Book Reviews

Chronique bibliographique

Torts: Cases and Commentary. By H. LUNTZ, A.D. HAMBLY AND R. HAYES. Melbourne: Butterworths Pty. Ltd. 1980. Pp. xxxii, 1158. (No Price Given)

The dusky orange cover of *Torts: Cases and Commentaries* is a dead give away as to the inspiration for this Australian tort casebook which is self-admittedly and self-consciously modelled on Hepple and Matthews' excellent English tort casebook, *Tort: Cases and Materials*.[1] Self-conscious also is the casebook's attempt to present tort law with a distinctively Australian flavour, and as well, to focus the presentation of modern tort law around the problems of accident compensation.

A comparison of the table of contents with that of Hepple and Matthews alone indicates that the editors have adopted negligence issues as their centrepiece. Parts I and II dealing with personal injury and property damage, and economic loss comprise some 700 pages alone. The sequence of other topics is also virtually identical to that in Hepple and Matthews. Both contrast with Wright and Linden's more traditional introduction of the subject via the intentional torts of interference with persons and property.[2] Absent are chapters devoted specifically to economic torts and products liability. In contrast, however, to Hepple and Matthews in which the final chapter is devoted to the accident compensation alternative, the introductory chapter in Luntz, Hambly and Hayes deals with the issue and thereby sets the tone for the remainder of the text, as if the confession in the Preface that Professor Atiyah's work, "has provided us with a shining beacon towards which we should bend our steps",[3] did not already alert the reader to the book's orientation.

This is an excellent casebook and may be most favourably compared in every way with Hepple and Matthews, and Wright and

[1] London: Butterworths (2nd. ed., 1981).

[2] Toronto: Butterworths (7th ed., 1980).

[3] P. v.

Linden. Each chapter is introduced by well-written and thoughtful analyses of the law gathered from the selected cases, and extremely well-researched, provocative and information-laden glossalalia are interspersed throughout. The commentary is stuffed with references to a wide variety of legal and related resources, both Commonwealth and American. It is not unusual to find in a single note references to leading articles, books and cases in American, Canadian, English and occasionally European materials, as well as Australian and New Zealand references. This casebook is a bibliographic goldmine.

The cases reproduced are a balanced selection of English and Australian decisions with occasionally other national decisions provided where relevant. Although individual case selection is inevitably a personal matter, and one might have preferred to substitute other cases for those presented, on the whole the selection is excellent, and makes the text a valuable teaching tool.

Finally, the physical format of the book also demands favourable comment. The paragraph enumeration technique could well be copied in other legal casebooks generally. The use of headings, indentation, majuscules and different points of type where appropriate could also be fruitfully copied. As well, the book is well bound and suitable for desk use without the sacrifice of one or both hands to keep it open. Lucky is the modern tort scholar to have at his disposal the triumvirate of Hepple and Matthews, Wright and Linden and now, Luntz, Hambly and Hayes!

M.H. OGILVIE*

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Economic Special-Opportunity. Conduct and Crime. By PAWEL HOROSZOWSKE. Lexington, Mass.: Lexington Books. Toronto: D.C. Heath & Co. 1980. Pp. cii, 207. ($27.95)

The author has written an interesting and thought-provoking work on the concept of white collar crime.

After dealing with general juridical questions, he quickly focuses on a major question in white collar crime, which is whether a collective body such as a corporation is capable of committing a crime.

He then invents a new word termed ESOC, or economic special opportunity conduct crime, which is the book's title.

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An ESOC crime is one which is criminal, has an economic motive, is non-violent, and takes advantage of a convenient situation. It is an abuse of trust and entails small risk. It is undertaken basically for personal, immediate or future material gain and usually involves the victimization of a large number of people. In short, an ESOC crime is an economic non-violent infraction of law carried out by taking advantage of some conditions especially favourable for acting according to the criminal intent, and for avoiding penal responsibility.

After dealing with definitions and concepts in Part I, the reader moves into Part II, which deals with ESOC problems in societal interactions, using public figures as behavioural models.

The author notes that using the great advantage of high governmental position is not new. Particular chapters deal with the position and failings of the president of the United States, the position and failings of Congress and the problems in state and local government.

