The Law of Criminal Attempt. By Eugene Meehan. Calgary: Carswell Legal Publications. 1984. Pp. xlvii, 295. ($58.00)

It is not a coincidence that criminal law writers have of late devoted much attention to the problems of attempt.[1] In the past decade we have seen a striking renewal of interest in theories of criminal liability, and attempts present some of the classic theoretical problems in the criminal law. The law of attempt "determines the borderline between innocence and guilt, between freedom and incarceration".[2] Should attempt be criminal? How should attempt be defined? How should it be punished? The persistence of these questions is testimony to their theoretical importance and to their difficulty.

Dr. Meehan has provided us with a meticulously researched and comprehensive study of the law of attempt. Following brief introductory chapters he reviews two major approaches to the problem: that of the objectivists with its emphasis on actual or potential harm, and the subjectivist approach which emphasizes the actor's intention. He also reviews theories of punishment and concludes that punishing attempts is consistent with the purposes of criminal law. Indeed "[t]he law of attempt is necessary to construct and maintain the equilibrium between individual freedom and protection of society".[3] He takes the pragmatic position that no single approach or theory of punishment furnishes the rationale either for the existence of the crime or its definition, and thus avoids committing himself to a precise view of the harm presented by criminal attempts. Those who pursue their own interests to the detriment of others and who risk injuring an interest protected by law merit its sanctions on the *several* rationales discussed to prevent the complete crime and to punish what already has been done. As for conduct sufficient to constitute an

[1] Attempt is a major concern of Hyman Gross, A Theory of Criminal Justice (1979) and of George Fletcher, Rethinking Criminal Law (1978). It also receives substantial treatment by Don Stuart in Canadian Criminal Law (1982), and is the subject of a number of recent articles.

[2] P. 5.

[3] P. 32.

attempt, in general it is conduct that a lay person would regard as an attempt to commit an offence.

Of course Dr. Meehan would be among the first to recognize that observations such as these beg questions as to when injury is *in fact* risked by one said to have attempted crime, or just what it is that a lay person would regard as an attempt. It is in his discussion of the definition of attempt that we discover his approach to these problems. For Dr. Meehan an attempt should be said to have taken place when there has been a substantial step toward the commission of the crime where the defendant either intentionally tried to commit the crime or was reckless as to the high likelihood of bringing it about.[4] Let us consider each of these elements separately.

The mental element of attempt is a complex subject. In part it is difficult for reasons that are not peculiar to attempt—disagreements about the basic principles said to be expressed by the "guilty mind" concept[5] and, consequently, about the meaning of basic terms such as purpose, intent and recklessness. As well, the meaning of attempt (and therefore its appropriate mental element) is itself controversial. Dr. Meehan thinks that the issue is unnecessarily complex. What is wrong, in his view, is that attempt is treated differently from other crimes with respect to the required state of mind. The *mens rea* of attempt is the specific intent to commit the crime—even if a state of mind falling short of intent is required for the completed crime. "It is anomalous", the author writes, "that a more culpable state of mind is required for attempt than for the full offence".[6]

But where is the anomaly? Dr. Meehan's example is murder, a crime that is complete only upon the occurrence of death. He argues that an actor should be liable for attempted murder where, had death resulted, he would have been liable for murder. Of course, as Dr. Meehan concedes, the anomaly may lie with the fact that an unintentional killing can be murder, in other words may lie with the definition of murder. What he resists, however, is the idea that the (arguably) sound reasons for treating some unintentional killings as murder do not extend to enable us to say that an attempt to murder has taken place if death did not in fact occur.[7] Consequences, even entirely fortuitous ones, matter greatly in the criminal law. With attempt, as with other crimes, we have to identify the harm that invites a criminal sanction. And with attempt the harm that is identi-

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[4] Pp. 76-77, 126-134, 145-146.

[5] Don Stuart, *op. cit.*, footnote 1, p. 113.

[6] P. 44.

[7] He is, therefore, uncomfortable about the Supreme Court decision in *R.* v. *Ancio*, [1984] 1 S.C.R. 225, (1984), 6 D.L.R. (4th) 577, 39 C.R. (3d) 1, holding that the *mens rea* for attempted murder is a specific intent to kill; see pp. 48-49.

[8] *R.* v. *Ancio*, *ibid.*

fied is closely associated with the crime conceived as one of purpose or specific intent.[8]

In any event, what Dr. Meehan says should be the *mens rea* of attempt may even now be the *mens rea* of attempt. In ruling that the crime is one of specific intent, the Supreme Court in *R. v. Ancio*[9] did not put to rest all argument about the mental element. We have never been clear about precisely what is meant by the identification of intent as "specific".[10] And the legal definition of the word intent itself compromises the distinction between intention and recklessness. In *R.* v. *Buzzanga and Durocher*[11] the Ontario Court of Appeal concluded that consequences are intended when they are foreseen as certain or substantially certain to occur. Although a distinction was made between forseeing consequences as "substantially" certain to occur and foreseeing them only as "probable", the distinction is illusory. In human affairs the foresight of consequences always belongs to the realm of probabilities. By "substantially certain" we can only mean "highly probable" and probabilities are part of what recklessness is all about as well. And so when Dr. Meehan urges that a high degree of recklessness should be a sufficient mental element for attempt he may be closer to reality than he recognizes. The legal definition of intent means that liability for at least some reckless attempts is inevitable.

An attempt is more than just an intention but how much more has always been controversial. In Chapter 5, The Factual Requirement—Actus Reus, Dr. Meehan provides a comprehensive review of tests that represent competing approaches to the identification of conduct sufficient to constitute the *actus reus* of attempt. The proximity theory, in its various forms, "is vague, nebulous and indeed unintelligible to a jury".[12] First stage theories are open to the same criticism and, additionally, in practice they "reduce the *actus reus* to virtually zero".[13] The "commencement of execution" test "is vague, begs the question under consideration, and is often difficult to apply to a factual situation".[14] "Last act" and "penultimate act" tests are not as simple as at first they appear to be and, in any event, are unduly restrictive. Intervention and desistance theories are also inappropriately restrictive and are inherently uncertain. Dangerousness and equivocality tests, used by themselves, are seriously flawed.

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[9] *Ibid.*

[10] See, for example, the opinion of Dickson J. in *Leary* v. *The Queen*, [1978] 1 S.C.R. 29, (1977), 74 D.L.R. (3d) 103. See also Stuart, *op. cit.*, footnote 1, p. 143; Glanville Williams, Textbook of Criminal Law (1978), p. 430.

[11] (1979), 101 D.L.R. (3d) 488, 25 O.R. (2d) 705 (Ont. C.A.).

[12] P. 93.

[13] P. 99.

[14] Pp. 102-103.

The identification of a sufficient *actus reus* depends on one's theory of the harm presented by criminal attempts. Arguments range from first stage theories, to the application, in this context, of the theory of manifest criminality propounded by Professor Fletcher.[15] The "substantial step" test preferred by Dr. Meehan is as good as any and better than most. But the selection of a test that adequately expresses a defensible theory of harm is only one of the major problems in this area. Whatever test is adopted must be relatively easy to apply so that results are reasonably predictable and consistent. Professor Fletcher's most telling criticism of the subjectivist approach to attempt was that this could not be done. His criticism can be answered by pointing to Canadian law that reserves to the judge the duy of deciding whether the proved facts amount to an attempt.[16] Dr. Meehan expresses preference for the English alternative that sees this question put to the jury, along with the question whether the facts have been proved beyond a reasonable doubt. But in this context, at least, we should not defer to his view that a jury "should decide if certain conduct amounts to a crime or not, rather than being relegated to deciding merely whether the facts were proved . . . ".[17]

There is at work in attempt theory the rather curious idea that there should not be liability for an attempt unless at the material time the actor had a sporting chance of success. He did not succeed, of course, but it is important to some that he *might* have. The idea is expressed in the doctrine of impossibility and is introduced to generations of law students through real or hypothetical examples which feature efforts to pick empty pockets; shooting at tree stumps which are mistaken for intended victims; trying to kill through voodoo; or trying to perform abortions on women who are not in fact pregnant. The importance that is attached to impossibility depends on the theory of harm represented by a criminal attempt. If the harm is seen to lie only to the risk that an attempt might be successful, impossibility is an appealing defence. And if our concern is with the dangerous people that set out upon criminal endeavours, we must concede that some attemptors are not dangerous. For example, we are not terribly worried by the voodooist provided that he stubbornly persists with voodoo and does not try poison.

Dr. Meehan provides us with an excellent review of many of the hotly debated examples of impossibility. This approach is necessary because the division of impossibility into various categories—such as "legal" and "factual" impossibility—is not particularly helpful. "[I]t is extremely difficult to draw unanimously supported principles from cases dealing with impossibility, and, although at first appearing as a mosaic, lines will

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[15] Fletcher, *op. cit.*, footnote 1.

[16] *The Queen* v. *Carey*, [1957] S.C.R. 266.

[17] P. 86.

dim and blend into each other''.[18] Dr. Meehan emphasizes the importance of not punishing attempts to commit what is not in law an offence. Like most commentators, however, he does not otherwise attribute much importance to impossibility. ''The impossibility should be taken into account, together with all the other facts and circumstances of the case, to determine if subjectively, that particular individual should be deterred, and to determine objectively if society should be protected from that type of activity''.[19]

By this point in the book one is not surprised to find also that Dr. Meehan would not recognize a defence of abandonment. He is more ambivalent about this subject than he is about impossibility, for he finds that arguments for or against the defence to be ''relatively evenly balanced''.[20] But he is now to be placed firmly in the camp of the subjectivists, whether or not that was his chosen destination. And subjectivists concede the possible significance of abandonment, in determining whether or not the mental element was present and as a mitigating factor in sentencing. Beyond that they are not prepared to go.

This is a book that is well worth reading. It is not a daring or novel approach to the problem of attempt but is, as the title indicates, a treatise that deals admirably both with the difficult theoretical questions and with the evidential and procedural problems of attempt. The book is a fine addition to Carswell's Criminal Law Series.

