Legal Research Handbook. Second Edition.
By DOUGLASS T. MACELLVEN.
Toronto: Butterworths. 1986. Pp. xxiv, 397. ($55.00).

Reviewed by P. Carlson*

This is a good, basic legal research guide for the practitioner. It makes a dry and technical subject matter—one that frightens even the fierce—bearable and approachable. Available sources are listed and explanations given as to their use. It is well organized, and adequately cross-referenced and indexed. The writing is clear and concise. Undue attention to detail is avoided. It is up to date, accurate, and wide in scope. In addition to traditional research materials, the work covers to a limited extent research of legal materials of the United States, England, Australia, New Zealand and other jurisdictions. There are also chapters on Legal Citation; Legal Writing; and Social Science, Science, and Government Publications Research.

As expressed in his preface, Mr. MacEllven's primary motivation in writing the first edition was to assist the practitioner in the small Saskatchewan law office.[1] The book is useful to practitioners across Canada. Equal treatment is given to all provinces and examples of sources are not Saskatchewan slanted. Checklists are provided for research in every province and territory and the federal jurisdiction, and specialized checklists are provided for a variety of subject areas.[2] Attention is given to the impact of the Charter by way of a particularized checklist and by a discussion of researching American law.[3]

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[1] P. vii.

[2] Chapter 11, Research Checklists: Master, Federal, Provincial, Territorial, and Subject Areas, pp. 197-236.

[3] Charter Checklist, pp. 212-213; Chapter 14, Researching American Law, pp. 277-292.

The practitioner will have some difficulty with statute and regulation research of a particular province. An extensive description of federal legislation is followed by a half page overview of statute research sources and a few lines on regulation research in each province. The practitioner will have to become familiar with local legislative research works. Many law faculties now publish legal research manuals which may prove useful in filling the gap.

The coverage of law reports, digests, and looseleaf services is impressive. There are charts covering over 150 of these sources. For each, the chart indicates the years of coverage, type of indexing, computer data base availability, scope of coverage (digest, reported, unreported, articles) and publisher.[4] The reports, digests, and looseleafs are classified into twelve formats and an example of each format is described in detail.[5]

Considered as a teaching manual, the work has some deficiencies. While the book describes the content of sources and explains how to use them, it rarely reaches the next step of evaluation.[6] Sources are rarely priorized in terms of efficiency and effectiveness; suggestions are rarely ventured as to the extent of search required.

I do commend Mr. MacEllven on his brave beginning in the first chapter, Legal Research Concepts. In twelve pages, he provides an accurate, albeit brief, introduction to concepts of primary and secondary authority, mandatory and persuasive authority, relevance, *stare decisis*, and issue framing. Most would not have dared to attempt such a dangerous synopsis for fear of misleading the innocent. As instruction in legal research usually begins at the commencement of the first term of first year, the basic introduction provided in the first chapter is most welcome. It is unfortunate that having outlined the introductory concepts Mr. MacEllven fails to take the student through a case file approach. In such an approach the student is introduced to a legal problem and in succeeding chapters the sources and indexes are related to the case file.

In providing a wide scope the book at times suffers from superficial treatment. For example, the second edition adds an eight page chapter, "Improving Legal Writing". In his preface Mr. MacEllven suggests that the chapter's purpose is to "aid lawyers wanting quick pointers for improvement and law students who may use the chapter as a supplement to more extensive classroom instruction."[7] The goal is so limited that it would

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[4] Chapter 3, Digests and Indexes for Law Reports, pp. 36-61.

[5] Pp. 62-92.

[6] Some evaluative remarks are made in Chapters 2 and 3 (Law Reports, and Digests and Indexes for Law Reports). The reader's attention is drawn (in passing) at p. 13 to duplication problems, at pp. 13 and 32 to time lag problems, and at p. 33 to omissions that occur in the rapid digesting services.

[7] P. vii.

be hard to fall short of achieving it. Nonetheless I wonder whether this section is useful in its limited form.

In other respects, the second edition is an improvement. The need to update a research manual is self-evident. In addition the coverage of Quebec and American law has been much expanded and the chapter on researching social science, science, and government publications has been added.

For the third edition I suggest the following: a case file approach, less superficial treatment of legal writing or none at all, a bibliography of Canadian materials on legal research, more extensive indexing (words such as "family" and "Private Acts" are currently omitted), and a more evaluative approach.

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Canadian Income Tax Policy—An Economic Evaluation. Third Edition. By VLADIMIR SALYZYN.
Toronto: CCH Canadian Ltd. 1986. Pp. xiii, 289. ($35.00).

Reviewed by Gordon Bale*

This is an important and timely book. Tax reform has become a pressing public policy issue and is certain to develop into a major political issue. The significant tax reform which has occurred recently in the United States will require a Canadian response and it is indeed fortunate that the publication of this substantially revised edition coincides with this renewed interest in fundamental tax reform. It is also fortunate that the objective of the book is to reassert basic principles of tax policy and to provide a unifying set of guidelines to assess the Canadian income tax system.

The Report of the Royal Commission on Taxation (Carter Report) was released approximately twenty years ago. It was to be the blueprint for an equitable and efficient tax system. The Carter Report has had a profound impact at the intellectual level but, as Salyzyn notes, our tax laws continue to be amended frequently with little or no improvement in the tax structure. Tax principles are still frequently sacrificed to pragmatism, expedience and special interest group pressure. The result is tax legislation of ever-increasing complexity, understandable by fewer and fewer Canadians, and a growing dissatisfaction with the tax system. It is

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the objective of Salyzyn's book to assist in the repair and renovation of the income tax structure through a restatement of basic tax principles.

Salyzyn is remarkably faithful to the Carter Report. He asserts that a taxpayer should be taxed on ability to pay as measured by the Haig-Simons definition of income. While a significant number of economists have been persuaded that a personal consumption tax is preferable to an income tax, Salyzyn remains unconvinced. He concedes that income tax does distort the choice between present and future consumption while a consumption tax does not. However, he notes that although both taxes create an excess burden on the choice between work and leisure, the consumption tax, because it excludes saving, would require higher tax rates to be levied on the smaller tax base, resulting in more distortion than the income tax. On equity grounds, he believes the arguments for a consumption tax to be weak. Ability to pay, he contends, should be based on the economic power of a taxpayer measured not only by goods and services actually consumed but also the option to consume and the use of income to transfer the ability to consume to others through gifts and bequests. It is potential consumption and not actual consumption that Salyzyn believes to constitute the better tax base.

At the beginning of the book, the author indicates that his emphasis will be on normative issues of tax policy—about what ought to be. He also notes that tax equity is a highly elusive and ambiguous goal resting on changing contemporary opinion reflecting the value judgments of society. The author, however, does not attempt to conceal his own value judgments. He acknowledges that the main failure of the private sector is that it does not distribute income and wealth equitably. Thus when the tax goals of equity and efficiency come into conflict he, like the Carter Report, is inclined to give precedence to the goal of equity. Salyzyn has not succumbed to the strong neoconservative tide of the last decade which has led to calls for proportional or flat rate taxation. He believes not only in horizontal equity but also in vertical equity and the latter implies for him a progressive tax structure. Not everyone will be satisfied with his explanation for progression. Like the Carter Report, it is based on the idea that each taxpayer should pay tax at some fixed proportion of net economic power or ability to pay. Taxpayers are expected to use some of their income to maintain an appropriate standard of living. This is regarded as non-discretionary income and such non-discretionary expenditure increases as income increases, but less than proportionally. Thus, net economic power or ability to pay increases more rapidly than income. A tax levied at a flat rate against net economic power (income less non-discretionary expenditure) will result in increasing average rates of tax levied on total economic power or income.