Of interest is the concept that the higher the number of urban dwellers, the better are the conditions for all kinds of ESOC activities.

The author writes:[1]

> This dependency of the population upon the decisions of officials has created many opportunities and temptations to use power for different personal purposes.

The fallacy of human nature, and how ESOC crimes develop is demonstrated in the statement:[2]

> Expressing gratitude for a positive attitude is a characteristic common to all human interactions. This attitude is demonstrated by giving a cash tip, a small gift, or doing a favour for the governmental agent. And it is only a short distance from expressing gratitude to influencing by more money, more expensive gifts and costlier favours, a positive treatment, even before the decision has been made.

The reader, learns how ESOC has manifested itself by corruption in the administration of justice and the fallacies to be found therein. Of particular interest is the chapter on Churches and Charities. The author notes that the most successful religious organizations released in some countries completely from taxes have great fortunes. Attempting to bring into focus the inherent dangers of the religious related cults, he states:[3]

> The apparent intellectual blindness of countless members of a huge variety of cults is often so great that sometimes it is almost like induced insanity. Mass psychosis and mass hysteria occurring when entire groups of people take over, occasionally, the [religious] delusional ideas of a single person.

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[1] P. 123.

[2] *Ibid.*

[3] P. 144.

This statement is not only a truism in today's society, but a warning of the dangers of mass media.

The reader is reminded that a further human weakness is the people's readiness to support any kind of organization pretending to raise funds for charity which opens the way to deceitful business methods. An example of human cupidity is the story of the enterprise which called itself a "Blind Shop", and sold concert tickets, raising a good sum supposedly for the benefit of blinds. It turned out the shop was selling venetian blinds!

Part II concludes with a chapter dealing with business and common life situations bringing the reader into the realities of day to day life.

In Part III, the reader learns about ESOC and the application of its concept to non-capitalistic systems.

There is an interesting comment that another phenomenon of ESOC is that property crimes play a role in stimulating economic life in a country. The reader, wondering how this can be, is informed: from the point of view of economics, it is much more profitable when money is moving fast and not being stored, but being brought into circulation. The property criminals bring accumulated expensive objects into trade and are very often big spenders.

In all, the book is not only of interest, but to some extent presents a frightening condemnation of today's society in its toleration of wrongful actions which lead to continued ESOC. While of little direct use to the practitioner, those who read the book will certainly have a greater appreciation of some of the pressing problems which evolve in our fast changing and growing bureaucratic society.

ERIC L. TEED*

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Crime and Punishment in Revolutionary Paris. By ANTOINETTE WILLS. Westport, Connecticut: Greenwood Press. 1981. Pp. xxi, 227. ($32.50)

Crime and Punishment in Revolutionary Paris is a potent scholarly antidote to the literary depiction by nineteenth century English novelists of the criminal justice system during the French Revolution, as one evoking Dickensian self-sacrifice and the snatching of necks from

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Madame Guillotine in the nick of time by mysterious Scarlet Pimpernels. In fact, this book is a fascinating and important contribution to our understanding of the reforms of the French criminal justice system in the early years of the Revolution and also to the masochistic art of writing good legal history. Using archival resources not previously studied, the author sets for herself the ambitious task of examining the *philosophes'* critique of the barbaric criminal justice machine of the *ancien régime*; the transformation of theory into legislation in the earliest legal reforms of the Revolution; how the reforms were effected in the new criminal courts and how they were perceived by their victims. Given the slenderness of the volume and the youthfulness of the author it is understandable that she does not fully succeed, but that she has come close to so doing by writing a valuable book is in itself an achievement, especially when one remembers the difficulties created by the nature of her primary sources and the paucity of good exemplars on which a keen young legal historian can meditate.