PETER MACKINNON*

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Working Manual of Criminal Law. BY JANET A. PROWSE. Calgary: Carswell Legal Publications. 1984. Pp. lxviii, 463. ($65.00)

Criminal Lawyers Commonplace Book. BY PAUL RICHARD MEYERS. Vancouver: Butterworths & Company. 1980, updated 1984. Looseleaf. ($85.00 filed to date, one service issue per year approximately $50.00)

Until recently, purchasing books on Canadian Criminal Law was a simple matter of purchasing the few that were available. But, with the rapid

[18] P. 153.

[19] P. 210.

[20] P. 227.

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growth of publications in the criminal law field, this task has become increasingly difficult unless, of course, one's book budget is unlimited. Compounding this is the growing phenomenon of publishing books in expandable binders, which commits the buyer to the ongoing expense of updating them. Readers acquiring these types of material must therefore be careful in making their choice: *caveat lector*.

Janet Prowse's Working Manual of Criminal Law and Paul Meyer's Criminal Lawyers Commonplace Book illustrate the difficulty of selecting between texts which have a similar content and format. As the titles suggest, these books, both in looseleaf binders, are designed to be ready in-court reference materials for the criminal lawyer. In fact they both have the appearance of the kind of precedents book all practitioners have been meaning to start the next time there is a lull in the office. These manuals are thus aimed at those busy souls who are still awaiting the lull.

As acknowledged by the authors, neither of these works is intended to be academic, nor to be a critical analysis of issues in criminal law; rather, both authors aim at providing the criminal law practitioner with a source for quick and easy reference on issues which commonly arise in day-to-day criminal trials. The success of such manuals will usually depend, to a large extent, on the breadth, rather than the depth of the topics covered. Therefore, it becomes incumbent on the author, first, to carefully select topics that are most often dealt with, and second, to organize these topics so that the material is easily and quickly accessible. To reduce the most common criminal law issues into one looseleaf binder becomes an exercise fraught with the dilemmas of what and how much to include, and how, for reasons of economy of space, to present it. In attempting this exercise, Prowse has succeeded, but Meyers has unfortunately fallen short.

Janet Prowse's Working Manual of Criminal Law was originally produced as an in-house publication for the Ministry of the Attorney General of British Columbia. From its humble beginning it has grown into a very useful and helpful reference source, especially for criminal law practitioners just starting out. The binder is divided into five main sections: Defences, Evidence, Procedure, Sentencing and Substantive Offences. Each section is, in turn, subdivided into subsections of a more specific nature, creating a well organized and logical sequence. In addition to a full table of contents, a useful and comprehensive index is provided, making the many topics and the over 800 cited cases easily accessible.

For the most part, Prowse's style consists of short, simple statements of law followed by case citations as authority. In areas of law which are not wholly settled, a note or comment on the case or point of law is provided to assist the reader, although for reasons of space, these are very brief.

Prowse has tried to cover a large number of topics while still striving for brevity, but at times there appears to be a false economy in the selection of these topics. For instance, one wonders why the section dealing with Defences contains such specialized topics as insanity and automatism, as both are most unlikely to arise in the ordinary course of a criminal prosecution, and even when such defences do arise, preparation would, no doubt, far exceed what a quick reference manual is able to provide. Similarly, the substantive offences section contains about eighteen pages on impaired-related driving offences, and seven pages of Narcotics Control Act[1] offences, which is like trying to condense the Wigmore tomes on evidence to Reader's Digest size. Such topics are better left to other specialized manuals or texts.

Meyer's Criminal Lawyers Commonplace Book is designed strictly from a defence point of view and is limited both in breadth and depth. Initially published in 1980, no new additions were added to the looseleaf format until early 1984, when it underwent its first major update and at the same time was given a new standardized Butterworth binder. The publisher now promises to provide updates every six months.

Meyers has divided his manual into fifteen separate, and at times confusing and poorly organized sections. Ten sections deal with evidence ranging from a very general heading such as "Evidence" to the very specific "Cross examination of Crown witnesses based on prior inconsistent statements". A more logical and useful format would have been to start from the general and move to the specific within each major topic area. Procedure is given four sections and Sentencing is dealt with in one. In general, Meyers' selection of topics appears to be of the random nature that one would expect from a partially completed precedents book.

The lack of an index compounds the poor organization, making it very difficult to locate a desired topic. The user must be fully conversant with the table of contents for effective access, which in itself is fatal to a text designed to be a daily in-court reference manual.

Although the final page is numbered as 463, the Meyers text is, in fact, appreciably shorter. Only about sixty pages are given over to useful text in a style which is slightly more discursive than Prowse's work while using the same basic format of short statements of law with a supporting case authority. A further approximately 160 pages consists of short case briefs, akin to headnotes, of the authorities cited in the text. This format greatly reduces the amount of useful textual material while creating unnecessary bulk. Meyers refers to about 170 cases, relying heavily on western Canadian authority, in comparison to Prowse's approximately 880. The Meyers text is not one that would serve as a useful companion to the

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[1] R.S.C. 1970, c.N-1.

[2] (1983).

criminal lawyer in the same way as do Martin's Criminal Code[2] and McWilliams' Canadian Criminal Evidence.[3]

On the whole therefore, Prowse's manual is by far the better organized, more comprehensive and decidedly more useful of the two. But over reliance on either may be a danger. Manuals such as these must be used sparingly and with caution, for by their very nature they omit much that is of importance and they temptingly offer the kind of short cuts lawyers are warned against in law school. Although we may not have heeded the advice, we no doubt all recall being admonished not to rely merely on headnotes for our legal knowledge.

NILS B. JENSEN*

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Victims Before the Law: The Organizational Domination of Criminal Law. BY JOHN HAGAN. Toronto: Butterworths. 1983. Pp. 320. ($40.00)

This book, part of the publisher's Criminology Series, represents a significant, and for the most part, successful effort to provide information on and insight into the relationship of victims to the criminal justice system. Hagan carefully explores victims' involvement in, influence on and perceptions of the processes which follow a person being charged with a crime. The results of his study should disturb the easy preconceptions of many of us who participate professionally as judges, Crown or defence counsel, or who attempt to observe and dissect as legal scholars. In my view, the work may have been significantly improved had the author chosen to sharpen his theoretical foundations and extrapolate further on the policy/political front, on the basis of his impressive array of data. On the other hand, Hagan did fulfill his stated objectives and perhaps it should be left to others to pronounce or speculate on the implications of his findings. He did begin to move in this direction at the end of his monograph, calling such explorations "license often taken by authors in concluding chapters".[1] I would see this more as a matter of entitlement, even obligation, given the methodological and substantive quality of his research. It is I who shall take some license in this vein, as a reviewer.

Hagan, apparently contrary to the expectations with which he entered upon his inquiries, discovered that most victims were not "innocent and

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[3] (2nd ed., 1984).

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[1] P. 205.

frequently defenceless individuals who have experienced serious and often permanent injuries''.[2] Rather, he draws a sharp distinction between such individual victims, of whom of course there are many, and the statistically dominant and more legally successful organizational victim, particularly the commercial organization. He concludes that the criminal law and its operations are dominated by organizations, with unfortunate results for the humbler category of victims:[3]

> . . . criminal justice agencies originally thought to have emerged for the purposes of protecting individuals, against individuals, today are devoting a substantial share of their resources to the protection of large affluent corporate actors. It is in this context, for example, that the special kinds of problems we have found associated with domestic assault cases get swept aside. These kinds of victims simply represent unrewarding problems for the criminal justice system.

Hagan further observes that the criminal justice system is ''loosely coupled'' and that this characteristic serves to both fit the needs of the organizational victim and exclude the disruptive influences of the individual. In explaining loose coupling he refers to organization theory, to denote that the constituent sub-systems (such as probation departments, prosecutors offices, the judiciary, the police and individual or organizational victims of crime) within the criminal law vary in the tightness of their inter-connections. Rules are often violated, decisions go unimplemented or have uncertain consequences, technologies are of problematic efficiency and inspection systems are often subverted or rendered so vague as to provide little co-ordination.[4] As well, the criminal justice system is formal and highly impersonal.

What explains the existence of these phenomena of organizational dominance and loose coupling? Hagan argues that both are attributable to the needs of developing capitalism for formal rationality as opposed to substantive irrationality, as Max Weber used the terms. By formal rationality, Hagan says that Weber referred ''primarily to the generation of legal outcomes in a logical, unbiased and generically determined manner''.[5] Weber maintained that ''the rise of modern capitalism was dependent on, and perhaps productive of, the expression of formal rationality in the economy and the law''.[6] The substantive irrationality of the individual, ''the absence of general norms''[7] and ''the resort to arbitrariness or emotional evaluations in the production of legal outcomes'' was inimical to a legal and economic system ''ideologically committed to formal

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[2] P. 1.
[3] P. 218.
[4] P. 6.
[5] P. 2.
[6] P. 206.
[7] P. 2.

rationality''.[8] Individual victims had to be decoupled from the criminal justice system, as they made substantively irrational demands, while organizational victims, themselves formally impersonal and setting higher priorities on efficiency, more likely accepted and appreciated ''a loosely coupled role in a criminal justice system that reduces the consumption of their time and increases the predictability of cases outcomes''.[9] In effect, law and economy gradually began to speak the same language and the individual, who may as well have been talking in tongues given the needs and parlance shared by these two bureaucracies, had to fade in importance. The stage was then prepared for the resistance by the legal system of the irrationality of the individual, a resistance laudable in most instances, but nonetheless ominous as this trend was conducive to the dominance of the organizational victim. The individual was left with remedies ''that in large part do not impinge on decision-making about the accused, and which, in any case, may be more symbolic than instrumental in their consequences''.[10]

This link of logical formalism between law and economy is surely of relevance in attempting to understand the operations and character of the criminal justice system, but how far does it take one? Hagan is obviously not blind to the shallowness of a ''formal legal abstraction [the equality of rights and interests for natural and juristic persons] that is inconsistent with social and economic inequalities that differentiate corporate and individual entities''.[11] It is by no means a grand leap of faith to maintain, as many critical scholars would, that these connections between law and the economy are of a very fundamental nature, beyond the similarities of formal rationality and bureaucracy, observed from the perspective of victims, as in this work. For example, a Marxist stance would have us accept that the relationship between economic and legal factors is a wholly dependent one:

> Historically, the state originated because of the formation of class relations, and therefore every comprehensive system of laws is essentially determined by class factors. Legal or state definitions of crime are especially important because they maintain the interests of ruling classes by force. Such general interests are above all sustained by laws that guard the economic infrastructure of a political order. First and foremost, the infrastructure requires guarantees that a dominant set of social production relations will be reproduced.[12]

This materialist outlook, obviously presented simplistically here, is a viable alternative theoretical foundation for Hagan's data, which might

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[8] P. 206.

