BOOK REVIEWS
REVUE DES LIVRES

La notion de soustraction frauduleuse et la conception civiliste objective de la possession. Par PAUL CORLAY. Paris: Librairie Générale de Droit et de Jurisprudence. 1978. Pp. 188. (Prix non indiqué)

Une thèse récemment publiée dans la Bibliothèque de droit privé revêt pour le lecteur québécois et canadien un intérêt tout particulier. Elle opère en effet, ce qui est difficilement concevable en droit québécois, une synthèse et une jonction entre les principes de droit civil et ceux de droit pénal.

L'auteur, M. Paul Corlay, tente en effet dans cet ouvrage de réconcilier la notion de droit civil de "possession" et celle de droit pénal de "soustraction frauduleuse". L'étude se situe donc toujours sur le double plan du droit civil et du droit pénal.

Dans l'introduction, l'auteur rappelle brièvement les théories de la conception matérielle et de la conception juridique de la soustraction en faisant état de l'évolution de la jurisprudence française et des difficultés rencontrées par cette dernière. Cette évolution, comme le signale l'auteur, aboutissait à faire reposer la définition sur la notion civiliste de possession.

L'auteur expose ensuite la célèbre controverse qui opposa jadis Ihering et Savigny et poursuit en critiquant la théorie de Saleilles.

La première partie de l'ouvrage s'attaque directement à la conception subjective. Pour l'auteur, l'intention de se comporter comme titulaire du droit ne doit pas être considérée comme un *élément* de la possession elle-même, mais seulement comme une *qualité* de celle-ci. Il se base, pour appuyer cette thèse, sur l'étude détaillée du Code civil et de la jurisprudence. Selon M. Corlay la possession se caractériserait donc par la composante matérielle (*corpus*) et par ce qu'il appelle un "libre pouvoir de fait" sur la

chose. Ce faisant il adopte la conception objective de la possession. Cependant, le lecteur ne reste pas totalement convaincu que l'aspect subjectif de la possession ne retransparaît pas à travers ce "libre pouvoir".

La seconde partie de l'ouvrage est plus technique et plus difficilement accessible pour le lecteur canadien étant donné les différences importantes qui séparent le droit pénal canadien du droit pénal français. L'auteur expose la théorie maîtresse de sa thèse à l'effet que le "vol" en droit pénal, tel que défini par la jurisprudence française, ne peut logiquement être expliqué qu'en recourant à la théorie objective de la possession. L'analyse est serrée, la démonstration extrêmement rigoureuse et menée de main de maître. L'élément matériel du vol est examiné dans le titre premier; l'élément intentionnel dans le titre second. L'auteur conclut enfin que la thèse qu'il défend permet d'expliquer d'une façon logique et continue la notion de soustraction frauduleuse et de lui donner tout son sens d'une part et d'éviter, d'autre part, certaines réformes suggérées notamment la création d'une infraction "d'appropriation illicite de la chose d'autrui".

Comme l'écrit le Professeur Jean-Denis Bredin dans la préface de l'ouvrage, M. Corlay ne parvient peut-être pas à se débarasser entièrement de l'élément subjectif de la possession. Il m'a semblé cependant que la démonstration qu'il fait est convaincante, logique et mériterait d'être reprise par la doctrine et la jurisprudence.

Nous espérons vivement que les juristes canadiens, notamment ceux qui, à l'heure actuelle travaillent précisément sur la question des rapports entre le droit civil et le droit pénal, prendront bonne note de cette thèse qui constitue une contribution majeure et importante à l'étude des principes philosophiques qui soustendent ces deux domaines de la science juridique. M. Corlay mérite des félicitations pour un excellent travail, pour un exposé clair et rigoureux et pour un livre dont il est difficile d'interrompre la lecture tant l'auteur réussit bien à soutenir l'intérêt de son lecteur.

JEAN-LOUIS BAUDOUIN*

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Canadian Securities Regulation. By DAVID L. JOHNSTON. Toronto: Butterworth's. 1977. Pp. xvi, 505. ($55.00)

Students in this area of the law looked forward to the timely publication of Johnston's *Canadian Securities Regulation.* Some

* Jean-Louis Baudouin, c.r., Faculté de Droit, Université de Montréal.

seventeen years had passed since Professor Williamson's treatise[1] had been published. The rapid pace of development in this area of the law underscored the need for a detailed overview in a general text of this type. A reader's expectations for the book were heightened by the author's reputation as a scholar, writer[2] and administrator. The treatise is ambitious in scope and satisfies many of the needs for introductory analysis. However, the limitations in the coverage of individual topics contributes to making this comprehensive work less than fully responsive to the needs of scholars and practitioners in the area.

Johnston was thorough in his treatment of topics. The book begins by tracing the philosophy and scope of regulation and proceeds to describe the administration of the law. This is followed with discussions of licensing of industry personnel and regulation of the distribution process. The subject of continuous disclosure is considered and followed by an analysis of insider trading and the regulation of takeover bids. The work concludes with a description of enforcement and self-regulation and contains extensive bibliographical data. In view of the broad scope of the treatise and the constraints placed upon a review of this type, the chapters on "Insider Trading", about which the author has written extensively before, and "Distribution", which is a cornerstone of current regulation, will be considered in greater detail below and the comments pertaining to these chapters, to a great extent, apply to the work generally.

The chapter on "Insider Trading" was disappointing for two reasons—a comparatively superficial analysis and what may be an apologetic tone for existing policies. The chapter begins with a discussion of the Kimber *Report*,[3] giving it prominence as the source of regulation, and proceeds, in apparent detail, to discuss insider reporting, liabilities for improper trading and conflicts of interest in mutual funds. What is somewhat surprising about the introduction itself is that, while the Kimber *Report* was the source of policy in this area for Ontario and, for that matter, in other provinces, Johnston's discussion of the report and selected Anglo-Canadian judicial decisions limits a full understanding of the applicable principles. The writer gives the impression that several English cases addressing

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[1] Securities Regulation in Canada (1960; Supp. 1966), pp. 351 *et seq.*

[2] See *e.g.*, Johnston, Insider Trading Liability; A Comparison of U.S. and Ontario Legislation, Sept./68 OSCB 199; Case Comment on *Green* v. *Charterhouse Group* (1973), 51 Can. Bar Rev. 676; Commentary on *Regina* v. *Littler* (1972), 2 Can. Bus. L.J. 234; Insider Trading Liability Legislation—*Green* v. *Charterhouse Group Canada Ltd.* (1977), 15 U. of West. Ont. L.Rev. 239.

[3] Report of the Attorney General's Committee on Securities Legislation in Ontario (1965).

fiduciary duties were followed by a provincial report that responded to judicial limitations. Indeed, he notes "[i]t is surprising that regulation of insider trading came so late to the securities markets".[4] A more careful analysis of the Anglo-Canadian common law, a tracing of the American common law, statutory developments in the United States and jurisprudence under Rule 10b-5 would have placed the Kimber *Report* and Canadian rules in proper context.[5] Moreover, the discussion of proposed (at the time the book was written) and now enacted changes in the law[6] would be seen as the historical development that they are. One is left with the impression that Canadian securities law is based on original ideas in governmental reports and recommendations of regulatory study groups whereas, in fact, the source material in this area can be found, almost entirely, in the policies of other jurisdictions.[7]

The discussion of insider reporting repeats the now familiar rules and offers some insight on regulatory attitudes but adopts an unquestioning posture. Although the analysis is reasonably accurate and thorough, raising most of the issues attending the topic, it conveys an attitude that the system works well. Most observers would, at this point in time, concede the general benefits of insider reporting. However, it would have been helpful if Johnston had reconsidered the objectives in the context of the experience with the sanctions and perhaps, if he had offered some insights as to whether the legislative goals were being met. For example, Canadian legislation imposes personal obligations which are broadly based and the regulatory authorities have publicized the problems of default in filings, late filings, and so on. Johnston's response to these and such issues as "nil" reports, a bureaucratic maze of paperwork, costly administration, and the need to come to regulatory authorities for exemption orders is, essentially, to describe rather than to critically analyse and comment. Such repetitions of conventional thinking and discussions of refinements in policy provide a convenient review but, for a treatise published currently, are somewhat disappointing.

Johnston's review of insider liabilities contains stronger analysis. The Ontario judicial decisions in *Green* v. *Charterhouse Group Canada Ltd.*[8] inspired a description consisting, to a great extent, of the careful breakdown of the elements of liability which are fundamental to an understanding of the considerations. Selective

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[4] P. 276.

[5] Comp. Anisman, Insider Trading Under the Canada Business Corporations Act, Meredith Memorial Lectures (1975), pp. 173 *et seq.*

[6] The Securities Act, 1978, S.O., 1978, c. 47.

[7] *Op. cit.*, footnote 1, Supp. 1966, pp. 351 *et seq.*

[8] [1973] 2 O.R. 677 (H.C.), aff'd (1976), 12 O.R. (2d) 280 (C.A.).

reference to American policies and jurisprudence assists in pointing to the source of many considerations. Generally speaking, this portion of the book will help in resolving most of the liability issues a practitioner will consider.

By limiting itself to consideration of the Canadian law as interpreted to date, however, the discussion of insider liabilities is inconclusive and, to some extent, will not assist in understanding more recent changes in the legislation. If Johnston had traced American jurisprudence or, at a minimum, referred to the analysis of leading American commentators such as Loss, Bromberg and Painter,[9] the reader could have gained a greater awareness of the difficult and, in some ways, unique issues attending this problem.[10] Scores of judicial decisions, articles and treatises have addressed the issues of who should be liable, the required "connection" to a transaction, the elements of privity, scienter, causation, reliance and materiality, and the measure of damages. Johnston's approach was limited to an introduction to some of the problems, to making passing references to selected American jurisprudence and to relying almost exclusively on the analysis of the Ontario courts.

This type of analysis gives rise to two immediate concerns which are evident here and in the treatise generally. First, it does not explain why the sanctions are or, more realistically, can be virtually inoperative. Second, it contributes to characterizing more recent changes in the law as being relatively arbitrary regulatory intrusions in a system which, from the implications of the description in the treatise, are working satisfactorily. A related criticism is that, without the historical overview and more detailed word by word analysis of the sanctions and proposed improvements to them, there is an evident insensitivity to more current issues. For example, without detailed analysis of the source of regulation—theories of accountability and compensation—and the current difficulties of enforcing insider liabilities—proof of "scienter" and "causation"—it is a difficult if not impossible task to understand the broader implications of "tippee liability" and the more difficult issue of "market information".[11]

The chapter concludes with a discussion of mutual funds and conflicts transactions. To this reader, the discussion belonged in a

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[9] Loss, Securities Regulation (1961) in three vols. and Supplement (1969) in three vols. See vol. 3, pp. 1446 *et seq.*; Bromberg, Securities Fraud—SEC Rule 10b-5, looseleaf in three vols. See vol. 1, p. 27; Painter, Federal Regulation of Insider Trading (1968), Supp. (1976), pp. 144 *et seq.*

[10] *Op. cit.*, footnote 5, at pp. 217 *et seq.*

[11] See Fleischer, Mundheim and Murphy, An Initial Inquiry into the Responsibility to Disclose Market Information (1973), 121 U. Pa L. Rev. 798.

separate chapter since the topic raises more and significantly different issues than are evident in an extension of insider trading considerations. Johnston follows the pattern of The Securities Act, 1978 in Ontario which would consider the problems as those of self-dealing.[12] What is lost is the institutional framework and some of the context giving rise to the problems. For the new student of the area especially, it should be difficult to analyse the issues.

The chapter on "Distribution" was well prepared and written and is significantly more responsive to the reader's needs. The description of regulation of the distribution process and the administrative discretion attending this regulatory function are dealt with thoroughly and a great deal of the shroud of secrecy and complexity attending the need for preparation, filing and clearance of a prospectus is removed. The exemptions are ably explained as are the sanctions. A careful reading of this chapter will be rewarded with a fairly strong understanding of the process. In this respect, Johnston's close affiliation with a leading regulatory authority in the area offers insights.

A cynical observer of regulation of this process could have stated that there is an "in group" of lawyers who clear prospectuses and that the administration of the law contributes to this. Johnston has clarified the process sufficiently, choosing relevant examples and offering welcome insights to the component features, so that such cynical comment will not be warranted. This chapter is typical of the real strengths of the book in that, like the chapters concerning "Licensing" and "Enforcement", the reader can gain insight into the directions of administrative discretion, considerations and philosophies. Unlike the weaker treatment of specific topics like "Insider Trading", "Takeover Bids" and "Continuous Disclosure", Johnston has ably described what the regulatory authorities do and why and how they do it.

Where the descriptive effort in the "Distribution" chapter can be improved is that Johnston occasionally fails to maintain a critical eye in his descriptions and analysis. For example, is regulation of the distribution process working well? Some questioning of, for example, the concept of the preliminary prospectus, the continuing problem of the unreadable prospectus, the desirability of including "soft information" in public documents, the dichotomy between what the "public" determines from a prospectus and what, for example, an institution may learn from an investment memorandum, might all have been discussed in greater detail and in the multi-jurisdictional context of the distribution process. The question of whether so much emphasis should be placed on the initial

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[12] *Supra*, footnote 6, Part XX.

distribution process should be asked and one has the feeling from Johnston's analysis that he continues to have the highest confidence in the process as established.

