A New Endeavour: Selected Political Essays, Letters, and Addresses.
By FRANK R. SCOTT; Edited by Michiel Horn.
Toronto: University of Toronto Press. 1986. Pp. xlix, 144. ($25.00 cloth, $12.95 paper)

Reviewed by Alan C. Cairns*

This collection of the political writings of Frank Scott completes a trilogy which commenced with his Essays on the Constitution in 1977, followed by The Collected Poems of F.R. Scott in 1981. For the student of Scott these should be supplemented by, On F.R. Scott: Essays on His Contributions to Law, Literature, and Politics[1] and, on its appearance, by the eagerly awaited biography of Scott by Sandra Djwa. Djwa confronts the daunting task of providing a coherent interpretation of a renaissance man of letters who could have earned fame from any one of his poetry, his legal and constitutional scholarship, or his contributions to politics and public life.

The selections in this volume are from Scott's political writings. They include letters to the editor, personal correspondence, numerous occasional pieces, and several substantial works, particularly Social Planning and Canadian Federalism, Scott's contribution to Social Purpose for Canada,[2] designed as an intellectual contribution to the transformation of the depression-born CCF into the New Democratic Party.

These writings, covering the period from 1931 to 1971, and the thoughtful introduction by Michiel Horn, provide an entrée into the evolving political thought of one of Canada's leading intellectuals of the previous half century, who "for most of his adult life. . . thought of himself as a socialist".[3] From his early involvement in the League for Social

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[1] S. Djwa, R. St. J. Macdonald (eds.) (1983).

[2] M. Oliver (ed.) (1961).

[3] P. xlvi.

Reconstruction, through his eight years as national chairman of the CCF from 1942 to 1950, and his subsequent role in the formation of the NDP, Frank Scott was a constant force for the adaptation of democratic socialism to the brutal lessons which the middle years of the twentieth century imposed on all reflective reformers.

Unlike his colleague and friend Frank Underhill, who found the tensions between CCF membership and intellectual autonomy unacceptable, or his other colleague of the thirties, Eugene Forsey, who could not accept the two nations approach of the NDP founding convention, Scott did not leave the CCF party he helped to found nor the NDP which succeeded it. He was, however, always in the vanguard of the party, arguing for responsiveness to those emergent realities in Canada and the world which routinely falsified the predictions of yesterday's seers. As post-war Keynesianism seemed to have stabilized the mixed capitalist economy, and as the inhumanity of Soviet collectivism without democracy became increasingly evident, he came to define socialism more as the fulfilment of democracy than the displacement of capitalism by a regime of public ownership. The latter was reduced to only one of the instruments to be employed for the socialist objective of creating the conditions for human personality and individuality to flourish. As he informed the 1950 National CCF Convention: "[W]hen to nationalize. . . is a matter of practical application rather than of principle. Nationalization is only one tool, and we must learn to use all the tools."[4]

Although Scott consistently saw the concentrated corporate power of capitalism as hostile to democracy, and its dependence on the profit motive as morally degrading, he was unswerving in his conviction that when the chips were down the combination of democracy and capitalism in the United States was greatly to be preferred over the totalitarian collectivism of the Soviet Union. Soviet experience confirmed "that it is possible for a country to nationalize all the means of production and still be as far from socialism as ever".[5]

Scott was a consistent supporter of a two-language vision of Canada and of Quebec, a position he held long before it became fashionable to do so. In a 1936 article on French Canadian Nationalism, reprinted here, he anticipated much of the philosophy of the Laurendeau-Dunton Royal Commission on Bilingualism and Biculturalism of which, three decades later, he was a commissioner. He also persevered in defending the rights of the English-speaking community in Quebec when it appeared threatened by the linguistic nationalist policies of a succession of Quebec governments in the 60s and 70s. Like Trudeau, he was opposed to a coincidence of ethnic and political boundaries, and he did not confuse

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[4] P. 95.

[5] P. 93.

minority rights with provincial rights. Nevertheless, his view of Canadian federalism did evolve from the centralist posture typical of the CCF in the 1930s to a more sympathetic appreciation of the provinces in the postwar decades. Scott, however, never went as far in his defence of the provincial role in the establishment and diffusion of democratic socialism in Canada as did Trudeau in his famous article, The Practice and Theory of Federalism.[6]

This volume ranges from ephemeral correspondence not intended for the public eye, through acid political commentary intended to hit the public and the establishment in the eye, to a few scholarly essays. Scott's developing views on federalism, on the relations between capitalism, socialism and democracy, on French-English relations, and on Canada's international role are paraded before the reader in this volume. In two short articles his support for the 1970 invocation of the War Measures Act is crisply presented.

Scott was a master of the English language. His graceful prose is an intoxicating delight for social scientists sentenced to read the output of many of their colleagues.

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A History of English Criminal Law and its Administration From 1750, Volume 5, The Emergence of Penal Policy.
By LEON RADZINOWICZ and ROGER HOOD.
London: Stevens & Sons. 1986. Pp. xv, 1101. (£75.00)

Reviewed by Graham Parker*

Radzinowicz, and now Hood, are guilty of false advertising. This historical behemoth, running to five volumes and several thousand pages, is about crime, not criminal law. This fifth volume discusses criminology, penology, prisons, reformatories, police, vagrancy, drunkenness, transportation, borstals, juvenile deliquency, probation, ticket of leave, Victorian reformers and, inevitably, flogging.

Radzinowicz is no Gibbon, Macaulay, Maitland or Toynbee; there is no grand scheme or insightful synthesis. The History of English Criminal Law reads like the work of a committee or a royal commission. Much of the text is made up of bland general statements, some of the more interesting material being relegated to the very comprehensive footnotes and bibliography (264 pages). On the other hand, the first three

[6] In Oliver, *op. cit.*, footnote 2.

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chapters on theories of crime, describing the views of Lombroso, Marx, Galton *et al.* are excellent. The examination of criminal statistics is a useful discussion of a neglected subject. I enjoyed reading of the exploits of the Victorian reformers. The chapters on habitual criminality, the establishment of prisons and borstals, drunkenness, vagrancy and flogging are history as written by lawyers and sociologists, heavy on facts obtained from conventional secondary sources and rather lacking in interpretation. This volume does not hold together very well; the chapters seem like rather long entries in an encyclopedia. The book would make a good source-book for student essays.

The intellectual origins of modern English penal theory are full of paradox. While the rational and ameliorative views of Beccaria (and other *philosophes* of the Enlightenment) had their effects on Howard, Romilly and Mackintosh, the super-rationality of Bentham's views on codification and "scientific" treatment of criminals was largely ignored in England although very influential in Europe. Admittedly, the science of Galton and the statistical work of Rawson were taken seriously in England, but after the mid-nineteenth century the most impressive reforms were by the remarkable gallery of Victorians who were usually amateur, pragmatic and enthusiastic rather than scientific, organized and idealistic. These Victorians were not dreamers and they were not rigorous ideologues. They were doers, such as the country squire Thomas Barwick Baker who was a prolific pamphleteer but who also built a boys' reformatory on his estate; Matthew Davenport Hill, a judge who used his addresses to grand juries as a vehicle for reform; Mary Carpenter, who devoted her life to better housing for the poor and establishing reformatories; Sydney Turner, who used his evangelical zeal to create more humane penal institutions; John Horsley, a temperance pamphleteer and prison chaplain who undertook pioneering "criminological" research. Another fifty illustrious names could be added; they would include many clergymen, usually with evangelical or social gospel roots; writers, such as Charles Booth and Henry Mayhew, whom we would now call investigative journalists; public-spirited country squires; barristers who were also good polemicists; and dedicated penal administrators and public servants such as William Crofton, Joshua Jebb, Edmund du Cande and Evelyn Ruggles-Brise. Radzinowicz and Hood present us with a good survey of these people who lived through a century of extraordinary energy and remarkable reform. I felt James Fitzjames Stephen and John Maconochie were somewhat neglected. I was disappointed by the treatment of the development of the borstal. I thought the history of transportation was trite but perhaps the authors looked upon that form of penal discipline as Australian rather than English history.