[9] *Ibid.*

[10] P. 217.

[11] P. 218.

[12] Herman Schwendinger, Julia Schwendinger, Social Class and the Definition of Crime, in Tony Platt, Paul Takagi (eds.), Crime and Social Justice (1981), p. 62.

be considered as either supplanting or extending his conception of the implications of his findings. Weber himself, according to Zeitlin, argued that every perspective:[13]

> . . . can never be more than a partial, limited, and necessarily one-sided explanation, and if one stops there, without exploring the phenomenon in question, from additional perspectives, an understanding of the total complex cultural whole will never be gained . . . only by taking a variety of such approaches systematically can one gain an increasingly adequate knowledge of "reality" which in its infinite characteristics and complexity can never be grasped in its entirety.

What one sees in Hagan's findings, then, is arguably another replication of the dominance of our social and economic life by the interests of the ruling elites, as represented by corporations, this time from the viewpoint of victims within the criminal justice system. It is this other, more avowedly political perspective, which the volume lacks, but which seems to spring from his exposition. However, perhaps I should recall the "Fools rush in . . . " adage in explaining Hagan's apparent reluctance to engage in this level of analysis.

One should not, however, stop at theoretical disagreement in reviewing this book, for its results stand on their own, whatever one's ideological outlook, in their enrichment of our appreciation of being a victim in the criminal justice system. For example, in Chapter 2, Hagan describes in detail his methodology and his reasons for designing his study in the manner chosen rather than more in the fashion of previous studies. At least a criminological outsider, such as myself, is left with the impression that a unique contribution has been made by Hagan to the comprehension of the plight of the victim.

Chapters 3 and 4 present a thorough account of the responses of the individual to his or her experience as a victim, of victim attitudes toward the accused and toward legal principle, personnel and policy. It would appear that, with the replacement of the individual by the state as prosecutor of the case, have come other systematic developments which conspire to loosen and nearly sever the coupling between victim and criminal justice system. The author's response to this degeneration of relationships is to prescribe both that the state encourage the victim to attend court and make more readily and reliably available information on the final outcome of the case to the victim.

Chapter 5 provides an outlook from the viewpoint of the organizational victim. As one would expect, given the general thesis of the book, this species of victim is more likely to have a detached and impersonal view of the accused. The organization assumes more responsibility for crime prevention and is more likely to be satisfied with the results of a case, while paradoxically, from the data with respect to individual vic-

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[13] Irving M. Zeitlin, Ideology and the Development of Sociological Theory (1968), p. 114.

tims, being less likely to attend court and know the bottom line of a proceeding. As Hagan reiterates, the formal rationality of the organization and its comparative detachment readily explain this difference.

Chapter 6 illuminates the influence victims have on judicial decision making. Offenders against organizations are more likely to be convicted and the larger the organization, the more predictable is conviction. The organization simply uses the criminal justice system more skillfully and rationally, thereby creating a sense of affinity between the two bureaucracies.

In Chapter 8, Hagan, having observed that the decoupling of individuals is a source of victim discontent, discusses the range of remedies available, such as private prosecution, restitution through the criminal law, peace bonds, special family measures, civil actions, victim compensation schemes and private insurance. Victims are more likely to use private options following the suffering of a loss. The public remedies, while symbolic of the concern of society, are not turned to as frequently; although they were known about by victims, they were not used to the extent of private avenues.

In the concluding chapter the author recommends ways in which the gap between the symbolic and instrumental functions of victim remedies might be closed. He is, as he observes of other scholars in this field, fundamentally concerned that victims are "neglected, ignored, and sometimes abused by the criminal justice system and its agents",[14] in a process which is both loosely coupled and organizationally dominated.

This book should do a great deal to acquaint its readers with the travails of the victim of crime, particularly the individual. While it may be the subject of legitimate (some would say illegitimate, no doubt) critique for its political conservatism, this should not detract from the author's achievements in so ably researching a topic which has only too lately received scholarly attention. There is a danger that this book will be read only by criminologists and not by lawyers, in practice and in universities, nor by judges. While viewed superficially it may not be exciting reading for the legal profession (for that matter, how often can we say that anyway?), this is more likely to be due to its methodological content and precision, which will be foreign territory to most lawyers. The data and insights which Hagan presents on the victim in the criminal justice system should make the process more intelligible for lawyers and should give us a more holistic and sensitive vision of what it means to be a victim of crime.

H. ARCHIBALD KAISER*

[14] P. 217.

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Administrative Law Cases, Text and Materials, Second Edition. J.M. EVANS, H.N. JANISCH, D.J. MULLAN AND R.C.B. RISK. Toronto: Emond Montgomery Ltd. 1984. Pp. xlix, 994. ($90.00)

This is the second edition of the authors' extremely useful collection of materials on administrative law. Each of the collaborators is a well-known scholar in administrative law, and together they have assembled a case book on the American model—"a book . . . which will be of value beyond the classroom . . . ".[1] Thus, the vast proportion of this volume consists of well-edited extracts from the leading cases, articles, government reports and other primary sources. In effect, the work is an excellent surrogate library.

In addition, however, the textual material provided by the authors provides a good analytical framework for the primary material, pointing out difficulties in the decisions, referring to other hypothetical issues, and pointing the reader to many other secondary sources. Altogether, therefore, the volume provides a wealth of information and critical commentary on administrative law. Although a case book is not a substitute for a text book, it must be recognized that the textual part of this work is extremely good.

A western Canadian reviewer may be forgiven for pointing out that far too many Canadian legal books focus unduly on Ontario decisions, while masquerading as "Canadian" authorities. Happily, this criticism cannot be made about Evans, Janisch, Mullan and Risk. Although all four authors teach in Ontario, they have included a large number of cases (and references to many other cases) decided elsewhere in Canada. Similarly, although they focus on the particular statutory law of Ontario (*e.g.* The Statutory Powers Procedure Act[2] and The Judicial Review Procedure Act[3]), they frequently refer to the corresponding statutes in other provinces, and in any event deal comprehensively with the historical common law principles from which all Canadian jurisdictions derive their respective present form of administrative law. Accordingly, this work can easily be used as a teaching tool at any Canadian law faculty—wherever located—with only a small amount of supplementation to bring local problems into focus.

There are only two suggestions which one might ask the authors to consider when preparing a third edition. First, as they themselves note in their foreword, the present work does not include a comprehensive discussion of the law relating to the contracts of public authorities, public interest immunity, recent statutory developments in freedom of informa-

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[1] P. iv.

[2] R.S.O. 1980, c.484.

[3] R.S.O. 1980, c.224.

tion and privacy, or a detailed treatment of delegated legislation (and the scrutiny thereof). Perhaps these important topics could be usefully included in a companion volume. Secondly, on a technical note, it is sometimes difficult instantly to recognize which parts of the book are extracts from primary materials such as cases, and which parts constitute the text written by the authors. Perhaps the next edition could make this distinction clearer by using different type faces or margins for these two distinct categories.

In summary, this is an excellent tool, both for the neophyte student learning the law, as well as for the experienced counsel who needs help in finding authorities or a conceptual basis for dealing with a particular problem. Every administrative lawyer needs this work.

DAVID PHILLIP JONES*

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Ontario Labour Relations Board Law and Practice. BY JEFFREY SACK, Q.C. AND C. MICHAEL MITCHELL. Toronto: Butterworths. 1985. Pp. xli, 700. ($95.00)

Practitioners of labour law will already be familiar with Sack and Levinson's Ontario Labour Relations Board Practice.[1] Although it is not so identified, Sack and Mitchell's Ontario Labour Relations Board Law and Practice is, as may be expected, a new edition of Sack and Levinson.[2] It retains for the most part the same chapter division, as well as much of the same topical division within chapters. Significant portions of the text of Sack and Levinson are repeated in Sack and Mitchell.

The basic approach of the authors to their subject matter also remains the same as in Sack and Levinson. The book is a legal digest of the legislation and jurisprudence concerning labour relations law in Ontario in so far as that law is administered by the Labour Relations Board. It is not a legal treatise which examines underlying principles or attempts to develop the law by exploring unresolved issues. Sack and Mitchell content themselves with summarizing what the statutes, regulations, and Board and court decisions have already laid down. The authors generally

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[1] (1973), hereinafter cited as Sack and Levinson.

[2] Neither the title page of Sack and Mitchell nor the listing of books in Butterworth's Canadian Legal Textbook Series which precedes it have a "Second Edition" notation. Moreover, there is not even an acknowledgement of Sack and Levinson in the Preface, pp. vii-ix.

avoid raising issues which the legislation or decisions have not directly addressed. When they do identify such an issue, they are likely to simply note that the issue has not been dealt with.[3]

There are nonetheless a number of significant changes from Sack and Levinson. For one thing, the text has grown substantially.[4] The authors have sensibly dropped lengthy Appendices containing various constitutional, statutory and subordinate legislative provisions.[5] They have introduced a topic numbering system with room for insertion of additional topics which facilitates cross-referencing and future updating of the text. The Table of Contents now includes a complete list of these topics, making it useable for the purpose of scanning the book topically. The topical Index has expanded from seven to twenty pages which should significantly increase the user's ability to find portions of the text relevant to particular issues. Indices showing references to the Ontario Labour Relations Act and to the Rules have been added. A Table of Concordance shows the correspondence of provisions among the 1960, 1970 and 1980 Revised Statutes of Ontario versions of the Labour Relations Act.

Because of the authors' basic approach, the book is primarily useful, like any digest or abridgment service, as the place to begin research. Footnotes contain long lists of cases which relate to a single point. If the reader wishes, therefore, extensive research on a particular issue can be done using Sack and Mitchell as the key. The book also provides a valuable integration of the legislative and jurisprudential source materials into a logical topical format. The reader can quickly obtain a good overview of the state of the law on any particular issue.