Quite apart from the strengths of this treatise mentioned earlier, the book has many additional virtues. Johnston's writing is thoughtful and clear and, in an area where jargon could have made the book difficult to read, the writing and manner of presentation shows the writer's experience in the area and as a teacher. Since a primary purpose of the book would have been to introduce students to this area of the law, the treatise addresses that function well. Similarly, the painstaking job of assembling bibliographical data is appreciated and Johnston has gone to some lengths in that regard. For these reasons alone, the book is a welcome addition to a library.

For this reviewer, the greatest promise for this work is that it is a first edition. Johnston's profile in academic and regulatory environments may be an indication of the time constraints placed on a work of this type and of reliance on others to collect materials. Quite apart from these considerations, a writer in the area faces the almost impossible task of working in the shadow of Professor Loss's seminal treatise and finding his new work pale by comparison. It is hoped and, indeed, essential that the author work toward a second edition of the book. Johnston's *Canadian Securities Regulation* provides sufficient promise and strengths in the first edition for what could be the seminal treatise on Canadian regulation of securities markets and the limitations of the current work should not detract from that central objective.

MARVIN YONTEF*

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Environmental Assessment Law. By D. PAUL EMOND. Toronto: Emond-Montgomery Ltd. 1978. Pp. 380. ($30.00)

The concern of the 1960's and 1970's with matters environmental has ushered in many new developments arising from greater sophistication in environmental protection. That some of these developments are based upon theory that is not carefully worked out should not surprise us: for increased public consciousness placed pressures for immediate action upon administrators and decision-makers who sometimes lacked sufficient time to think through the theoretical basis of their approach. Nor should we be surprised if some of the bold environmental thrusts of this period have turned out

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* Marvin Yontef, of the Ontario Bar, Toronto.

differently than we expected: our incapacity to predict the outcome of legislative and policy initiatives has been proven many times in the past.

One of the most important environmental developments has been a growing emphasis upon the need for environmental assessment or impact statements relating to major development projects. The notion that we ought to assess, in advance, the likely environmental effects of significant industrial and other projects has become commonly accepted at most levels of government. Environmental assessment requirements have appeared in many forms—in provincial and municipal legislation, in policy guidelines and directives from government, and in establishment of *ad hoc* commissions of inquiry struck to evaluate the environmental, social or economic effects or both of mega-projects such as the Mackenzie Valley gas pipeline. *Environmental Assessment Law* is the first major piece of literature in Canada to deal with this subject. Its publication is very timely since many of the legislative and other developments it analyzes are several years old, and have been applied to numerous and varied projects. Since much of the previous legal literature in this area dealt only with the theory of environmental assessment, this is truly a pioneering work.

The book consists of six chapters. It begins with an introduction, raising a number of fundamental legal and theoretical issues that are addressed from time to time in the balance of the book. Two lengthy chapters examine the Ontario Environmental Assessment Act[1] and the Board which is responsibile for administering it. In the fourth chapter, environmental assessment at the municipal level is examined in the context of two case studies. The federal government's Environmental Assessment Review Process (E.A.R.P.) occupies one chapter, and the book concludes with several proposals for reform. The design of the publication makes it an easy-to-use reference work for lawyers, planners, engineers and others. It contains a detailed Table of Contents, a Table of Cases, a Table of Statutes, and an Index. Most importantly, it also contains a glossary of acronyms, enlightening the reader as to the real meaning of T.E.I.G.A., C.A.R.C., S.N.C., F.E.A.R.O., and R.C., terms which will be familiar to some but foreign to others. A set of six Appendices contains useful reference material, including the Ontario Environmental Assessment Act, forms, regulations, and guidelines issued under it, as well as summary material such as bibliographical information about the members of the Ontario Environmental Assessment Board, and an analysis of the Board's decisions over a four-year period.

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[1] S.O., 1975, c. 69.

Environmental Assessment Law is not, nor does it purport to be, a comprehensive treatment of the subject in a Canadian context. Indeed, 166 of the 283 pages of text focus upon Ontario. Assessment procedures in some provinces, such as Saskatchewan, Alberta, British Columbia and Newfoundland, are simply referred to in passing, and for the purpose of brief comparison. The state of the art in other provinces, such as Quebec and Prince Edward Island, does not even receive this cursory treatment. Professor Emond's "central Canada" focus is justifiable, however: as he points out, at the time of writing[2] the province of Ontario stood alone with its comprehensive legislative scheme for environmental assessment. Thus, it merits the detailed scrutiny he gives it at the expense of the less complete and less formalized approaches found in other jurisdictions. The non-Ontario practitioner who is not involved in projects subject to review under the federal E.A.R.P. will find this book useful primarily from the point of view of the shape of things to come. For, to the extent that other provinces move toward enacting environmental assessment legislation in the future, it is likely that the Ontario Act will provide the major model. Also not dealt with in any significant way is the matter of environmental assessment by *ad hoc* commissions of inquiry such as the Berger, Thompson, Porter and Hartt Commissions. The relationship between the environmental assessment undertaken in this manner and that pursued under general legislation or policy guidelines raises many fascinating legal and theoretical issues which have yet to be examined.

However, drawing attention to areas not covered by Professor Emond is in no way to criticize the structure of his book or indeed his comprehensive and thorough analysis of the topics that have been included. *Environmental Assessment Law* is thought-provoking, thoroughly documented, well-organized, and well-written. It is an essential reference book for anyone working actively in this area.

The introductory chapter focusses upon several legal and theoretical questions which have emerged with the development of environmental assessment procedures. One of the most fundamental relates to the underlying purpose of environmental assessment. Is it, on the one hand, designed as an information-gathering process to help us alleviate the detrimental effects of development projects? Or, in contrast, is it intended to serve as an alternative decision-making process, giving impact assessors the authority to approve or disapprove a project because it is potentially environmentally damaging? The lack of clarity in our thinking on this matter has led

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[2] Since the book's publication, the province of Quebec has enacted environmental impact assessment requirements. These are contained in Bill 69, an Act to amend the Environment Quality Act, which received assent on December 22, 1978: L.Q., 1978, c. 64.

to confusion about the process in many quarters. Most obvious, perhaps, is the fact that environmental assessment procedures have raised competing expectations among different interest groups, and on occasion fostered acrimony and misunderstanding. Professor Emond points out,[3] however, that in reality the approach of government lies in between the two extreme models. By educating both proponent and opponent as to the likely effects of the development, and by enabling the approving body to impose mitigative measures upon the project, environmental assessment procedures in Canada may actually reach the middle ground they seem directed toward.

One of the most interesting issues raised in the introductory chapter is the question of public participation in environmental assessment. Discussion of this issue in the literature tends to be simplistic. Opponents of public participation raise arguments of delay, anti-democracy, cost, and the impossibility of finding true representatives of the "public interest". Proponents of public participation, too, have been guilty of painting with too broad a brush, and of failing to come to grips with some fundamental questions of cost-effective and meaningful participation. Professor Emond's approach is refreshingly sophisticated. While admitting a bias in favour of public participation, he has prepared an excellent and detailed analysis of the types of participation required at various steps in the procedure. He points out the basic weakness of most environmental assessment procedures in Canada that little or no participation is required at the early information-gathering stage of a project's development. In contrast, he suggests that there may be too much participation at the later, public hearing stage. While not resolving this basic dichotomy, he provides a thoughtful look at a thorny problem which will continue to require our attention.

The second and third chapters of the book focus upon the Ontario Act and the Ontario Environmental Assessment Board. These are essential reading for the Ontario lawyer who works in the area. Nearly one hundred pages are devoted to a detailed, section by section analysis of the legislation. Not only does this examine ambiguities and legal issues about the Act which have already emerged. Perhaps more importantly, it poses problems of interpretation and application that may arise in the future, and develops the legal arguments which can be mustered to resolve them. For example, sections 12(2)(d) and 13(d) permit the Minister to dispense with a public hearing on a project where he considers the request for such a hearing to be frivolous or vexatious, unnecessary, or cause undue delay. In the several following pages, the jurisprudence

[3] P. 9.

surrounding these terms in other contexts (such as the Ontario Rules of Court) are analyzed and applied to the Ontario Act. The research basis laid out in this section of the book will, no doubt, prove invaluable in the future to lawyers or others who wish to contest the exercise of this ministerial discretion.

A most enlightening example of the actual application of the legislation is found in the examination of section 30 of the Act. This section has been the object of much adverse comment and gives the Minister, with Cabinet approval, the power to exempt undertakings from the operation of the Act, where he considers it in the public interest to do so. Professor Emond has studied two of the most notorious exercises of the exemption power, the Darlington Nuclear Generating Station, and agriculture drainage schemes. While he is critical of the exercise of the discretion in both cases, he is careful to suggest that they may merely reflect "growing pains" of new legislation, and cautions against an overreaction that would require across-the-board application of the Act.

An underlying theme of the chapter on municipal assessment is the importance of ensuring that the municipal view point is included in the decision-making process. One of the case studies in this chapter is section 653 of the City of Winnipeg Act,[4] which required a review of and report upon "every proposal for the undertaking by the city of a public work which may significantly affect the quality of the human environment". This section was interpreted in a series of well-known judicial decisions, ultimately repealed by the Manitoba Legislature, and replaced with a much weaker successor section. Professor Emond's discussion of these cases supports his earlier contention[5] that Canadian courts have shown little inclination to take a strong environmental protection stance and reinforces the point of view that the most effective place for environmental action in this country is before government and the bureaucracy.

One of the most useful aspects of this book is its analysis of the federal Environmental Assessment Review Process (E.A.R.P.). Based upon federal Cabinet directives of 1972 and 1973 (and not upon legislation as in the case of Ontario), E.A.R.P. has gained an increasing profile on the federal scene and has now been applied to many diverse and well-publicized projects. These include the Alaska Highway Gas Pipeline, off-shore drilling in Lancaster Sound, and the Point Lepreau Nuclear Generating Station in New Brunswick, to mention but a few. E.A.R.P. has been thoroughly criticized by groups such as the Canadian Environmental Law Association and the Canadian Arctic Resources Committee, such criticisms including

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[4] S.M., 1971, c. 105.

[5] P. 28.

E.A.R.P.'s lack of a legal basis, the absence of public participation requirements, and the tendency for E.A.R.P.'s panels (at least in the past) to be filled by civil servants whose disinterestedness may be suspect. The chapter on E.A.R.P. contains an excellent description of the various steps in the process and the types of projects to which it is intended to apply, as well as a summary of the major criticisms of E.A.R.P. This is followed by four E.A.R.P. case studies revealing how the process has actually been applied. The author concludes that, despite many short-comings, major improvements in the process have been accomplished over the past few years. Furthermore, he points out that in certain circumstances, this non-legislated, policy-based process has been more effective than that mandated under Ontario legislation. In view of this stance, and also in view of his earlier point[6] that "[T]here is nothing magic about legislation, particularly if it vests substantial discretionary powers in those who administer it", one is left somewhat puzzled by the hope he expresses that E.A.R.P. will be transformed into legislation.

The final chapter of *Environmental Assessment Law* contains a number of modest proposals for reform. This provides an appropriate conclusion to a book that is based upon solid research and considerable thought, and which has gone a great distance toward improving our understanding of an important subject. Professor Emond has made a major contribution to the legal literature with this book, and deserves congratulations for it.

CONSTANCE D. HUNT*

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Grievance Arbitration of Discharge Cases. By GEORGE W. ADAMS. Kingston, Ont.: Industrial Relations Center, Queen's University. 1978. Pp. 108. (No Price Given)

Research concerning legal disputes tends to be preoccupied with the litigation stage, and particularly the actual adjudication, to the relative exclusion of the pre-litigation and post-litigation stages. The pre-litigation stage does receive attention from the practicing bar because of the demand for preventive legal services. The post-litigation stage, however, is generally neglected. The legal system tends to forget that, although a settlement or adjudication of a dispute may be final, it is not the end. The parties go on living, and the dispute and its resolution frequently continue to impact upon their lives.

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[6] P. 126.

* Constance D. Hunt, of the Faculty of Law, University of Calgary, Alberta.

Some attention to the aftermath of litigation has begun to appear in the labour relations field because the parties do not merely go on living, they frequently go on living together, creating a substantial risk of a recurrence of their dispute. George W. Adams' *Grievance Arbitration of Discharge Cases* is a significant contribution in this field of research.

Adams' work is subtitled "A Study of the Concepts of Industrial Discipline and Their Results". Without the subtitle, the title can be somewhat misleading since one might be led to expect an extensive analysis of the substantive and procedural law of industrial discharge as developed by arbitrators.[1] While Adams does deal with these aspects, he does so only by way of a broad and general outline of basic concepts. Even with the subtitle, the title page does not really reflect the true focus of the work which is the effectiveness of reinstatement of the discharged employee.