Unlike the legal historian of the *ancien régime* who is overblessed with court records, his counterpart for the Revolutionary period was rendered virtually recordless after the destruction by fire in 1871 of most of the records of the Parisian criminal courts which functioned during the Revolution. However, there was one exceptional survivor, the complete records of the six provisional criminal courts established in Paris in March 1791 to handle the backlog of cases after the abolition of the Châtelet and the Parlement of Paris. These courts processed criminal cases until August 1792 and it is these records which form the primary source for the book. They are contained in 116 cartons which have reposed in the Archives Nationales (series Z, Tribunal Criminel des Dix, et Tribunaux Criminels Provisoires), misfiled, and unused until Professor Wills' study. The documents are badly organized; judgments are filed separately from the dossiers to which they refer, the cases are unnumbered and the only known index, drawn up in 1859 and lost until recently, simply listed the contents of each carton, and was therefore of little value. The cases of 1,620 accused persons are contained in the cartons.

In addition to the difficulties associated with the organization of the primary sources, the author was faced with the decision as to the appropriate historical technique to use in analysing and presenting the material: should she opt for the idiosyncratic and vividly impressionistic style of Richard Cobb[1] or the statistical and quantitative methods presently in vogue, especially in France?[2] The incomplete

[1] The Police and the People: French Popular Protest 1789-1820 (London, 1970), and Reactions to the French Revolution (London, 1972).

[2] Porphyre Petrovitch, Recherches sur la criminalité à Paris dans la seconde moitié du XVIIIe siècle, in André Abbiateci, crimes et criminalité en France 17e-18e Siècle,

and unsatisfactory nature of the information recorded by court clerks untrained in modern criminological statistical techniques makes a purely quantitative approach difficult[3] and the author has opted for a blend of both techniques which appears to have been the correct solution.

The five chapters in the book can be subdivided into three groups. Chapters one and two, which examine the critique of the eighteenth century criminal justice system by the *philosophes* and the criminal legislation of the early Revolution, provide the jurisprudential underpinning. Chapters three and four provide the quantitative core of the study, analysing the patterns of crime and criminality apparent in the 1,620 cases brought in the Parisian provisional criminal courts. Chapter five attempts a history of *mentalités* by reproducing the pathetic yet often vicious tales told the courts by the accused so as to provide a fascinating glimpse of the lives of those who lived *en marge* and inevitably came into conflict with the law.

In the first chapter Professor Wills examines the views of Montesquieu, Beccaria, Brissot, Madelaine and other *philosophes* on the causes of crime and the penological reforms which they would make. Murat summed up their starting point simply, "Crime is the result of poverty, misery and unhappiness".[4] Unlike earlier ages, the eighteenth century Enlightenment regarded the causes of crime to lie in the defects of social institutions rather than to result from the defects, especially original sin, of the individual criminals. Eradicate the corruption and lack of good morals demonstrated by the ruling classes of the *ancien régime*, restore public virtue and provide honest, meaningful work for the poor and the widespread criminal activities characteristic of the lower classes would all but disappear. It was no mere coincidence that criminal reform began on the night of August 4th, 1789 when the National Assembly first met to sweep away the most blatant abuses of the old system. The correlative to the *philosophes'* criminology was their penology which focused on the necessity for restoring the damage done to the individual by society and rehabilitating him into society. If eighteenth century society was a school for crime then punishment should be a school for virtue. The

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Cahiers des Annales, No 33 (Paris, 1971); and François Billacois, Pour une enquête sur la criminalité dans la France d'Ancien Régime, Annales, E.S.C. 22 (March-April, 1967), at pp. 340-349.

[3] For the difficulties in using historical criminal records see J. M. Beattie, Toward a Study of Crime in Eighteenth Century England: A Note on Indictments, in The Triumph of Culture: 18th Century Perspectives, ed. by Paul Fritz and David Williams (Toronto, 1972), pp. 299-314.

[4] Plan de législation criminelle (Paris, 1790), p. 5.

new Penal Code enacted in September-October 1791 after the familiar process of law reform reports, commissions, and debates reflected the *philosophes'* proposals for reform: the abolition of the myriad private jurisdictions and seigneurial courts, of torture as a means of attaining confessions, and the abolition of the death penalty and forced labour as punishments. The enormous judicial discretion of the Criminal Ordinance of 1670 was replaced by fixed and precise definitions of crimes and penalties and the prison sentence was instituted—the perfect penalty for a society founded on *Liberté*!