The digest-like style of the authors has some major drawbacks, however. In the absence of some exposition of the principles underlying our labour law, the book conveys to the reader much information, but not a lot of understanding, about the subject matter. Someone who is looking for insight into labour law will not find it in Sack and Mitchell. This applies both in the case of the reader who is looking for a general introduction to labour law and in the case of the reader who is looking for new ideas to help solve a particular issue or problem.

Sack and Mitchell do provide occasional glimpses of the direction in which the law may develop, but when they do so, it is through quotation

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[3] See, for example, the authors' reference to the problems involved in completing applications for certification in the construction industry between unions which are covered by province-wide bargaining provisions and those which are not covered: p. 585.

[4] The actual text of Sack and Levinson consisted of 311 pages of approximately 450 words per page. Sack and Mitchell contains 655 pages of text of approximately 500 words per page.

[5] Sack and Levinson, pp. 312-538. Since those purchasing such a text are likely to have and to keep updated their own set of relevant legislative materials, the inclusion of such materials in this type of reference work was wasteful.

from the Labour Relations Board, and not in the authors' own words. A substantial portion of the text is in fact devoted to quotations from Board decisions. While one hesitates to criticize this feature of the book, since the quoted passages are frequently interesting, it is disappointing that the authors are not prepared to go beyond settled points of law in their own words. Moreover, there are numerous quotations which do not offer new insights, but merely state a point which the authors have already adequately set out.

One particularly annoying feature of the authors' digest-like style is that occasionally they indulge in an extensive listing in the text of different factual situations in which a particular statutory provision has been involved.[6] Such listings are an inadequate substitute for analysis of whether such cases have in any way elaborated or clarified the statutory provision in terms of legal principle. While one may deduce from the very existence of such a listing that the cases really establish nothing in the way of legal principle, the authors might at least say so. In that event, the listing should deserve no more than a footnote.

Given the amount of work which must of necessity have gone into the researching and writing of Sack and Mitchell, it is regrettable that the authors have not seen fit to elaborate beyond the settled points of law that the book contains. The authors' experience, and the collective experience of the law firm of which they are members, eminently qualify them to write a more reflective work on labour law. Moreover, in selecting quotations from the Board which indicate policy directions, the authors had to be attuned to issues that are open for discussion. The authors could have provided a book which contributes to the law, rather than merely collects it.

Even though the book is confined to Ontario law as administered by the Board, it is likely to be widely used in Canada because of similarities between the Ontario law and that in most other jurisdictions. However, the digest-like style tends to minimize the usefulness of the book for purposes other than as a manual for practitioners before the Ontario Board. A discussion of basic principles in the context of the Ontario Board's law and practice would have been entirely justifiable, particularly in light of the leadership which the Ontario Board often provides in the labour law field in Canada.

It seems appropriate to conclude by noting one further feature being introduced with this edition. There was no arrangement for regular updating of Sack and Levinson.[7] However, Mitchell will be preparing a quar-

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[6] See, for example, the authors' listing of job classifications which have been subject to a Board determination of whether the persons involved are employees: pp. 95-99.

[7] Two Supplements to Sack and Levinson were issued: Cavalluzzo and Sack, Ontario Labour Relations Board Practice Supplement (1974), and Mitchell, Kainer and Sack, Ontario Labour Relations Board Practice Supplement (1977).

terly update to the new book under the title of the Ontario Labour Relations Board Law and Practice Citation Updater.[8] Such a provision is an essential feature of a legal digest service. Since Sack and Mitchell's book is more in the character of such a digest, than a legal treatise, it will have the advantage with the updater of carrying this character to its logical conclusion.

Robert W. Kerr*

* * *

Tort Law. By R.W.M. Dias and B.S. Markesinis. Oxford: Oxford University Press. 1984. Pp. xxxiv,526. ($42.75)

This text may be best described as an "introduction" to English tort law. It was written by two Cambridge scholars "to initiate beginners into this rather amorphous but nonetheless intricate branch of the law".[1] As with other books of this genre, the style is narrative, with few references to case authorities or other sources. Statements are brief and general, and take little account of the refinements or complexities of the law. The scope of the text is comprehensive, with chapters on negligence, product liability, occupier's liability, the intentional torts, strict liability, defamation, and damages being included.

The text was written for the English law student, presumably from the lectures given by the two authors. It has limited use for Canadian law students as it focusses almost exclusively on English law. There are substantial areas of difference between Canadian and English tort law, which is not apparent from this text. One might point to the law concerning *res ipsa loquitur*, the onus of proof in trespass actions, the tort of breach of statutory duty, occupier's liability, the barrister's immunity from suit as examples of these differences. As well, substantial parts of the text discuss English legislation in the tort law area.

The authors' broad knowledge and understanding of tort law are evident in this work. Not only is the substantive law of torts discussed, but the authors are able to incorporate into their review relevant legislation in other areas which impinge upon the topics being examined. One of the strengths of the book is the authors' concern for pragmatic considerations which affect the law of torts, such as the role of insurance and policy.

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[8] Scheduled to commence publication in April 1985.

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[1] P. v.

There is also the recognition that political ideology plays an important part in how tort law and alternative compensation schemes are evaluated.

Rather than commenting upon the authors' interpretation of substantive tort law principles, I would prefer to assess the contribution which these types of books make to legal literature. As a rule, general overview approaches to law have little appeal to me. They are necessarily too superficial for the knowledgeable reader, interested in researching difficult areas of tort law, or in quickly discovering the state of the law. Tort law, especially, is an area with numerous comprehensive texts explaining recent developments, to say nothing of the articles, law reform reports and other valuable material which are available.

Beginners are likely to find much of the material difficult. The chapter on General Principles of Negligence for example, discusses the overlapping elements of the duty of care issue, the role of policy in negligence law, the law concerning recovery for pure economic losses, *Anns* v. *Merton London Borough Council*[2] and *Junior Books Ltd.* v. *Veitchi Co. Ltd.*,[3] subject areas which do not lend themselves to simple analysis. Do the authors intend this to be read before the students have studied this material in class, or afterwards, as a review of what they had learned? If the former, then I would question the students' ability to understand it; if the latter, then I would question its benefit to them.

The problem of being required to abbreviate and simplify discussion, and the distortion which this creates, is also a factor in this type of book. I do not think, for example, that *Junior Books Ltd.* v. *Veitchi Co. Ltd.* can be left as a case which based liability "squarely on the 'neighbour' principle in *Donoghue* v. *Stevenson* as elaborated in later cases".[4] Regard must be paid to the special facts of this case, facts which led Lord Roskill to state that the relationship between the parties to this dispute was "as close a commercial relationship . . . as it is possible to envisage short of privity of contract".[5] I also do not agree that *Horsely* v. *MacLaren*,[6] one of the few Canadian cases referred to in this text, can best be described as a judgment which "held that a rescuer could be liable to the person rescued if, having started the act of rescue, his carelessness leaves the latter worse off than before".[7] I think that the law regarding finders is more involved than as indicated,[8] and that the right of bailees at will to

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[2] [1978] A.C. 728, [1977] 2 All E.R. 492 (H.L.).

[3] [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

[4] P. 49.

[5] *Supra*, footnote 3, at pp. 542 (A.C.), 211 (All E.R.).

[6] [1972] S.C.R. 441, (1972), 22 D.L.R. (3d) 545.

[7] P. 53. Not only did the facts of this case not support the existence of this duty, but the duty to rescue was based primarily on the relationship between the parties, notwithstanding the prior conduct of the rescuer.

[8] The authors state: "With regard to things lying loose on land, a finder gets

sue for trespass cannot be fully understood without looking at *Penfold Wines Proprietary Ltd.* v. *Elliott*.[9]

In short, while I appreciate the limitations of such a book, and the goal of its authors, it is my assessment that this book has limited value, especially in view of the considerable effort which has undoubtedly gone into its publication.

LEWIS KLAR*

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Report on the Law of Trusts. BY ONTARIO LAW REFORM COMMISSION. Toronto: Ministry of the Attorney-General. 1984. Two vols., pp. xiii, 522. (No price given)

The Ontario Law Reform Commission's Report on the Law of Trusts ("the Report") may fairly be classified as a set of recommendations for changing the law so that trusts in Ontario may be better administered. By its own admission the Commission decided against a complete codification of the law of trusts and confined its efforts to a wholesale revision of the Ontario Trustee Act provisions dealing primarily with trust administration. Topics such as trustees' duty of care, the appointment and discharge of trustees, the variation of a trust and so on, are dealt with. The Commission has only ventured into areas of substantive law "where it appeared that present rules of law were so outmoded or unclear as to warrant legislative intervention".[1] Into this latter category falls clarification respecting items such as impartiality and conflict of interest avoidance.

From the quantity of material alone (522 pages in two paperbound volumes), quite apart from the many generally thoughtful analyses provided, one is led to the conclusion that the Commission did a substantial amount of research, re-thinking and revision of the law on trust adminstration. The Commission has come to some important conclusions in recommending reforms for its Province. Included was an early decision that legislation should continue to play its customary "complementary role-only" in the still developing law of trusts. Such a decision of course shapes the whole thrust of the Report, down to and including the ninety-two section draft legislation which is annexed as its last part.

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possession as such, even against the landowner"; at p. 211. What of the trespassing finder, discussed in *Parker* v. *British Airways Board*, [1982] Q.B. 1004, [1982] 1 All E.R. 834 (C.A.).

[9] (1946), 74 C.L.R. 204 (H.C. Aust.).

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[1] Volume 1, pp. 1,2.

Seven major topics occupy the main body of the Report. They are: general principles governing the exercise of power and discharge of duty by trustees; appointment and discharge of trustees; administrative powers of trustees; dispositive powers of trustees; contribution and indemnity among trustees; variation and termination of trusts; and (to a limited extent) charitable trusts and non-charitable purpose trusts. One cannot fault the choice of the Commission in both its general and particular selection of topics for review and reform. The administration of trusts is of vital importance to society, providing as it does for the due application in an appropriate manner of very substantial benefits to a significant number of persons and bodies. Any reform which will better assist trustees in their functions must be welcomed. As the reforms suggested are specific and practical ones, it is more than likely that many of them will be acted upon by the appropriate legislative authority.