The most intriguing story in the book is the diminution of crime in mid-nineteenth century England. Statisticians and social historians could have a field day with this topic. Radzinowicz and Hood suggest the

following factors could be the causes of this phenomenon (if it indeed happened): the amelioration of social conditions, an increase in police manpower and efficiency, a reorganization of the prison system with reformatory and industrial schools "reforming" criminals, the supervision of habitual criminals, and the social hygiene consequences of emigration. That list is fraught with potential controversies.

I wish I had the space to cite many of the quotations that the authors have culled from the authorities. There is an insightful comment from Engels about the relativity of criminal statistics. Can you imagine finding Cardinal Manning more or less in agreement with Engels? — "Those who live among statistics, and have seldom, if ever, lived among the poor, little know how poverty brings temptation, and temptation both vice and crime . . . It would be an affectation of scepticism to say that this close relation is not by way of cause and effect".[1] The authors quote the perceptive interpretation of the popular Victorian phrase "dangerous classes" by a modern commentator, Kellow Chesney:[2]

> [T]hey were not talking about the labouring population as a whole, nor the growing industrial proletariat. Neither were they referring to that minority of politically conscious, mostly "superior" radical working men on whom any sustained working class political movement ultimately depended. They meant certain classes of people whose very manner of living seemed a challenge to ordered society and the tissue of laws, moralities and taboos holding it together.

I have reservations about this book because the authors do not offer me much nourishing food for thought on the crucial questions. Why, despite the good works of the Victorian reformers which had such promise, did the end of the nineteenth century see an expansion of crime and a great proliferation of penal institutions? What role did social class play in the history of crime and penal institutions? What was peculiar about English legal and penal institutions and the thought that created them?

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Contract Law in Australia.
By K.E. LINDGREN, J.W. CARTER and D.J. HARLAND.
Sydney, Australia: Butterworths Pty. Ltd., 1986. Pp. lxxvii, 817. ($A. 54.00)

Reviewed by M.H. Ogilvie*

Until the publication in 1986 of Contract Law in Australia, Australian lawyers were without an indigenous textbook on the law of contract, but

[1] P. 45.

[2] P. 69.

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for the Australian edition of Cheshire and Fifoot.[1] Thus Contract Law in Australia is the first major textbook developed for Australian lawyers and based on Australian contract jurisprudence. The advent of such an event was, perhaps, proclaimed by the publication of several other books on particular aspects of contract law in the early 1980s, including Time in the Performance of Contracts, by K.E. Lindgren;[2] The Law of Unjust Contracts, by J.R. Peden;[3] and Understanding Contract Law, by D. Khoury and Y.S. Yamouni.[4] As well there is increasing evidence of innovation in Australian contract jurisprudence in the courts,[5] and to a lesser extent in the legislatures.[6] The contract decisions of the High Court of Australia, indeed private law decisions generally from Australia, have always commanded greater respect and been accorded greater persuasive value in the English courts than Canadian decisions. The time was ripe, then, for an Australian textbook on the law of contract.

On the basis of a first reading, Contract Law in Australia is the best textbook written about contract law in the Commonwealth common law world, with perhaps the exception of Chitty.[7] It exemplifies the best traditions of doctrinal exposition, often associated with English legal writing. The material is comprehensive and well-organized. The exposition is lucid, economic and detailed. Close attention is paid to the careful description and restatement of the law as well as to the problems created by individual contractual principles. The authors propose solutions to the problematic areas, drawing both upon Australian and English scholarly writing, and their own ideas and experience as practitioners and professors of contract law. The writing style is simple, straightforward and decidedly Anglo-Saxon in nature. And, especially important in a text written by three authors, there is no sense of stylistic discontinuity from chapter to chapter. The authors' stylistic idiosyncrasies have apparently been repressed in the interests of writing a homogenous text, although individual responsibility for each chapter is indicated in the table of contents.

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[1] G.C. Cheshire and C.H.S. Fifoot, The Law of Contract (4th Australian ed. by J.G. Starke and P.F.P. Higgins, 1981).

[2] (2nd ed., 1982).

[3] The Law of Unjust Contracts, including the Contracts Review Act 1980 (N.S.W.) (1982).

[4] (Sydney: Butterworths Pty. Ltd., 1985).

[5] See for example *Meehan* v. *Jones* (1982), 149 C.L.R. 571 (Aust. H.C.); *Taylor* v. *Johnson* (1983), 151 C.L.R. 422 (Aust. H.C.); *Commercial Bank of Australia Ltd.* v. *Amadio* (1983), 151 C.L.R. 447 (Aust. H.C.); *Legione* v. *Hateley* (1983), 152 C.L.R. 406 (Aust. H.C.).

[6] See for example the Contracts Review Act, 1980 (N.S.W.), as well as consumer protection legislation in the various states.

[7] (25th ed., 1983).

Contract Law in Australia covers the law of contract in the traditional manner, tracing the life of a contract from formation and contents to performance and termination. The internal organization of each of the twenty-four chapters is also entirely traditional, mirroring that in the standard English contract law textbooks. If there is anything untraditional about the structure and internal organization of the book, it is the clarification brought to the discussion of certain topics which are not well organized in other texts, including terms (chapters six and seven), misrepresentations (chapter eleven), mistake (chapter twelve) and illegality (chapters sixteen and seventeen). In contrast to other texts the authors have decided to disregard older categorizations of these topics in favour of providing a contract law for the next decade. They have distinguished the wood from the trees, particularly the newer part of the wood thought more worthy of description and analysis. If one wishes to cavil at all with the organization of the book, it would be with the separate discussion of terms and misrepresentations; whereas the identification and construction of terms is presented in the context of contractual formation, misrepresentations are discussed in the context of matters affecting consent, such as mistake, duress or undue influence. While misrepresentations are also about contractual consent, there is a separation by three chapters (about capacity, privity and plurality of parties) between terms and misrepresentations which fails to take account of the close interrelationship of the evolution of the two topics over the past two decades.

On the other hand the authors deserve praise for bringing a welcome organization to several topics in contrast to other textbooks, in particular the chapter on misrepresentation, which finally presents an integrated discussion of misrepresentation in contract after *Hedley Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*,[8] and the two chapters on illegality. Conversely, the authors have down-played the function of unconscionability in contract law, perhaps reflecting the lower profile of that doctrine in Australia, in contrast to Canada where, it may be speculated, the enthusiasm of the author of one of Canada's two leading textbooks[9] for the doctrine has resulted in its excessive use in Canadian contract jurisprudence in the past decade or so.

Approximately seventy per cent of the cited cases in the book are Australian, although the text itself focuses equally on English and Australian cases, reflecting, self-evidently, the influence of English contract law on Australian jurisprudence. Indeed, reading the text one is struck by the fact that there is a law of contract common to England,[10] Canada,

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[8] [1964] A.C. 465 (H.L.).

[9] S.M. Waddams, The Law of Contract (2nd ed., 1984).

[10] And to a large extent in Scotland as well. See D.M. Walker, The Law of Contracts and Related Obligations in Scotland (2nd ed., 1985).

Australia and New Zealand, sharing identical underlying moral values as well as qualities of reasonableness, pragmatism and commercial efficiency. For this reason Contract Law in Australia deserves to be as well known in Canada as Anson, Cheshire and Fifoot, or Treitel. This is an outstanding textbook useful both to students and to practitioners searching for that elusive case "just like" the problem file on their desks. In short, this is perhaps the best contract text available today.

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Doing Business in Canada.
Edited by H. HEWARD STIKEMAN AND R. FRAZER ELLIOTT.
New York: Matthew Bender. 1985. 3 Volumes, Looseleaf, pp. xii, 1700. (US $250.00)

Reviewed by Armand de Mestral*

The work under review represents a major effort to summarize the law of Canada as it governs business transactions within this country. In the past, reviews of foreign law were prepared in centres of comparative law, in order to compare different legal systems. Today such compilations are frequently supported by commercial publishers with a view to supplying foreign investors and their legal advisors with up-to-date information on the legal system of the country in which they are contemplating investment or other business transactions. Such volumes bridge the gap between the domestic and foreign legal advisors, allowing the foreign legal advisor the opportunity to gain a general impression of the basic legal system and the principal laws governing international and domestic business transactions. They allow the foreign legal advisor to be more fully briefed on the law of the jurisdiction in question before asking specific questions of domestic legal counsel, and without facing the difficult if not impossible task of mastering a foreign legal system.