The strong emphasis on equity clearly emerges in chapter five. The author considers whether imputed income from owner-occupied homes should be included in the tax base. He concludes that there would be

administrative problems but that even an arbitrary allocation based on the size of the owner's equity would be better than ignoring the problem. He also notes that taxing imputed rental income would provide a strong incentive for needed improvements in municipal property tax assessments. Thus Salyzyn would prefer to go further than the Carter Report, which dismissed including imputed income of owner-occupied homes because it would be administratively impractical and politically unacceptable. Salyzyn, like the Carter Report, believes that gifts and bequests should be included in the income tax of the donee for such receipts increase the donee's ability to pay. He would also view a gift as an ordinary consumption expenditure by the donor and would allow no deduction in determining the donor's income. It is estimated that the present exclusion of gifts and bequests from the income tax base costs the government about 6.6 per cent of total personal income tax annually. Salyzyn also believes that capital gains should be taxed in the same way as other sources of income. Effective use is made of charts and tables, as illustrated by table 5.9, which reveals that the benefit from excluding half the capital gain from the tax base is highly concentrated at the high end of the income scale to the extent that in 1982 over three-quarters of the benefit accrued to households with incomes of $50,000 or more. The author adds that the $500,000 lifetime capital gain exemption will "accentuate this gross inequity".

Although this reviewer finds himself applauding the thrust of much of the book, there are times when he must part company with the author. One of these occasions occurs in chapter six. Salyzyn notes that Canadian tax laws do not permit the deduction of interest costs incurred to finance personal consumption but that the intent of the law can be easily circumvented. He rightly makes the point that a person with net assets can finance a vacation trip by selling an income-producing asset and can turn around and borrow an equivalent amount which is used to repurchase a similar income-producing asset. This person has effectively financed his vacation trip through borrowing and has succeeded in making the interest cost deductible. Only persons with net assets have the ability to rearrange their investment portfolios in order to deduct the interest costs of funds effectively used to finance personal consumption. This is all true[1] but I strongly disagree with Salyzyn's solution to this dilemma, which is to permit everyone to deduct all his or her interest costs. This solution has the apparent virtue of reducing the discrimination against the poor, but it has the unfortunate impact of increasing the scope for tax arbitrage.

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[1] Dickson C.J. recently said *obiter* that the deduction might be disallowed if the sequence of transactions was a formality or sham arranged to take improper advantage of the deduction: *The Queen* v. *Bronfman Trust*, [1987] 1 C.T.C. 117, at pp. 129-130 (S.C.C.).

Tax arbitrage occurs when a taxpayer borrows money, fully deducts his interest payments for tax purposes, and uses the proceeds of the loan to buy a tax preferred asset. Tax arbitrage has been described as perhaps the most critical issue of tax reform currently facing us. The solution to tax arbitrage does not lie in making all interest payments deductible but in further restricting interest deductibility. Salyzyn's solution of making all interest payments deductible could only be contemplated after a truly comprehensive income tax base had been achieved. Even then I am not sure that he has the appropriate prescription because access to credit is so weighted in favour of persons with high income and wealth that deductibility of all interest payments may do little for lower income persons with few assets.

Salyzyn is an enthusiastic advocate of the family as the basic tax unit. He notes that the creation of the income is not always shared by spouses but believes that the use of the income is shared. Thus he insists that married couples with equal incomes should pay the same tax, regardless of who earns it. However, some feminists would argue that while nondiscretionary income may be pooled, discretionary income and investment assets are not shared. Therefore, without full mutuality, they would oppose aggregation of the wife's income with that of the husband's because it would cause the wife's rate of tax to increase. Salyzyn's concern for achieving inter-family equity may thus be opposed by some feminists who will be more interested in intra-family equity as a first priority.

Aspects of Canadian Income Tax Policy can be criticized but, on the whole, it is a challenging and important book in which the author has followed a logical and consistent framework in making his assessment of the income tax. As a result, it constitutes a valuable critical evaluation of the Canadian income tax and a stimulating guide to comprehensive tax reform.

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Report of the Canadian Bar Association—Ontario Committee to Study the Legal Implications of Acquired Immunodeficiency Syndrome (AIDS). T. TREMAYNE-LLOYD, CHAIRPERSON.
April 1986. Pp. 79, plus appendices.

Reviewed by Janice Dickin McGinnis*

AIDS it the topic of the hour. It seems we cannot settle down to our morning read and coffee anymore without those four letters leaping,

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capitalized, from the newsprint. We are bombarded with reports on radio and television. Amidst all this smoke, we have lacked until recently intelligent, straightforward discussions regarding what exactly we can do in our current predicament. Now public health officials are starting to fight to get their point across that education and condoms are the best prevention. Pressure is being put on governments to vote more money and to think through the implications of any proposed legislation. The hope for a quick cure or for containment of AIDS within groups who practice anomalous lifestyles has eluded us.

The admission that curative medicine has so far failed us and that preventive medicine faces a long battle before AIDS can be contained means that there are decisions to be made about what procedures we will take in the meantime. That is the business of law, and examination of the justification for and possible results of various available procedures is what the CBA-Ontario AIDS Report sets out to perform. The committee behind this report was constituted under a resolution passed by the CBA-Ontario in October 1985. Two of its seventeen members have medical as well as law degrees. The committee held its first meeting in January 1986, met formally seventeen times, appointed six subcommittees and held extensive sessions with professional and non-professional experts on AIDS. This frenetic activity resulted, just over three months later, in an intelligent report which claims to be the first of its kind in North America.

Perhaps the greatest value of this report to lawyers lies not in its consideration of the law but in its presentation of the medical and scientific facts regarding AIDS. Anyone whose information has come largely from the daily press must be thoroughly confused medically by this point. We all know that AIDS is a deadly disease: if you get it, you die. That is what the newspapers say and to some extent they are right. The problem comes in the understanding of what "having AIDS" means.

Medically, you "have AIDS" if you have developed one of the rare opportunistic diseases—usually pneumocystis carinii (pneumonia) or Kaposi's sarcoma (skin cancer)—that suppression of the immune system leaves AIDS victims open to. By the time the victim develops one of these diseases, he or she is dying. Therefore, AIDS is a fatal disease because you are not medically diagnosed as having AIDS until you are dying. Once you have entered this stage, you will survive an average of two years.

But there is as yet no reason to assume that infection with the AIDS virus inevitably sets one on the road to death from opportunistic disease. Many victims enter a state designated as ARC or AIDS Related Complex in which one is plagued by a series of infections which the body's damaged immune system fails to arrest. All ARC cases may develop in time into full-blown AIDS. We have, as yet, no way of

knowing. Nor do we know how many of those infected with the virus will break down in any way whatsoever.

All statistics regarding the number of people infected with AIDS are only estimates. For one thing, only a very small section of the population, albeit a section in which what are considered "high-risk" groups (homosexuals, bisexuals and their female partners, haemophiliacs, Haitians) are heavily represented, has been tested. For another, the test used only picks up antibodies, not the virus itself. This means that a person who has not been infected long enough to have produced antibodies will be erroneously diagnosed as AIDS free. It is also possible that the blood sample taken may contain no antibodies but that they are in residence all the same, secreting themselves in some bodily nook or cranny. In addition, there are some problems (as with many medical tests) of false positive results and, one would assume, also false negatives.

It is this indistinct and ill-defined group of antibody-positive reactors which makes up the figure of 30,000 to 50,000 Canadians infected with AIDS which the CBA-Ontario cites. This does not mean that we have 50,000 Canadians currently dying a ghastly death. In fact, as of March 1986, only 514 such cases had so far been reported to the Laboratory Centre for Disease Control in Ottawa. It does not even mean that we have 50,000 infectious people within our ranks, possibly never sick themselves but capable of passing sickness on to others. It does not follow that just because you have the antibody you are infectious. Presence of the antibody may mean, on the contrary, that you have put up some sort of successful resistance and will neither sicken nor infect without reinfection yourself. We do know that the antibody produced by the body in its fight against the AIDS virus does not grant immunity in and of itself.