The study is divided into two sections which are appropriately called Parts. Part I deals with "The Concepts of Industrial Discipline". With broad strokes it sketches the defects of the common law in dealing with industrial discipline and then examines the rationale of industrial discipline under the regime of "just cause" which collective bargaining has introduced. Notwithstanding its brevity, Adams' review of the basis of discipline is quite probing. It places the issues in a teleological framework which, if widely accepted by the arbitral profession, promises to be a valuable contribution towards increased rationality in the arbitral system.

In Part II on "Reinstatement and Results" Adams analyses the results of an empirical study of reinstatement awards and their aftermath. The results of the study are recorded in some thirty-three tables designed to test statistically the impact of virtually all conceivably relevant independent variables both on the initial decision to reinstate and on the success of reinstatement. The tables are accompanied by an extensive qualitative analysis by the author.

On the whole the study supports the conclusion that reinstatement is a successful remedy which generally leads to a satisfactory reintegration of the employee into the workplace. As the author notes,[2] the study is restricted to reinstatement under a collective bargaining relationship. The findings, therefore, are of dubious applicability in other contexts, such as reinstatement resulting from an unfair labour practice charge where no collective bargaining

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[1] Two recent major Canadian texts on the substantive and procedural law of labour arbitration, of which discharge forms a significant part, already exist: Brown & Beatty, Canadian Labour Arbitration (1977); Palmer, Collective Agreement Arbitration in Canada (1978).

[2] P. 39.

relationship is established,[3] or reinstatement under statutorily imposed "just cause" provisions.[4] Apart from this, the statistical analysis may be helpful to arbitrators and other participants in the process of the identification of factors which are more or less favourable to the prospects of a successful reinstatement. At the same time, it demonstrates there is no correlation between any variable and the chances of success such as would justify an arbitrator in shirking the responsibility to make an independent judgment on the individual case.[5]

Adams' study is essential reading to anyone concerned with the administration of industrial discipline, be they arbitrators, personnel officers, union agents, or labour lawyers. In view of the continuing reluctance of the courts to give arbitrators a free hand remedially in discipline cases in the absence of express authorization in the collective agreement or by statute,[6] not all arbitrators can operate under the discretionary regime which Adams prefers and to some extent assumes.[7] However, the ultimate choice between upholding discharge or ordering reinstatement, on which Adams focuses, is effectively available to most arbitrators in discharge cases. Wherever such a choice arises, Adams' work helps to clarify the issues and factors deserving of consideration.

ROBERT W. KERR*

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The Doctor and the Law. By H. E. EMSON. Toronto: MacMillan. 1979. Pp. x, 233. ($9.95)

The Physician and Canadian Law. Second Edition. By DAVID T. MARSHALL. Toronto: Carswell Co. Ltd. 1979. Pp. xx, 130. ($15.75)

The publication of books concerning the interaction between doctors and lawyers, for a period, lagged behind the demand for such avian

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[3] As Adams notes, an existing American study, Stephens and Charney, A Study of the Reinstatement Remedy Under the National Labour Relations Board (1974), 25 Lab. L. J. 31, indicates a distinct lack of success in cases of reinstatement by the N.L.R.B. in the U.S.

[4] *E.g.*, Canada Labour Code, R.S.C., 1970, c. L-1, s. 61.5, as enacted by S.C., 1977-78, c. 27, s. 21.

[5] The strongest correlation between any variable and failure of reinstatement occurs in cases of alcohol abuse: Table 16, p. 68. However, even in this case, the possibility of combining a treatment programme with reinstatement argues in favour of individualized consideration.

[6] For a recent illustration, see *Nova Scotia Civil Service Commission* v. *Nova Scotia Government Employees Association* (1978), 29 N.S.R. (2d) 522 (S.C.).

[7] *E.g.*, The Labour Relations Act, R.S.O., 1970, c. 232, s. 37(8).

* Robert W. Kerr, of the Faculty of Law, University of Windsor, Windsor, Ont.

studies as Law and Medicine but has now caught up.[1] Immediately, of the two monographs under review Professor Emson's is quite poor whilst that of Dr.-Counselor Marshall is quite good.

The faults of Professor Emson's efforts are manifold and range from deficiencies of style, to prejudice of approach to thinness of content. Treating these in order: the acknowledgment warns of the heavy-handed humour to follow and the preface heralds the practice of reliance on hackneyed quotations presumably culled from some dictionary of apt quotes. Thereafter the text is larded with overly-familiar statements attributed to such luminaries as Winston Churchill, Pierre Trudeau, Tommy Douglas and Mr. Pickwick. Worse still the writer reveals himself to be a medical bigot whose limited perception of the purposes and function of law rarely reach below the populist shibboleth of Shakespearean origin. The carping statements as to the unintelligibility of the law, the gratuitous criticisms of the political power of the legal profession and invidious comparisons with an "autonomous priesthood" scarcely support the author's ingenuous plea for efforts to be made by both sides to bridge the gulf between the professions.[2]

In addition the author's parochial defensiveness provides an unnecessary diversion. For example, his reliance on Saskatchewan practice, in itself justifiable in view of the writer's experience, is needlessly supported by the aside, ". . . a nice redress of the customary delusion which presumes Canada to end at some point just west of Sudbury".[3]

As to content, the opening substantive part describes the process of licensing, certification and discipline but is unhelpful with regard to the issues of the "living will" and "brain-death". The succeeding two portions in order provide a child's guide to the structure of the law and the courts and an accurate description of the functions of expert witnesses and the giving of evidence. The latter writing is enlivened by the comment that medical persons entering court rooms are like ". . . Shriners who have wandered into a Knights of Columbus meeting . . .".[4] The description of the work of coroners and medical examiners is adequate but the firm common sense approach to malpractice is marred by a gossipy style of presentation. The text on consent speaks to the problem areas but

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[1] In addition to the two reviewed here we have: Ellen I. Picard, Legal Liability of Doctors and Hospitals in Canada (1978); Frederick A. Jaffe, A Guide to Pathological Evidence (1976); and L.E. Rozovsky, Canadian Hospital Law (1974); Gilbert Stanley Sharpe & Glenn Ivan Sawyer, Doctors and the Law (1978).

[2] P. 13.

[3] P. 15.

[4] P. 51.

gives no hint as to solution. Thereafter the volume improves when the author gives what is in reality medical advice on the performing of autopsies, the collection of specimens and preparation of reports, the recognition of gunshot wounds and the characteristic symptoms of death caused by extremes of temperature. The chapters on sexual assault, child abuse and the law relating to alcohol and drugs are fair.

In conclusion this reviewer can only imagine that the western law professor, whose contribution is acknowledged, has already framed her suit in professional disparagement.

By comparison, Dr. Marshall's small book is good. It suffers from none of the vices of its competitor. It provides a simple, straightforward outline of the basics of the law relating to M.D.'s and goes further to offer preventive advice. As an introductory text it can be used to advantage not only by medical personnel but also by law and medical schools. The author right away identifies the awkward areas: consent, professional standards and doctor-patient communication. Throughout the commentary is intelligent, informed and informative. At the close of each chapter there are useful lists of itemised advices on how to avoid legal problems. The writer is particularly sure-footed in the areas of consent, privilege and confidence and the basics of negligence.

Unfortunately the brevity of the volume imposes its own limitations and in this regard the author's choices can be challenged. For example, the discussion of malpractice is truncated whilst the coverage of the coroner's system is unnecessarily historical and discursive. The emphasis might properly have been reversed. And while the bibliography is decent enough it is strangely outdated and noticeably so with regard to the editions of the tort texts.

Therefore, in conclusion, Marshall is to be recommended, Emson is not.

EDWARD VEITCH*

* * *

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

A refreshing if not startling innovation on the method of presenting the general concepts of criminal law faces the reader of this text. The entire book is patterned on the posed question with an answer and further questions flowing from the answer. One can almost visualize

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* Edward Veitch, of the Faculty of Law, University of New Brunswick, Fredericton.

a professor asking the first question to stimulate the mind of the student and then an educational and informative dialogue developing.

The format of the book is also unusual. The questions are in large black type. For general reading, there is the standard type; for technical matters, we find them in smaller print. This allows the novice to skip read and the more enlightened to delve into the greater details presented in the smallest type.

The text book not only deals with the fundamentals, but also presents some of the idiosyncrasies of the criminal law. The book can be used either by a person well versed in criminal law as a refreshing re-approach or by the beginner who would soon quickly learn some of the basic concepts.

The book is divided into six parts; these are:

1. "General Considerations", which deals with the theory of criminal law.
2. "The Protection of the Person", which deals with actual forms of offences.
3. "Involvement in Crime", which deals with the persons who perform a crime, accessories, methods and conspiracies.
4. "Defences" which includes ignorance, intoxication, provocation, entrapment and necessity.
5. "The Protection of Property", which deals principally with different concepts of theft.
6. "Regulatory Offences", which includes strict liability and vicarious liability.

The six parts contain a total of forty-four chapters which in turn contain from four to twenty-eight subtitles. Each page contains a heading which allows a ready reference to the index.

The book is full of stimulating questions designed to arouse the interest of the reader, such as "killing a supposed corpse?" or "can a man's presence at the scene of a crime ever amount to an encouragement of the commitment of a crime?", or "can there never be an accessory without a perpetrator?" An illustration of this question is: if a man handles goods, believing them to be stolen, where in effect they are not, can the person who helps him be convicted as an accessory to the handling of or attempting to handle stolen goods?

The discussion on "Prevention of Crime" is one of particular interest, starting with the question: suppose a person tries to prevent a crime, but in fact no crime is being committed? and ending; suppose someone tries to help a peace officer arrest someone, and the arrest is unlawful, what is the liability?

The chapter on "Duress" contains a number of questions which unfortunately are of a practical concern to a growing number of people but are as yet unanswered. These deal particularly with the threats of injury to oneself or others by terrorists as a means of requiring a person to perform a criminal act and the subsequent liability of the person. Another debatable question involves the position of the agent provocateur. What if a plain clothes officer coming to know that some nefarious scheme is afoot, pretends to join in, in order to secure the conviction of the other parties. Is he guilty himself?

Delightful questions which stimulate unending discussion are found under the heading "Planning the Impossible": does taking a wallet for the purpose of stealing the money in it when it was empty constitute theft? or a sequel: will the courts aquit a person charged with attempted theft, when he is the light-fingered character whom I find with his hand in my *empty* pocket?

The major drawback insofar as Canadians are concerned is the fact that many of these questions and answers are based upon the particular statutes applicable to England and therefore may not be relevant in Canada.

While England suffers under, or enjoys, depending upon the view of the reader, the position of not having the constitutional problem of the division of jurisdiction over criminal law and related matters between the Dominion Parliament and provincial legislatures, the difficulty facing the reader of the book is to differentiate between the laws which are classified as criminal in England and those which are only quasi criminal under our Canadian concept. The range of English Statutes from the Piracy Act of 1698,[1] through the Dog Act of 1906,[2] the Abortion Act of 1967[3] and the Sex Discrimination Act of 1975,[4] which all give a criminal basis for discussion, are nevertheless incorporated into the text in such a way as to be of thought provoking interest to the reader, of whatever nationality.

Notwithstanding this drawback, the principles are so well illustrated that a great deal of benefit and useful information can be obtained from reading the book. Although the book is extensive in length, it is developed in such a way as to be readable not only as a text, but also as a presentation of the development of various philosophies of criminal law in relation to the common law and statute law.

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[1] 11 Will. 3, c. 7

[2] 6 Edw. 7, c. 32.

[3] C. 87.

[4] C. 65.

As the preface to the book so aptly states, "the primary purpose of the work is educational". It certainly lives up to the author's expectations.

ERIC L. TEED*

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Self-incrimination in the Canadian Criminal Process. Par ED. RATUSHNY. Toronto: Carswell Co. Ltd. 1979. Pp. 417. ($39.00)

Nemo tenetur seipsum accusare. Ceux qui comptent cinquante ans ou plus ou même un certain nombre de ceux qui en comptent moins, se souviendront sans doute avec l'esquisse d'un sourire railleur ou nostalgique selon les attitudes et croyances qu'ils épousent, que c'est par une expression latine que les sermons du carême jadis débutaient.

Ce commentaire n'a pourtant rien de religieux ni de pontifical. Mais il a trait au travail de tout premier plan de Ed Ratushny, *Self-Incrimination in the Canadian Criminal Process,* qui mérite pour le moins qu'on le lise. L'oeuvre porte sur la notion fort ancienne du droit au silence ou plus justement de nos jours, du privilège de non-incrimination. Et c'est au moyen du latin que cette notion fit son entrée en *common law* et un peu à cause de lui que les juristes ont accepté de n'en jamais faire le procès rigoureux de sorte que l'on persiste encore de nos jours, sans trop se soucier des forces qui la mettent en danger, à en étayer les thèses savantes des professeurs de droit ou les arrêts érudits des magistrats.