Matthew Bender is one of the principal international legal publishers putting out such works. The standard of their texts is high; the quality of the work under review is no exception. The work has been prepared under the senior editorship of the two leading members of the law firm of Stikeman, Elliott and the general editorship was undertaken by Richard Pound, of the Bar of Québec, and E. James Arnett, of the Bar of Ontario. The individual chapters are almost all the work of members of the Stikeman, Elliott firm. Many of the chapters are co-authored by a common and a civil lawyer, in order to reflect more clearly to the foreign reader the dual nature of the Canadian legal system.

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Doing Business in Canada is devoted principally to those aspects of the law which govern business activities, but a number of chapters are devoted to more general issues to reflect the nature of the legal system and the investment climate. The work is divided into the following four major parts: I. Government, Legal System and Business Environment; II. General Private and Commercial Law; III. Business Organizations; and IV. Regulation of Business. Throughout the various chapters the authors seek to provide uniform information on general principles of law, case law and the most relevant statutory material. In most cases, where relevant, the discussion of the statutory material seeks to bring out the salient differences between the laws of the different provinces of Canada. With a few notable exceptions, to be discussed below, the authors also make a very considerable effort to provide full information on the differences between the common and civil law systems. The text of each chapter is completed by footnote material on the same page. Some chapters are completed by annexes on special questions; in a number of cases relevant statutory forms are appended to the chapters and in a very few chapters the authors have added lists of cases.

Part I is composed of six chapters devoted to: 1. Introduction to the Political System; 2. The Constitution; 3. Regulation of Foreign Investment; 4. Immigration Law; 5. Taxation; 6. Export-Import. These chapters are all well prepared, and written so as to include a great deal of information in a relatively short compass. Professor S.A. Scott's presentation of the division of powers under the Canadian constitution is a masterful summary and leaves one all the more hopeful that he will soon complete his long-awaited treatise on Canadian constitutional law. The discussion of foreign investment and taxation law is particularly authoritative and the chapter on the law governing the importation and exportation of goods is valuable, given the relative scarcity of writing in Canada on this subject.

Part II is composed of chapters dealing with the following topics: 7. Contracts; 8. Commercial Instruments; 9. Property; 10. Trusts; 11. Intellectual Property; 12. Bankruptcy; 13. Conflict of Laws. These chapters, covering some 500 pages, are among the most impressive of this work, given the degree of synthesis required, the great range of materials to be covered and the necessity of dealing with both the common and civil law. Part III deals with the following topics: 14. Establishing a Business Enterprise in Canada; 15. Business Corporations; 16. Accounting; 17. Franchising; 18. Government Disclosure Requirements. These chapters are devoted to the problems of company law. They are carefully prepared and faithful to the many differences of detail which exist between the different jurisdictions of Canada. The chapter devoted to accounting, a topic not always adequately covered in company law texts, will be particularly useful to the reader. Part IV is devoted to a broad range of topics: 19. Regulation of Specific Businesses; 20. Competition

Law; 21. Security Law; 22. Labour Law; 23. Oil and Gas Law; 24. Environmental Law; 25. Consumer Protection and Product Liability; 26. Banking; 27. Insurance; 28. Language Legislation. These chapters are equally carefully prepared and well documented.

Despite the high quality of these volumes certain concerns must be expressed. While public law issues are well treated one regrets the lack of any reference to public international law. In particular there is room for information on the international economic law treaties to which Canada is a party, as well as treaty law, treaty interpretation by Canadian courts and the status of treaties in Canadian law. Information on Canadian views on the extraterritorial extension of laws would also be useful. The chapter on constitutional questions should now be completed by a section on the Canadian Charter of Rights and Freedoms.[1] The treatment of banking, securities and insurance is sound, but one misses treatment of certain other services of interest to the foreign reader, in particular legal services. In a work directed to the international market one misses, in chapter 26, extensive treatment of Canadian participation in international banking services such as syndicated loans, letters of credit or performance bonds; or, in chapter 12, treatment of the extraterritorial dimensions of bankruptcies (although there is some treatment of the issue in chapter 13). Chapter 8 should devote more space to the discussion of CIF and FOB contracts, as well as turnkey and other international service contracts. Certain chapters, such as chapters 9, 25 and 26, could usefully devote more space to constitutional issues.

The volumes under review are stated to be up to date to 1986. However, there are still problems of updating and coordination of such new information. Thus, while the chapter devoted to foreign investment contains a detailed account of the Investment Canada Act[2] one is surprised to find only a reference to the Foreign Investment Review Act[3] in chapters 15, 17 and 23. One is even more surprised in 1986 to find no reference to the elimination of Québec succession duties in chapters 5 and 10. One can certainly not fault the absence of reference to the most recent amendments to the Competition Act,[4] since they were only adopted in 1986, but some kind of quarterly advance notice of such major legislative changes, perhaps by way of a special page, would be welcome.

As noted above, this work makes a highly commendable effort to represent faithfully the bi-systemic character of the Canadian legal order.

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[1] Constitution Act, 1982, Schedule B.

[2] S.C. 1985, c. 20.

[3] S.C. 1973-74, c. 46.

[4] S.C. 1986, Part II, c. 26, s. 19 renamed the Combines Investigation Act, R.S.C. 1970, c. C-23, The Competition Act. Part II of the 1986 Act contains extensive amendments to the legislation.

Chapters 7, 8, 10, 14 and 15 are particularly impressive in this regard. In chapter 9 it is stated that a full treatment of the civil law is still in preparation, and one must regret that chapters 13, 17 and 27 are written from essentially a common law perspective and await the addition of a civil law dimension.

However, these criticisms reflect points that can be amended in subsequent periodic updates of the work, and they in no way detract from the overall impression of careful and thorough preparation. This book is essential to any foreign legal counsel seeking information on Canadian business law, and the high quality of the work, together with its broad scope, should lead many in Canada to purchase the work also. No other publication presently available in Canada puts together so much information on the law governing business transactions in this country.

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Arbitrage des griefs.
Par FERNAND MORIN ET RODRIGUE BLOUIN.
Montréal: Les Éditions Yvon Blais Inc. 1986. Pp. xx, 554. ($37.50)

Compte-rendu de Marie-France Bich*

Voici la seconde édition d'un ouvrage que devraient fort bien accueillir tous ceux qui, dans la communauté juridique et ailleurs, s'intéressent au droit du travail. Sans être véritablement un traité de l'arbitrage de griefs,[1] il s'agit ici bien plus que d'un simple guide pratique: les auteurs ont tenté, et bien réussi, le mariage de ces genres que sont le précis, le résumé didactique, et l'analyse. Le résultat de ces efforts satisfera donc autant le praticien, l'arbitre, l'avocat ou le conseiller en relations industrielles, qui cherche une solution concrète à un problème particulier, que l'étudiant soucieux d'approfondir ses connaissances sur le mécanisme de l'arbitrage.

Le livre est facile à consulter, ce à quoi contribuent une excellente table des matières, un index analytique détaillé et une division du texte en paragraphes. Le repérage de l'information se fait donc rapidement. Cinq appendices reproduisant les textes législatifs ou réglementaires pertinents complètent adéquatement l'ouvrage. Par ailleurs, le langage des auteurs est clair et se lit fort agréablement. On appréciera aussi à sa

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[1] Ou de l'arbitrage des plaintes analogues aux griefs, par exemple dans le cadre de l'article 124 de la Loi sur les normes du travail, L.R.Q. c. N-1.1.

juste valeur le fait que les professeurs Morin et Blouin définissent systématiquement chacun des concepts qu'ils emploient: de ce point de vue, leur texte est véritablement exemplaire, le lecteur, profane ou averti, sachant toujours exactement où il en est.