One could have wished that circumstances had permitted the inclusion of more information, and recommendations, on forms of trusts used in business. Thoughtful direction in that area would be a welcome addition to understanding and applying trust administration law better. However, the Commission apparently felt that because of their vast diversity, encompassing as they do retirement saving plans, stock purchase agreements, corporate bond trusts and the like, the Trustee Act of Ontario is not the appropriate legislation to deal with business trusts. This is not to say that the Act would not also apply to them as far as it goes. It may be that the topic of business trusts may yet be reviewed at a later date by some Canadian agency such as the Commission.

The form of the Report is of a fairly usual variety found in Canadian law reform agencies. Past law is often referred to, then the present law succinctly explained. Observed difficulties with the present law are enunciated, followed by some comparisons with other jurisdictions on the same topic. Finally, recommendations for change are suggested with reasons given for the suggestions. In the last mentioned phase reference must ultimately be made to the draft legislation appended to the Report.

The methodology just outlined appears to be appropriate to the subjects raised. Take, for example, the small but still important matter of evidence to third parties of a change made in trustees. A nice link is made in the text of the Report between a previous recommendation respecting encouragement of the use of the non-judicial appointment and discharge power, with the notion that third parties must be afforded protection against improperly appointed trustees. The present law is looked at; problems of third parties are raised; comparative English law is discussed; and recommendation for change in favour of more protection for third parties is suggested, with reasons given.

Throughout all seven of the Report's major topics runs a recurrent theme: the importance of modern-day business flexibility for the adminis-

tration of trusts. That this theme should emerge as the dominant *raison d'etre* of the Report is not surprising. Along with those in other Canadian common law jurisdictions, trustees in Ontario undoubtedly have felt the restrictions of older trust administration laws in an ever faster moving society. It is time to update. To give an example, trustees' powers of investment of the trust subject-matter have not kept pace with an inflationary business world. New Brunswick, Manitoba and the two Territories have had the more flexible Massachusetts prudent man rule for trustee investments for some time. Unlike them, Ontario has retained the so-called legal list of authorized investments since 1868-69. Trustees are not to stray outside these listed investments unless the trust instrument grants broader (or stipulates more restrictive) powers. The Ontario Law Reform Commission recommends deletion of Ontario's legal list and the adoption of a version of the prudent man concept. Certainly, such a move should place that Province's trustees in a more advantageous position to deal appropriately with investing in the last decades of the twentieth century.

It is presumed it is in the interest of expediency that some things heretofore regarded as pretty much the exclusive province of the settlor are recommended to be changed. One notes the matter of a maximum number of trustees, recommended by the Report to be set at four unless the Court decides otherwise.[2] Or the grounds for retirement from serving the trust, to be as set out in the draft legislation, which will prevail over more onerous terms which may be found in the trust instrument.[3] The actions of a settlor in these and other situations appear to be somewhat restricted, notwithstanding the use made of similar innovations in other jurisdictions. Certainty of dealings may be a cogent reason to add to that of expediency in recommending the changes. It is foreseen, however, that at least some Ontario settlors may feel the recommended constraints unduly limit their freedom of action. As in similar situations, the validity of the new will only be tested through use.

The legislative draft provided would apparently effect the reforms suggested, notwithstanding a bothersome turgidity of legislative expression in some portions of the draft which may or may not be capable of improvement. The previously mentioned decision not to codify the law of trusts but rather to use legislation as the means of providing flexible trust administration, appears to this writer to be a sound one. That decision has at least two virtues: it is generally consistent with the present use of trust legislation in other Canadian common law provinces for the same purposes; and it allows for an accretion type of further development of the general law of trusts, largely by case precedent but also by practice.

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[2] Volume 1, p. 178, recommendation 42.

[3] Volume 1, p. 173, recommendation 5.

We are indebted to the Ontario Law Reform Commission for its insights and recommendations as set out in the Report. While of necessity provincial in its scope, the Report—and especially its recommendations—will provide substantial food for thought to other common law jurisdictions grappling with the problems of trust administration in the 1980's.

BEVERLEY G. SMITH*

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Contemporary Trends in Family Law: A National Perspective. K. CONNELL-THOUEZ ET B.M. KNOPPERS (ÉDS.). Toronto: Carswell. 1984. Pp. vi, 327. ($45.00)

La sous-section du Droit de la famille de l'Association canadienne des professeurs de droit a tenu une réunion nationale à Montebello (Québec), au printemps 1983. L'ouvrage réunit les communications qui avaient été présentées. Il faut savoir gré aux éditrices de cet ouvrage, les professeures Connell-Thouez et Knoppers pour le travail accompli en colligeant les textes et en les préparant pour la publication.

Les éditrices nous signalent dans leur introduction (pp. 1-9) qu'elles ont regroupé les onze études sous trois grands thèmes, même si ces trois thèmes ne sont indiqués ni dans la table des matières, ni dans le corps du texte. Il s'agit, en premier lieu, du thème "Spouses Equality and Property Rights", sous lequel sont présentées les études du professeur Brière (Le régime matrimonial primaire dans le nouveau Code civil de Québec, pp. 11-26)[1], celle de la professeure Connell-Thouez (Matrimonial Property Regimes in Québec Before and After the Reform of 1981: Adapting Traditional Institutions to Modern Reality, pp. 27-53) et finalement celle du professeur Payne (Policy Objectives of Private Law Spousal Support Rights and Obligations, pp. 55-103)[2].

Le second thème: "The Recognition of Children's Rights", est subdivisé en deux sous-thèmes. Le premier (The Recognition of the Rights of Special Groups of Children) coiffe quatre textes, à savoir: celui des professeurs Fraser et Kirk (*Cui Bono?* Some Questions Concerning the "Best Interest of the Child" Principle in Canadian Adoption Laws and Practices, pp. 105-123), celui de la professeure Davies (The Enforcement

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[1] Aussi publié dans (1982), 13 R.G.D. 5.

[2] Aussi publié dans J.D. Payne, Digest on Divorce Law in Canada, Tab 82-769.

of Custody Orders: Current Developments, pp. 124-145), celui du professeur Poirier (Educational Rights of Disabled Children in Four Canadian Provinces, pp. 146-165) et, enfin, celui des professeures Pask et Jayne (Child Protection Issues Among the Indo-Chinese Refugees, pp. 167-188). Le second sous-thème (Procedural Mechanisms Protecting the Rights of Children) regroupe trois études. Le professeur Pollock intitule la sienne, "Representation of Children: The Alberta Experience" (pp. 189-204), celle de la professeure Knoppers porte le titre de "From Parental Authority to Judicial Interventionism: The New Family Law of Quebec" (pp. 205-222), et celle du professeur Bushnell est coiffée du titre, "The Welfare of Children and the Jurisdiction of the Court under Parens Patriae" (pp. 223-242).

Le troisième et dernier thème, (The Role of the State in the Recognition of the Rights of Family Members) ne comporte que l'étude du professeur Bala et de monsieur Redfearn, (Family Law and the "Liberty Interest": Section 7 of the Canadian Charter of Rights) (pp. 243-280)[3].

Les éditrices ont aussi inclus dans l'ouvrage trois appendices; l'appendice A reproduit des extraits du Code civil du Québec et du Code civil du Bas-Canada, en reproduisant, en réduction photographique, des parties de l'édition critique des Codes civils/The Civil Codes, publiée par le professeur Crépeau, bien que l'on n'indique pas la source. Il aurait fallu aussi indiquer au lecteur que les articles reproduits en plus petits caractères mettaient en évidence ces articles qui n'étaient pas en vigueur. On peut regretter que ces extraits du Code civil du Québec reproduisent des articles en petits caractères, alors qu'ils étaient en vigueur pour la plupart depuis le 1er décembre 1982, donc avant la tenue du séminaire et bien avant la date à laquelle l'introduction a été signée par les éditrices de l'ouvrage.

L'appendice B reproduit des extraits du Code criminel et de trois lois des provinces de Common Law (Nouveau-Brunswick, Alberta et Ontario).

Enfin l'appendice C reproduit intégralement la Convention internationale sur les effets civils de la séquestration internationale des enfants.

Il est difficile de procéder à l'évaluation d'un ouvrage aussi diversifié. Sa richesse se trouve précisément dans sa diversité et dans les optiques différentes adoptées par chacun des signataires des textes. Il est, certes, un apport à la bibliographie en droit comparé. Il nous semble, par ailleurs, que les articles des professeures Connell-Thouez et Knoppers, en particulier, permettront à nos collègues d'autres provinces de mieux se familiariser avec le droit québécois en facilitant leur tâche puisqu'ils ne devront pas surmonter la barrière linguistique; d'autant plus que, comme le soulignent avec raison les éditrices "[t]he most comprehensive of the recent reforms

[3] Aussi publié dans (1983), 15 Ottawa Law Rev. 274.

in the area of family law may be found in the province of Québec'' (p. 2). Cette affirmation donne aussi une importance particulière à l'étude du régime primaire québécois faite par le professeur Brière.

Cela ne veut pas diminuer, bien au contraire, l'importance des autres articles dont l'originalité et le niveau de réflexion est remarquable, tout particulièrement dans le cas des textes traitant de la protection des droits des groupes spéciaux d'enfants dans lesquels l'éclairage d'autres disciplines constitue un apport fort intéressant.

L'ouvrage constitue donc un texte de consultation fort utile sur les sujets traités; il est soigné et bien présenté, même si un index analytique aurait certes facilité la consultation et les recherches en droit comparé.

ERNEST CAPARROS*

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Parliament, the Executive and the Governor-General. BY GEORGE WINTERTON. Victoria: Melbourne University Press. 1983. Pp. viii,376. ($39.00, Aust.)

This book, published in the series, Studies in Australian Federation, examines in detail the federal executive power in Australia. It deals with such matters as the constitutional relationships between the Queen and the Governor-General, the Governor-General and the Ministry, and Parliament and the Executive; there is also a chapter on judicial review of executive action. Especially interesting is the final chapter, Reform and the Future.