Le citoyen jouit-il face à la société ou au pouvoir policier qui la représente, d'un droit fondamental de ne pas être contraint de servir la cause de celui qui cherche à le faire condamner? Plusieurs ont abordé la question sous l'un quelconque de ses nombreux aspects. Je ne crois pas qu'on l'ait à date traitée scientifiquement (c'est un gros mot quand on parle de droit), de façon globale. L'on peut dire que toutes les incursions dans ce domaine vaste et complexe, à quelques exceptions près, ont été marquées au coin du préjugé de droite, de gauche ou du centre et elles se sont souvent avérées riches en émotions et en conséquence largement dénuées d'objectivité. C'est quand même dans un passé relativement récent, comme nous le rappelle M. Ratushny, que l'on reprenait en haut lieu les propos de Jeremy Bentham: "L'innocence réclame le droit de parole et la culpabilité le privilège du silence." Si l'on s'avise de parler ainsi, il

* Eric L. Teed, Q.C., Master of the Supreme Court of New Brunswick, Saint John, N.B.

faut être prêt à s'accommoder des conséquences, les prévoir surtout et cet excellent travail nous y initie.

Le livre représente à n'en pas douter une analyse du sujet aussi lucide et aussi complète qu'il est possible d'espérer. Son mérite premier à mon sens, c'est qu'il part du réel vécu et des véritables attitudes courantes que les chefs de file dans le monde juridique et celui de la politique, véhiculent sans cesse de mille et une manières. Il ne s'appuie pas sur des postulats sociologiques à demi vérifiés. On peut prêter à l'auteur les intentions qu'on voudra. Mais on éprouvera beaucoup de difficulté à trouver fautif son résumé de la situation existante.

La notion du privilège contre l'auto-incrimination nous dit-il, n'a pas de valeur opérationnelle. Elle n'existe donc pas si ce n'est à titre de symbole. Il nous démontre à l'aide de la jurisprudence récente que les tribunaux se sont refusés à s'en inspirer soit pour définir la fonction policière et prescrire les sanctions qui s'imposent lorsque ses attributions ont été outre-passées, ou soit pour construire un système de justice pénale qui se tienne et qui traduise les préoccupations générales de la société canadienne, lesquelles font l'objet d'un consensus assez facile à constater.

Après avoir établi ainsi l'état des faits, il lève le masque. Sa logique est inéluctable. Il faut faire câdrer les grandes déclarations du haut des tribunes qui ont trop souvent réussi à nous endormir, avec ce qui se passe dans la rue, les milieux de détention, et même devant les tribunaux. Si tout le monde tombe d'accord sur les valeurs à mettre en évidence à savoir le respect de la personne et les libertés fondamentales, plusieurs semblent se méprendre sur les exigences qu'elles traînent à leur suite dans la mise en vigueur d'un droit pénal qui veut prétendre en tenir compte.

L'auteur convie les adversaires en présence, c'est-à-dire les procureurs de la défense et de la couronne à une rencontre et il leur demande de déposer les armes. La nature de la tâche à accomplir selon lui exclut du débat presque par la définition de leur fonction et par la preuve historique de leur incapacité à être fidèles au rendez-vous, les juges et les politiciens. Les preuves qu'il dit vrai abondent. Il met donc les procureurs et tous les autres qui accepteraient le défi, en demeure de se pencher sur le droit pénal dans son élément le plus essentiel, celui qui le constitue, le définit en pays qui se veut démocratique, la *rule of law*. Celle-ci ne favorise ni l'accusé, ni la poursuite. Les lois peuvent être sévères ou bénignes. Ce qui importe c'est qu'elles doivent exister et pour tout le monde, sans catégories d'exceptions dites "techniques" pour ceux qui ont charge de repérer les criminels et leur faire cesser leurs activités que la société a jugé nocives.

Si on se satisfait de pieuses exhortations et que l'on continue le processus d'érosion de la *rule of law* déjà amorcé, on ne devrait pas se plaindre de ce que l'intégrité et la crédibilité de l'appareil judiciaire soient compromis.

La question brûle d'actualité. Peut-on oui ou non permettre qu'on enfreigne impunément les lois sous prétexte que le motif est bon? Qu'advient-il de la *rule of law*, si la réponse est affirmative? On a également raison de se demander quel sort est réservé au droit au silence lorsque l'Etat provoque des enquêtes sur le crime organisé. Ce sont là des problèmes qui sont débattus et doivent l'être. L'auteur les aborde et nous met en face des points d'interrogation que par la nature des choses et des êtres humains, la majorité des citoyens, tous bien pensants qu'ils soient et peut-être parce que bien pensants, ont tendance à reléguer aux calendes grecques pour plus facilement continuer leur petit bonheur dans le meilleur des mondes.

M. Ratushny ne se borne pas à poser des questions. Il propose un certain nombre de solutions possibles qu'il écarte l'une après l'autre, sauf une, à laquelle il tient comme étant la seule qui vaille selon lui quoiqu'il accepte qu'on tente de la réfuter. Elle consiste en général à faire disparaître les aveux; c'est là un côté de la balance. L'autre c'est d'imposer à l'accusé, une obligation morale de répondre à une accusation précise lorsqu'il est muni de tous les avantages dont on entoure un procès en régime accusatoire. Je passe sous silence un corollaire à la thèse principale que l'on peut appeler l'incarcération avant la comparution, dans des lieux qui ne sont pas sous le contrôle de la police. Sa thèse de fond consiste bien à faire un échange. Compte tenu des problèmes du fardeau de la preuve qu'il faudra préciser davantage et qui constituent une pierre d'achoppement assez intrigante, il faut l'admettre, l'option présentée par M. Ratushny a beaucoup de chance de retenir l'attention et rencontrer l'approbation de tous ceux qui l'étudieront avec soin. Le livre mérite de toute façon de faire époque et son influence je l'espère sera grande. L'auteur est-il naïf de croire à l'objectivité des avocats sur laquelle il mise grandement? C'est à eux de répondre.

E. E. SMITH*

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Burglary: The Victim and the Public. By IRVIN WALLER and NORMAN OKIHIRO. Toronto: University of Toronto Press. 1978. Pp. x, 190. ($12.50)

The researchers sought to compile a dispassionate composite of the realities of residential burglary.

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* L'Hon. E.E. Smith, Ottawa.

It is a "victimology" study which sets out to change the traditional emphasis on the role and characteristics of the offender by studying also the situation of the offence and particularly the role and characteristics of the victim. The principal subjects of the study were over 1,600 households in Toronto selected in a "disproportionately stratified design" which over-selected houses in high burglary rate areas. An adult from each household was interviewed using a complex coded questionnaire. The number of households interviewed amounted to 65% of households originally approached, which is adequate for this type of research. A complementary analysis was undertaken of a random sample of over 5,000 occurrences recorded by the Toronto police in 1971 of the robberies, break and entries, thefts and malicious damage occurring in dwelling houses and also of 1971 census information. An unspecified number of interviews were conducted in an informal and unscientific basis with convicted residential burglars.

A myriad of findings emerged. The estimated residential burglary rate in Toronto for any one year was approximately three in a 100. The average loss was only about $345.00 but over forty million dollars were stolen in total. A mere 62% of all burglaries were likely to be reported to the police and the detection rate was one in ten. Burglary was not found to occur at any one time and the entry techniques were typically by the door and unsophisticated. Personal injury rarely occurred. If there was a confrontation it was typically peaceful. The public were found to be concerned about residential burglary and even fearful but relatively few precautions were taken. There are also detailed chapters concerning the public's experience with the criminal justice system and their attitudes to crime and punishment generally.

The study is thoroughly well documented with a substantial and apparently exhaustive bibliography. The statistics and statistical tests are presented in a satisfactorily clear and palatable way.

Fortunately the researchers are not content to spew out figures as in many recent United States field studies.[1] The concluding chapter is an impressive attempt to assess the significance of this survey for criminal justice policy and make practical suggestions.

It is significant that the researchers conclude that, in respect of sentencing alternatives in this area, the criminal justice system is dragging behind what the public would tolerate, for example in its use of community service orders. Over two thirds of the victims, admittedly long after the event, did not wish to see the offender in

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[1] See, for example, Pope, Examination of Burglary Offense and Offender Characteristics (1977), Criminal Justice Research Center, Albany, New York.

prison. As to crime or more particularly burglarly prevention, the study is significant in suggesting that current police crime prevention programmes, aimed for example at discouraging carelessness and encouraging the provision of better locks, are likely to be ineffective. The authors suggest that a better strategy for houses is to increase the hours in which the residence is occupied and surveillance, and for apartments to restrict entry. There is also much in the study for the police to consider such as the recommendation that they could do more to provide assurance to the victim by explaining the amateur and non-violent nature of most residential burglaries and realistic feedback as to investigation progress or lack of progress. There are other important observations in this study too numerous to mention here but including scepticism of the benefits of the costly "defensible space" experiments now being conducted in the United States, in terms of which a residential environment is created which "enables residents to become the critical force in providing their own security".

It is unfortunate that the researchers marred their bold and constructive thinking by sloppiness. Just after talking about "trends in public policy towards decriminalisation" they suggest a new classification of burglary into less serious and more serious. This is *not* a plea to decriminalise burglarly but they do suggest a maximum penalty of a fine for the lesser "summary" variety. The line is drawn—surely simplistically—at the value of property stolen ($200.00). This one cavalier categorisation and careless use of the abused word "decriminalisation" has allowed commentators to unfairly assassinate the whole study. For example, W.M.H. writes in the Spring, 1979 issue of the *Canadian Police Chief*:[2]

> One of the most disquieting aspects of the report on this study is the repetitive reference to expressions synonymous with non-violence in the description of most burglaries surveyed, imparting to burglarly the aura of a Halloween prank. The inference is that most burglarly offences can be forgiven, or at worst be treated as summary offences, because of their endemic character and the disinclination on the part of the victims—interviewed for the study long after the occurrences—to support criminal justice sanctions against the offenders.

There are some other points of criticism. In correcting the traditional emphasis in criminology on the offender, this study may have gone too far in concentrating on the victim at the expense of the offender. There are some details and discussion of the offenders but these are sketchy and almost as an afterthought. One would also have expected in such a comprehensive look at burglary that an in-depth treatment would have been offered of insurance and State compensation schemes. The topics are skimmed.

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[2] Review in (1979), 68 Can. Police Chief 35.

But overall it is a thoughtful and conscientious contribution to Canadian criminal justice thought and deserves careful attention rather than ridicule.

DON STUART*

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Pardon under the Criminal Records Act. Prepared by NATIONAL PAROLE BOARD OF CANADA. Ottawa: Minister of Supply and Services Canada. 1978. Pp. 12. (Free)

The National Parole Board of Canada has provided a great service to all those involved in the criminal justice system in the form of its latest booklet entitled, *Pardon under the Criminal Records Act*. The Parole Board, under the leadership of its chairman, William R. Outerbridge, Q.C., has decided, at long last, to participate actively in the movement to enlighten offenders concerning their legal rights. This clearly stems, at least in part, from the general increase in the significance and attention presently being directed towards public legal education and the legal rights of special interest groups.

The Parole Board has received numerous requests over the years from prisoners, prisoners' rights groups, and those active in the criminal justice system to embark upon an educational programme to explain its legislative mandate and how it actually operates. This has resulted in the production of two booklets in 1978 namely, *A Guide to Conditional Release for Penitentiary Inmates*,[1] and the pamphlet under consideration in this review. Both are geared primarily towards the consumer of the Parole Board's service.

The Criminal Records Act[2] is one of those far-too-common pieces of legislation which is small in size, important in impact, and largely unknown. It is this reviewer's experience that most of those people who are aware of its existence misunderstand its operation. Therefore, the arrival of this publication is welcome indeed.

The booklet is extremely straightforward, concise, and easy to read. It is packaged in an attractive manner with a bright orange and yellow cover and a drawing of a seagull in flight in the corner. Although some might question the wisdom of this approach, it is clearly more likely to be examined and read than most drab

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* Don Stuart, of the Faculty of Law, Queen's University, Kingston, Ontario.

[1] (1978). For a new U.S. publication on criminal records see Privacy and Security of Criminal History Information: A Guide to Record Review and Challenge (1978).

[2] S.C., 1969-70, c. 40, as am., S.C., 1972, c. 13.

governmental publications. It is printed both in English and in French and contains the required application form inside the front cover.

Its overall content and style is very good. A question and answer approach is utilized to confront the thirty-three most common concerns in a way that should generally be understood by most readers. The only confusing aspect of the text is in regards to the timeliness of applications from eligible individuals.[3] This could be expressed more clearly through recourse to factual examples of each category accompanied by a chart. However, it still is a dramatic improvement over the language of the Act,[4] which follows directly after the text in the pamphlet.