Plutôt que de se lancer d'entrée de jeu dans l'analyse des mécanismes de l'arbitrage de griefs, les professeurs Morin et Blouin prennent d'abord le temps de situer cette procédure dans son contexte historique, en expliquent la place et l'importance en milieu de travail et en définissent les éléments caractéristiques. Le lecteur est dès lors prêt à passer aux chapitres suivants, qui expliquent les assises juridiques de l'arbitrage, s'intéressent à l'objet des griefs et aux parties en cause, puis à l'arbitre ou au tribunal d'arbitrage lui-même. Le portrait des acteurs étant ainsi bien campé, les auteurs vont ensuite démonter et exposer toute la mécanique arbitrale, depuis les procédures préalables jusqu'à la décision finale, en passant par l'enquête (y compris les objections préliminaires et les moyens de preuve[2]) et la plaidoirie, sans négliger l'étude de ces aspects fondamentaux de la fonction arbitrale que sont l'interprétation de la convention collective et le contrôle de l'application de cette dernière.

Tous ces chapitres sont fort intéressants: toutefois, leur ordonnancement, et c'est bien là le seul reproche véritable que l'on puisse adresser aux auteurs, nous semble obéir à un choix contestable. Pourquoi intercaler le chapitre relatif aux objections préliminaires entre celui de l'interprétation de la convention collective et celui du contrôle de l'application de la convention collective? La question, très importante, des objections préliminaires aurait, croyons-nous, gagné à être placée au chapitre relatif à l'enquête, ou alors immédiatement avant celui-ci. De même, on peut se demander pourquoi les auteurs n'ont pas d'abord traité de l'interprétation et de l'application de la convention collective pour ensuite parler des procédures arbitrales proprement dites. Tous les problèmes liés au fond de l'arbitrage auraient ainsi été réglés en premier lieu, permettant de passer ensuite à la dissection des diverses étapes formelles du processus. Notons tout de même que la compréhension de la matière n'est pas substantiellement affectée par ces imperfections du plan tracé par les auteurs: il nous paraît cependant que la rigueur de leurs propos serait accentuée par le réaménagement partiel de la structure de l'ouvrage.

Les auteurs, et la chose est cette fois tout à leur honneur, n'évitent pas les controverses qui foisonnent en arbitrage, et n'hésitent pas, au besoin, à prendre position, faisant par là oeuvre de doctrine. On regrettera cependant la brièveté du traitement accordé à certains problèmes, par exemple celui du contrôle judiciaire des décisions arbitrales[3] ou celui

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[2] Les parties de l'ouvrage consacrées à la preuve sont d'ailleurs excellentes: succin-tes et précises, elles fournissent tous les renseignements voulus.

[3] Pp. 457 à 473, par. X.50 à X.72.

de la nature juridique de la convention collective,[4] pour ne mentionner que ces deux là. Ceci s'explique sans doute par la nature même de l'ouvrage, centré sur l'arbitrage des griefs lui-même et non sur le droit administratif, l'ensemble du droit collectif du travail ou même le contenu substantif des décisions arbitrales. Le lecteur pourra toutefois, à l'occasion, se sentir frustré de ne pas avoir droit à la discussion approfondie d'un sujet à propos duquel les auteurs éveillent savamment son intérêt.

La recherche jurisprudentielle et doctrinale sur laquelle repose l'ouvrage est digne de mention: complète, mais ne péchant pas par excès d'abondance. Les auteurs ont, à cet égard, fait des choix judicieux, s'attardant aux décisions les plus importantes et les plus significatives. On doit les féliciter d'avoir, à la facilité du nombre pléthorique, préféré un usage plus discriminant des renvois (dont la quantité, mais surtout la qualité, restent impressionnantes). D'autre part, si les propos des auteurs sont contextuellement québécois, on notera que leurs renvois témoignent d'un recours constant aux sources canadiennes: ceci donne à leur analyse une envergure accrue.

Bref, l'ouvrage des professeurs Morin et Blouin, seul ouvrage canadien de langue française sur le sujet, est un outil pratique et commode qui devrait figurer dans les bibliothèques de tous les praticiens de l'arbitrage. Cependant, même le profane y trouvera son compte: cela en dit long sur le talent déployé par les auteurs qui, sans sacrifier l'aspect scientifique de leur travail, ont rendu celui-ci parfaitement intelligible.

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The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss.
Edited by MICHAEL FURMSTON.
London: Duckworth. 1986. Pp. vi, 231. (£29.95)

Reviewed by M.H. Ogilvie*

Precisely what the law is today about liability to compensate for pure economic loss is uncertain. What is certain is that it is not the same as it was twenty-five years ago. Judicial and scholarly opinions vary from support for full recovery to condemnation of its recovery at all. Perhaps two of the greatest obstacles to acceptance of recovery for pure economic loss have been an underlying moral sense that violations of property rights are less worthy of compensation than violations of the per-

[4] P. 31, par. I.41.

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son, and the long shadow of Cardozo J.'s fear of unlimited liability for a moment's carelessness expressed in the oft-quoted phrase, "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[1] These concerns as well as many others were fully addressed in the 1984 Colston Symposium Lectures at the University of Bristol, now published as The Law of Tort: Policies and Trends in Liability for Damage to Property and Economic Loss.

Edited by Professor Michael Furmston, this volume is comprised of the eleven lectures given by perhaps the most distinguished tort scholars teaching in England and the United States today, including from England William Bishop (an expatriate Canadian), Peter Cane (an expatriate Australian) and Donald Harris (an expatriate New Zealander), and from the United States Richard Abel, Robert Rabin and Gary Schwartz. Mere recitation of these names will alert tort afficionados to the great variety of approaches to and views about the subject of the lectures. So too, the quality. The Law of Torts contains a collection of excellent articles—with a few exceptions—about the problems relating to full compensation for pure economic loss. Whether or not one agrees with the approaches to such loss or the ideological views propounded by some of the lecturers, one must fairly praise the high quality of the scholarship in the volume.

It is possible to discern six broad themes in the eleven papers. Some papers address several of these; some address only one. First, several lecturers attempt the daunting task of restating and re-examining the present legal regime in relation to pure economic loss, in particular by assessment of the two leading cases, *Junior Books Ltd.* v. *Veitchi Ltd*,[2] and *J'Aire Corp.* v. *Gregory*.[3] Papers by K.M. Stanton[4] and Robert Rabin[5] address the situations in England and the United States respectively and show that in both countries neither foreseeability nor proximity have provided conclusive or useful tests for determining the extent of liability.

A second group of papers addresses the fact that many leading economic loss cases occur along the boundary between contract and tort. *Junior Books* and *J'Aire* are cases in point. The best lecture examining the tort-contract continuum is by Gary Schwartz: Economic Loss in American Tort Law: The Examples of *J'Aire* and Products Liability.

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[1] *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, at p. 179, 174 N.E. 441, at p. 444 (1931).

[2] [1983] 1 A.C. 520 (H.L. (Sc.)).

[3] 24 Cal. 3d 799, 598 P. 2d 60 (1979).

[4] The Recovery of Pure Economic Loss in Tort: The Current Issues of Debate, p. 9.

[5] Characterisation, Context and the Problem of Economic Loss in American Tort Law, p. 25.

Professor Schwartz examines *J'Aire* in the light of the pragmatic decision by the tenant to sue the defaulting contractor instead of his landlord in order to protect a good business relationship—and perhaps also because, as counsel for the tenant admitted to Professor Schwartz, "contracts was never my strong point in law school".[6] Schwartz examines the tort-contract boundary as such as well as the inter-relationship between a claim in tort on the basis of products liability theory and in contract on the basis of an implied warranty theory. However, he proposes no theory of his own as to the appropriate way for the law to develop. In contrast, Peter Cane explicitly attempts to construct a general theory of liability for relationships cases with the building blocks currently available in tort and contract law. Again, no theory results from this exercise.