The opportunity presented to eighteenth century criminal law theorists to enact legislation to reflect their principles is a rare one and so its study by legal historians is potentially significant. Professor Wills' analysis of both the theory and the legislation could perhaps have been more detailed. The *philosophes* are presented as a uniform group of thinkers, and the inconsistencies between them as well as the ambiguities within individual theories is not explored as fully as one might have wished. In particular greater exploration of the apparent contradiction between the Rousseauesque view of natural man turned criminal and the surprisingly harsh penalities prescribed for some crimes suggests that society alone was not the sole cause of criminal activity but perhaps indeed some vicious defect within the individual. More detailed discussion of the contents of the Penal Code itself would have been useful together with the records of the Châtelet so that one could have got a clearer idea of how definitions of specific crimes had changed as well as the penalties prescribed for them. The somewhat superficial analysis of the Penal Code in chapter two suggests that the historian got the better of the lawyer.

Chapters three and four comprise the statistical core of the book and are based on the records of the six provisional criminal courts. Given the nature of these "criminal statistics" Professor Wills is to be congratulated on the many detailed conclusions which she has been able to surmise from their analysis. In chapter four she is able to draw a persuasive portrait of "the criminal" most likely to appear before the courts and to surmise quite accurately his victims as well as to map the geography of criminal activity in Paris in 1791-1792. Her conclusions here suggest that the *philosophes* were not entirely correct in their perception of the nature of crime: the typical criminals were young, unattached males, often provincials attracted to Paris, and marginally employed as errand boys, messengers or street vendors. Less than twenty per cent were unemployed at the time of arrest and seemed to regard petty thefts from shopowners, street vendors and lodging house keepers as a way of life. The complete overlap of the *classes dangereuses* and *classes laborieuses* so characteristic of nineteenth century French perceptions of crime, found little statistical

support during the Revolutionary times when one would have expected the overlap to have been most blatant.[5]

In addition to typing the criminal, Professor Wills in chapter three compares patterns of criminality in 1791-1792 with those of the *ancien régime*. She presents a number of interesting tables and makes a strong case for the increased criminal activity during those troubled years, as well as a change in the pattern of criminal behaviour to show a large increase in theft, violent crimes and crimes of fraud, such as counterfeiting money and forging legal papers. How significant these apparent increases are seems uncertain. The National Guard supplemented by citizen and section patrols were surely more efficient than the pre-Revolutionary police. Crimes of fraud could be expected to increase after the introduction of the assignats in August 1790 and with the abolition of feudalism freeing thousands from the land lacking proper legal identification. The influx of peasants to Paris is also likely to be reflected in the increased theft and violent crimes, mostly street-fighting and tavern brawls. Murder remained rare.

If the changing patterns of criminality reflected the social disruptions caused by the Revolution almost exclusively, the sentencing patterns discernible in the records of the provisional criminal courts seem more significant. Once the Penal Code came into effect in January 1792 the acquittal rate rose appreciably higher than that under the previous dispensation. However, at the same time, once the judges were convinced of the accused's guilt the penalties prescribed were much harsher than under the *ancien régime*. Whether these sentences were for punitive or rehabilitative purposes is difficult to discern. How interesting a conclusion on this would have been given the philosophical underpinnings of the criminal law reforms.

The final chapter in which a number of case histories are recounted in order to demonstrate how the accused perceived the changing criminal justice system is the least successful. Obviously, the challenge of writing a synthetic and persuasive account of these perceptions is difficult given the nature of trial evidence which rarely aims at getting a criminal's critique of the system. Professor Wills groups several trial accounts under various headings such as violence and murder, drunkenness, the police and so on to demonstrate attitudes to such issues. This attempt at impressionistic history adds little to the other four chapters in the absence of detailed analysis by the writer most familiar with the sources, no matter how touching and pathetic the individual stories are.

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[5] The pioneering work is, of course, Louis Chevalier, Classes laborieuses et classes dangereuses (Paris, 1958).

In September 1792 the Austrian army advanced on Paris and the mobs attacked the prisons with the purpose of murdering aristocratic collaborators with the Austrians. They went berserk and massacred virtually all of the prisoners. Criminal law reform together with the middle class stage of the Revolution was replaced by the Reign of Terror. It is difficult to assess, then, the significance of the first attempt to put criminological theory into practice in 1791-1792 and Professor Wills wisely refrains from an attempt at so doing. The vision, in her view, was more important. Criminology as an application of the forces making men criminals and penology as a scientific search for criminal rehabilitation had made their first appearance in a criminal code.

