). Even if one does not entirely agree with Kahn-Freund's reasoning or conclusions, what

[6] Pp. 44-45.

he states must be given careful consideration, and merits an answer. It cannot be brushed aside. Nothing he writes can be treated so cavalierly, even though, to some, who are not as smitten as our author is with the vital relevance of social sciences (if they may be ennobled with such an appellation), Kahn-Freund, in so far as he has been influential in bringing about certain changes in labour law or family law, may be regarded as the villain of the piece rather than as the hero that he might appear to be to others.

Emphasis on sociology, or social aspects of the law or a legal system, does not blinker Kahn-Freund against the importance of history and jurisprudential analysis of the more classical kind. This is amply borne out by the essays on status and contract in British labour law and legislation through adjudication. In the former, he takes up the famous dictum of Sir Henry Maine about the movement from status to contract and looks at what has happened in England in recent times in order to see whether there is now greater emphasis on status or on contract as a basis for labour law and the position of employees. This involves him in a consideration of the concept of status, as well as that of contract; and the course of the discussion reveals the extent to which the learned author is at home with classical notions of jurisprudence in the same way in which he is with more modern sociological views and approaches. In the latter essay he considers the historical development of "fair wages clauses" from their introduction by resolution in the House of Commons in England in 1891; and the way in which their interpretation, use and exposition have affected the development of the law, and our conceptions of both legislation and adjudication. The theme of this essay is that, through the medium of these "clauses" and the judicial structure created to enforce them, the legislature in England has, in effect, empowered a judicial body to make law, not simply determine an issue or dispute between "litigating" parties. This is a topic that is as much of interest to the social scientist as the lawyer, as Sir Otto points out at the very end.

Throughout these essays, and especially but not exclusively those devoted to labour law, Kahn-Freund demonstrates that he is equally capable of handling statutory material and case-law. Indeed, from his background in the civil law, with its emphasis on codes, that is written statements of the law in a more or less succinct form (though, as he points out on several occasions, European systems are growing more and more towards some kind of case-law system, similar to, even though not quite as advanced as that of England and other common-law countries—which, at the same time, are developing more and more into systems reliant on statutory law), it is not surprising that the author should be so dextrous. What he has done, over his years in England, is to instill into lawyers there the need to examine and understand statutes, to analyse their meaning and content, with the same intensity and detail as

formerly they showed and employed towards the cases. As the "common-law" becomes more and more "statute-bound", as it were, it becomes obvious that the role of statutes is growing in importance; and the need to cope, and juggle with statutes with the same facility as the older lawyers handled the cases is also growing. Kahn-Freund was perhaps one of the earliest of modern English legal writers to adopt such an approach. The areas of law in which he writes, labour law and matrimonial law, especially matrimonial property law, are *par excellence* more and more governed by statute than by cases. It is hardly surprising, therefore, that he should be a pastmaster at the art of expounding, comparing, analysing, criticizing, and explaining such statutes.

Finally, one other characteristic of the man and his approach to law should be stressed. He is essentially civilized and humanistic. For him law is not an intellectual exercise; it is not a matter of expatiating upon the cases and statutes in order to pursue or clarify some logical analysis that satisfies the arid desires of an academic mind. Law, to Kahn-Freund, serves a social purpose or function. It must be examined and discussed in terms of its values and utility. What ends is the law supposed to be serving? Does it achieve those ends satisfactorily and successfully? These are the kind of questions which concern him most directly. That he is capable of strict logical and intellectual analysis is undeniable. The pages of this book reveal most clearly his abilities in these respects. They also show that his chief interest is in developing the law from the point of view of its ends. That is as true of legal education, on which he has many illuminating things to say (whether or not every reader will agree with all of them), as it is of matrimonial property law or labour law. Even in conflict of laws, which, if anything, offers the analyst of the law plenty of scope for the exercise of intellect and logic, Kahn-Freund is vitally concerned with the functions of that branch of the law. Chapter 10, which is about conflict of laws in relation to the law of employment, shows this very plainly. In it he analyses the different ways of approaching the question of employers' liability, that is, the contractual and delictual. His purpose is to indicate the extent to which the courts in England have adopted a satisfactory method of dealing with cases of such liability, from the point of view not only of principle but also expediency and usefulness. His Unger lecture, to which I referred earlier, is devoted fundamentally to a discussion of the extent to which the law in England adequately copes with the problems of the wife who is being cast out or bereft of sustenance after many years of marriage. He is perturbed by the lack of satisfactory legal rules that will provide some solution for her financial needs and her justified claims. Sir Otto is a true product of Western European civilisation. He is intellectual, urbane, concerned about people, desirous of making the law serve a useful, humanistic purpose, analytical without being cold and withdrawn. These essays reveal a man who must have been a witty,