A third theme discernible in the papers is that of delineation of the public policies as to the control of responsibilities for economic loss. Schwartz addresses these issues by suggesting that economic loss is not a single problem but a set of problems each requiring different answers. However, the papers most concerned with defining the policy issues are those given by the law and economics advocates among the lecturers. Thus, Donald Harris and Cento Veljanovski[7] and Paul Burrows[8] engage in detailed economic analysis of the economic loss problem, again without resolution, while William Bishop[9] takes the opportunity to respond yet again to Professor Rizzo in their largely forgotten and quite forgettable long-running scholastic dispute on the application of economic theory to the economic loss problem.[10]

The fourth theme is, of course, the role of insurance, which is addressed by the only non-lawyer lecturer, E.W. Hitcham, a Fellow of the Chartered Insurance Institute.[11] Interestingly, Mr. Hitcham observes that there is a significant over-capacity in the insurance market which results in undercutting the deterrent effects which legal theory has ascribed to liability insurance since customers with bad claims records are unlikely to have their premiums so loaded that they will take their business elsewhere.

The fifth theme, the objectives of compensation, is addressed by Professor A.I. Ogus,[12] who shows that while the law has had at different

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[6] P. 86.

[7] Liability for Economic Loss in Tort, p. 45.

[8] Corrective Justice and Concessions to Efficiency in the Law of Nuisance, p. 201.

[9] Economic Loss: Economic Theory and Emerging Doctrine, p. 73.

[10] M.J. Rizzo, A Theory of Economic Loss in the Law of Torts (1982), 11 J. Leg. Stud. 281; W. Bishop, Economic Loss in Tort (1982), 2 Oxf. J. Leg. Stud. 1; M.J. Rizzo, The Economic Loss Problem: A Comment on Bishop; W. Bishop, Economic Loss: A Reply to Professor Rizzo (1982), 2 Oxf. J. Leg. Stud. 197 and 207.

[11] Some Insurance Aspects, p. 191.

[12] Limits of Liability for Compensation, p. 211.

times and in different places various goals, none considered singly has proven entirely satisfactory, and that all must recognize what, in the public law context, Professor Frank Michelman has called "demoralization costs",[13] that is, the need to mollify the sense of outrage which the non-payment of compensation might engender. This leads to the sixth and most fundamental theme, the values which a tort system should espouse in relation to pure economic loss. Thus Professor Richard Abel's lecture argues that no liability at all should ensue for economic loss since the net effect would be the redistribution of wealth from the poor to the rich. Abel develops a sophisticated and controversial argument which must have provoked the liveliest discussion at the Symposium.

Professor Abel's article comes late in The Law of Tort and reading it finally impressed upon this reviewer the reason for a growing unease felt throughout reading the earlier parts of the book: with the exception of Abel's piece the book, in all its cleverness, contains no substantive real ideas as to the future shape of tort law in respect to liability for negligence or pure economic loss. Peter Cane's article symptomatically demonstrates the ultimate failure of this highly intelligent and articulate group of legal scholars to move the discussion forward. Cane explicitly defines his project as an attempt to state a general theory of liability and proceeds to do so by stating what a general theory of liability should contain but not what it should be. Subtle case manipulation, perceptive observations about the current state of the law and clever articulation of what the law has been are no substitute for a set of principled rules for the future. Once the scholarly veil is pierced it is not clear that we are more enlightened than we would otherwise be after reading the inarticulate and ill-conceived opinions of some of our less distinguished judges.

Professor Abel implicitly tells us why. His analysis is founded on a principled moral vision of the society he would like to see. While many would not agree with his vision, his orientation to doing fundamental legal scholarship is the correct one and ultimately the only intellectually honest one. It is not surprising, then, that his lecture is the only one worth reading.

In contrast, although intellectually the most sophisticated, the law and economics contributions are the least useful. When Bishop and Rizzo can indulge in an intellectual Hundred Years' War without resolution of a single outstanding issue, and Harris and Veljanovski can end their paper on a different line than their initial economic theory would predict, what hope is there that the law and economics movement can assist the resolution of pressing social and legal issues? It is trite to observe, as well, that no lawyer, legislator or judge has the time, energy or money

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[13] Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law (1967), 80 Harv. L. Rev. 1165.

to incorporate the scholasticism of the law and economics movement into his or her daily professional round. There is still much to be said for the view that the common law should be founded on the common sense and common experience of mankind.

The problems raised by liability to compensate for economic loss are difficult and fundamental, perhaps intractable. And, despite the foregoing criticisms, they are addressed in this excellent book. While resolutions are still far from sight, The Law of Torts contains within its covers a most thoughtful collection of materials about the issue.

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Assessment of Personal Injury Damages.
By CHRISTOPHER J. BRUCE.
Toronto: Butterworths. 1985. Pp. xix, 358. ($65.00)

Reviewed by T.A. Cromwell*

Litigation of a serious personal injury case is a complex business, placing counsel as captain of a team of economists, actuaries, employment counsellors, rehabilitation experts and physicians. Behind the legal doctrine prescribing heads of damages and the parameters of their calculation lies a host of sophisticated economic, statistical and mathematical techniques, all with their own underlying theories, strengths and weaknesses. Christopher Bruce has produced a valuable sourcebook for captains and would-be captains who find it all somewhat daunting. He has brought to the task his academic skills as a professor of economics and his practical experience as an expert witness. The result is a lucid exposition of how damage awards in personal injury and fatal accident cases are or should be calculated as well as a rich economic and statistical bibliography relevant to the process.

The book has two main purposes. First, it seeks to investigate in depth the strengths and weaknesses of the theories, statistics and mathematical techniques employed to calculate the awards for the losses which are recoverable at law. Second, it aims to survey and help make accessible a wide variety of literature touching on these matters. Both of these purposes are pursued with a potential audience of legal practitioners, financial experts and legal researchers in mind. Thus the overall enterprise is to pursue in depth a fairly narrow subject for the benefit of a broad audience. Overall, the author has achieved his main purposes with distinction, but the projected width of the audience occasionally has distracted him from pursuit of his principal objectives.

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The book is divided into five parts. In the first, there is a brief review of the legal rules governing damage assessment, a chapter devoted to the expert witness and a lengthy section explaining the basis of calculations of one time lump sum payments. It is the last section which is of special merit, providing a readable explanation of the conceptual bases of present value calculations and their place in damage assessments. This material will be welcomed especially by lawyers and law students seeking a reasonably non-technical yet thorough explanation of these mathematical and economic mysteries. The chapter dealing with the expert is, in my view, of less interest, although there is some useful material on the retaining of experts and the gathering of information they require. The sections offering advice to the expert about report preparation and testimony are brief and rather superficial. Here is an example, perhaps, of the book trying to be too many things for too many people.

In Part II, headed General Factors, wage and fringe benefit loss, contingencies and interest rates are discussed. These sections contain plenty of thoughtful discussion of the difficult issues facing counsel and the courts in damage assessment. For example, the serious difficulties of calculating loss of prospective earnings for a young plaintiff, graphically illustrated by the Supreme Court judgment in *Arnold* v. *Teno*,[1] receive extensive treatment. The reader is taken through the literature on statistical correlations between various factors, such as I.Q., schooling and parents' occupations and income, and performance in the labour market. For many lawyers this discussion and the lengthy bibliography accompanying it will open new terrain which will repay careful exploration. The author brings together in readable form the combined expertise of psychologists, sociologists, economists and educators. The thorny problem of contingencies benefits from the same sort of detailed and interdisciplinary approach.

Part III is devoted to personal injury cases and deals primarily with so-called non-labour market losses such as costs of care and pain and suffering, employment prospects of the disabled and valuation of household services. The last subject is especially topical in legal circles and the author presents a fine summary of the main theoretical approaches to the assessment, and offers as well some sound practical advice about how such claims may be substantiated.