So we must get things straight when we start talking about legal initiatives in the control of this disease. This is a disease in which people are the reservoirs, not mosquitos or wells or garbage dumps. We cannot just simply kill something or drain something or burn something. When we talk of controlling AIDS, we are necessarily talking of controlling people. Which people? Those with full-blown AIDS? With ARC? All homosexuals? Haitians? Prostitutes? Prison inmates? The Report takes the position that all people who test antibody-positive should be dealt with as infectious.[1] In the absence of scientific proof, is this just? Supposing that we do manage to make a justifiable decision regarding which group we should control, how should we control them? Do we lock them up or stop them from having sex or monitor their condom consumption?

[1] P. 8.

We already have models for possible legislation in the old communicable disease statutes, notably those passed in various Canadian provinces around 1920 to deal with venereal disease. Curiously, the CBA-Ontario Report gives the VD Acts very little attention, saying they are really only appropriate if there is a cure available. There was no cure available for gonnorhea in 1920, although a range of local treatments seemed to have some good effect, and the cure for syphilis was troubled. If the Report's assumption is that the cure available at the time the provincial legislatures passed laws severely restricting the civil rights of VD sufferers (for example, testing prison inmates and keeping them, if necessary, past their sentences until cured) was penicillin or equally as fast and effective as penicillin, it is mistaken. The cure for syphilis available in 1920 was a preparation of arsenic, called salvarsan, which could kill you. It nevertheless was an effective treatment, although it made you feel terrible and could take from two to five years of thrice weekly injections before producing a cure.

When we examine these old laws, then, which are now disappearing from the statute books, we are not considering the situation which prevailed after penicillin was released for mass civilian consumption in the late 1940s. After that point, being held past your sentence meant being held until the next visit from the prison doctor allowed you to have one shot in the buttocks and a further short wait for a negative reaction to the Wassermann test. Before that point you could be held five or more sickening years. When we consider our legal options regarding AIDS, we must assess the type of national psychology that would approve such draconian legislation. There was a fear of the sick abroad in the land the like of which we have not seen from that day to this. Communication of a venereal disease was made a Criminal Code offence. Fear of infection was then and is now complicated by personal beliefs regarding acceptable sex practices and by scientific as well as popular ignorance about the future progress of this disease. We have no cure. When and if we are lucky enough to get a cure, it may be as difficult and dangerous as salvarsan. We have no vaccine. We can only prevent the spread of AIDS at this point through condoms and frank education, both of which face social opposition.

In deciding our legal options, then, we have to take into account scientific and social factors. The civil rights of individual sufferers will necessarily be eroded by medical fact (what if there is a really serious epidemic?) and social mores (what if the safe sex campaign, complete with condoms, is thwarted?). There are already mechanisms in place compelling reporting of AIDS cases to the relevant provincial health officers. There are also regulations stating that "No case shall engage in any activity that may transmit the disease" (Alberta Communicable Diseases Regulation 238/85, Schedule 4). The CBA-Ontario Report is against

compulsory testing except for immigrants[2] but it is not difficult to imagine that this attitude will change, especially if there is a cure. When Canada decided to wipe out tuberculosis after World War II, the entire population was tested and treated to good effect. The Report is also against quarantine[3] and it is unlikely that this will be tried for the simple reason that quarantine has proved ineffective in every major epidemic from the Black Death of 1347-51 to the Spanish Influenza of 1918-19.

The Report is an excellent attempt at beginning to come to grips with the legal problems of AIDS. It tries to balance public protection and individual rights. It makes the requisite references to the Charter. The main thing to remember at this point is that in the end, it is law that will have to dance to the disease's tune. We must move with caution and fairness but we should not make any assumptions about our ability to take control.

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Colloque du Laval sur l'arbitrage commercial international. Sous la direction de NABIL ANTAKI ET ALAIN PRUJINER. Montréal: Wilson et Lafleur Ltée. 1986. Pp. ($38.00).

Vincent Karim*

Le colloque du Laval dont ce volume présente les travaux coïncide avec les importantes législations en matière d'arbitrage international adoptées au cours de l'année 1986 par les gouvernements fédéral et provinciaux.

Ce volume, qui vient combler une lacune de la littérature canadienne consacrée à l'arbitrage international, est donc le bienvenu au moment où le Canada s'apprête à se mettre à l'heure de l'arbitrage commercial international.

Cette utilité est mise en évidence si l'on tient compte du fait que l'inauguration du Centre d'arbitrage commercial national et international du Québec et les projets visant à la création d'autres centres à Toronto et ailleurs au Canada impliquent nécessairement l'existence d'un environnement juridique favorable, approprié et bien préparé. En effet, le fonctionnement de ces centres exige une bonne connaissance du droit d'arbitrage et des conditions de son usage. Dans cette perspective, ce volume présente un intérêt multiple et certain.

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[2] Pp. 25-40.

[3] P. 57.

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Ce colloque a été un grand succès. Les travaux de la séance d'ouverture mettent l'accent sur l'importance de l'arbitrage commercial international, sur son évolution contemporaine et sur les raisons de son succès croissant. Les observations du professeur Lalive concernant les fonctions principales et les caractéristiques de l'arbitrage international (sa spécificité, son internationalité et sa neutralité) justifient avec clarté et conviction la nécessité de distinguer l'institution internationale de son équivalent interne ou domestique: "l'internationalité de l'arbitrage lui donne une dimension culturelle, ou plutôt 'pluriculturelle' dont il est indispensable d'avoir conscience si l'on veut comprendre quelque chose à l'institution". Les avantages de ce mode de règlement des litiges n'empêchent pas, toutefois, le professeur Lalive de faire preuve de réalisme en reconnaissant également les inconvénients et les risques qui peuvent en découler.

La deuxième séance a été consacrée aux pratiques de l'arbitrage international. Cinq rapports ont été présentés. Le premier (celui du professeur Cavalda) portant sur l'arbitrage *ad hoc*, fait état de la coexistence de cette formule avec l'arbitrage institutionnel. Il fait ressortir les différents facteurs qui jouent en faveur de l'épanouissement des centres d'arbitrage. Ceux-ci, en effet, constituent aujourd'hui de "véritables juridictions privées" qui mettent au point des recettes procédurales éprouvées et fournissent une "ingénierie de l'arbitrage", une garantie d'efficacité, d'une justice bien administrée, de sécurité et d'exécution de la sentence arbitrale. Toutefois, l'arbitrage *ad hoc* occupe encore une place non négligeable et différents motifs peuvent jouer en sa faveur. Les difficultés relatives à la constitution du tribunal arbitral peuvent être contournées par l'adoption d'une formule "mixte" qui consiste en la désignation d'arbitres de confiance par les parties et la soumission au Règlement d'arbitrage d'un centre, sans qu'il soit nécessaire de soumettre le litige à l'organisation de ce centre.

Les autres rapports traitent de l'arbitrage des institutions arbitrales: la Chambre de Commerce International, le London Court of International Arbitration, l'American Arbitration Association et la Commission Interaméricaine d'arbitrage commercial. Ces quatre rapports montrent l'existence d'une concurrence entre ces différentes institutions et que chacune d'elles cherche à fournir aux parties et aux arbitres le Règlement d'arbitrage le plus efficace et le plus complet, l'assistance indispensable pour en assurer le bon déroulement, la garantie de la compétence, de l'expérience et de l'indépendance.