Pardon under the Criminal Records Act explains the process of applying for a pardon in an understandable fashion assuring the ex-offender that it is easy and does not require the retaining of a lawyer. The individual is informed that he or she will be investigated by the National Parole Board's staff, the Royal Canadian Mounted Police or the local police. Confidentiality is guaranteed. The applicant is even notified that he or she can request the investigation not to include certain named individuals such as present employers. It is interesting to note that the application form contains a consent provision in small print which permits the release of personal information within the meaning of section 52(2) of the Canadian Human Rights Act.[5] This is not mentioned nor explained anywhere in the text.

The Parole Board's function of examining the results of the investigation and presenting a recommendation to the Solicitor General is succinctly outlined. The applicant is notified that he or she will have an opportunity to make representations to the Board, if its initial decision is unfavourable, before it is presented to the Minister for reference to the Governor in Council. The booklet indirectly states that the whole process is discretionary and administrative in nature in that the Board is not required to give reasons for its unfavourable recommendation. The text does not precisely indicate that the individual has no right of appeal nor judicial review. The existence of a pardon as part of the traditional exercise of the royal prerogative of mercy is also not mentioned.[6] It

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[3] Question 12, pp. 3-4. The booklet indicates in Question 7, p. 3, that a pardon is available for a violation of the Juvenile Delinquents Act, R.S.C., 1970, c. J-3, as am. This is a subject of some controversy at the present time and may not actually be within the scope of the Criminal Records Act.

[4] *Supra*, footnote 2, ss 2(2), 4(2) and 4(3).

[5] S.C., 1976-77, c. 33, as am., 1977-78, c. 22.

[6] For a brief discussion, see Tremeear's Annotated Criminal Code, by L.J. Ryan (6th ed., 1964), pp. 1219-1221 and C. Ruby, Sentencing (1976), pp. 420-421.

is even more surprising to note that the relevant provisions of the Criminal Code are equally ignored.[7]

However, it does reveal that the granting of a pardon is not automatic once a person becomes eligible. Further, it removes the myth that a pardon is permanent in nature. It expressly informs the reader that it can be revoked if obtained through a misrepresentation[8] or if the person is "no longer of good conduct".[9] This latter factor is not defined in any way either in the Criminal Records Act or in the text, which is a situation that is difficult to defend. The most common form of revocation is improperly described by the booklet when it is said that conviction for any further offence may lead to a loss of the pardon.[10] In fact, the Act limits this situation to a conviction "under an Act of the Parliament of Canada or a regulation made thereunder".[11]

The limitations of the Criminal Records Act, although the text does not connote it to be such, are described in some depth. It is specified that the Act applies only to offences under federal law, does not allow the pardonee to deny the existence of a prior conviction, does not cause the destruction of the record only its separation from the other criminal files, and the prohibition against disclosure of the conviction only applies to federal agencies. The provisions in the Act restricting questions in applications for employment within the general jurisdiction of the federal government[12] is not discussed. The protections under the Canadian Human Rights Act,[13] surprisingly, are omitted as well.

In summary, this pamphlet explodes several of the myths surrounding the pardon system while providing a straightforward and understandable translation of the Criminal Records Act. One might have expected it to promote the application for pardons by way of a greater elaboration of its benefits. However, *Pardon under the Criminal Records Act* meets most of its objectives. The reviewer

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There is virtually no case law nor other sources of legal information available in print.

[7] Ss 683 and 685-686, Criminal Code, R.S.C., 1970, c. C-34, as am. This specifically preserves the royal prerogative of mercy as a completely discretionary act of Her Majesty or the Governor in Council. It is thus not subject to the eligibility requirements of the Criminal Records Act.

[8] *Supra,* footnote 2, s. 7(b)(ii).

[9] *Ibid.,* s. 7(b)(i).

[10] Question 32, p. 8.

[11] *Supra,* footnote 2, s. 7(a). It should be noted, however, that a conviction under a provincial statute might justify a revocation under s. 7(b)(i). There appears to have been only one revocation under s. 7(b)(i) in the last three years.

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

[13] *Supra,* footnote 5, ss 3 and 5-9.

would urge every criminal lawyer, probation and parole officer, court worker, legal aid office, community center, criminal court, and prison to have a large supply on hand in a visible location. Every person convicted of a federal offence should know of the existence of this Act and their right to utilize it.

It is particularly to be hoped that the legal profession will begin to overcome its notable lack of involvement with the offender subsequent to the conviction. The distribution of this booklet to clients would be one small step.

BRADFORD MORSE*

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The Law of Habeas Corpus. By R. J. SHARPE. Oxford: Clarendon Press. 1978. Pp. 254. ($29.50)

From 1893 until quite recently the writ of habeas corpus was ignored by legal text writers. For the United States of America there were the treatises of R.C. Hurd (1876) and W. S. Church (1893), and then in 1969 R.P. Sokol produced a book entitled *Federal Habeas Corpus*. For England there were no texts dealing exclusively or even at length with the writ until the subject book by Professor Sharpe; for Canada the situation was the same until my book, *The Law of Habeas Corpus in Canada* (1974). This is not to say that there was no scholarly writing published on habeas corpus during the first six decades of this century; indeed there were some first rate pieces written, but they were not many in number and they were fairly narrow in their focus. There were not all that many reported judgments either. I recollect from my research that I found about two thousand or so Canadian cases in total. I believe that the writ was not used as much as it might have been in part because of the lack of writing and thus lack of familiarity with the writ on the part of the profession. The dearth of writing strikes me as quite extraordinary, given the fundamental importance of the writ in our system of law.

The paucity of sources on habeas corpus is over. Relatively speaking there has been a blizzard of activity in recent years, both in terms of published writing and reported judgments. It was inevitable that habeas corpus would be discovered by LL.M. students (I was one of them in 1964-66); with this discovery came theses, articles, books, and more judgments as a result of greater usage of the writ by lawyers who turned to the writ in part because through the published writings, they had become more familiar with the writ. For Canada,

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* Bradford W. Morse, of the Faculty of Law, Common Law Section, University of Ottawa.

since my book in 1974, there have been published the following articles: R. J. Sharpe, "Habeas Corpus in Canada",[1] E. Koroway, "Habeas Corpus in Ontario",[2] T. Cromwell, "Parole Committals and Habeas Corpus",[3] D.A. Bellemare, "Droit pénal",[4] G. Létourneau, "L'habeas corpus et la capacité légale (locus standi) du requérant",[5] K.E. Wright, "Judicial Review of Parole Suspension and Revocation",[6] and T. Cromwell, "Habeas Corpus and Correctional Law—An Introduction".[7] As well, G. Létourneau has two chapters on habeas corpus in his recent book, *The Prerogative Writs in Canadian Criminal Law and Procedure*.[8] Respecting reported judgments as an indicator of the growing use of the writ, I counted over one hundred and twenty-five since the fall of 1973. Although the annual average over the last one hundred years has been in the vicinity of the twenty reported cases, actually that figure is deceiving for there have been historical events that produced unusual flurries of use of the writ, such as the two World Wars and the now repealed Chinese Immigration Act. Thus, I think that the number of reported judgments in recent years reflects a significant rise in the use of the writ, and I say this realizing that apparently more cases are now being reported generally than ever before.

Turning to the subject book Mr. Sharpe states in the preface that "the book is a somewhat revised version" of the thesis which he submitted for his D. Phil. degree at Oxford University. I think that he should have revised that thesis to a much greater extent before having it published, if he wished to reach a broad readership. The book contains far too much historical data and discussion, notwithstanding Mr. Sharpe's opinion that "dealing with any aspect of habeas corpus almost inevitably involves the history of the writ" and notwithstanding the Chinese proverb that is to the effect that those who do not know their history are doomed to repeat it. In particular, I question the devotion of the first twenty pages of the book to a survey of what might be called the ancient history of the writ (and

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[1] (1975), 2 Dal. L.J. 241.

[2] (1975), 13 O.H.L.J. 149.

[3] (1976), 8 Ott. L. Rev. 560.

[4] (1976), 36 R. du B. 715.

[5] (1976), 17 Cahiers de Droit 205.

[6] (1976), 18 Cr. L. Q. 435.

[7] (1977), 3 Queen's L.J. 295.

[8] (1976), chps. 1 and 5. In my opinion the chapter devoted to habeas corpus in the second edition of Administrative Law and Practice by R.F. Reid and H. David (1978) is completely inadequate. It is a reprint of the first edition. At the very least the authors might have amended the opening sentence in their habeas corpus chapter in connection with parole suspension and revocation decisions which is surely in the area of administrative law.

this is only the tip of this iceberg) which has been done many times. Perhaps it would have been better if the author had essentially simply referred the interested reader to these other accounts (Mr. Sharpe's reference to other accounts is far from complete) where such a reader would receive a richer recounting and discussion. As well, the author's inclination throughout this specialty book to expound on and demonstrate his grasp of general concepts of administrative law by way of introduction to his exposition of the habeas corpus aspect is bothersome. While these two dimensions were appropriate when it was an academic thesis, they become inapt in a book. In the result I think that while this book will be read by habeas corpus enthusiasts and a few administrative law teachers, I doubt that it will be read by law students or by practising lawyers, at least in Canada.

I question the length to which the author goes in discussing the grounds of review in the chapters devoted to scope of review. The discussion strikes me as too protracted, historically oriented, and academic to be of use to the average Canadian lawyer. The situation concerning grounds of review in a habeas corpus proceeding is not much different from that in any review proceeding. What is in issue is simply the legality of the detaining order. Anyone with a good grasp of the grounds of review generally in the area of administrative law can easily apply that knowledge to habeas corpus as a particular review proceeding.

The book primarily deals with the law of England. There are Canadian references, but they are sporadic and uneven. The Canadian reader therefore must be careful to avoid taking away misconceptions. There is no substantial treatment of the ramifications on habeas corpus in Canada of our federal governmental structure.

To this point I have been critical of Dr. Sharpe's book. To end on a generous note, the best chapters of the book for me were VII and IX, for the review and discussion of the law in these chapters are clear, crisp and concise. The topics covered in these chapters include the need for actual detention, appeals, renewed applications, and the legal effect of a discharge order. I found his note on the Canadian situation regarding the need for actual detention particularly interesting.[9] There were two other discussions which caught my attention, having to do with the use of habeas corpus in connection with prison conditions,[10] and with the burden of proof in habeas corpus proceedings.[11] Perhaps the courts have not dealt with the point of burden of proof to any great extent because the question has

[9] Pp. 162-164.

[10] Pp. 145 *et seq.*

[11] Pp. 80 *et seq.*

not arisen in many cases and because there can be no real doubt that nine out of ten judges and courts are going to favour liberty of the subject in any situation where the scales might be in balance so to speak.

CAMERON HARVEY*

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The Civil Rights Injunction. By OWEN M. FISS. Indianapolis: Indiana University Press. 1978. Pp. vi, 117. (No Price Given)

Readers of the major American reviews have enjoyed over the past fifteen years the elegant and perceptive articles of Professor Fiss and have come to expect from him penetrating and thought-provoking essays. They will not be disappointed by these lectures, his most recent contribution, which comprise the Addison C. Harris Memorial lectures given at Indiana University on April 5th and 6th, 1976. These prove to be something of a wayward grandchild of the Frankfurter and Greene polemic of the twenties—*The Labor Injunction.*[1]

By way of background to his central argument—why should the injunction be an "extraordinary" remedy, to be used only if all else fails?—the author describes the restrictive notions of the past and the as yet unfinished transition of the injunction as a remedy of first recourse.[2] Today, while the remedy is invoked regularly in the United States to cope with civil rights violations in voting, mental hospitals, prisons, and jobs in the police and other public services there is concern over a perceived judicial attack on its flexibility.[3] In response Professor Fiss argues for the raising of the status of the remedy and its freeing from the old, limiting rules.

In this monograph the author reiterates his taxonomy of injunctions—the preventive, the reparative and the structural.[4] Their differing purposes are contrasted effectively with other related judicial judgments so to challenge the label of *uniqueness* which has been the traditional characterisation of the injunction. Accordingly

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* Cameron Harvey, of the Faculty of Law, University of Manitoba, Winnipeg.

[1] (1930).

[2] The injunction has been the typical remedy for desegregation purposes since *Brown* v. *Board of Education* (1954), 347 U.S. 483, (1955), 349 U.S. 294, but is not free from difficulty—Altman, Implementing a Civil Rights Injunction: A Case Study of *NAACP* v. *Brennan* (1978), 78 Col. L. Rev. 739.

[3] Goldstein, A *Swann* Song for Remedies: Equitable Relief in the Burger Court (1978), 13 Harv. Civil Rights—Civil Liberties L. Rev. 1.

[4] Fiss, Injunctions (1972).

Professor Fiss likens the preventive injunction with the liability rule or criminal prohibition as controls operating through deterrence. The reparative injunction seeks to make good past injury and so is analogous to an award of damages. The structural injunction is compared to a damage judgment or an administrative scheme whose aim is to induce co-operation of the defendant social institution.

The author accurately analyses the realities of who petitions, who is affected (in all circumstances groups rather than individuals) and what are the varied sanctions in the event of breach. His telling criticisms of the historical restrictions—inadequacy of other remedies, irreparable harm and prior restraint—sear widely held misconceptions and so underpin his own non-hierarchal scheme of remedies.