Part IV deals with remarriage and divorce and dependency rates in fatal accident cases. The final section of the book, Part V, discusses structured settlements. An appendix is included listing results in personal injury cases appearing in the provincial law reports from 1982 to 1984. With the material on structured settlements, the focus of the book once again blurs somewhat. In the twelve pages devoted to the subject,

[1] [1978] 2 S.C.R. 287.

the author is unable to say much that is not familiar to lawyers or to add to the several more extensive treatments of it which are readily available.[2]

Despite the occasional loss of focus, the book achieves its two main objectives with distinction. Academic and practising lawyers will find it to be an excellent guide to the complex economic and mathematical aspects of personal and fatal injury assessments. There is much raw material here for future litigation and considerable fuel for reform proposals.

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The Fundamentals of Legal Drafting. Second Edition.
By REED DICKERSON.
Boston-Toronto: Little, Brown & Co. 1986. Pp. xxix, 393. ($60.00)

Reviewed by Sandra K. McCallum*

This is the second edition of Professor Dickerson's work. The first edition was addressed not only to those charged with drafting and applying written law, but also to practitioners, academics, and students. The second edition will not disappoint those who found the first so helpful; they will gain greater insight into the drafting process and learn of new developments in the field.

The second edition reproduces much of the core material of the first, such as the relationship between drafting and substantive policy, and drafting and communication. It also retains the very useful chapter on the steps in drafting, an essential aid to any would-be drafter.

One of the first edition's most useful contributions to the understanding of the drafter's task was Professor Dickerson's explanation of the importance of the "architecture" or structure of legal instruments. This edition expands on this topic. His insistence that legal drafting requires a solid knowledge of substantive law, and his belief that drafting is an art rather than a skill, again are emphasized.

The changes which have taken place in the area of drafting as a result of the plain language movement, the drive to eradicate sexist language, the use of computers, and the impact of changes in legal education are explored. In dealing with verbal sexism the author raises some interesting drafting problems and suggests, in my view correctly, that many of the present problems in language arise not from the words

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[2] For example J. Weir, Structured Settlements (1984).

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themselves, but from the prevalence of male visual stereotypes in the categories they represent: "Changes in the referents of traditional terms are a more effective force in controlling meaning than any wholesale infusion of new terms."[1]

In his chapter on the use of computers he puts to rest any delusion one may harbour about the machine being the panacea to all, or even most, drafting problems. If one accepts Professor Dickerson's thesis that drafting is an art, premised on an understanding of substantive issues, it is not surprising to find him sceptical about those who regard boiler plate paragraphs on the computer's memory an advance in the drafting art.

Given the author's reputation as a drafter it is not surprising that the book is very readable. The fact that it is from a United States scholar in no way diminishes its utility for Canadian readers. The wisdom the book offers is universal. Those who must read what legal drafters produce should hope that all of them read this volume, not once but often.

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Droit international public: notes et documents. Tome 1, Documents d'intérêt international.
Par JACQUES-IVAN MORIN, FRANCIS RIGALDIES et DANIEL TURP.
Les Éditions Yvon Blais Inc.: Montréal. 1987. Pp. 525. ($36.50)

Compte-rendu de John P. Humphrey, O.C., O.Q.*

Subitement, vous avez besoin de consulter un traité international quelconque, mais vous n'avez pas le temps d'aller dans une bibliothèque où vous pourriez trouver—ou peut-être ne pas trouver—le Recueil des Traités des Nations Unies. Voici un répertoire assez petit pour prendre place sur vos rayons. Mais attention: de l'aveu même des éditeurs, "le recueil a pour objectif prioritaire de mettre à la disposition des étudiants qui suivent le cours de droit international public général du premier cycle à la Faculté de droit de l'Université de Montréal des documents leur permettant de compléter leur enseignement de base". C'est donc en quelque sorte un outil de travail pour étudiants.

Ce premier tome—il y en aura d'autres portant surtout sur les organisations internationales, le droit des relations économiques et le droit international des droits de l'homme—contient les textes (et quelquefois des extraits des textes) d'une trentaine de conventions internationales

[1] P. 243.

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multilatérales, de certaines résolutions des Nations Unies—telles que la Déclaration universelle des droits de l'homme—de jugements et sentences arbitrales des cours et tribunaux internationaux ainsi que des notes de présentation. Ces notes ont pour but de situer les documents dans leur contexte et de donner des informations diverses. Toutefois, les étudiants seront obligés de faire ce voyage à la bibliothèque s'ils veulent consulter, par exemple, le Pacte de la Société des nations, document qu'il est nécessaire de consulter si on veut réellement comprendre la Charte des Nations Unies. Et puisque le cours universitaire en question comprend un enseignement du droit international des droits de l'homme, ces mêmes étudiants auront besoin de consulter d'autres conventions, telles que la Convention sur le génocide et celle sur l'élimination de toutes les formes de discrimination raciale dont le texte n'est pas reproduit dans le recueil. Cet ouvrage sera cependant d'une grande utilité, et pour les étudiants et pour les professeurs.

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Law's Empire.
By RONALD DWORKIN.
Cambridge, Massachusetts: Harvard University Press. 1986. Pp. xiii, 470. ($20.00)

Reviewed by
S. Coval,* Joe Naylor,* J.C. Smith**

Professor Gilbert Ryle used to ask somewhat rhetorically, "from among those (philosophers) who have written articles but have not written books, which do we believe should have written one?" Understandably, there were usually no nominees from students and very few from Ryle himself.[1] Now Ronald Dworkin has written a book after he has written, and had collected, two long series of articles, and therefore Ryle's question must, albeit in *ex post facto* form, occur to potential and actual readers. The answer to that question as it concerns Law's Empire is reserved to the final words of this review.

Law's ultimate arguments, we recall from earlier Dworkin, are arguments of principle.[2] And, as we are told in Law's Empire, it is the

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[1] Wilfrid Sellars' work was an example of the sort which Ryle thought called for elaboration and deepening in a book.

[2] Ronald Dworkin, A Matter of Principle (1985); see esp. "The Forum of Principle", pp. 33-72 and "Principle Policy, Procedure", pp. 72-104. Political implications

business of adjudicators and legislators and, of course, jurisprudence, to identify those fundamental agreements which explain and justify the complex of institutions, beliefs and behaviour constitutive of what we call Law in our (Western)[3] society.

To that end Dworkin identifies four main ideals or principles whose content and relations define for us the area of Law. These ideals are Fairness, Justice, Integrity and Fraternity. Mention is made of "due process" as an additional ideal but it is not pursued and is probably includable under Fairness.[4] These four ideals are then both the province of law and provincial in that they are, the argument goes, presupposed by and excogitated from the data provided by the behaviour of our Anglo-American legal systems. It is possible that Dworkin does not mean that these ideals, and therefore our institution of Law, are all that relative. It might be held that while the interpretation of these ideals is relative from legal empire to legal empire, no legal entity could be without these four ideals and still claim "to justify coercion"[5] or otherwise be explanatory and justificatory of Law. Given, however, Dworkin's strong descriptivist bias and moral scepticism[6]—the Law is its behaviour and what explains that—this less relativistic interpretation of him is unlikely. Dworkin anyway is not giving us an account of what the Law ought to be like but one of what it is like. What distinguishes him from the Positivists then is that his description is not restricted to the behaviour of the institution but includes the teleological antecedents of that behaviour. Thus the four ideals. They too, however, are merely descriptive of those attitudes of ours which as a matter of fact inform our Law. It is therefore possible for Dworkin that some legal empire could embody none of these four ideals. Interestingly, then, Dworkin is at heart a descriptivist: what Law is, is either equivalent to what law ought to be or what Law ought to be is irrelevant. But this leaves us at a loss about how Law may be criticized with relevance from the outside of what it is.

The four ideals which are supposed to constitute the fundamental teleology and therefore the explanation of our Law have the following import. Fairness is *how* legal outcomes are decided—the legal process;[7]

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of this view are discussed in "Political Judges and the Rule of Law", pp. 9-33. Ronald Dworkin, Taking Rights Seriously (1977), attacks the incompleteness of a positivistic picture of the law in "The Model of Rules", I and II. Without employing principles to interpret the law, Dworkin feels that positivism cannot fully describe actual legal behaviour, Law's Empire, pp. 213, 214, 245, 345, 346.