Un autre aspect des débats a été consacré à l'arbitrage international et au droit. Deux rapports portant sur les conflits de lois et la *lex mercatoria* ont été présentés. L'arbitre est souvent confronté à la nécessité de déterminer la loi applicable au fond du litige au cas où les parties ne l'ont pas désignée. L'arbitre devrait-il recourir aux règles de conflit du système d'un état national ou bien appliquer la *lex mercatoria* sans être tenu de

se référer à un système de réglement de conflit? Le professeur Goldman opte pour la deuxième solution. Selon lui, il s'agit d'appliquer les usages du commerce international et les principes généraux du droit. Même si ces règles (d'origine coutumière) constituent un ordre juridique incomplet et imparfait comme l'ordre international, elles restent cependant des règles de droit qui lient les parties. Elles traduisent un consensus des opérateurs du commerce international et, de ce fait, il est normal que l'arbitre s'y réfère pour déterminer la loi applicable au fond du litige, parce qu'elles constituent un véritable système de rattachement transnational. Cette méthode qui a été suivie par les arbitres dans plusieurs sentences arbitrales est conforme aux dispositions de la Convention de Genève de 1961 et des Règlements d'arbitrage de la C.C.I. et de la CNUDCI.

Pour Me Kassis (2e rapport), par contre, laisser à l'arbitre la liberté de déterminer la loi applicable sans passer par une méthode conflictuelle c'est proclamer le règne de l'indétermination, de l'incertitude et de l'imprévisibilité absolue. C'est donc entrer dans l'insécurité juridique totale. En voulant éviter les conflits, on verse alors dans le subjectivisme complet qui risque de conduire à l'arbitraire. Le choix de la loi applicable peut, en effet, être dicté par des préférences personnelles. Plus grave encore est le fait que l'arbitre peut créer son propre droit s'il estime que les règles les plus appropriées sont celles de sa conception personnelle de la règle juridique. Dans ces conditions, il devient le législateur pour les parties sans qu'il ne soit certain qu'il sera le bon législateur.

Même si l'on partage l'avis de Me Kassis sur la nécessité de maintenir une certaine objectivité dans la détermination du droit matériel, on peut toutefois se demander si la localisation du contrat sous l'empire d'un droit national est toujours facile lorsqu'il s'agit d'un contrat complexe, conçu et élaboré selon des notions, des concepts et des règles de plusieurs droits différents. En pratique, la difficulté est réelle. L'arbitre doit-il, dans le doute, déclarer que la *lex mercatoria* s'applique, sans passer par une méthode conflictuelle?

Quant à l'amiable composition, institution privilégiée pour l'application de la *lex mercatoria*, le rapport du professeur Antaki fournit une étude pragmatique de la nature juridique de cette forme d'arbitrage et de son utilisation en droit interne et international. Il expose avec clarté les conditions de validité de la clause d'amiable composition, les pouvoirs de l'amiable compositeur et les avantages de cette institution dans le domaine du commerce international, notamment dans les contrats de transfert de technologie et de vente d'installations industrielles où les parties donnent souvent à l'amiable compositeur le pouvoir de refaire leur contrat pour l'avenir.

La quatrième séance du colloque traite de la Convention de New York. Les quatre rapports nationaux (canadien, français, américain et celui des pays musulmans) font ressortir les points essentiels du domaine

d'application de cette convention, des conditions de l'efficacité internationale de la convention d'arbitrage, des moyens d'assouplir les procédures de reconnaissance et de l'exécution des sentences arbitrales.

La cinquième séance a été consacrée à l'arbitrage international au Canada. Les rapports des professeurs Brierley et Prujiner traitent de la situation législative au Canada et de l'exécution des sentences arbitrales internationales au Québec. Bien que la situation ait changé après l'adoption, par le fédéral et les provinces, d'une série de lois en matière d'arbitrage commercial international, les deux rapports demeurent cependant une référence importante et utile en raison des remarques et des opinions qui y sont exprimées.

La sixième séance a porté sur les dernières tendances dans le domaine de l'arbitrage. Deux rapports présentent un intérêt particulier. Le premier est celui du professeur Bernini qui compare les nouvelles législations nationales en matière d'arbitrage international. Cet exposé, si riche et si complet, comporte non seulement une analyse et une étude comparative des différentes législations, mais aussi des observations concernant l'arbitrage inter-parties en matière de brevets, l'impact des règles juridiques internes sur le déroulement de l'arbitrage international et la nécessité de se séparer de ces règles internationales. Pour sa part, le professeur Herrmann examine les dispositions de la loi type adoptée par la CNUDCI en 1985, loi récemment adoptée par le gouvernment fédéral et par les provinces de common law comme loi d'arbitrage commercial international.

Enfin, ce volume comprend d'autres commentaires pertinents et des remarques de plusieurs professeurs et praticiens dont il est impossible ici de faire état de manière exhaustive. Il est cependant important de mentionner la conférence synthèse du professeur Castel qui contient une série de recommandations visant, entre autres, à résoudre certains problèmes relatifs à la diversité des règles et des lois applicables à la procédure arbitrale et à l'homologation des sentences arbitrales étrangères au Canada. Bien que les solutions proposées soient fort intéressantes, certaines ne pourront cependant pas faire l'unanimité. Toutefois, chose certaine, les questions soulevées par le professeur Castel feront désormais l'objet de débats animés.

Dans l'ensemble, il s'agit d'un texte de référence et d'une contribution fort utiles à la connaissance de la pratique et des problèmes relatifs à l'arbitrage international. La diversité des questions abordées, la qualité notoire des textes et des interventions, l'autorité des intervenants et la manière dont les opinions sont exprimées font de ce livre un instrument de base tant pour le praticien que pour le théoricien du droit.

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Canadian Financial Institutions: Changing the Regulatory Environment. Edited by JACOB ZIEGEL, LEONARD WAVERMAN AND DAVID W. CONKLIN. Toronto: Ontario Economic Council. 1985. Pp. viii, 474. ($17.95)

Reviewed by M.H. Ogilvie*

Since the life of the law is life itself it is hardly surprising that the most exciting area of the law today is that involving the massive and far-reaching changes relating to the regulation of our financial institutions, whether they be home-grown or foreign imports. One simple measure for this statement is to consider what has occurred in the short space of time between the conference whose papers have been published in the volume under review, and the publication of this review: two Canadian Schedule "A" banks have gone out of business; two more have been sold to foreign-owned banks; London has had its "Big Bang" and Toronto its "Little Bang"; the ownership of several major Canadian trust companies has been re-shuffled; round-the-clock computerized brokerage services are now operating in several major world stock exchanges and most major international securities dealers and banks have expanded their operations beyond the borders of their "home" countries to take advantage of perceived new markets for their financial services. And most informed observers regard these events as a mere preview of more to come until the turn of the next century.

Canadian Financial Institutions: Changing the Regulatory Environment is, therefore, a timely publication. It is also a most valuable one in that it addresses articulately the major issues surrounding the regulation of financial institutions in Canada. It grew out of a similarly titled conference held in May 1985 in Toronto sponsored by the Faculty of Law and the Institute for Policy Analysis at the University of Toronto, the Canadian Bar Association and the now disbanded Ontario Economic Council. The aim of the conference was to bring together members of the academic, legal, policy-making and business communities to analyse and discuss commissioned papers addressing the policy issues relating to financial institution regulation.