kind, learned, scholarly and, above all, vitally interesting teacher. From my personal recollections of him, not as a teacher but as a colleague on several occasions, I can testify to his warmth and keen interest in other people and their problems, both legal and otherwise. What this collection of essays underlines is that he was capable of expressing that interest in a positive, useful way, as a result of which the path was indicated for the law to take towards a better resolution of current problems.

It is worthy of note that at the end of each chapter Sir Otto has added several paragraphs designed to bring the reader up to date with what has occurred in relation to the matters discussed in the chapter. The result is that these various essays, though sometimes as much as a quarter of a century old, can still have relevance and meaning to the present-day reader. Anyone who takes the time and trouble to read them will find that his efforts have not been wasted. For the Canadian reader, although it may be true that what has occurred in Canada is not always the same as what has happened in England, there is still much that may be looked on as interesting and material to the Canadian scene. And, as I have stated earlier on in this review, one aspect of these essays would certainly prove to be profitable for any reader: their style.

G.H.L. FRIDMAN*

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European Community Law and Institutions in Perspective. By ERIC STEIN, PETER HAY and MICHEL WAELBROECK. Indianapolis: Bobbs-Merrill Co., Inc. 1976. Pp. iv, 1132; Documentary Supplement, pp. iv, 525. (No Price Given)

The increasing importance of the European Community and its court has resulted in the introduction of courses in European law in many of the English law schools, and the increasing consolidation of economic law which this is creating tending towards the development of a single European commercial law, means that non-European countries can no longer afford to ignore what is happening as if it were on another planet. For a country like Canada which has entered into a special relationship with the European Community and has a permanent representative at its seat, the matter is of both academic and practical significance. In 1967, it was still possible to prepare materials on the "Law and Institutions of the Atlantic Area", but in the ten years that have elapsed since then the primacy of the Western European institutions has become so clear that the basic need is for material devoted to that part of the Atlantic area

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alone, especially as there has been no similar development with regard to the rest of the Atlantic zone.

From the point of view of the man in the street, and perhaps of most lawyers who follow European affairs, the best known institution in Europe, particularly since the decision in *Ireland* v. *United Kingdom*,[1] is the European Court of Human Rights, for this is the one whose activities are generally reported. However, from the point of view of everyday life in Europe, even as it affects the individual, this court and the convention under which it operates are by no means of paramount significance. Of far more importance, even though its decisions are not so generally newsworthy, is the European Community Court and, *a priori*, the Community of which it is an organ. Professor Stein and his colleagues have now made available to us in usable form a collection of cases and readings relating to *European Community Law and Institutions in Perspective*, in which it is made clear that even the Community Court may be concerned with issues of human rights, particularly with regard to the right of establishment and the freedom of movement of workers. In view of the fact that the volume contains a chapter entitled "The Movement of Goods—Payments", the reviewer must express surprise that questions relating to establishment, labour and the freedom of movement are discussed under the rubric "Free Movement of Factors of Production", which may be a term well understood in some American legal circles, but is likely to mean little to those working in the field of European law. From a wider viewpoint, the volume contains some ten pages on the European Convention on Human Rights, but one might have expected the material selected to have come from the practice of the Human Rights Court rather than doctrinal writings.

In addition to the two chapters mentioned, the remaining material in the book is classified under "The Institutions of the European Communities: The Law-Making Process and Administration"; "The Judicial Process—National, Supranational, International"; "Protection of Competition", a subject which is causing a great deal of concern and resulting in a revised attitude towards problems of patent, monopoly and copyright law;[2] "The External Relations of the Communities"; and "Common Policies". Perhaps the most interesting chapter is that on the judicial process, in which the attitudes of various national courts, French, German and Italian, are looked at, as well as the very important issue of the interrelationship of Community and national law. This latter raises the complex question of supremacy, under which item there is a section on the attitude of the new member states, with extracts from

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[1] (1978), 17 Int. Leg. Mat. 680.