There are, of course, some problems which derive from his model. The use of the injunctive device, and particularly the structural injunction, requires that the court gather facts concerning the defendant's conduct, evaluate that behaviour and make a political guess as to the chances of the defendant's compliance with the decree. These processes require inevitably that the court examine statistics including social science information and to indulge in evaluations beyond normal judicial expertise. Equally the drawing up and implementation of schemes often requires the employment of judicial agents if the construction and administration of the order are too much for the court to handle. There are also problems of the financing of elaborate schemes of enforcement and of the proper role of the agent as enforcer or monitor of the scheme. The personification of the judge and the identification of the particular judge with the particular order cannot be overlooked in a task which can often be portrayed as being essentially anti-democratic. Yet as the political branch has shown itself to be incapable, the judicial order has become the sole means of coping with situations in which the plaintiff is deprived of some entitlement, where he faces the likelihood of multiple suits to enforce his right, where he is entitled to some performance by the defendant, and where damages are so speculative as to be inadequate.[5] But while these arguments may be unanswerable some recent decisions reveal a judicial denial of that appreciation.[6]

One striking comment, in a closing footnote, provides a starting point for consideration of the Fiss thesis in our own situation:[7]

> Conceived in the boldest terms, the ambition of the administrative law system might have been to restructure industries put under its jurisdiction, but the truth

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[5] Dobbs, Remedies (1973), pp. 57-58.

[6] *Younger* v. *Harris* (1971), 401 U.S. 37; *Milliken* v. *Bradley* (1974), 418 U.S. 717. And see Fiss, *Dombrowski* (1977), 86 Yale L.J. 1103.

[7] P. 110, n. 7.

> of the matter is that that ambition has not been realized. The administrative law system, so anxious about its own legitimacy, in fact became judicialized, content to issue cease-and-desist orders (the counterpart of the preventive injunctions), and to avoid structural reform. In recent years the task of structural reformation of public institutions (schools, prisons, and mental hospitals) has been taken up by the courts, and it remains to be seen whether this judicial experience-by-example and by lending legitimacy to coercive structural reformation—will revitalize the administrative system, encourage it to attempt a realization of its boldest ambitions.

The uses of the injunction in the United States have sometimes been preventive but more frequently reparative and structural relating to "systemic enforcement inadequacy". On the other hand, in Canada the judicial intervention in the administrative process has been usually to assist citizens aggrieved by abuse of statutory authority or to prevent the encroachment of government agencies.[8] Herein certiorari, prohibition, mandamus, quo warranto, habeas corpus and damages have been the traditional public law remedies. The extensive use of the declaration is a creature of the 60's while the administrative injunction has remained eunuch-like limited by the requirements of interference with private rights and special damage suffered by the plaintiff.[9] Equally courts have not been prepared to grant injunctions where there existed alternative remedies[10] or until all other remedies have been exhausted.[11] In addition, problems of Crown immunity remain unresolved.[12] As a consequence the injunction is still pre-eminently a private law remedy whose potential has not been exploited despite the expectations of the committed.[13] It is to be hoped that that situation is amenable to change. Therefore Professor Fiss's orgininal work is commended to those who will argue to extend the capacity of the injunction and strive to develop its proven potential.

EDWARD VEITCH*

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[8] *Maclean* v. *Liq. Licence Bd.* (1975), 9 O.R. (2d) 597; *Jack's Enterprises* v. *Sask. Liq. Lic. Comm.* (1970), 15 D.L.R. (3d) 493 (Sask. C.A.).

[9] Mullan, Administrative Law (1973), p. 3-140, para. 189; Reid and David, Administrative Law and Practice (2nd ed., 1978), p. 436.

[10] *Tyrell* v. *Consumer's Gas Co.* (1964), 41 D.L.R. (2d) 119 (Ont.).

[11] *Loc. 1571 Int'l Longshoremen's Assoc.* v. *Int'l Longshoremen's Assoc.*, [1951] 3 D.L.R. 50.

[12] *Cf* Proceedings Against the Crown Act, R.S.O., 1970, c. 365, s. 18; *Pike* v. *Council of the Ont. College of Art,* [1972] 3 O.R. 808.

[13] deSmith, Judicial Review of Administrative Action (3rd ed., 1973), p. 383.

* Edward Veitch, of the Faculty of Law, University of New Brunswick, Fredericton.

Racial Justice: Black Judges and Defendants in an Urban Trial Court. By THOMAS M. UHLMAN. Lexington and Toronto: D.C. Heath & Co. 1979. Pp. xv, 119. (No Price Given)

This monograph presents in a relatively short form the results of a detailed study of a single state trial court in the Northeastern United States. The author, a first-generation white American of German ancestry, uses biographical data of the judges and statistics regarding almost 44,000 case dispositions, to explore a number of race-related issues. In essence two separate studies are entailed: the first of the characteristics of the black bench, the second of the effect of the race of judges and defendants in case dispositions.

In the opening chapter an overview is provided of the black presence in the American legal professions. Whilst there is some dispute as to exact figures, even at best a black judicial element of one point five percent represents a black population which comprises twelve percent of the nation. This paucity is hardly surprising given the lack of opportunities available, at least until recently, for poorer minority group members to acquire a legal education, and the difficulties experienced by the few who do reach practice. Despite greater awareness and affirmative action today, systemic discrimination is still manifest in the virtually total absence of a black bench in the South, and the concentration of black judges elsewhere in lower judicial positions.

The second chapter describes in some detail "Metro City" (a pseudonym for a Northeastern city) and its trial court personnel, organization and procedure. Blacks comprise about one-third of the city's residents, and about one-half of its workforce. A number of exceptional features made it particularly appropriate for this study, including full computerization of its court records for the period under review (1968-74) and the presence of sixteen black judges on the one bench, of a national total of not more than 350.

In chapter three these judges are compared with the white members of the bench on several criteria, including regional ties, education, pre-judicial careers, methods of selection, and professional and community involvement. Some disparities occur, but they are not pronounced. More black judges come from "out-of-town", and nearly all are first appointed to the bench, temporarily, pending the calling of an election. The electoral power of the black community has clearly not made itself felt over the weight of the conventional party machine. However, the clear picture which is presented is of systemic as opposed to direct discrimination in appointment to the bench. Approximately the same qualifications are found in both black and white judges—but the black person who fulfills these criteria is indeed exceptional within his community.

The oft-heard assumption that black judges are more lenient toward black defendants finds no support in Dr. Uhlman's statistical study. Both black and white judges find blacks guilty more often than whites, although black judges are generally more pro-defence than their white colleagues. Similarly, both black and white judges sentence blacks approximately twenty per cent more severely than whites. Further analysis leads to the conclusion that whilst certain judges display a great deal of individuality in sentencing, this does not correlate with the race of the judge concerned.

In the fifth chapter the difference between black and white defendants' sentences are examined. Path analysis, a sophisticated technique well established in the behavioural sciences, is used to quantify the effect of a number of factors on sentence: for example, charge severity and type of counsel retained. Unfortunately the results of this analysis, potentially the most significant in the work, must be set at nought. After siphoning off the effects of all other factors thought likely to be significant, the "race component", accounting for over forty per cent of the sentencing discrepancy, remains. However, two factors are not taken out: the effects of defendant socio-economic status, and that of prior criminal record. Both, as the author notes, are well known for their effect on sentence.[1] Likewise, he notes, "the small race-related disparities in conviction rates may simply reflect the minimal influence of prior record on this [case verdict] sanctioning decision".[2] These explanations, it is said, "remain as a viable but untested alternative" and must remain so until prior record can be investigated in conjunction with the variables examined here".[3] This acknowledgement of deficiency does nothing to excuse the premature and inconclusive publication of these results.

To this reviewer, then, Dr. Uhlman's book contains a great anticlimax. Despite some minor complaints, regarding presentation—the text is often verbose, unnecessarily jargonistic, and somewhat self-righteous in continually reassuring the reader that this is the first research of its kind—the first four chapters contain worthwhile data and convincing analysis. Against this background it is very disappointing that the final analysis, which should have pulled the work together, and answered many of the reader's questions, leaves him instead with only a tentative conclusion and some very good reasons for not accepting it.

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[1] See Thomas, Principles of Sentencing (1970), pp. 176-177; Campbell, Law of Sentencing (1978), ss 100, 114; Dawson, Sentencing: The Decision As to Type, Length and Conditions of Sentence (1969).

[2] P. 95.

[3] *Ibid.*

The statistical parts of the monograph are written in terms unfamiliar to most lawyers, who might nevertheless have a great deal of interest in the issues examined. To this end it is regrettable that these chapters are not summarized in lay terms, as is frequently the case for similar studies. For this reason it will probably find greater marketability among criminologists and political scientists than in legal circles.

Finally, the book has limited direct relevance to the Canadian legal system due to greatly differing background—in particular the system of electing judges. However, the questions raised are those which should be pursued with equal vigour in both jurisdictions, and with the growth of American literature in this area no doubt we can look forward to the appearance of Canadian studies of similar problems.

R. PAUL DAVIS*

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Individual Liberty and the Law. By Sir ZELMAN COWEN. Calcutta: Eastern Law House; Dobbs Ferry, N.Y.: Oceana Publications. 1977. Pp. 203. ($8.59)

Immigration Law. By J. M. EVANS. London: Sweet & Maxwell. 1976. Pp. xv, 152. ($4.20, paper)

As one of his last major academic functions before being appointed Governor General of Australia, Sir Zelman Cowen delivered the Tagore Law Lectures on the theme of "Individual Liberty and the Law." In the course of these lectures, Sir Zelman dealt with protection of reputation, privacy and fair trial, particularly, in the case of the latter, the problem of prejudicial publicity, and the extent of the law of obscenity. He begins by pointing out the crisis of resistance by autonomous groups to the whole panorama of establishment, which "has led to a condition in which legitimate government can be nearly paralysed by a chaos of criss-crossing pressures by autonomous groups. . . . Questions are asked about the binding force of law: justifications for disobedience to law are readily formulated. . . . [T]here is a contemporary doctrine which asserts the right to disobey free of any penalty. . . . [There] is an attitude to gross breaches of the law which sees the violator as an innocent victim, perhaps, even more, as some sort of hero. No doubt such attitudes are reinforced by cynical and hypocritical attitudes to law on the part of governments and those highly placed within

* R. Paul Davis, of the Faculty of Law, Common Law Section, University of Ottawa.

them''.[1] Sir Zelman might have added the strange philosophies sometimes propounded by political and social scientists, especially those whose intellectual home has been the United States, while the reactions of the media too frequently tend to support such attitudes, at the same time claiming in the name of freedom the right to criticise private as well as public actions of government and citizen alike. Sir Zelman seems to sympathise with Fleming's view that we need a ''fairly well-balanced compromise . . . broadly adopting generally accepted community standards of civilized conduct as the criterion for prescribing the scope of legal protection''.[2] The problem of the limits upon a free press has recently been considered in Canadian courts, with judgments that have been vehemently criticised, particularly by the media. Perhaps there is still time for our courts to re-examine the principles embodied in *N.Y.T.* v. *Sullivan*,[3] and *A.G.* v. *Times Newspapers Ltd.*,[4] while still preserving our traditions differentiating liberty from licence.[5] ''As the pressures mount to relax the reach of the law of defamation [particularly as it affects the media], they also rise to provide more adequate assurances for the protection of privacy.''[6]

Much is being heard in Canada today about the desirability of a bill of rights which is entrenched in the constitution. Sir Zelman refers to some of the traditional criticisms of such constitutional statements on various occasions, but his one comment that might be drawn to the attention of the current protagonists is, ''as the late Justice Jackson once put it, that unless doctrinaire logic is tempered with a little practical wisdom, the Bill of Rights would be converted into a suicide pact''.[7] All one need do here, is refer to the paradox inherent in entrenching the rights of a free press and the right of individual privacy. Again, one should not overlook the fact that in this confrontation in which so much is heard of the defects of the law of defamation and its threat to the freedom of expression, the media as potential defendants are much better organised and financed than potential individual plaintiffs, have access to means of publicity which the latter do not, and are able to present their arguments to law reform bodies far more effectively than those who seek to protect individual rights against press incursions.[8]

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[1] P. 4; see also p. 60.

[2] Pp. 11, 81.

[3] (1964), 376 U.S. 254.

[4] [1974] A.C. 273.

[5] Pp. 14-16.

[6] P. 23.

[7] P. 27.