The resulting volume comprises fourteen major papers together with a number of comments and reports of discussion from the floor, being equally as instructive and enlightening as the major papers. All the papers are of an excellent quality and the editors and conference organizers deserve fulsome praise. The papers may be subdivided into seven subject-area categories. First, Thomas J. Courchene provides an overview of the entire topic in his "Regulating the Canadian Financial Sys-

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tem: Paradigms, Principles and Politics''. Secondly, William D. Moull, Edward J. Waitzer and Jacob S. Ziegel address the inevitable first Canadian question of the constitutional obstacles to change, in ''The Changing Regulatory Environment for Canadian Financial Institutions: Constitutional Aspects and Federal-Provincial Relations''. Thirdly, provincial perspectives on regulatory change are the topic for three papers. In ''The Challenge of Dynamism'', William T. Pidruchney, the chairman of the Alberta Securities Commission, makes the case for provincial regulation, and in ''The First Steps of a Deregulator'', Jacques Parizeau discusses the issues of deregulation with which he was faced as Quebec's Minister of Finance. Finally in a brief but interesting paper, ''Security and Diversity in the Financial Services Industry'', Robert L. Andrew, the Minister of Finance for Saskatchewan who had to cope with the Pioneer Trust insolvency, argues that provincial regulation encourages diversity as expressed, for example, by the cooperatives and credit unions.

The fourth group of papers is devoted to a comparative study of English and American regulatory experiences. Thus, George J. Benston discusses ''The Regulation of U.S. Banking'', and Robert C. Clark discusses the broader topic of ''Changes in the U.S. Financial System'', while Professor Richard Brealey of the London Business School addresses ''The Changing Structure and Regulation of the British Securities Market''. Fifthly, what were at the time of the conference the two most recent government study papers, the Interim Report of the Ontario Task Force on Financial Institutions and the federal Green Paper, The Regulation of Canadian Financial Institutions: Proposals for Discussions, are scrutinized by James E. Pesando in, ''Government Responses to the Regulatory Challenge: The Interim Report of the Ontario Task Force and the Federal Green Paper''. Sixthly, the volume turns to consideration of how deregulation should take place and of the goals which it should seek to espouse, in three papers, by an economist, a regulator and a regulated. Thus, John F. Chant discusses, ''Economic Prerequisites to the Regulation of Financial Institutions'', Lawson A.W. Hunter discusses, ''The Changing Nature of the Financial Services Sector'', and Thomas Kierans, ''Consequences of Deregulation''. The seventh and final subset of papers discusses the problems of protecting the depositors in the event of insolvencies under current deposit insurance schemes as well as future ones. In ''Insolvencies of Financial Institutions and Problems of Deposit Insurance'', Richard Humphrys argues the adequacy of the present scheme in Canada, while Edward J. Kane in, ''Correcting Incentive Problems in Deposit Insurance: The Range of Alternative Solutions'' argues that changes are required to restore fear of failure into deposit taking institutions so that they will not run high risks, and to shift the burden of underwriting insolvencies from the taxpayer back to the institutions and their creditors.

Together, the papers espouse every conceivable perspective on every conceivable issue in the broad area of the regulation of the financial

services industry. However, despite this, and the very different professional backgrounds which both paper-givers and commentators bring to their respective tasks, there is general agreement on a number of important issues. First, the constitutional impasse must be resolved either by facing the issues straight on, or simply ignoring them, as first the Quebec government and most recently the Ontario government have done by permitting foreign financial institutions and Canadian banks to engage in the securities business. Secondly, deregulation is vital in order to permit Canadian institutions to develop the critical masss and expertise to compete in the world marketplace—and soon, otherwise we will all lose. Thirdly, the "four pillars" must be permitted to crumble completely; in any case many financial institutions are already circumventing this traditional regulatory scheme by complex arrangements of holding and subsidiary companies. Fourthly, the nature of the protection required for depositors and creditors must be clearly rethought, but with the ultimate goal of placing responsibility for risks on the institutions and the determination of what is an unreasonable risk on more effectively armed regulators than at present. Fifthly, all of the speakers were agreed that we have waited too long to act and that something—anything—should be tried rather than governments continuing to study the matter in the forlorn hope of producing the perfect regulatory scheme. Sixthly, even the English and American contributors to the conference conceded that whatever regulatory regime ultimately results from the current soul-searching, it must be Canadian. As Edward Neufeld forcefully argues in his comment on the fourth group of papers devoted to comparative analysis, the Canadian financial institutions scene historically has been unique and any future scheme must continue to reflect that uniqueness. In particular, it will have to include co-operative federal-provincial and interprovincial actions and sensitivity to our provincial differences and regional disparities which today are reflected in such obvious indicia as the strength of the banks' presence in the large Eastern cities and, conversely, the strength of the co-operative and credit union movements in the West and in the rural areas.

Canadian Financial Institutions: Changing the Regulatory Environment is devoted explicitly to economic and public policy analysis of the regulation of financial institutions and there is little here for the practitioner who wishes to answer every day factual questions about banking transactions, loan and trust companies or securities broking. It is of greatest value, however, to those who advise financial institutions at the senior level in that it provides in a single convenient and highly readable package detailed coverage of the policy issues which such clients must address in making major business decisions. Therefore, it is of most value to the lawyer *qua* business adviser, rather than the lawyer *qua* lawyer. But it is also for the same reason a useful volume for economists, businessmen, government regulators and interested laymen.

This is not to say that there are no papers devoted to descriptive analysis of the present regime. There are, in fact, several, of which the papers by Moull, Waitzer and Ziegel on the current constitutional structure of regulation, Benston on American regulation, Brealey on English regulation and Humphrys on deposit insurance schemes are the best. Conversely, the remaining papers are mostly devoted to prescribing the appropriate policies for future regulatory schemes, and of these the most provocatively thoughtful are the papers by Professors Pesando, Chant and Kane. However, a note of caution must be sounded in that some of the discussion in this latter group of papers has been overtaken by subsequent events.

Reading this volume and prompted by the high quality of its contents, this reviewer was reminded of the fact that there is little written in Canada about the financial institutions for the legal market, of a specialist and scholarly nature. In stark contrast, every lunch time bookstore browser cannot help but be struck by the plethora of books written in recent years by journalists for the popular market about the financial services industry. Likewise, perusal of law school calendars indicates that but for one or two faculties, including to a superlative degree that which co-sponsored the conference, no courses at all are offered to future practitioners about the law and the institutions for which they will be acting (or opposing) within a year of graduation, whether in a small suburban firm, a large corporate practice, a government office or as in-house counsel, or whether in small consumer transactions or large corporate ones.

Canadian Financial Institutions: Changing the Regulatory Environment goes some way toward filling the near-void currently existing in Canadian legal literature, although given its explicitly interdisciplinary crossovers with economics and business policy, only some way. One would hope that its appearance will spark greater interest in its subject matter in the legal community and that further scholarship will result. In the meantime, it is highly recommended as an articulate and scholarly introduction for lawyers to the significant policy issues concerning the regulation of financial institutions in Canada and therefore also the future shape of the Canadian economy.

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Law, Capitalism and the Right to Work.
By R.D. WHITE.
Toronto: Garamond Press. 1986. Pp. 109. ($5.95).

Reviewed by Michael MacNeil*

This book is one of a series brought out by the Network Foundation for Educational Publishing, a voluntary collective of scholars whose goals include the development of a Canadian post secondary book publishing sector, the production of innovative texts and more varied sources for critical works in the humanities and social sciences.[1]

In this short and sketchy work, White warns against the danger of increasing emphasis on the individualization of rights in Canadian society. With the introduction of the Charter of Rights and Freedoms, there has been a pronounced tendency to transform many social and political problems into legal questions to which courts are expected to provide definitive and just solutions. The author examines these developments from a sociology of law perspective, positing a theory of law as an institution which serves to maintain class differences and inequalities in modern society. White attempts to substantiate his thesis by looking at the problems of women and workers in the context of legal change.

Law is viewed primarily as a means of social control which complements but is much more subtle than direct state coercion.[2] The success of law at achieving social control is based in part on its being perceived as relatively autonomous from the advantaged class.[3] Hence it is accepted as a legitimate institution whose norms and methods of dispute settlement are to be respected. Law is able to achieve this preeminent position by its appearance of neutrality and by its emphasis on formal equality of individuals before the law.