[2] See, *e.g.*, Lord Denning's comments in *Application des Gaz S.A.* v. *Falks Veritas Ltd*, [1974] 3 W.L.R. 235, which, surprisingly, is not referred to in this volume.

three English decisions—including Raymond Blackburn's attempt to have the British accession to the Treaty of Rome declared invalid as involving a surrender of British sovereignty,[3] and one from Denmark[4] which was very much to the same point. The tendency of the national courts to uphold the constitutionality of a country's membership of the Community is sustained in a French case[5] decided too late for inclusion in this collection.

The Treaty of Rome controlling the European Community has established one of the world's busiest tribunals and the comprehensiveness of the scope of that Treaty means that judicial activity covers a wealth of fields, many of which, for instance the right of entry discussed in *Van Duyn* v. *Home Office*,[6] at first sight might appear more properly to fall within the competence of a tribunal like the European Court of Human Rights. Moreover, because of the interrelationship between the members of the Community and the Community's institutions a growing system of supranational law is developing with the national courts deciding issues on Treaty interpretation, subject to the overall supervision of the European Court itself, and with the parties to the Treaty obliged to enforce the decisions of this latter. As the volume contains a number of select decisions from the European Court and from the courts of the member countries, it is perhaps a drawback that the tables are by court and by country, and that there is no single comprehensive alphabetical table of cases.

While the volume is devoted to *European Community Law*, the editors are conscious of the fact that it is primarily intended for use in American law schools. They have therefore included references to, and occasionally texts of United States decisions for the purpose of comparison. This means, that while the volume is essentially a source-book on European law and will appeal particularly to those interested in this area, it will nevertheless be of value to anyone interested in comparative law as well.

L. C. GREEN*

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[3] *Blackburn* v. *Attorney General*, [1971] 1 W.L.R. 1037.

[4] *Tegen* v. *Prime Minister*, [1973] C.M.L.R. 1.

[5] *Re Direct Elections to the European Assembly*, [1977] 1 C.M.L.R. 121.

[6] [1974] E.C.R. 1337.

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EEC Immigration Law. By T.C. HARTLEY. Amsterdam: North Holland Publishing Co. 1978. Pp. xxv and 335. ($44.50)

Legal Protection of Individuals in the European Communities. By A.G. TOTH. 1978. Amsterdam: North Holland Publishing Co. 1978. Pp. Vol. 1, xxi, 226; Vol. 2, xxi, 372. ($70.00)

Ever since the decision of the European Court of Justice in *Van Duyn* v. *Home Office*,[1] it has been evident that the rights of the individual, including his right to immigrate and reside in the various countries of the European Community, are not as far-sweeping as a casual reading of the relevant documents—the Treaty of Rome and the European Convention on Human Rights—might suggest. It is useful, therefore, that these rights be clarified and explained as specifically as possible, for the advantage of both potential immigrants and their legal advisers.

Mr. Hartley's *EEC Immigration Law* is published in the *European Studies in Law* series of the Centre of European Law at King's College London and seeks to unite two different systems of law in so far as they relate to the same subject. Immigration law is normally purely a matter of domestic jurisdiction falling exclusively within the ambit of national law. However, the supranational law created by Community law is a mechanism for establishing a certain amount of unity in Europe and is to a great extent, directed at securing uniformity in law. As a result, it frequently enters into realms which were formerly regarded as within the exclusive competence of the state and, in so far as there is a conflict, it is Community law which prevails.[2] As *Van Duyn* showed, however, there is still some measure of discretion left to the state when issues of public policy or morality are involved, although, as this decision confirms, the issue is subject to judicial review.[3]

The EEC Treaty provides for free movement of persons, services and capital, and refers in particular to the right of movement by "workers". While this term is not defined in the Treaty, it is clear that for the purposes of Community law "a 'worker' is any employed person, irrespective of whether he is wage-earning or salaried, blue-collar or white-collar, an executive or an unskilled labourer. The Treaty provisions are, however, concerned only with migrant workers, that is with workers who are employed in a Community country other than their own"[4] of whom there are more than two and one half million, the majority from Ireland and Italy, the two most under-developed countries in the Community.[5] Moreover, the concept of "worker", in so far as it relates to the right of establishment extends

[1] [1975] 2 W.L.R. 760, 1 C.M.L.R. 1.

[2] *Watson and Belmann* case, [1976] E.C.R. 1185.

[3] P. 154.

[4] Pp. 1-2.