The author wrote the book as part of his doctoral work at Columbia University. Clearly he has done intensive research and produced a work of meticulous scholarship. It is unfortunate, however, that he has relegated so much information to notes or ''references''. This is a common fault of doctoral dissertations, sometimes corrected before publication, but the surfeit of notes in this one is carried to extremes. For instance, the third chapter consists of five pages of text and more than seven of notes, the latter being in much smaller print. Later in the book, on page 141, there are eight notes relating to one sentence. At first I tried to read the references (which are grouped together at the end of the book) in conjunction with the text, but found it impossible to do so without losing track of the theme. Eventually I gave up and read the text alone, looking up

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references only when I was especially interested in a statement and wanted more information on it. This was a pity because the references contain useful information, much of which could have been incorporated into the text.

Moreover, in some cases, the text without the notes is misleading. For instance, on page 19, when dealing with reservation of Bills "for the Queen's pleasure", the author states that section 58 of the Constitution (which deals with this matter) became a dead letter soon after the Commonwealth of Australia was established and that "the only Bills reserved since then have been those the Australian government has advised the Governor-General to reserve because, for sentimental reasons, they wished the Queen to assent to them, and Bills required to be reserved by section 74 of the Constitution". He then adds "Reservation and disallowance of Bills were finally interred at the Imperial Conference of 1930".[1] This gives the impression that no Bills have been reserved, even for sentimental reasons, since 1930. In fact, this is not the case, as the author explains in a reference.[2] The Flags Act, 1953, and the Royal Style and Titles Act, 1953, were reserved by the Governor-General on the advice of the Australian Attorney-General; the Queen gave her assent to these Bills on the advice of the Australian Prime Minister. The Royal Style and Titles Act, 1973, was also reserved; presumably the same procedure (no advice by the British Ministry being involved) was followed.

The book contains not only detailed factual information on the federal executive power in Australia, but also the author's opinion on important matters of controversy. He has strong views on many issues and frequently expresses disagreement with other constitutional scholars. For example, when dealing with executive independence from legislative control,[3] he maintains, contrary to the views of Professor J.E. Richardson, that all executive power conferred by section 61 of the Constitution is subject to legislative control. Professor Richardson is the principal exponent of the view that the executive power to maintain the Constitution is not subject to such control. Though giving forceful expression to his own opinions, Dr. Winterton always states clearly the arguments on both sides of a question.

For Canadian readers the book is especially valuable in showing similarities and differences between federal executive power in Australia and Canada. Some of these are noted; others will be obvious to readers familiar with the main features of Canadian government. The format of

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[1] The author is incorrect in referring to the "Reservation and Disallowance of Bills"—a Bill is reserved, but only an Act can be disallowed.

[2] P. 218.

[3] Pp. 94-98.

[4] (1867), 30 & 31 Vict. c.3 (U.K.)—now in Canada called Constitution Act, 1867.

the Commonwealth of Australia Constitution Act, 1900, is different from that of the British North America Act, passed thirty-three years earlier.[4] Although both are Acts of the United Kingdom Parliament, the former, unlike the latter, incorporates a separately numbered "Constitution". In effect section 9 of the Commonwealth of Australia Constitution Act is the Constitution; it is divided into chapters, parts, and sections. Thus, Australia, unlike Canada, has a single document called "The Constitution". Although the term "Constitution of Canada" was used in a 1949 amendment to the British North America Act,[5] it was not until 1982 that it was defined in a constitutional statute.[6] The Australian Constitution, again unlike the Canadian, from the beginning included an amending formula (section 128).

One nit-picking difference between the Governor-General of Australia and the Governor General of Canada is that the former is correctly spelled with a hyphen and the latter without one. The Constitution of Australia consistently uses the hyphen; Canada's Constitution Act, 1982, follows the practice of the original Act of 1867 in omitting it.

An interesting difference between the Australian and Canadian Constitutions is that in Australia ministers are required by law, rather than by convention, to be members of the legislature. Section 64 of the Australian Constitution provides that no minister "shall hold office for a longer period than three months unless he is or becomes a senator or a member of the House of Representatives". Dr. Winterton gives an interesting account of the historical background of the decision to include this provision and notes that, as a result of it and as acknowledged by the High Court, responsible government is implied in the Constitution.[7]

Of special interest to Canadian readers, in the light of proposals to replace the appointed Canadian Senate with an elected one,[8] is the author's treatment of the question of whether the Australian executive is responsible to one or both Houses of Parliament. The Constitution, he states, does not expressly indicate whether Ministers are responsible to both Houses or only to the House of Representatives, but section 53 and section 57 clearly imply the latter. He admits, however, that because the final sanction of responsible government is denial of supply to the government, and the Senate can reject Appropriation Bills, the Senate could have ensured government responsibility to it as well. Only once, in 1975, has the

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[5] B.N.A. (No. 2) Act, 1949, 13 Geo. 6, c.81 (U.K.) repealed by Constitution Act, 1982 (enacted by Canada Act 1982, c.11 (U.K.), s.53 (1) in conjunction with the Schedule, Item 22.

[6] Constitution Act, 1982, s.52(2).

[7] Pp. 74-76.

[8] Report of the Special Joint Committee of the Senate and the House of Commons on Senate Reform (Ottawa, 1984).

Senate forced the dismissal of a government by refusing to grant it supply.[9] The author claims that this was not truly an instance of government "responsibility" to the Senate, but I did not find his reasoning on this point very convincing. In the last chapter of the book, he deals with the difficulty of amending the Constitution to remove the Senate's power to block supply.[10] Although he claims that, even in the absence of a constitutional amendment, a government could accomplish much by legislation, he admits that the validity of some such legislation may be doubted, but not by him.[11]

Although acknowledging that federal executive power is vested in the Queen, rather than the Governor-General, the author downplays the role of the Queen in Australian government. In the opinion of some commentators, he states, appointing a Governor-General is the only power she possesses under the Australian Constitution.[12] He does not say at this point whether he agrees with this view, but statements elsewhere in the book suggest that he does. Section 61 of the Constitution states, among other things, that the executive power of the Commonwealth is exerciseable by the Governor-General as the Queen's representative. Dr. Winterton believes that since 1926 this should be read "exerciseable [only] by the Governor-General". In Canada, on the other hand, even after the Letters Patent of 1947 authorized the Governor General "to exercise all powers and authorities lawfully belonging to us in respect of Canada",[14] some of these powers continued, in practice, to be exercised by the Monarch on the advice of his or her Canadian ministers. It is noteworthy, however, that the amending procedures in sections 38, 41, and 43 of the Constitution Act, 1982, confer power directly on the Governor General.[15] Though the trends are the same in both countries, there are interesting differences between the two in the role of the Queen and her representative.

In dealing with the relationship between the Governor-General and his ministers, Dr. Winterton includes "neither a wide-ranging review of the 'reserve powers' of the Crown nor . . . a detailed examination of the validity and/or propriety of Sir John Kerr's dismissal of Mr. Whitlam on 11 November 1975".[16] In the last chapter he explains why. The reserve

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[9] P. 79.

[10] Pp. 147-148.

[11] Pp. 148-149.

[12] P. 20.

[13] P. 51.

[14] Letters Patent Constituting the Office of Governor General of Canada, 8 September 1947 (effective 1 October 1947).

[15] For a commentary on this matter, see Stephen A. Scott, Pussycat, Pussycat or Patriation and the New Constitutional Amendment Processes (1982), 20 U.W.O. Law Rev. 247, at pp. 276-277.

[16] P. 144.

powers have been examined by "such a legion of writers" and the events of 1975 reviewed so extensively both by lawyers and by the protagonists themselves that there is little point in covering the same ground again. The appropriate task now, he maintains, is "to undertake the reforms necessary to return the reserve powers to the oblivion they deserve".[17] He believes that the reserve powers should be codified, though acknowledging that there are problems associated with this task.[18] If the office of Governor-General is to continue, its occupant should, he declares emphatically, have no power to act without or contrary to ministerial advice.[19] After the Ontario general election of May 1985, it was widely held that if the then Premier, Frank Miller, had asked for a dissolution following the anticipated defeat of his government in the legislature, the Lieutenant Governor would have been justified in refusing. Presumably, Dr. Winterton would disagree, though under his proposed plan of reform for Australia, this situation would not arise because the Prime Minister would be chosen by the House of Representatives, as is the case in West Germany and Papua New Guinea.[20] In fact, in Ontario in 1985, Frank Miller resigned after a defeat in the Legislature and David Peterson became Premier; the result would have been the same had the legislature elected the Premier.

This is a thought-provoking book which should be read with interest not only in Australia, but also by constitutional scholars in other countries, both within and outside the Commonwealth.

MARGARET A. BANKS*

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The Human Rights of Aliens in Contemporary International Law. BY RICHARD B. LILLICH. Manchester: Manchester University Press. 1984. Pp. vii, 178. (£ 27.50)

In recent years, we have witnessed an increased volume of writing about the international law of human rights. What contribution does Richard Lillich's new book make to the existing literature on the human rights of aliens? The book is "an attempt to bring some rough order out of . . . 'the rich chaos' of existing international law"[1] and thus to help "international human rights lawyers . . . to assess, develop and establish the legal regimes under which the rights of aliens may be more effectively

[17] P. 145.

[18] Pp. 150-151.

[19] P. 155.

[20] P. 157.

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[1] P. 122.

protected''.[2] Despite a few minor shortcomings, the book fulfills its stated purpose and makes a useful contribution to the earlier literature.

Lillich believes that the use of treaty law in the development of international human rights law has not been adequately emphasized by the international legal community. If for no other reason, Lillich's book is worth reading because of his analysis of a number of selected treaties which are not discussed in depth in many of the recent books in this area.

The author stresses a number of themes throughout his book. Probably the most significant one is that individual persons are gradually gaining limited recognition as subjects of international law. Traditionally, states were the only subjects or persons with which international law was concerned and to which it would accord legal rights. This situation has altered, particularly since World War II; yet, as long as there were no mechanisms by which individuals could enforce the human rights which might be indirectly granted to them by treaty or customary international law, these rights were of very limited utility. International law has, however, developed several mechanisms by which individuals can initiate a complaint process. In at least one situation, this mechanism can result in a legally binding determination against a state in favour of an individual (European Convention on Human Rights). In view of the author's emphasis on the importance of complaint or enforcement mechanisms which can be initiated by an individual, it is unfortunate that he does not briefly discuss the mechanism created by the Optional Protocol to the International Covenant on Civil and Political Rights. The development of these enforcement mechanisms is significant because the only other remedy available to an alien is to ask the state of which he is a national (his home state) to exercise diplomatic protection on his behalf. But, as Lillich points out, there are a number of theoretical and practical difficulties in relying on diplomatic protection as an effective means of protecting the human rights of aliens.