The author disputes the myth of judicial neutrality, claiming that judicial decision-making often rests on a search for moral consensus, a particular judge's view which is informed by his or her position in class, gender and race structures of Canadian society.[4] As for equality, it is argued that the legal system's conception of each citizen as having equal rights supports existing inequality. Formal equality ignores social and

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[1] Other recent texts in the series of interest to students of law include L. Panitch and D. Swartz, From Consent to Coercion: The Assault on Trade Union Freedoms (1985) and V. Burstyn and D. Smith, Women, Class, Family and the State (1985).

[2] P. 23.

[3] P. 28.

[4] P. 38. See also D. Olsen, The State Elites, in L. Panitch (ed.), The Canadian State: Political Economy and Political Power (1977), p. 199.

economic inequalities and makes it unlikely that law can be an effective means for redistributing either power or wealth.[5]

These conclusions are more a matter of assertion than the result of sustained argument and evidence. For instance, state welfare policies are dismissed as "special law" which, it is claimed, does not detract from the predominance of the rule of law ideology. Given the extent of twentieth century welfare state policy, this is an inadequate analysis. The existence of the welfare state has become so crucial to the maintenance of advanced capitalism that it can be argued that the latter cannot exist without the former. These welfare policies do distinguish between groups on relevant bases in order to promote greater substantive equality. Employment standards legislation, for instance, restricts the ability of the employer and the employee to contract and so recognizes the inequality of bargaining power between the two. While redistribution may not be taking place from capital to labour, redistribution within labouring classes does occur, ameliorating to some extent the position of the most disadvantaged.[6] White fails to delve deeply into these issues, leaving an overly simplified account of the role of law and the state.

The text analyzes a number of recent Canadian developments. The Charter of Rights and Freedoms is described in ambivalent terms, characterizing it as a basically individualist document which transfers much power to judges who are not politically responsible to an electorate. This is said to be potentially dangerous.[7] On the other hand, sections 1 and 33 of the Charter, which reserve to legislatures the power to make laws which infringe on individual rights, are described as limits that can be used to bypass entrenched rights and freedoms.[8] It is difficult to have it both ways, and again White appears unwilling to undertake a full analysis to determine whether the judges or the legislators should decide rights issues generally.

A preliminary analysis of this issue would require one to focus on the general approach taken by judges in interpreting the Charter and on the sorts of circumstances in which legislatures are likely to exercise their powers to override Charter guaranteed freedoms. No attempt is made to do so in the text. Some elements that could be noted include the courts' apparent espousal of a substantive due process element to section 7 of the Charter.[9] This creates the possibility that the courts could use

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[5] P. 27.

[6] C. Offe, Contradictions of the Welfare State (1984).

[7] P. 32.

[8] P. 31.

[9] *R.* v. *Morgentaler* (1985), 52 O.R. (2d) 353, 22 D.L.R. (4th) 641 (Ont. C.A.); *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

the Charter to strike down legislative initiatives which are specifically responding to the redistribution concerns of particular groups. On the other hand, the first resort to section 33 of the Charter to immunize legislation from Charter review (other than the province of Quebec's complete opting out) was by the government of Saskatchewan in its back-to-work legislation for government workers, denying labour the right to strike.[10] These developments show that neither judicial nor legislative control will necessarily guarantee the system of social rights for which White argues.

The analysis of the contribution which law makes to improving the position of women in society displays a great deal of scepticism. Although White concedes that a number of positive developments have taken place, these are attributed more to changes in underlying social and economic conditions than to conscious attempts to change society through legal reform. Elements of the legal system which impede its effectiveness as a channel for improving women's rights include the male dominated judiciary, the narrow and ultimately conservative nature of judicial decision-making, procedural complexities dictated by the requirements of administrative law, and the individualization of issues. This latter point is demonstrated by identifying shortcomings of such rights as equal pay for equal work and prohibitions on sexual harassment.

There is evidence to demonstrate that equal pay for equal work legislation has had virtually no impact on the pay differential between men and women.[11] The recent decision of the Federal Court of Appeal in *The Queen* v. *Robichaud*[12] demonstrates the difficulties in requiring an effective response from an employer to ensure against sexual harassment by its employees. It is because of, among other things, the reliance on individual complaints that the law fails to attack the systemic nature of the problems which underlie the complaints.

The final part of the book focuses on the increasing use of "right to work" rhetoric. This is a slogan which would appear to imply that everyone should have a right to a job with fair wages and conditions, but has been distorted to mean that there should be no interference with an individual's liberty to enter an employment contract on whatever terms he or she wishes. White traces the influence of this increased emphasis on right to work through legislative changes and labour board and court decisions in Saskatchewan, Alberta and British Columbia that illustrate the attempts of both business and government to limit the power of unions.

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[10] SGEU Dispute Settlement Act, S.S. 1984-85-86, c. 111, s. 9(1), enacted 31 Jan. 1986.

[11] M. Gunderson, Spline Function Estimates of the Impact of Equal Pay Legislation: The Ontario Experience (1986), 40 Relations Industrielles 775.

[12] (1985), 6 C.H.R.R. D/2695 (Fed. C.A.).

Care must be taken in interpreting the developments to which White attaches such significance. He does demonstrate the reliance on right to work ideology in justifications given for many of the legislative amendments in the three Western provinces. Nevertheless, many of these changes merely imitate the provisions in other jurisdictions where right to work rhetoric is eschewed. A more careful analysis would demonstrate an overarching search in most Canadian jurisdictions for industrial peace, which serves to enhance the productivity concerns of industry and government. At the same time, the relative autonomy of law from the economically dominant classes means that many rights are granted to employees and unions and even the most recent developments cannot be solely attributed, as White appears to claim, to a conspiracy between government and private sector employers. The process by which specific legislative initiatives, designed to further the ideological views of the party in power, are mediated through other institutional mechanisms requires a complex analysis which White has failed to undertake.

The author refuses to accept the inevitability of the predominance of individual rights over social rights and collective power. In many ways the book is an impassioned plea to those who are involved in the legal process to be alert to the broader significance of many features of legal reasoning and structures. The problem, if one accepts the analysis, is to decide what to do. Does one give up in despair, does one ignore law altogether and concentrate on changing the social and economic structures through other means, or does one continue to plug away with the hope that law can incrementally make changes that lead towards greater power sharing and political, economic and social equality? It is in attempting to answer this question that this book is least satisfying.

White is emphatic that for fundamental changes to occur, sustained pressure must come from outside existing institutional forums. He admits that more specific research must be carried out to devise better political strategies that challenge the basis of the present legal system. Nevertheless, it is important in his eyes to resist policies and legally supported practices that take power out of the hands of such groups as women, labour and native people. Furthermore, struggles centred around law can be used to publicize social and political issues. An attempt to enshrine social rights, such as the right to food, housing, education, health care and transportation, into the legal structure can serve to unify various social groups who sometimes are blinded by the emphasis on individual rights from seeing the commonality of their problem. This emphasis would also serve to challenge the ideological terrain on which the rights debate normally takes place.

This proves less than satisfying because of the failure to work out in any detail the practicalities of such an approach or give any analysis suggesting why it is likely to succeed. For instance, White's concern about the existence of an insulated judiciary making political decisions

is not adequately addressed by the suggestion that we consider having an elected judiciary. We already have an elected legislature, which by no means ensures the accountability of lawmakers to the groups who, White argues, should have greater voice and power in societal decision-making. The experience of our neighbours in the United States does not lend any great support to the idea that effective control of the judiciary is provided by electoral requirements.[13] Nor are any concrete suggestions given about how one mobilizes groups around the fight for social rights. Even the suggestion that one use legal disputes as forums for exposing the ideological, class-based results of dispute settlement is not detailed.[14]

Despite these limitations, White's book is a provocative investigation of recent Canadian developments. It forces one to reassess the law's commitment to equality, individual rights and judicial neutrality. We need more such critical perspectives on law in Canada.