[8] Pp. 33 *et seq.*

There can be no denying that the media exposures played a major role in uncovering the Watergate mess, and this has encouraged the media in their arguments in favour of unfettered exposure, so that the public may know the facts. However, even journalists may be wrong, and "unless one is prepared to sustain the argument that the media should be granted a privilege in the public interests to be wrong in their *facts*, we do well to hesitate before seeing in Watergate-type disclosures the virtues of an American defamation law and the vices of the constraints imposed by English law and its progeny".[9] It would appear that the Canadian media at present tend to believe that they are entitled to this "privilege" and to special rights in the name of press freedom that no other part of the citizenry should enjoy. This tendency is, of course, not confined to the media in this country, but appears to be the view throughout the English-speaking world,[10] and there has frequently been the appearance in the attitudes of those concerned with freedom of expression and libel law reform a view "that the voice of the press [is] the voice of freedom incarnate".[11] The attitude at present prevailing in American jurisprudence, fully discussed, analysed and criticised by Sir Zelman, opens the door to media irresponsibility that could be intensely damaging during an election and could easily pave the way for the victory of an autocrat, trading on lies which the press claims it has no duty to investigate—a contention that in 1979 found support in some organs of the Canadian press. It might be interesting to know whether the journalists involved really support the United States Supreme Court decision in *Miami Herald Publishing Co.* v. *Tornillo*[12]—Sir Zelman would seem not to,[13] and it is to be hoped that like the author, they would reject any claim for "the press and television to libel with impunity, to lie with impunity and with equal impunity to invade the privacy of anyone whose privacy they chose to invade",[14] which seems to be the present legal position in the United States.

Much of the recent debate in Canada has turned on the issue of "fair comment" insofar as the media are concerned, and perhaps Sir Zelman's view as to what this defence should comprise might be of interest: "the comment should be based on proper material, as, for example, a true statement of fact or a fair report of parliamentary proceedings, that the comment relates to a matter of public interest and that it should be either a genuine opinion of the author or, if it be

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[9] P. 37.

[10] Pp. 37-39.

[11] P. 42.

[12] (1974), 94 S. Ct 2831.

[13] Pp. 58 *et seq.*

[14] Pp. 62-63.

in the form of a letter or article published in a newspaper, that the defendant newspaper published it in good faith''.[15] He does not, therefore, consider it necessary for the editor to believe in the veracity of the letter which he publishes, although the defence might fail ''if the plaintiff proved that the comment did not represent the defendant's (genuine) opinion''.[16]

Insofar as the right to privacy is concerned, it is perhaps remarkable that proposals to this effect were first put forward by Warren and Brandeis in the *Harvard Law Review* in 1890, when the writers in question were warning that mechanical devices were already threatening that ''what is whispered in the closet shall be proclaimed from the housetops''.[17] Despite technological advances that have taken place since then,[18] there are still numerous jurisdictions that have not conceded a right to privacy, while there is strong vested interest coming especially from the media against establishment of any such rights, and there are probably many who would still agree with Warren and Brandeis that ''the press is overstepping in every direction the obvious bounds of propriety and decency''. As to those who pin their faith to the reforming powers of the judiciary, or who believe that what ensued in the United States consequent upon the *Harvard* article is to be emulated, Sir Zelman considers that ''it is very doubtful if the common law of England would, at this time, recognise or announce a general right of privacy and if changes are to take place in this area, outside the scope of existing remedies [for instance, trespass, defamation, breach of copyright, breach of confidence],[19] it is certain that they will be accomplished by legislation''.[20] Modern society and the conditions of life related thereto make it impossible to claim that ''privacy can or should be absolute'',[21] and the decision in *Roe* v. *Wade*[22] that the right to abort is part of a woman's constitutional right of privacy is still limited, as that judgment itself made clear regarding late term pregnancies, by ''countervailing social interests''.[23] Sir Zelman's own view of this approach to the right of privacy, is that what was in issue in cases like *Wade* ''is the individual's autonomy or his interest in self-determination rather than his privacy''.[24]

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[15] P. 70.

[16] P. 72.

[17] P. 80, and see the quotation from Brandeis' dissent in *Olmstead* v. *U.S.* (1928), 277 U.S. 438, at p. 478.

[18] Pp. 86-88.

[19] P. 83.

[20] P. 84.

[21] P. 90.

[22] (1973), 410 U.S. 113.

[23] P. 93.

[24] *Ibid.*

Among modern approaches to the concept of privacy is that suggested, for example, by Prosser as placing the plaintiff in a false light in the public eye, but "this generally may be seen as an aspect of injury to reputation, and therefore has its proper links with defamation rather than with privacy".[25] This reality may in fact lead one to question whether a properly defined right to privacy, entrenched in a bill of rights, might not result in the desuetude of much of the law of defamation. In fact, while ". . . this has not occurred, thus far, in the common law, . . . in the German legal system, defamation has lost its identity as a separate tort and has become fused into the broader tort of the infringement of the right of personality".[26] Generally the media oppose proposals to protect privacy,[27] but perhaps one might enquire whether the press at large does not pay sufficient attention to Lord Goodman's comment that "the principle of publish and be damned is a valid and sensible one for the newspaper and it should bear the responsibility. Publish and let someone else be damned—is a discreditable principle for a free press".[28] Finally, on the right of privacy Sir Zelman is of opinion "that it is desirable to include in the armoury of privacy provisions for such a tort".[29]

For the ordinary citizen the problem of privacy is perhaps more related to his protection against the state than against the media or other private interests, and evidence of this is found in the attitude of the public towards disclosures as to R.C.M.P. activities and restrictions upon such evidence-collecting practices as wire-tapping. Many may in fact agree with the view of Attorney General Ramsay Clark that "manpower devoted to wiretapping and electronic eavesdropping might be more beneficially used for purposes of public safety in other ways".[30] Sir Zelman appears to sympathise with those who consider some measure of lawfully authorised surveillance may be necessary from the point of view of national security and the protection of society against crime, but as Watergate showed "surveillance has been conducted on a massive scale without colour of legal authority . . . [and] almost any form of invasion of privacy can be and indeed is defended on grounds of public interest, [therefore] the onus of justification must always rest on the person or authority claiming to exercise surveillance [even though] the annihilation of all privacy might perhaps bring organised crime to an end. [However, as illustrated by Orwell's *1984*] the price

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[25] P. 94.

[26] Pp. 94-95.

[27] Pp. 97-100.

[28] P. 66.

[29] P. 113.

[30] P. 118.

paid was an all-embracing public crime of such magnitude that freedom was totally destroyed''.[31]

As to prejudicial publicity and its impact upon a fair trial, Sir Zelman refers to what happened after the Kennedy assassination,[32] and the *Adams* trial in England, and to the manner in which the House of Lords applied the contempt rule in the *Thalidomide* case[33] contrasting it with the American view as propounded in *Delaney* v. *U.S.*[34] While it may be the case that ''American courts, while they have gone far in denying the application of contempt laws, have reversed convictions on the ground that prejudicial publicity surrounding the events and trial denied to accused persons a trial satisfying the requirements of constitutional due process'',[35] which is alleged to have been one of the grounds for the Nixon pardon, it is interesting that this failed to upset the Calley conviction, while if carried to its logical conclusion it could well prevent any trial of a person accused of some horrifying or disgraceful crime, such as committed by Manson, the ''Son of Sam'' or Bradley and Hindley on the English Moors.

From what has been said it is clear that Zelman Cowen's Tagore Lectures will be of interest to lawyers everywhere. It is perhaps unfortunate that he restricted himself almost completely to English, Indian and American jurisprudence, although there is reference to the British Columbia Privacy Act of 1968[36] and to *R.* v. *Steiner*[37] on a fair trial. It is to be regretted that when Oceana agreed to co-publish, they did not check the text. The book is spoiled by such things as Fleming and Flemming, New Fork Times, and we have an author named ''Professor''.[38]

Among the liberties increasingly being claimed at present on behalf of the individual is that of immigration and of residence. Insofar as the European Community is concerned, the right has been recognised, although *Van Duyn* v. *Home Office*[39] shows that even within the Community this right, like those discussed by Sir Zelman, is far from absolute. It also used to be the case that all British subjects, regardless of where they were born within the Common-

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[31] Pp. 121, 122-123.

[32] Pp. 139-142.

[33] *Att. Gen.* v. *Times Newspaper Ltd.*, [1974] A.C. 273, discussed at pp. 144-151.

[34] (1952), 199 F. 2d 207, discussed at pp. 125-131.

[35] Pp. 133 and 162-164.

[36] P. 106.

[37] (1955), 114 C.C.C. 117.

[38] P. 28, n. 7.

[39] [1975] 2 W.L.R. 760.

wealth or Empire, had the right to immigrate into the United Kingdom. By virtue of a series of restrictive statutes, and as illustrated by Lord Denning's judgment in *Ex p. Thakur*,[40] this is far from being the case any longer. Anyone possessing formal British nationality must now pay particular attention to the latest manifestations of English immigration law, while anyone residing in the member countries of the European Community may find his freedom of movement radically affected by the provisions of the Treaty of Rome and particularly by the public policy reservation governed by *Van Duyn*. Such persons and their legal advisers will be grateful to Professor Evans of Osgoode Hall Law School for the very short and comparatively uncomplicated account he has provided of Immigration Law in Britain and Europe. Perhaps some time he may do the same for Canada, for what he describes as the basis of immigration control applies equally here as to the areas of his examination: "As with other restrictions imposed by the state upon personal freedom, legal powers that interfere with an individual's freedom to enter or remain in the country raise two issues. First, justification must be found for the substance of the power by striking an acceptable balance between the pursuit of a legitimate state interest and the interest of the individual in his freedom. Secondly, the form of the power should limit the exercise of the protection of legitimate state interests and provide as clear an indication of the scope as practicable; this latter point is closely connected with the questions of procedure and the appropriate means of reviewing its exercise"[41]—a matter which constantly arises in applying or appealing against the application of Canadian immigration law. Be that as it may, this comment with but little amendment could easily have been embodied by Sir Zelman Cowen in his Tagore Lectures on *Individual Liberty and the Law*.

L. C. GREEN*

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Learning the Law. Tenth Edition. By GLANVILLE WILLIAMS. London: Stevens & Sons. 1978. Pp. 209. ($10.60)

Introduction to the Study of Law. By S.M. WADDAMS. Toronto. Carswell Co. Ltd. 1979. Pp. 270. ($7.95)

Many books aimed at the beginning law student come and go, but Professor Williams' slim volume has remained a creditable and constant feature of legal publishers' lists for over a quarter of a century. Distilled from over forty years of experience as a teacher

[40] [1974] 2 W.L.R. 593.

[41] P. 11.

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

and writer,[1] it provides the fresher with a treasure-trove of advice and wisdom which will stand him in good stead throughout his legal career. Of more immediate interest, it provides a discrete and eminently readable source of information and answers to all those nagging questions which the student does not feel sufficiently confident to ask for fear of being prematurely labelled a dull student. Being the tenth edition in thirty-three years, the law teacher can rest assured that in recommending this publication, the material has been selected and written by a proven master of his craft.

Yet, aside from this deserved praise, there lingers a feeling that if this book is to retain its pre-eminent position as a model of relevance and readability, it will have to try just that little bit harder to maintain the high standards it has set for itself. Although the author has been well advised to delete the short section on "Women" which struck an unduly dated note, the up-dating is largely restricted to a few footnotes and points of substantive law in the text. Basically, the alterations are of an entirely cosmetic nature. Based, as it is, on a very traditional process of legal education, there is a real danger, therefore, that, if some sensitive attempt is not made to amend its overall style and approach to meet and reflect the changing face and structure of modern legal education, its sterling qualities of universal appeal and reliability will be seriously undermined. Fortunately, these incipient signs of weakness are unlikely to have as serious consequences as might first be predicted for the potential readership for Professor Waddams has published a monograph that makes good any signs of out-datedness in Glanville Williams' book and stands as a genuine contender, certainly in Canadian terms, to Glanville Williams' previously unchallenged and leading position in the market.

Professor Waddams has put together a book that is thoroughly contemporary in scope and content. Writing in an uncluttered and incisive style that befits his chosen topic, he presents various foundational issues in a balanced and stimulating manner. Always at pains to illustrate and explain concepts, like judicial precedent, by reference to extracts from modern cases, he manages to be decisive without appearing partisan:[2]

> Judicial reasoning is always result orientated. . . . Some law students are distressed to find that judicial reasons generally conceal conclusions. It seems perhaps that the judges are guilty of some kind of fraud. In my own view, result orientated reasoning is inevitable, and indeed desirable. Judges cannot become mere automata drawing in facts and dispensing inevitable conclusions. For the same reason they cannot be replaced by computers. The settlement of human

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[1] See Reshaping the Criminal Law: Essays in Honour of Glanville Williams (1978).

[2] Introduction to the Study of Law (1979), pp. 107-108.

> disputes is a human process, and it is fortunate that it cannot be automated. The fact that the reasoning of judges is open to critical analysis does not imply that their decisions are perverse or arbitrary. It is no easy task to explain a decision, as anyone knows who has tried to do it. Moreover, critical analysis of past decisions is as often a technique of arguing for future development of the law as a genuine assessment of the decision. Criticism of former decisions is essential to the flexibility of the common law.

Furthermore, his treatment of many fundamental, yet potentially volatile matters, such as the role of the judges and public policy, is carried out with confidence and delicacy.