[3] Pp. 207, 208.

[4] Pp. 164, 404, 405.

[5] Pp. 110, 201, 207.

[6] Pp. 299-312. Ronald Dworkin, Liberalism, in Stuart Hampshire (ed.), Public and Private Morality (1978), pp. 113-143.

[7] Pp. 164, 165, 179, 249, 404.

Justice is *what* is decided—the outcomes themselves;[8] Integrity is the relation of balance between these two and prevents us from following either Fairness or Justice without counting the effects each has on the other.[9] What Dworkin calls "Integrity" is more plainly describable as coherence. The fourth ideal is Fraternity and is the source of authority or obligation in Law.[10]

Dworkin attempts to keep Fairness and Justice distinct as ideals even though they are found in the law to be both mutually limiting and enhancing through the relation of Integrity or coherence. Fairness, according to Dworkin, concerns *how* our procedures are to function; with consistency, for instance.[11] It has an important additional ingredient, however, as we may surmise from the examples: each individual who may be affected is to have a say in or otherwise be fully counted in the process of how we decide what we are to do if that process is fair. So the fair legal and/or political process will, as Rawls saw,[12] contain the Kantian premise that each person is to count equally and none function essentially as means for others. We can see that such a process will not be fair and would certainly be inconsistent unless certain considerations or desires are prohibited from being counted. Implicitly excluded as determinants in a fair decision process are considerations which allow agents to be treated in a manner which is incompatible with the very reasons for which we find agents necessarily includable in the process. It is because free agency is at the centre of value for us that we cannot value a process whose outcomes are not determined by counting the interests central to the agency of each affected. Just as we cannot value a process which is inconsistent with its presuppositions, we cannot value a process which produces outcomes that are inconsistent with the values presupposed by the process. This presupposed equality right gives us a bridge between fairness and justice, a connection which Dworkin seems to have missed. On Dworkin's view we have: "Fairness stands in the relation of Integrity (coherence) to Justice" — but Fairness and Justice are separate ideals.[13] As we have seen, however, Fairness already incorporates two basic rights which must therefore be inserted as well in the annals of Justice. These are, the right to be given, as Dworkin would put it, "equal concern",[14] that is the right to have one's concerns counted

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[8] Pp. 177, 180, 249, 404.

[9] Chap. 7, esp. pp. 243-254; Chap. 6, pp. 182-190, 213, 214.

[10] Chap. 6, esp. "Obligations of Community", pp. 195-206, and "Fraternity and Political Community", pp. 206-215.

[11] Pp. 164-165, 340-342.

[12] John Rawls, Justice as Fairness: Political not Metaphysical, Philosophy and Public Affairs, No. 14, 1985.

[13] Chap. 6, esp. pp. 177-179.

[14] Pp. 213, 214.

equally with others in the process of decision and the right not to have these same decisions detract from that very ability to both express and otherwise act in the accomplishment of those interests, that is the right to "equal respect".[15]

If we see Justice in Dworkin's way as separate from Fairness we will necessarily miss or otherwise downplay the equality rights implicit in Fairness. For him, Justice consists in a certain distributional requirement—one tending towards equality—of the goods of life.[16] Nowhere in Law's Empire do we find a true debate between the individual rights to agents' autonomy implicit in Fairness and those distributional rights which Dworkin claims comprise our practice of Justice.

When the question of their relative strength arises as it does in the case of affirmative action we find that distributional goals or policy goals, not basic individual rights, determine the outcomes and that individual rights to autonomy are claimed not to be violated by such a determination.[17]

When we come to realize what a violation of individual rights would amount to we discover that Dworkin is not a friend at all of such rights. His individual rights theory is indeed so weak that such rights may be overriden by *any* policy so long as the reason used to override is for the achievement of some policy and not for any *invidious* reason aimed at individuals. In other words "equal respect" and "equal concern" are not violated unless you are treated unequally *just because of* a differentiating property you happen to exhibit.[18] A violation of equality, an improprer discrimination, occurs when properties irrelevant to equality are used to make distinctions. But a theory of irrelevance must be informed by one of what is relevant. We need then not just examples of violations of individual rights to equality but a theory of what affirmatively constitutes the justification of such rights: what they protect, and through that the notion of violations. In order for "equal respect and concern" to carry such affirmative import we must supply that phrase with a substantive by means of which the comparative, "equal", may function non-emptily.[19] Without such a substantive the concept of equality could, gratuitiously, be given some negative or even positive content but if that content is ungoverned by a notion of *what* is being violated or affirmed

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[15] Pp. 200, 201, 223, 224, 377.

[16] Pp. 297, 298, 302-309, 403-404, and Ronald Dworkin, What is Equality? Part I: Equality of Welfare (1981), 10 Philosophy and Public Affairs 185, and Part II: Equality of Resources (1981), 10 Philosophy and Public Affairs 283.

[17] Ronald Dworkin *et al.*, Ronald Dworkin and Respondents, in J. Arthur and W.H. Shawn, Readings in the Philosophy of Law (1984).

[18] *Ibid.*

[19] Peter Weston, The Empty Idea of Equality (1987), 95 Harv. L. Rev. 537.

or *what* it is we are losing or gaining equal portions of, then that content is conceptually and explanatorily without basis and therefore subject to conceptual and judicial abuse. The *what* of equality, moreover, cannot be "respect" or "concern" since they only describe the value-attitudes (and perhaps resultant behaviour) we are enjoined to have to the value presupposed. The proper phrase is, "equal respect and concern as. . . what?" Or, the proper question is, "why equal respect and concern?" The value which is to complete the phrase or supply the justification is missing. Hence the charge of the emptiness of this "substantive-hungry"[20] use of equality.

In traditional liberalism the value identified was that of agency: of an entity which has a teleological nature and abilities, an entity with goals and effectiveness. That is, what is valued—its expression and thereby its satisfaction (not its *mere* satisfaction): its freedom. In the democratic libertarian tradition we then have equal concern and respect for agency since it is taken as the basic distributed value. Without the comparativeness of the concept of equality so informed—and it is not in Dworkin—he has a conceptual blind-spot with regard to what is to be equally meted out or why. These concepts of equal respect and concern carry in Dworkin no positive content of their own as far as the protection of agents' autonomy goes. *They have only negative content in that we are given only the conditions of their violation, never the positive conditions of their satisfaction.* The substantive we are to share in equally is never brought forward. Thus equal respect and concern for our individual rights to autonomy as agents cannot count against *any* policy, since almost any policy can satisfy Dworkin's condition of non-invidiousness; we see that "equality", empty of individual autonomy rights, protects almost no ground at all. (With such friends, the liberal doctrine of basic individual rights needs no enemies). Dworkin's abandonment of individual rights becomes clearer when we see what he has embraced in his fourth ideal of Fraternity.

Fraternity is what is claimed to give authority to our Law.[21] Fraternity is supposed to be an "associative practice": one which creates obligations even upon those who do not voluntarily (that is, contractually) enter the association. These associative obligations exist so long as four conditions are met. Fraternity, then, is used by Dworkin to replace contract or voluntariness as the source of our obligations as citizens to the law. With it, he hopes to replace the liberal ideal of the rational, free, *voluntarily* associating individual agent as the final source of authority. With Fraternity, we are bound to associate so long as the fraternity thinks of itself as exclusive, has personal reciprocal obligations and treats

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[20] J.L. Austin, Sense and Sensibilia (1962), p. 68.

[21] Pp. 201, 214.

us with equal concern according to whatever its lights may be. Fraternity being a separate ideal, conflicts with Justice and Fairness are to be avoided, but not necessarily, if Fraternity is to have any independent power to create obligations. The trouble with all this is that "practices" such as Fraternity are just supposed to *create* obligations without any explanation. What we must insist upon is an explanation of such artifacts or practices which takes us into our nature as rational, choice-making creatures, towards, that is, a cognitive or motivational explanation of the "practice". To get such an explanation would put us, of course, on the road to a contractarian account of Fraternity. We get instead an assertion that there are such obligation-creating practices, a few examples, and many distinctions. Here again, Dworkin characteristically mistakes complication for depth. Nowhere do we get an argument even for the supposed *sui generis* obligation-creating nature of these "associative practices". Certainly we have a right to expect, in a book in which words are not at a premium, an argument which shows that Fraternity cannot be construed as voluntary or contractual. It is as if Dworkin has borrowed another notion, (as he earlier had borrowed or misunderstood W.B. Gallie's "essentially contested concepts"),[22] and proceeded to employ it in what certainly appears to be an *ad hoc* fashion, at the centre of his views.