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Judging the Jury.
By VALERIE P. HANS AND NEIL VIDMAR.
Penum Press: New York and London. 1986. Pp. 285. (US $17.95)

Reviewed by Anthony N. Doob*

The jury in criminal trials appears to be more important than its numbers would suggest. Evidence would suggest that fewer than five per cent of all criminal cases are disposed of by a jury, and for our most common offences jury trials are not available to the accused. But the jury in Canada does have a special status. The Charter of Rights and Freedoms[1] guarantees the right to a jury trial in all offences (other than an offence under military law tried before a military tribunal) for which the potential punishment is five years or more. Jury trials are mandatory for trials involving our most serious offences unless both the accused and the Crown consent to a trial without a jury by a judge of the superior court.[2]

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[13] See R. Davidow, Judicial Selection: The Search for Quality and Representativeness (1981), 31 Case W. Res. L. Rev. 409.

[14] One exegesis of such a possibility is set out in P. Gabel and P. Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law (1982-83), 11 N.Y. U. Rev. L. & Soc. Change 369.

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[1] Constitution Act, 1982, Part 1, s. 11(f).

[2] Criminal Code, R.S.C. 1970, c. C-34, ss. 429.1, 488.

Jury verdicts, though sometimes controversial, also have a special status in our law. Implicitly, they may be seen as having more weight than a verdict by a judge. Section 613(4)(b)(ii) of the Criminal Code[3] indicates that a Court of Appeal has the power to substitute a verdict of guilty for a not guilty finding if the trier of fact is a judge, but not if the trier is a jury. If the not guilty verdict in a jury trial is overturned, the accused has the right to be heard by a new jury.

Interestingly enough, although decisions by judges in Canada are often criticized, occasionally to the point of eliciting contempt charges, juries themselves seem to be remarkably free from criticism of their decisions. For example, the Morgentaler trials in Quebec and, more recently, in Ontario dealt with extremely controversial topics, yet even those who disagreed with the outcomes did not focus their displeasure on the decision makers themselves.

The jury is a peculiar institution. The Law Reform Commission of Canada began its Working Paper Number 27, The Jury in Criminal Trials,[4] as follows:

> In trial by jury, twelve people are chosen at random to decide the fate of a fellow human being. They are placed in an unfamiliar setting and required to observe solemnly the unfolding of a real life human drama. They deliberate in secret. They return a verdict for which they are not required to give reasons. They then fade anonymously back into their everyday lives.

After they fade anonymously back into their everyday lives, the jurors are effectively forbidden forever to explain the reasons for their decision. The process by which they make their decision and the deliberations themselves are almost completely secret. For the most part, jury members are unknown to the public. In only a small number of trials does anyone outside of the courtroom know anything about the members of the jury. Seldom are the names of jury members ever published in the mass media. Jurors are seen as interchangeable. Even within the courtroom, very little is known about the characteristics of this amateur group of triers of fact. And yet, it seems, we have a great deal of faith in their decisions.

About ten years ago, the Law Reform Commission of Canada commissioned a Gallup poll to determine Canadians' views of the jury. Put most simply, Canadians like the jury. For example, respondents were asked whether they thought a judge or a jury was more likely to come to a just and fair verdict. A majority of Canadians—fifty-four per cent—thought the two forms of court were equally likely to come to a just and fair verdict. However, of the remaining forty-six per cent who saw there to

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[3] *Ibid.*

[4] Law Reform Commission of Canada, Working Paper No. 27, The Jury in Criminal Trials (1980), p. 1.

be a difference, it was four to one in favour of the jury. It was not simply that people thought that juries were more likely than judges to acquit or to be susceptible to certain kinds of argument. It was, instead, the view that juries were more likely to be "just and fair".

There are other ways in which the public has expressed its faith in the jury. In the same survey, over three quarters of the respondents thought that members of the jury ought to be instructed that: "It is difficult to write laws that are just for all conceivable circumstances. Therefore you are entitled to follow your own conscience instead of strictly applying the law if it is necessary to do so to reach a just result." Thus not only do many Canadians think that a jury is likely to be more just than a judge; a substantial portion think that a jury should be encouraged not to apply the law strictly as written. Not surprisingly, therefore, most members of the Canadian public want jury trials to be available for serious offences, and the more serious the offence the more likely they are to feel that jury trials should be available. For example, in the Law Reform Commission of Canada's survey, ninety-two per cent of Canadians felt that an accused should have the option of a jury trial for murder whereas only forty-seven per cent felt it should be available for someone charged with common assault.

There is, then, a good deal of faith in the jury. Nevertheless, it is important to look at the evidence on whether the jury is worthy of the esteem in which it is held. Unfortunately, the primary sources of this evidence are scattered and the data are often presented in a form that makes inferences difficult to draw. What is needed in this situation is a good, readable secondary source that tells what is known.

Valerie Hans and Neil Vidmar have, for the most part, succeeded admirably in providing this. Judging the Jury summarizes most of the important findings in the social science literature on juries. Equally important, the authors have done this in a thoughtful and interesting rather than in a technical and ponderous manner. Thus one is not subjected to a "this study show this; that study shows that" type of summary. Instead, using journalistic accounts of some celebrated trials and interweaving these with systematic survey, observational and experimental data, they are able both to bring the more substantial findings to the attention of the reader and to relate these findings to the individual jury trial—or at least the individual *celebrated* jury trial.

Using accounts of well-known trials as a way of illustrating more general points, which are then usually supported by more systematic data, makes for interesting reading. The real trials are often more vivid and memorable than are the statistical data. This would be all right except for one thing: celebrated trials, as Hans and Vidmar point out, are by definition unusual. Hence, one has to remember that few cases, even in the United States, get the attention and resources that these

cases do. It is difficult to know exactly how representative such cases are. Hans and Vidmar seldom distinguish between the run-of-the-mill cases and the ones they use as illustrations. The reader, then, must be careful to evaluate the evidence that various statements are actually based on

The book begins with a brief history of the jury. Though it is well-written it fails, I think, to emphasize some of the important changes that have taken place. A more thoughtful look at the history and a clearer discussion of the underlying theories of the jury would have helped us understand some of the issues that surround the jury today.

For example, the notion that jury members should, if possible, be ignorant of the events and the parties involved in the offence would have seemed quite peculiar to people in England in the early days of the jury. Similarly, the concept of "jury of peers" suggests a purpose of the jury that might well be thought absent from the jury made up, until fairly recently, of what were probably socially "acceptable" people. Such issues relate directly to our ambivalence about how we want our juries to be constituted. One can look, for example, at how the controversial issue of "jury nullification", whereby juries ignore the law to come to what they feel is a just result, arose in other times. Jurors a couple of hundred years ago might be seen as having to decide, not so much whether someone did something as who among all of the guilty should be hanged in public and who should be spared the indignity. Hans and Vidmar's chapters on jury nullification is excellent, but it could have been used to illustrate the conflicting theories of the jury. For example, in a survey conducted by the Law Reform Commission of Canada about ten years ago, Canadian judges who preside over jury trials expressed the somewhat contradictory view that although one of the legitimate purposes of the jury is to bring community values into the trial process, juries should not be told that they have the power to use these values to come to a just and fair verdict that might violate a strict interpretation of the law.

Jury researchers in the United States give an understandably large portion of their attention to issues related to the selection of jury members. This book reflects this tradition and the fifth of the book devoted to this topic makes interesting reading both for those who are interested in the phenomenon as practised in some parts of the United States and those who wonder whether the law in Canada should change. Hans and Vidmar point out that there are difficulties with jury selection in the United States. For example, one can ask, as they do, whether a system which allows, or indeed, encourages counsel to subject prospective jurors to extensive questioning undermines the legitimacy of the jury system. One could also ask, of course, why a juror in the United States or elsewhere should have to reveal his or her political, social, or religious views to the public in court.