[5] See Table I.

to those who are self-employed, and the Treaty provisions concerning services apply equally to legal as to natural persons. It would appear, also, that a migrant who has established himself as an immigrant worker has the right to remain even after his retirement.[6] Many of the rights of migrant workers require, according to the Treaty, implementing action by the member country. However, in practice, the European Community Court has tended to apply the equitable consideration of assuming as done that which is to be done. As a result, if a country has not effected the necessary legislation within the time specified by Community organs, the court will not feel inhibited from enforcing those rights as if the requisite legislation had passed.[7]

In view of the nature of the *Van Duyn* decision, perhaps one of the most interesting chapters in *EEC Immigration Law* is that relating to the whole issue of public policy, for this exception underlies much of the Community Treaty and, as was illustrated by the decision in *Ireland* v. *United Kingdom*,[8] the attitude of the European Court of Human Rights as well. In chapter 5 the author examines the Treaty provisions *per se*, and in addition, he discusses the application of the proviso, pointing out that the European Court rejects the idea of auto-interpretation requiring a state invoking the proviso to justify it "on the basis of some objective that may be regarded as forming part of public policy, public security or public health" and, "since the measures taken are exceptional, they will be restrictively interpreted"[9], although this was hardly true of the approach of the Human Rights Court in the *Anglo-Irish* case. In this connection it is interesting to note his argument that while the right of immigration clearly belongs to aliens, the right to emigrate, which is also subject to the proviso, pertains to nationals too. He argues, therefore, that a national can only be denied a passport and the right to leave if exceptional grounds of public policy exist.[10]

In the past, many countries have held that the right to immigrate is denied to any aliens with a criminal record. For the members of the European Community, however, such a blanket denial is illegal. For them, the question now is whether the offence relates to public policy, which entails examining such matters as its seriousness, the time that has elapsed since its commission, and whether further criminal activity is likely, and this is true whether the offences were committed in the country of emigration or immigration.[11] This of

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[6] P. 7.

[7] P. 11.

[8] (1978), 17 Int. Leg. Mat. 680.

[9] Pp. 154-155.

[10] P. 159. [11] P. 162.

course means that national criminal policies providing for deportation of offenders may be radically affected. In this connection, a rule which is of interest from a Canadian point of view is that which "provides that expiry of the identify card or passport used by the immigrant to enter the country of immigration and obtain a Residence Permit does not constitute justification for deportation. . . . [H]owever, . . . an immigrant seeking to enter the country for the first time . . . can be refused admission if he has no travel document even without resorting to the public policy proviso",[12] and "the fact that an immigrant has evaded immigration control . . . cannot justify deportation under the public policy proviso".[13]

Mr. Hartley points out that Community law is intended to operate within a democratic society, so that the right of immigration is limited by the normal restrictions that might apply in such a society, and suggests that restrictions may be applied against aliens provided they apply equally against nationals, and cites as an example restrictions on the freedom of movement, such as those consequent upon a gaol sentence.[14] One might quarrel, however, with his view that the liability to extradition to the country of emigration in accordance with an extradition treaty is really properly described as a limitation upon the right of residence.[15]

Since, as Mr. Hartley points out, the immigrant must not be discriminated against and is entitled to the rights of other residents, it is clear that *Legal Protection of Individuals in the European Communities* is a matter of real importance, and this is analysed in Dr. Toth's two volumes, the first of which relates to the position of the individual in Community law, and the second to remedies and procedures. To a great extent the first volume tends to be rather general and appears to have but little relevance to the implications of the title, for in it Dr. Toth discusses such matters as the nature and source of Community law, its relation to national law, the issue of supremacy, and other matters which one tends to find in most books dealing with the field of supranational law. Only in the last chapter of this volume[16] is he directly concerned with the status of the individual in Community law, and "the concept of 'individual' encompasses all persons, whether natural or legal, and in the latter case whether set up under private or public law and whether owned privately or publicly, who/which may possess substantive or procedural rights, obligations and capacities under Community law and which are not member States".[17] This concept is given the

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[12] P. 164.

[13] P. 165.

[14] P. 182.

[15] *Ibid.* [16] Pp. 99-114. [17] P. 99.

widest interpretation and therefore applies to all "individuals", whether or not connected to the Community or member states by nationality, residence, incorporation or establishment, and, "for the purpose of the application of competition law, undertakings need not be incorporated in a Member State, nor have their registered office, central administration or place of business within the Community", so that "the formal separation between a parent company and a subsidiary, arising from their distinct legal personality, cannot prevail against the unity of their behaviour on the market"[18]—a policy which may result in an American multinational corporation finding itself to some extent subject to Community law.