In his introduction to Canadian legal education, he sketches its history and present structure so as to enable the reader to get a feel for the contextual framework in which lawyers are moulded and conditioned. Similarly, in his account of the modern legal profession, he draws a basic picture, while, at the same time, pinpointing those matters that are of a more topical and controversial concern. Also, Professor Waddams has exceeded his modest aim of writing for students beginning or seriously contemplating the study of law and offers sound advice in the chapter on "Analyzing Legal Problems" that bears repeating to those who have long since completed their education. With a sure touch, he takes the reader through the basic analytical skills and techniques that any good lawyer should possess in abundance. Finally, the book contains a number of useful appendices on common latin phrases, abbreviations and law reports.

The legal community has good reason to be grateful to Professors Williams and Waddams for finding the time and energy to publish their monographs. It provides further evidence that Glanville Williams and Stephen Waddams are not only great lawyers but also great men. It is only rarely that figures of their reputation and stature remain so sincerely mindful of the needs and wants of the young student and are willing to make an active contribution to easing and overcoming those harrowing first few months.[3] Although both publications would repay the close attention of any fledgling law student, Professor Waddams' "little book" seems destined, by virtue of its contemporaneity and Canadian flavour, to take over as the recommended text for Canadian students.

ALLAN C. HUTCHINSON*

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[3] Further evidence of such concern is found in the recent publication of Professor Williams' book on criminal law which is specifically aimed at and designed for the first-year law student; see Textbook of Criminal Law (1978).

* Allan C. Hutchinson, of Osgoode Hall Law School, York University, Toronto.

The Legislative Process in Canada: The Need for Reform. Edited by W.A.C. NEILSON and J.W. MACPHERSON. Montreal: Institute for Research on Public Policy. 1978. Pp. xii, 328. (No Price Given)

Even today it is usual for the common law lawyer to be preoccupied with judicial decisions: in his reading he devotes a substantial effort to assimilating cases, headnotes, commentaries and digests; in his preparation he is wary of non-judicial inputs into the legal system such as custom, convention, morality or prerogative (discretion); in his daily practice he tends to see third-party adjudication before the courts as his ultimate recourse in dispute settlement. Most importantly, however, this preoccupation is displayed in a distrust of legislation and the legislative process. While ultimately there may be many explanations (including several good reasons) for such apprehension, it cannot be denied that a simple lack of familiarity with the work of Parliament contributes greatly to the suspicion with which new statutory initiatives are greeted. Shop-worn clichés such as "the meaning of the legislation is not clear yet; we'll have to wait for the courts to construe it" or "statutes in derogation of the common law must be restrictively interpreted" reflect a desire to translate the law-making activity of the legislative branch into a format and medium more compatible with customary modes of analysis (that is case parsing). Thus, it is not surprising that heretofore Canadian common law lawyers, in contrast to their civilian colleagues, have neither been much concerned with the legislative process nor contributed significantly to its assessment or improvement.

The Legislative Process in Canada can be seen in part as an attempt to remedy this absence of participation; fully one-quarter of the contributors to the work are legally trained. This volume, the first of four monographs on the governmental process to be published by the Institute for Research on Public Policy, consists of the edited proceedings of a Conference held at the University of Victoria on March 31st and April 1st, 1978. The format is traditional for books of this type: chapter I is an executive summary (in both English and French); chapters II through IX each consist of a major paper on a specific topic, followed by a comment or comments which address the issue raised by the lead-off essay; chapter X offers a concluding overview which thoughtfully addresses the underlying concerns of the Conference and provides the usual crystal-ball gazing suggestions for the future.

An appreciation of the scope of the volume can be gained simply by a recitation of the various substantive chapter headings: II—The Present State of the Legislative Process in Canada: Myths and Realities; III—Federalism and the Legislative Process in

Canada; IV—Congressional Government—Continuity and Change in the U.S. Legislative Process; V—The Backbencher and the Discharge of Legislative Responsibilities; VI—Lobbying and Interest Group Representation in the Legislative Process; VII—The Influence and Responsibilities of the Media in the Legislative Process; VIII—Procedural Reform in the Legislative Process; IX—Public Policy and Legislative Drafting. Although some of the above chapters are clearly better than others, each major essay and commentaries thereon repays close reading.

While many of the book's sections fall into the category which unsympathetic pedants would label as political science, (that is legally irrelevant social-scientific mush) fundamentally all are addressed to issues with which the Canadian lawyer should have intimate knowledge. This is more obviously the case with chapters on Lobbying and Interest Groups, Procedural Reform, and Legislative Drafting, where conference participants scrutinize many of the mechanics of raising and articulating, formulating and verbalizing, or evaluating and implementing policy through the legislative process. But it is only because of the lawyer's ingrained aversion to anything not emanating from the courts that many topics, including federalism and the legislative process, the role of the backbencher, and the responsibilities of the media are not usually acknowledged as proper legal concerns. For if matters such as the role of the Supreme Court in a federal state, the jurisdiction and function of court officers such as masters or bailiffs, and prohibitions on media reporting of certain trials are of concern to the legal profession, surely their legislative analogues also merit attention from the bar. An understanding of the judicial process in all its aspects historically has been crucial to the lawyer; today the advocate must achieve the same wide-ranging familiarity with the legislative process.

A thorough reading of this volume reveals many themes and sub-themes raised by individual contributors. But much of the Conference appears to have been devoted to examining the implications of a thesis presented in the opening address by Robert Stanfield (chapter II) and developed in the concluding speech by John Mackintosh (chapter X): briefly, this thesis is "to what extent do the perceived shortcomings and outright failings of the legislative process arise because we have adopted inappropriate assumptions about Parliamentary responsibility and modern government?" In other words, Canadians must consider whether they are asking Parliamentary responsible government to operate in conditions and to perform roles that were not anticipated for it. Mr. Stanfield concludes that we face a choice between "all-pervasive government" and "parliamentary responsible government"; if we are to avoid overloading Parliament into inertia, we may either abandon

our concept of responsible government (and adopt some other model) or we may cut back on the size of government and reduce the areas of life into which it projects itself. While agreeing in principle with this diagnosis, Dr. Mackintosh differs in his prescriptions. He suggests that parliamentary control of the legislative process may be resurrected first, by bringing the major policy issues of the day back into the parliamentary arena; secondly, by proselytizing the virtues of representative government, as opposed to direct democracy; and thirdly, by producing a workable limiting definition of the area of competence of Parliament.

Lawyers will immediately recognize this problem and some of these solutions, although they are cast in slightly different language when applied to the judicial process. For example, recent manifestations of court overcrowding reflect the fact that we expect the judicial system to accomplish too much; perennial themes such as the over-judicialization of domestic or voluntary organizations, or the limits of effective legal action, the development of alternate mechanisms of social ordering address this concern. Again, recent investigation of the adversary system and the forms and limits of adjudication parallel research into the modalities of the legislative process. The creation of specialized administrative tribunals and statutory no-fault schemes reflects an effort to deflect a substantial amount of dispute settlement away from courts. Permitting appellate courts to control their workload is analogous to reshaping Parliament so that it deals principally with major policy issues. In the result, it is fascinating and instructive to note how similar are the problems besetting the legislative and judicial processes.

The Legislative Process in Canada seems, at first glance, to be directed mainly to non-lawyers: political scientists, politicians, public administrators and constitutional scholars. Yet this should not deter members of the legal profession from examining carefully its various theses and empirical conclusions, for we may benefit from its analysis on two distinct levels. First, the increased familiarity with and sensitivity to all aspects of the legislative process which it offers is becoming absolutely essential for the Canadian advocate; an appreciation of the dynamics and priorities of Parliament in the creation of legislative instruments is now as significant as understanding the adversary system. Secondly, the insights presented by this volume into several institutional and psychological problems which afflict the legislative process, can be carried over into other areas of daily concern to the practicing lawyer; understanding how those concerned with the legislative process are coping with analogous problems cannot help but produce worthwhile suggestions for overcoming difficulties currently threatening the adjudicative

branch. For both these reasons, the papers reproduced in this book should be compulsory reading for every Canadian lawyer.

R.A. MACDONALD*

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The Abolition of Privy Council Appeals: Judicial Responsibility and "The Law of Australia". By A. R. BLACKSHIELD. Adelaide: Adelaide Law Review. 1978. Pp. 187. ($4.95 Aust.)

The abolition of Privy Council appeals is not a topic which excites a great deal of interest in Canada currently. Since the decision of the Privy Council in *A.-G for Ontario* v. *A.-G. for Canada*,[1] it has been generally accepted that such appeals no longer form part of the Canadian juristic apparatus. Apart from those of us who regret never having been able to take a leisurely sea voyage to London to argue before the Judicial Committee, few Canadian lawyers would have it otherwise. Australia is not so fortunate in this regard; there the issue raises very complex constitutional considerations together with strong nationalist fervour.

The Commonwealth of Australia Act[2] provides that the decisions of the High Court shall be "conclusive and binding". This has long been interpreted to mean that no appeals "as of right" are available from the High Court to the Privy Council. "Prerogative" appeals, with special leave of the Privy Council, are not excluded by the section. No appeal lies to the Privy Council from any federal court other than the High Court. Similarly, the Judiciary Act[3] abolished appeals to the Privy Council from State courts exercising federal jurisdiction. A combination of these provisions led to the possibility of appeals, both prerogative and as of right, directly to the Privy Council from State courts which were not exercising federal jurisdiction. In 1968 the Gorton government introduced the Privy Council (Limitations of Appeals) Act[4] which greatly curtailed the availability of prerogative appeals from the High Court. This legislation was introduced under the authority of section 74 of the Australian Constitution which gives the Commonwealth Parliament jurisdiction to make laws "limiting" the matters in which leave to

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* R.A. Macdonald of the Faculty of Law, McGill University, Montreal.

[1] [1947] A.C. 127.

[2] 1900, 63-64 Vict., c. 12 (U.K.), s. 9, Constitution, s. 73.

[3] (1903-69), Commonwealth Acts 1959, p. 644, No. 134 of the 1968 Act (Aust.), s. 39(2)(a).

[4] No. 36.

appeal from decisions of the High Court may be sought. The validity of this legislation was affirmed by the Privy Council in *Kitano* v. *Commonwealth*.[5] In a bolder move, the Whitlam government introduced the Privy Council (Appeals from the High Court) Act, 1975[6] which abolished prerogative appeals from decisions of the High Court. The Privy Council has not yet passed on this legislation, but in *Viro* v. *R.*,[7] the High Court announced that it no longer regards itself bound by Privy Council decisions, past or future. A few days later, the High Court in *A.G.-Commonwealth* v. *T. & G. Mutual Life Society Ltd.*,[8] granted a declaration that a petition for leave to appeal, which had been filed with the Privy Council, was incompetent. At the same time the 1975 statute was passed, the Whitlam government introduced the Privy Council (Appeals Abolition) Bill, 1975. This would have had the purported effect of abolishing appeals from State courts directly to the Privy Council. The Bill was rejected by the Australian Senate on two different occasions.

Professor Blackshield's monograph is an interesting scholarly exploration of the struggle to abolish Privy Council appeals from Australia. His work is in four parts. In the first major section he deals with the law of Privy Council appeals, past and present. In his second section he goes on to explore the problem of precedent in light of the *Viro* decision. He next explores the possible avenues for complete abolition of Privy Council appeals from Australia, that is, appeals from State courts not exercising a federal jurisdiction. He concludes by advancing the thesis that all such appeals have, in fact, been abolished by the combined effects of the 1968 and 1975 Acts. The book is a valuable contribution to the constitutional law of the Commonwealth. Professor Blackshields has documented his assertions with extensive footnotes, many of which raise interesting points of constitutional history. His central thesis, that appeals have *de facto* been abolished, is carefully argued and well thought out, although not entirely convincing. He offers some very original views on the history and nature of the prerogative. In particular, he argues that the evolution of the Judicial Committee system was a political phenomenon of the eighteenth and nineteenth century which was not in accord with English constitutional convention as it stood in the seventeenth century. The idea is intriguing, but it has not been thoroughly explored, although this is quite understandable given the brevity of the work.

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[5] [1976] A.C. 99.

[6] No. 33.

[7] (1978), 18 A.L.R. 257.

[8] (1978), 19 A.L.R. 385.

My major criticism of the work would be the manifest nationalist bias of the author. This leads Professor Blackshields into arguing what, to this reviewer, would seem extravagant positions, for instance, that the Judicial Committee should consider itself bound by the decisions of the High Court. This type of argument is interesting in light of one passage where the author writes of:[9]

> . . . the central truth that, where Privy Council appeals are concerned, legal analysis is inexorably (and inevitably) made subordinate to the imperatives of political dependence or independence.

On that point I am afraid that I must differ with the author. The remark contains a great deal of truth, but it conceals the fact that unless constitutional scholarship remains detached from political issues it runs the risk of lapsing into rhetoric.

This monograph will prove worthwhile reading for any lawyer or student of the law interested in exploring the peculiar nature of that constitutional convention known as prerogative.

WILLIAM I. INNES*

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[9] P. 10.

* William I. Innes, of the Ontario Bar, Toronto.