A second theme which recurs in Lillich's book is that the sovereign power of states to prohibit the entry of aliens, or to expel aliens, appears to be slowly weakening. Recent events, such as the expulsion of aliens by Nigeria, show, however, that any restrictions on a state's power to expel aliens are a long way from gaining universal acceptance.

Another theme which recurs in the book is that the emergence of international human rights norms which apply to both aliens and citizens may resolve the doctrinal dispute whether aliens should in some circumstances be entitled to human rights not enjoyed by citizens. This dispute has centered on whether aliens are entitled only to those human rights accorded to citizens of the state in which the aliens are located (the national treatment doctrine), or whether there is an international mini-

[2] P. 124.

mum standard which in some situations entitles aliens to rights not enjoyed by nationals of the state. The existence of an international minimum standard becomes important if the state in which the alien lives has a low domestic standard of human rights.

Lillich presents the reader with a clearly organized book. After a short introduction, the author gives a brief but interesting review of the law concerning aliens from the time of ancient Greece to the beginning of the twentieth century. This background material provides the reader with an historical perspective for the later discussion of contemporary law. In this first chapter, Lillich focuses on the evolution of diplomatic protection as a means of protecting aliens and discusses the doctrinal controversy surrounding it. He also traces the history of bilateral treaties, especially Friendship, Commerce and Navigation treaties, as a method for protecting aliens. The role of these Friendship, Commerce and Navigation treaties in the twentieth century is discussed briefly in chapters two and six.

The second chapter covers the period from 1900 to 1945. Few major steps were successfully taken during this time, although there was a growing awareness after World War I of the problems surrounding refugees and migrant workers.

The important multilateral developments after World War II, largely under the auspices of the United Nations, are discussed in chapters three and four. From the perspective of protection of aliens, Lillich examines the United Nations Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. He also examines the United Nations conventions on refugees and the International Labour Organization's conventions on migrant workers. But perhaps the most interesting aspect of these two chapters is Lillich's discussion of the United Nations Draft Declaration on the Human Rights of Individuals who are not Citizens of the Country in which they Live and the United Nations Draft International Convention on the Protection of the Rights of all Migrant Workers and their Families; the texts of both documents are included in appendices to the book.

In chapter five, Lillich turns from global to regional efforts to protect aliens. As an example of what can be done at the regional level, he focuses on a number of European Conventions including, of course, the European Convention on Human Rights. Chapter six examines a number of post-1945 bilateral treaties and discusses the role which these treaties are playing in the evolution of more general international norms. The impact of treaty law on the evolution of general norms is examined again in the final chapter, where Lillich reviews the growth of international law protecting aliens and looks to possible developments in the future.

Lillich's book is in part based on earlier lectures, some of which have been previously published. Readers should be aware that this book

does not purport to be comprehensive. The author realizes that his decision to deal with many large topics within the scope of one comparatively short volume will cause some readers to be dissatisfied with the treatment given to certain topics. He is in fact working on a larger jointly authored book which he hopes will appear within the next five or six years. Bearing in mind the author's disclaimers, the reviewer nonetheless feels that there are a few ways in which the present book could have been improved without significantly increasing its length. As previously noted, more emphasis should have been placed on the Optional Protocol to the International Covenant on Civil and Political Rights. In addition, a short discussion of the enforcement mechanism in the American Convention on Human Rights would have served as further support for the author's thesis that international human rights law can and should provide an enforcement mechanism which can be activiated by an individual. A brief allusion to the law concerning the human rights of enemy aliens in wartime might also have been interesting.

The physical production of the book is generally good, although the unfortunate location of the footnotes at the end of each chapter requires the reader to relocate the relevant footnotes each time he begins a new chapter. A more serious complaint is the method of cross-referencing. For example, instead of giving a precise reference (e.g. "*Supra* p. 88"), the cross-reference in footnote 11 on page 125 says, "See text at Chapter V, note 39". This method of cross-referencing may have allowed the book to have been published more quickly, but it has done so at the expense of the reader, who may need to refer to the table of contents in order to locate a particular chapter.

Despite these minor cavils, Lillich's book is well worth reading by anyone who is interested in the international law concerning the human rights of aliens.

J. BRUCE MCKINNON*

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A Contract Model for Pollution Control. BY B.J. BARTON, R.T. FRANSON AND A.R. THOMPSON. Vancouver: Westwater Research Centre, University of British Columbia. 1984. Pp. 100. ($9.50)

This book is about legal and administrative structures for the control of pollution. It recommends, as the primary vehicle for pollution control, a system of individual contracts between a provincial government and polluters, though the present system of permits and criminal sanctions would

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still operate concurrently. The book recognizes that the current permit system involves negotiation, and perhaps more negotiation than regulation. The proposal would put this on a more structured footing by the formal use of contracts and contract remedies.

The limitations of criminal sanctions are illustrated by the example of a plant where new equipment has been installed at the request of government, but contrary to expectations, it fails to achieve the required reduction in contamination.[1] To prosecute in that situation would obviously be inappropriate. Prosecutions are also criticized as diverting attention to legal process and away from "solutions to the environmental problem".[2] Other arguments against prosecutions can be encapsuled in the policeman's rule-of-thumb that it's not crime if it's business.

The authors would retain criminal sanctions for situations of extreme culpability, for example the secret dumping of toxic substances to avoid controls, or the discharge of contaminants without even bothering to negotiate a contract or obtain a permit;[3] but prosecutions would not otherwise be used for the discharge of contamination in the course of business, described in the book as "process pollution".

In each contract, euphemistically to be called a "waste management agreement", the province would agree not to prosecute or make statutory orders except in limited circumstances.[4] The model agreement suggested in the book provides for the resolution of disputes by arbitration.[5]

The proposal, however, raises more difficulties than it would solve, and the supporting arguments cannot withstand serious reflection. For example, one deficiency in the use of criminal law is identified as the lack of "moral guilt".[6] Yet a large proportion (probably a majority) of the population see "process pollution" as blameworthy, and the criminal label could be a marginal influence on the proportion who see it that way. To remove the implication of sin and substitute a contract regime could encourage the perception of pollution as socially acceptable. Even if prosecutions are unusable or unused, the preservation of a criminal law regime can serve a range of purposes; providing ammunition for conservationists in public debate or in regulatory proceedings, promoting a feeling among enforcement officials that they should do something about the problem, adding weight to the government position in any negotiations, and creating some apprehension in a polluter of adverse publicity at some stage.

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[1] P. 3.
[2] P. 5.
[3] P. 9.
[4] P. 30.
[5] P. 84.
[6] P. 5.

Again, the authors see it as an advantage that "by using the contract model, the tensions created by the criminal model are reduced".[7] That approach denies any role for confrontation in relation to "process pollution". Co-operative and confrontational approaches to pollution control have each had their successes and their failures, and an optimum government program will not rely on one of these to the exclusion of the other, or otherwise exempt the vast area of "process pollution" from any confrontational response.

Of course the criminal process is plagued by enforcement problems, but they would not be solved by switching to a contract model. For example, one difficulty in prosecutions is the aversion of the courts to strict liability and the reluctance of judges to recognize standard setting as a role for legislators and regulators. Similar problems would arise with the contract model. The draft bill in the book would permit liquidated damages clauses, which would not be unenforceable as penalties,[8] but, given the propensity of courts to want evidence of fault and loss (or at least one of those two) before imposing significant sanctions, this would not provide any improvement over the criminal process. Apprehension on this point is enhanced by the authors' statement that "[a]nother incentive which could be negotiated is a right to adjust the standards of effluent downward if, for example, it is proven that the adjustment would cause no harm to the environment".[9] One of the arguments raised in the first place for avoiding the use of criminal law is the uncertainty of the significance to the environment of many pollution situations.

Other problems would arise from the nature of the contract and the roles of the contracting parties. If one accepts theories about the dominance of corporate power in governmental decision-making,[10] the contract would, to a substantial extent, be one negotiated between the polluter and representatives of polluters. Even if one denies corporate dominance in government, the result would be a bargain struck between an adjudicator and one party (the polluter) while other parties (the polluted) are absent. On either view, the structure would be biased in favour of pollution. The proposal seeks to mitigate this problem by allowing the public an opportunity to object to pending agreements and to appeal to an environmental appeal board. While that might alleviate the problem to some extent, it would still leave representatives of the polluted (where they exist) at a disadvantage, coming into the picture after the die has been cast, and even then with limited resources.

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[7] P. 6.

[8] P. 73.

[9] P. 34.

[10] See, *e.g.*, (Corporate Power and Public Policy, Lecture by Professor S. Beck, Osgoode Hall Law School, May 1985.

Added to this, the authors want the contract to be voluntary.[11] Surely that is a complete abdication of government, bearing in mind that the contract is made only with polluters and not with the polluted. The authors argue that "[f]rom the perspective of the company it is clearly more acceptable and therefore it is more likely to elicit co-operation. In this way a more fitting and broadly accepted form of regulation is more likely to be effective in accomplishing pollution abatement".[12] This is frighteningly close to the old plea for industry self-regulation. If human health is to be protected from toxic hazards and the market economy is to be protected from the externalization of cost, the solution must lie in remedies that are less acceptable to polluters, not in remedies that are more acceptable.

Another weakness of the proposal is that when dealing with major industrial operations, no government could replicate the technical and economic knowledge of the industry, and for that reason, as well as possible apprehensions about the political power of the industry, government officials would often not have a confident bargaining position.