Crime and Punishment in Revolutionary Paris is well researched, well written and thoughtful. But it could be classified as legal history only if that phrase is broadly defined as a focal point for intellectual, social and political history as Professor Wills indeed so defines it. The use of criminal records as a foundation for social history is perfectly valid but to succeed in that demanding task of satisfying the lawyer as well as the historian greater attention to the details of the criminal law and procedure of eighteenth century France is required. Also useful would have been a final chapter assessing what the statistical findings revealed about the reforms in practice in the light of their jurisprudential foundations. Did the *philosophes'* theories improve the nature of criminal justice meted out to the poor or not? The dialectic between theory and practice might have been more fully explored.

Good legal history requires not just enormous energy, and perhaps a good measure of foolhardiness, it also requires a sense of the intimate balance to be struck between two disciplines. Professor Wills has not achieved that balance but has come quite close. At any rate, she has painted a precious miniature depicting that fleeing moment in 1791-1792 when theory was transformed into law and law into social regulation.

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Canada Labour Relations Board, Administrative Law Series Study Paper. Law Reform Commision of Canada. By STEPHEN KELEHER. Ottawa: Minister of Supply and Services Canada. 1980. Pp. VII, 106. (No Price Given)

This study paper deals solely with the Canada Labour Relations Board but the dissertations in many instances are equally applicable to provincial Labour Boards. In this aspect it is worth study by all who practice labour-management relations. The recommendations principally deal with administrative functions and policy which do not require legislation. However, there are several fundamental concepts which merit a practitioner's attention.

The recommendation that the Board's composition be changed to provide for equal representation from management and labour instead of the present non-representative organization is not supported by the arguments advanced.

While the study will have some value to the practitioner, it would also appear to have greater value as an explanatory text for persons becoming involved in labour law.

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International Law in the Netherlands. Edited by H.F. VAN PANHUYS and Others. Vol. III. Alphen aan den Rijn: Sijthoff & Noordhoff; Dobbs Ferry:Oceana. 1980. Pp. xxix, 469. ($37.50)

When the decision was made by the T.M.C. Asser Institute at The Hague to bring out a compendium on *International Law in The Netherlands,* it was considered advisable not to produce a Digest, but to collect together a number of essays dealing with the Netherlands approach to specific international law topics. The third (final) volume of this work has now been published and it deals with such issues as the status of persons—three essays on nationality, aliens and fundamental human rights originally guaranteed by the Constitution of 1814, although these provisions are now subject to the overriding authority of the European convention on Human Rights,[1] while the two in-

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[1] P. 114.

ternational covenants on human rights have produced proposals for radical amendment of the Constitution;[2] self-determination—the authors of the essay describe The Netherlands as a colonial power which was a champion of this right, while recognizing that the period leading to Indonesian independence may not quite match this description,[3] and there are some who would say that the Dutch treatment of the South Moluccans equally casts doubt on the role of this champion;[4] economic law with particular reference to the protection of foreign investments; privileges and immunities of diplomats and international officials, with an interesting comment on the interrelationship of these rights with the fundamental right to demonstrate;[5] war and neutrality comprising two papers, one on the law of prize and neutrality and the other on humanitarian law in armed conflicts, with a full account of the Dutch role in preparing the 1977 Protocols on the matter, with a useful disquisition of the position concerning the Red Shield of David as a non-protected emblem;[6] and finally an interesting paper on the interrelationship between Dutch municipal and international law.

Taken with the two earlier issues, while we may still lack the type of Digest that has come from the United States or Italy or France, and has been partly prepared for the United Kingdom, these volumes on *International Law in The Netherlands,* while not giving us so much of the background material, do tell us what The Netherlands' view of international law is at the present moment.

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[2] P. 119.

[3] Pp. 157-170.

[4] Pp. 171-176.

[5] Pp. 283-285.

[6] Pp. 320-322.

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