Throughout the chapter on the individual's status, Dr. Toth emphasises the interplay of remedies before the Community Court and before national courts,[19] and it is when he looks at this matter, particularly in connection with the protection of fundamental rights, that this volume runs in parallel with that by Mr. Hartley, even though he does not look at the right of immigration as such. It is this interplay between the two types of jurisdiction that constitutes the material of volume II. To a great extent the material tends to be somewhat technical and it is not the Canadian or other overseas lawyer who will really be interested in this aspect of Dr. Toth's work. This volume may well prove a boon and a veritable handbook for the European lawyer called upon to represent the interests of an individual under Community law. It will equally serve as a useful example to graduate students seeking to analyse and interpret specific aspects of complex institutional treaties.

The two works are well presented and attractive. However, perhaps one, especially one who is not primarily working with European court decisions, might ask the publishers to ensure, when putting out future volumes, that an alphabetical table of cases be included, rather than restricting this to the registration numbers of the relevant court. It may not even help a European lawyer to find his reference table restricted to, for instance "8 and 10/54".

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[18] P. 103.

[19] P. 106.

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The International Law of Détente. By EDWARD MCWHINNEY. Alphen aan den Rijn: Sijthoff & Noordhoff. 1978. Pp. xi, 259. ($35.00 U.S.)

For some years now Professor McWhinney has been writing on various aspects of coexistence and their implications for international law. Recently, co-existence has given way to détente and Professor McWhinney examines the *International Law of Détente* from the point of view of arms control, European security and East-West co-operation.

For the main part, Professor McWhinney provides a historic account of the development of this concept from the early Soviet proposals relating to peaceful coexistence, through the western reaction to this and the beginnings of a *rapprochement* which led to the United Nations formulation of the Principles of Peaceful Coexistence, the talks on nuclear disarmament and SALT, co-operation in space exploration, and from a more political standpoint the legitimation of European frontiers, the Brezhnev doctrine, Helsinki and the outlawing of aggression. To some extent, of course, it is possible to read legal significance into each of these issues, particularly when they have been accompanied by a regulatory treaty. However, one dare not overlook the fact that success at control and co-operation does not depend upon a legal formulation, but upon the willingness of the powers to co-operate and give effect to the regulatory system. So long as détente is absent, there is little chance or prospect of successful co-operation in the legal sphere between the superpowers as regards accommodation to each other on those issues which are likely to affect the peace of the world.

It is possibly true to say that the first major step towards détente in Europe was the legitimation of territorial frontiers in Central and Eastern Europe, although the cynic might be inclined to comment that, even without any formal recognition of the sanctity of these borders, in practice there was little prospect of the great powers tolerating an infringement of what had been *de facto* established, since any such disruption would almost certainly have meant a confrontation likely to result in a third world war. Even prior to the Helsinki Agreement, which though not a binding legal document did confirm the finality of the European frontiers, the Soviet Union had been seeking and encouraging bilateral agreements to the same effect, so that "the Helsinki Accords . . . merely served to confirm or ratify or sanctify legally binding arrangements that had already been effectively established between all the key parties".[1] Professor McWhinney points out that, by virtue of the Potsdam and Yalta Agreements and the factual situation created thereby and acquiesced

[1] P. 93.

in, perhaps none of these treaties or agreements was really necessary, although the Soviet Union was anxious "to make assurance doubly sure and to put the legitimacy of the 1945 European settlement and the resultant frontiers beyond any shadow of a doubt",[2] particularly since the Hallstein doctrine propounded by the West German Government suggested a permanent rejection of any East German frontier, a threat which was not finally removed until the signature of the 1972 Basic Treaty between the two Germanies, followed by the West German-Czech Treaty of 1973, removing some of the hatred left from Munich.[3]

While bilaterally, as between Germany and Czechoslovakia, there was final agreement as to mutual respect and non-interference, the Soviet reaction to the Dubcek "spring" in Prague made it clear that détente between East and West did not mean that there was the same relaxation between the Soviet Union and any of its clients. The promulgation of the Brezhnev doctrine indicated that peace and coexistence depended on the attitudes towards each other of the super-powers, who would accept the continued hegemony of each in its own sphere of influence. Had the Western Powers rejected the Brezhnev doctrine and its assertion of collective self-defence and socialist international law *inter se*,[4] it would have been difficult for the West to assert its own interests within its own area, and would have enabled the Soviet bloc to encourage dissidents in, for example, Latin America even more than it does. Where the West was not as strongly established historically as it might have been, for example in Africa, the Soviet Union has shown, ever since the Angolan civil war, that détente in Europe does not preclude a twentieth century version of the "grab for Africa".