Systematic or, more grandly, "scientific" jury selection in criminal trials in the United States has received a lot of attention in the media there and here. Assertions of its effectiveness, based usually on inadequate evidence, make it appear, depending on one's point of view, to be either an important weapon for counsel to achieve justice for the client, or a tool to dismantle the very nature of a jury trial. Hans and Vidmar point out that the small amount of evidence available does not show that it is effective above and beyond what (good) lawyers do on the basis of intuition. Furthermore, the authors point out that the practice is unique to the United States, and cite evidence from Great Britain of the rather skeptical view of the American jury selection held by some Welsh barristers. And yet, in the end, they conclude that:[5]

> Though far from a perfect solution, in depth, careful examination of prospective jurors that focuses on jurors' preconceptions or reactions to the specific case can help to minimize bias and incompetence.

Given that judges makes critical decisions about people's lives in criminal courts more often than juries do, and given that there is substantial evidence that judges differ from one another in important ways that relate to critical decisions in court (for example sentencing), one wonders whether anyone would argue that judges should be subjected to "careful examination. . .that focuses on [their] reactions to the specific case". Notwithstanding that trial lawyers may freely acknowledge in private that there are certain judges who they feel would not be as "fair" to their client as others, few, I think, would suggest an examination of this kind.

Although they present an excellent, balanced view of the social science evidence, Hans and Vidmar occasionally simplify issues unnecessarily. In doing so, they run the risk of overlooking interesting and sometimes critical issues about the jury. In the section on jury selection, for example, after contrasting the British view with the American view, they ask the question, "Who is right?" As I have already noted, they come down in favour of the Americans. But the question is not answerable unless one first decides what a trial is supposed to be about and how one weighs certain values. Given the different cultures, there is no reason not to assume that both are "right" (or for that matter that both are wrong). Perhaps the difference in the way in which many judges are selected in the United States necessitates differences in the way in which juries are selected. If a jury is a way to avoid a judge, perhaps greater scope is needed in the United States. I am not suggesting answers; but I am suggesting that the question is unlikely to be a simple unidimensional one. The answer, if there is one, will probably relate to one's concept of what a jury is supposed to be.

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[5] P. 246.

Perhaps the most mysterious aspect of the jury system in Canada is the jury decision process itself. Thanks to section 576.2 of the Criminal Code,[6] jurors are not able to tell us anything about how they make their decisions. However, jury researchers here and in the United States have found that other methods of studying the jury decision process may give us as good or, at times, better information about how juries come to a decision. Hans and Vidmar once again do an excellent job of analyzing these data. The issues are important. The evidence suggests, for example, that aspects of the jury decision process—like the way in which jurors are polled during their deliberations—may influence how (or whether) they will come to a verdict. Jury researchers have also shown that the kinds of experiences that jurors bring to the discussion are enormously varied.

Similarly, and not surprisingly, researchers have found that jurors vary enormously in how much they talk (and perhaps, then, how influential they are in determining the outcome). If one of the purposes of the jury is to bring a large number of different experiences equally to bear on the decision at hand, such findings as these suggest that we might want to think about whether there should be some "rules" or "procedures" or "guidelines" for jurors to use in structuring their deliberations. It is clear from the evidence summarized by Hans and Vidmar that at times the jurors desperately want advice on how to proceed and yet, for various reasons, are not given it.

For the most part, we have not addressed ourselves directly to the issue of whether jurors understand what they are supposed to be doing. Indeed, without systematic research on the issue, we do not really have any idea what jurors understand. Judges no doubt work hard to give instructions that they hope jurors can understand. A good deal of work has gone into the development and systematic testing of some instructions for juries in the United States.

When samples of jurors in Canadian criminal trials were asked ten years ago by the Law Reform Commission of Canada whether they understood the instructions given them by judges, almost all of them thought that they probably did. Nevertheless, about a quarter of those who had just finished serving on at least one criminal jury underestimated how certain they had to be before convicting an accused. We have a good bit of evidence from research carried out in this country, in the United States, and in Britain that instructions to jurors which limit the use to which the criminal record of an accused can be put (under section 12 of the Canada Evidence Act[7]) are not effective. Leaving aside the question of whether the law is based on a false theory of human behaviour, it

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[6] *Supra*, footnote 2.

[7] *Op. cit.*, footnote 4.

seems that jurors can be given such instructions in ways that make it more likely that they will be able to follow them. If we are serious in wanting jurors to understand what they are supposed to do, we would be well advised to think carefully about doing the kind of work, on developing an understanding of instructions, described and advocated by Hans and Vidmar.

Hans and Vidmar discuss other important issues that cross national boundaries. As I have already pointed out, they include an interesting chapter on "jury nullification"—the process by which juries are able to ignore the law to do what is just—a process that clearly receives a good deal of support from Canadian citizens but not from trial judges. In another chapter, the authors conclude, after reviewing the issues and evidence, that a twelve person jury that is required to come to a unanimous verdict is more likely to fulfil its functions effectively than a jury that is either smaller or not required to be unanimous. The Law Reform Commission of Canada's 1980 Working Paper, The Jury in Criminal Trials,[8] and its 1982 Report to Parliament, The Jury, seem to have laid to rest the pressure to change these two aspects of our jury system. However, anyone interested in these important issues will probably learn from Hans and Vidmar's chapter on them.

A more general question that brings together much of the research summarized in this book is a simple one: what can be done to make the job of juror more effective? Social science has clearly addressed some of these issues and the results are provocative. The issue has been studied whether jurors' taking notes—a practice that seems to vary from location to location—should be allowed, encouraged or discouraged. Not surprisingly, jurors found their own notes to be helpful, just as, presumably, judges find their own notes to be useful when hearing cases alone. Encouraging jurors to ask questions does not appear to be as disruptive as some suggest it might be. In the experiments that have taken place, jurors did not ask witnesses many questions—an average of fewer than three per trial—but they did feel that it helped them come to a reasonable verdict. Canadian data collected by the Law Reform Commission a few years ago suggest that most jurors perceived that they could not ask questions and most of those wished that they could have. More important, the evidence suggests that taking notes or being allowed to ask questions leads to an increase in the jurors' understanding of the law. In a society where jurors are sometimes asked to listen to cases for days, weeks, or even months on end, we would do well to consider the implications of findings such as these.

Hans and Vidmar, in the final section of their book, deal with the jury and insanity, rape, and capital punishment. These chapters may be

[8] Law Reform Commission of Canada, Report No. 16, The Jury (1982).

less interesting than the others to most Canadians, largely because the ways in which the issues are dealt with in Canada make some of the specific findings they discuss less relevant. However, the chapters do illustrate the same point: it is possible to find out something about juries (or, for that matter, other aspects of the trial process).

As social scientists, Hans and Vidmar are strong supporters of the American jury. It is difficult to know whether they would have the same view of the Canadian jury system. As has already been pointed out, they do not favour our rather limited questioning of prospective jurors. However, the answer to this and other similar questions is really quite irrelevant to the strength of the book. Similarly, the rather disappointing short concluding chapter is also irrelevant to the main value of the book. Different people could legitimately draw different policy conclusions from the evidence summarized in this book. They might agree on the "facts" but disagree on how the competing interests should be balanced. Social scientists, like lawyers, do not have exclusive expertise in how competing values and interests should be resolved.

What is hard to disagree with, however, is the view that it is better to make policy decisions in light of systematic knowledge of what is happening than to make them on the basis of anecdotal, unsystematic and differing views of what goes on. Hans and Vidmar not only demonstrate that we know a fair bit about the jury but, more importantly, they demonstrate that the answers to a good many (but not all) questions can be discovered through thoughtful research.