Apart from this strong impression of *ad hocery* at a crucial point in his account, we are, as Dworkin makes clearer his position, struck by how inappropriate is the description of him as a rights theorist where rights of individuals *qua* individuals are concerned. Once a book has been written by an author who has already written a series of articles, an additional question comes out of Ryle's original question. The original question was: Does an antecedent body of articles itself properly call for a following book? The additional question, however, is: Was *this* book called for by the original material? The answer to both of these questions we submit must be in the negative.

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Computer Technology and the Law in Canada.
Par J. FRASER MANN.
Carswell: Toronto, 1987. Pp. xxviii, 455. ($68.00)

Compte-rendu d'Ejan Mackaay*

Le développement fulgurant de l'informatique a donné lieu à toute une série de pratiques contractuelles et de problèmes juridiques nouveaux.

[22] W.B. Gallie, Essentially Contested Concepts, Proceedings of the Aristotelian Society (1965).

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Le juriste désemparé devant ces développements peut, aux États-Unis et en France notamment, se fier à une doctrine active. Il existe, dans ces deux pays, tout un éventail d'ouvrages pour le renseigner sur les différents aspects de ce nouveau domaine, tels la propriété des produits informatiques, les contrats, le droit pénal, la fiscalité.

Au Canada, qui n'est pourtant pas un pays sous-développé du point de vue informatique, rien de tel n'existait jusqu'à tout récemment. Certes, on pouvait compter sur quelques observations perspicaces sur le droit canadien dans le livre de Christopher Millard.[1] Mais ce livre a une visée comparative et traite principalement du droit anglais et du droit américain.

Le livre de Mann vient donc combler un vide. Et il le comble de façon heureuse. La publicité de l'éditeur dit vrai: il s'agit vraiment du "premier livre touchant tous les domaines du droit canadien régissant la technologie informatique et le développement, la distribution et l'utilisation des produits et services informatiques".[2]

Le livre comporte six parties. La première partie contient, en trente-deux pages, un survol du droit de l'informatique et de l'informatique elle-même ainsi que, fédéralisme oblige, une analyse de la répartition des compétences en la matière entre les différents paliers de gouvernement. Suivent des parties portant sur la propriété intellectuelle (II, 117 pages), sur le droit pénal et le droit de la preuve (III, 43 pages), sur la libre circulation de l'information, la vie privée, la protection des données ainsi que le paiement électronique et les flux trans-frontières (IV, 87 pages), sur les contrats informatiques (V, 124 pages) et sur la fiscalité (VI, 21 pages).

Le livre est rédigé principalement pour le praticien, mais atteint en même temps un bon niveau scientifique (par contraste avec certains livres de recettes vite publiés dans ce domaine). On y trouve une analyse détaillée de la jurisprudence aussi bien du Canada que d'autres pays du Commonwealth. Si l'auteur regrette souvent l'absence de dispositions expresses régissant les problèmes soulevés par l'informatique, il comprend fort bien que la plupart de ces problèmes ne sont pas foncièrement nouveaux et peuvent être analysés utilement avec les instruments juridiques traditionnels. Il situe bien les problèmes dans le contexte du droit existant et a judicieusement recours au droit comparé.

Un bel exemple de son approche se trouve dans l'analyse des "shrink wrap licences", c'est-à-dire des contrats d'adhésion imprimés à l'extérieur des boîtes dans lesquelles les logiciels standard pour les micro-ordinateurs sont proposés au public.[3] Ces documents soulèvent deux questions

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[1] Christopher Millard, Protection of Computer Programs and Data (1985).

[2] (Traduction par l'auteur de ce compte-rendu).

[3] P. 331 *et s.*

importantes, à savoir de quel contrat il s'agit et dans quelle mesure ils reflètent un véritable contrat. La première question présente un intérêt, entre autres, parce qu'une qualification de vente ou de louage déclenche l'application d'une série de dispositions d'ordre public visant à protéger les consommateurs. Elle soulève, à son tour, la question de savoir si le logiciel ainsi proposé au public est un bien ou un service.

Pour ce qui est de la deuxième question, celle de l'adhésion du client au contrat proposé, elle se pose évidemment de façon analogue dans d'autres domaines (le vestiaire, le garage, l'hôtel, le louage d'une auto, le billet de chemin de fer, et j'en passe). De telles analogies peuvent suggérer le principe que le client est lié aux clauses parfaitement standard dont il est censé connaître la teneur, mais non à celles qui sont inhabituelles ou particulièrement onéreuses à son égard. Il importe aussi d'apprécier à quel point l'entreprise offrant le logiciel au client a pris la peine de notifier celui-ci des clauses onéreuses et lui permet de revenir sur sa décision.

Cette discussion du droit commun (dans le cas de l'auteur, surtout de la common law anglaise et canadienne) amène l'auteur à examiner les solutions apportées au problème par les législateurs de Louisiane et d'Illinois, dans leurs lois régissant les "shrink wrap licences". Cette discussion a, hélas, perdu un peu d'intérêt depuis la décision de la Cour fédérale louisianaise de première instance, *Vault Corp.* v. *Quaid Software*,[4] déclarant ces lois inconstitutionnelles en tant qu'empiètements sur le domaine de la propriété intellectuelle, qui relève exclusivement du gouvernement fédéral aux États-Unis.

Retournant à la discussion du droit canadien, l'auteur ne peut conclure que par des conseils de prudence à l'intention de ceux qui formulent les "shrink wrap licences".

L'auteur couvre un éventail remarquable de sujets. Dans la discussion sur le droit d'auteur il aborde, par exemple, la question de la protection des microplaquettes, des banques de données et des oeuvres créées à l'aide de l'ordinateur. L'exposé sur les secrets du commerce et de la confidentialité de l'information crée de l'ordre dans un domaine où l'on a souvent du mal à en discerner. Dans la Partie IV, l'auteur aborde la question des flux transfrontières des données, question plutôt négligée en Amérique du Nord.

D'un intérêt particulier sont les analyses des contrats informatiques. Après un survol de ces contrats et du rôle de l'avocat dans leur conclusion, l'auteur passe en revue les contrats relatifs à l'achat et à la maintenance de l'équipement, les contrats relatifs aux logiciels et les contrats relatifs aux banques de données et aux bureaux de service. Dans le chapitre concernant les logiciels, à part les sujets évidents comme les

[4] 655 F. Supp. 750 (E.D.La., 1987).

licences, on trouve une analyse des contrats pour le développement de logiciels, des contrats d'entiercement (*escrow agreements*), des contrats d'édition de logiciels et des conventions de confidentialité.

La lecture du livre soulève quelques interrogations mineures. Pourquoi, par exemple, ne pas traiter les contrats tout de suite après la propriété intellectuelle et industrielle? En outre, on peut regretter que, voulant couvrir l'ensemble du droit canadien y compris le Québec, l'auteur n'ait pu rendre justice aux quelques aspects de sa problématique où le droit québécois apporte des particularités civilistes, comme en matière de secrets de commerce et de contrats informatiques. À la défense de l'auteur, il faut convenir que la plus grande partie de la matière est de compétence fédérale et que, dans le traitement des lois provinciales et fédérale d'accès à l'information, la loi québécoise est convenablement analysée.

Dans l'ensemble, ce livre constitue une excellent source du droit de l'informatique au Canada, une référence obligatoire pour les juristes canadiens concernés, ainsi que pour les juristes en dehors du Canada qui estiment que ce droit est, pour l'instant, nécessairement du droit comparé.