It is interesting to note that Professor McWhinney suggests that the Brezhnev doctrine may have contributed to East-West détente, "as if putting its own house in order again, once and for all, after all the polycentrist tendencies within the Communist bloc in more recent years was a condition precedent to any positive Soviet responses to the new Kissinger-Brandt *Ostpolitik* and to the West German tentative openings towards a final settlement of the frontier question".[5] As to the suggestion that Helsinki may have rendered the Brezhnev doctrine invalid and null, the learned author suggests that it would be necessary "to have some further confirmation, as to the collective intentions of the parties to the [Helsinki] Final Act, from other Western countries [than the United States] and especially those

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[2] P. 97.

[3] Pp. 106, 110.

[4] P. 121.

[5] P. 126.

most directly involved in the series of bilateral negotiations with the Soviet Union and Soviet bloc over European security and frontier questions over the decade preceding Helsinki. Further, in view of all the past history of the East-West tacit acceptance or recognition of the respective 'spheres of influence' in Europe and the principle, as between the two blocs, of mutual non-intervention in the affairs of the other, it would seem desirable, in order to support any legal argument that the Helsinki Final Act, applies directly to intra-bloc relations as well as to the relations between the two blocs that that be achieved rather more explicitly and categorically than has, in fact, been done in the Final Act''.[6] But to argue even in this way ignores the fact that the Helsinki Final Act itself, with its refusal to register the text as a treaty with the United Nations Secretariat, is not a legal document in the eyes of international law. Moreover, the Western attitude accepting ''organised immobility'' between East and West in Europe,[7] suggests that any argument concerning the interrelationship of Helsinki and the Doctrine is pure dialectics, lacking any real significance.

Professor McWhinney has an interesting chapter on Helsinki, which he describes as ''the sanctification of détente'', although one cannot help but feel that events since that Conference indicate that true East-West détente is still a matter for the future. From a purely legal point of view, the author recognises that the Final Act is not, in accordance with Western insistence, a legally binding document and does not fit into any of the normal international law concepts of an obligatory arrangement, although he accepts the view of one United States participant that it is ''a rather conservative document that generally follows international law closely''.[8] While this statement may be somewhat controversial, there can be no gainsaying that ''not too many countries seemed concerned today to respect the neo-positivist insistence that, to deserve the accolade of international law, a claimed rule or set of rules must fit into one or other of the closed, *a priori* categories of formal sources of international law recognised by classical international law doctrine''.[9] This may make Professor McWhinney's task easier in asserting that Helsinki is in accord with general international law, even though it is not in itself a legally binding document and cannot be cited before any United Nations organ with any authority[10] but, it has dangerous implications in that it provides a useful ground for any group of states,

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[6] P. 127.

[7] P. 128.

[8] P. 165.

[9] Pp. 165-166.

[10] P. 165.

particularly among the third world, to argue against the continued validity of what they regard as an out-of-date principle not binding upon themselves, or more importantly in insisting upon the legal character of some new-fangled doctrine that has no recognised legal basis and which is rejected as a legal concept by perhaps a majority of the older states. This has already happened, for example in connection with the self-determination reservation in the definition of aggression, to which the learned author makes no reference when discussing the outlawing of aggression as a contribution to détente,[11] just as the same reservation operates to legalise some acts of violence directed against diplomats and other internationally protected persons.

While from a political point of view one must be grateful for every move towards détente, it is respectfully submitted that there is a danger in reading legal principles into the essentially political documents that are produced by the search for détente, especially when any of these reject *expressis verbis* any attempt to confer on them a legal significance. *The International Law of Détente* provides a useful account of the struggle to achieve détente to date, but, despite the efforts of the author, it is suggested that he has not proved his case for conferring a status within international law for this movement, and that many of his arguments, particularly those relating to Helsinki, constitute special pleading and must be examined with extreme care, and cannot be accepted with the same equanimity that Professor McWhinney exhibits.

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[11] Ch. 9.

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