Even if the proposed regime had some beneficial influence in the reduction of contamination from existing sources, it would still have a perverse influence on the generation of pollution from new sources. A corporation creating a new activity causing a new discharge of pollution into the environment would acquire a bargaining position in dealing with government. This is also relevant to another concern. Would the proposal increase the externalization of cost by increasing the use of public funds for the control of pollution? There is an obvious risk that it would. Since a reduction of pollution would be sought by bargaining, the existing level might be perceived as having a legitimacy. Any reduction from that level might be perceived as requiring the offer of something in return, and the obvious *quid pro quo* would be taxpayers' money. The book enhances that fear. A corporation that internalized the cost of its product by incurring the capital cost of preventing pollution in the first place would obtain no benefit from the bargaining process; but a corporation that failed to incur that capital cost and established its production in ways that pollute the environment, thereby externalizing part of its cost, might then be able to externalize its cost further by obtaining a subsidy. Indeed, the book proposes that "[t]here could be inducements, including forms of subsidy, offered to the company to accelerate an upgrading program".[13]

As a check against non-enforcement, the book proposes that, as under some present consumer protection legislation, the agency should be required "to report to the Legislature each year concerning agreements entered into and any enforcement activity. This is a practice that should

[11] P. 28.

[12] P. 50.

[13] P. 45.

provide an effective check against non-enforcement''.[14] Such reporting mechanisms provide no check at all against non-enforcement.[15]

A key argument for the contract model is that controls should be site-specific.[16] That is obviously true of some pollution controls, but there must also be requirements of general application. The proposal would weaken pollution control by diverting from general to site-specific provisions. The individual site response includes a propensity to accept that the industry must operate, and any resulting pollution that cannot be reduced within the economic options must be acceptable. Acquiescence may not appear so logical or inevitable if the regulatory structure includes more general requirements. Again, the emphasis on site-specific responses leaves an incredible weakness in situations where downstream or downwind interests are outside the jurisdiction.

This brings us to a further point. Pollution control is not simply a matter of preserving the natural beauty of the environment from noxious waste, nor is it a matter of balancing the prosperity of a local area against damage to the environment in that area. Pollution includes discharges into the workplace, into the atmosphere, into our drinking water and into our food chain, of toxic substances with potentially deforming and lethal effects on human life. As the Great Lakes become the toxic cesspools of North America and even the peaks of the Rocky Mountains become submerged in airborne contamination, a rational policy for survival requires that each pollution source be assessed not merely for provable loss to immediate downstream or downwind interests, but also for the contribution that it makes to the aggregate of continental and global pollution. Any such policy for human survival requires broadscale and firmly entrenched standards rather than reliance on site-specific negotiations in which the political and economic pressures of the immediate time and place will tend to prevail over the long-term continental and global interest in control over the aggregate.

Most problems with the proposal result from an initial choice of the wrong model as a source of inspiration. The proposal in the book is based on the undertakings which, in several jurisdictions, have become part of the statutory framework of consumer protection. If there is any area of law more firmly characterized by non-enforcement than pollution control it is surely consumer protection. The use of that model is even harder to defend in British Columbia where a more efficient system already operates for the enforcement of controls over in-plant pollution. Under the Workers' Compensation Act of British Columbia, the Board can impose a penalty assessment in respect of internal pollution, thereby creating an

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[14] P. 38.

[15] See, *e.g.*, The Annual Reports of the Ministry of Consumer and Commercial Relations, Ontario.

[16] P. 6.

incentive to abatement.[17] If the political process favoured the serious enforcement of pollution controls, a similar structure could be adopted for external pollution. For example, there could be licensing with an escalating structure of fees varying according to the volume, quality and duration of the pollution. If the political process would enable such a fee system to work, it could internalize cost and create incentives for the prevention and abatement of pollution that would never arise under the proposed contract model.

Finally, a disappointing feature of the book is the absence of any political analysis. The power of polluters over the polluted in the political process results not only from the natural advantage of corporate over dissipated individual interests but also from the propensities of the political process to prefer short-term over long-term interests, and to prefer local over global interests. These realities are more determinative of outcome than the choices of legal and administrative structures. It is, nevertheless, surely incumbent upon any system designer to consider the significance of his proposal in terms of its influence on the incidence of political power in relation to pollution control.

A major polluter might find the book engaging, but this reviewer, whose drinking water comes from downstream of the Niagara River, would not sleep any easier if the proposal was adopted.

TERENCE G. ISON*

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Microeconomic Concepts for Attorneys. BY WAYNE C. CURTIS. Westport: Quorum Books. 1984. Pp. xvi, 153. ($29.95)

Cynical lawyers may well take delight in classifying Oliver Wendell Holmes' well-known assessment of the role of statistics and economic analysis in law, predictions of the end of the world or the imminent depletion of world oil resources, as some of the more gloriously inaccurate and naive prophesies of recent generations. Indeed, anyone who has experienced legal education during the last eighty-eight years may find it hard to conceal a smile on recalling Justice Holmes' 1897 view:[1]

> For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of the statistics and the master of economics.

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[17] See, *e.g.*, T.G. Ison, The Uses and Limitations of Sanctions in Industrial Health and Safety, Item No. 158 (1975), 2 Workers' Compensation Reporter 203: Decision No. 167 (1975), 2 Workers' Compensation Reporter 234.

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[1] The Path of the Law (1897), 10 Harvard L. Rev. 457, at p. 469.

Nevertheless, there is today perhaps more reason to think that this prophesy will imminently be fulfilled than at almost any time since Holmes wrote. Economic analysis of legal problems has, of recent years, captured the imagination of many legal scholars and a body of literature has appeared which is at once informative, challenging and stimulating. The economist's technique has been urged as a panacea for legal problems ranging from negligence to human rights, from contract law to the theory of federalism.[2] There is in such work a breadth of view and depth of insight that is refreshing, thought-provoking and genuinely exciting.

Unfortunately Microeconomic Concepts for Attorneys by Wayne C. Curtis has none of these attributes. What is offered here is a basic economics textbook illustrated from time to time with legal examples. The typical chapter involves an explanation of the meaning of some economic "jargon", followed by illustration of the concept involved through use of charts, graphs and figures. A rather crude appendage, in which judicial references to the appropriate economic concepts are cited , is "tacked on" at the end of each chapter. In all, only some thirty cases and four articles are cited in either the body of the text or in the notes (though this is supplemented by the inclusion of "selected references" at the end of each chapter). There is, simply, nothing that passes for either legal analysis or economic analysis of a legal problem to be found between these covers.

Worse, however, is Curtis' almost total failure to acknowledge the scope and range of economic analysis. The readers' hopes in this regard are raised in the early pages of the book by the following passage:[3]

> In addition to antitrust cases, there are numerous other areas on which microeconomics is being applied by the courts. Some of these are consumer and environmental protection, corporate finance, and the regulation of international trade. The importance of microeconomics is also generally acknowledged with respect to specific topics within other fields, such as the debate over automobile-accident compensation plans in torts. Going further, Posner has predicted that "it very soon will include such disparate but important topics as the deterrent effect of criminal punishment, court delay and judicial administration, the regulation of interstate commerce under the commerce clause and the Fourteenth Amendment, tort and contract damages and major parts of the substantive law of property and torts".

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[2] This is not an appropriate place to attempt to provide even a select bibliography of scholarship in the field of law and economics. For those approaching the area for the first time, however, the following works may be helpful introductions: A. Mitchell Polinsky, An Introduction to Law and Economics (1983); Henry G. Manne, The Economics of Legal Relationships (1975); Richard Posner, Economic Analysis of Law (1977). A particularly suggestive collection of essays is Mark Kuperberg, Charles Beitz (eds.), Law, Economics, and Philosophy: A Critical Introduction with Applications to the Law of Torts (1983).

[3] Pp. 6-7. The quotation attributed to Posner is from Richard A. Posner, The Economic Approach to Law (1975), 53 Texas Law Rev. 757, at p. 779. On the limits of

Apart, however, from this one brief, passing, acknowledgement of the many potential applications of economic analysis in law, Microeconomic Concepts for Attorneys is almost entirely illustrated with examples drawn from American anti-trust cases. Even within that limited area the approach seems to be to illustrate how (practicing) lawyers can "use" social scientific knowledge. This is all too much within the crass, philistine framework in which "the social scientist is. . .cast in the role of handmaiden to the lawyer, the lawyer being in the dominant position".[4] It is the more upsetting to see such an approach flow from the pen of one who is not a lawyer by training. The adoption of this view reflects unwarranted arrogance on the part of lawyers and is degrading of all social science. There is nothing here to suggest the very real achievements that are possible through honest and open-minded interdisciplinary collaboration.[5]

One reason for this perhaps is that both law and economics are in essence treated by Curtis as value-neutral *techniques* which can be mixed and matched without any very profound thought being required. In light of the thrust of much recent research illustrating the ideological baggage which accompanies each discipline, however, it is astonishing to see either law or economics treated as value-neutral in a book dealing with the overlap of those disciplines.[6]

Nonetheless, Microeconomic Concepts for Attorneys is clearly written and well illustrated. It does go a long way toward demystifying economic jargon, graphs and formulae, and does so with reference to issues that are of relevance to at least some lawyers. Like Curtis' previous book, Statistical Concepts for Attorneys,[7] this publication will be helpful to anyone trying to master a new discipline for the first time. It is subtitled "A Reference Guide", and I suspect that, like most reference books, it is a work that the majority of purchasers will seldom remove from their shelves.

W. WESLEY PUE*

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economic analysis in the environmental field see T.F. Schrecker, Political Economy of Environmental Hazards, Law Reform Commission of Canada, Ottawa. I have reviewed this working paper in (1985), 23 Alta. Law Rev. 399.

[4] Editoral (1974), British Journal of Law & Society 1. Needless to say, this approach is not endorsed in this editorial.

[5] See for example the recent assessment of socio-legal studies in England: Phil Harris, Approaches to the Teaching of Law through Social Science Perspectives, (1985), Jurisprudence Centre, Working Paper #3, Carleton University, Department of Law. As regards law and psychology, see Craig Haney, Psychology and Legal Change: On the Limits of a Factual Jurisprudence (1980), 4 Law & Human Behaviour 147.

[6] See generally (1980), 8 Hofstra Law Rev. numbers 3 and 4 for a series of articles probing the relationship of law and economics.

[7] Wayne C. Curtis, Statistical Concepts for Attorneys: A Reference Guide (1983).

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