The Fiercest Debate: Cecil A. Wright, The Benchers and Legal Education in Ontario 1923-1957.
By C. IAN KYER and JEROME E. BICKENBACH.
Toronto: Osgoode Society, University of Toronto Press. 1987. Pp. xii, 340. ($36.00)

Reviewed by John P.S. McLaren*

Both Blaine Baker in his essay on the development of legal education in Upper Canada in the nineteenth century,[1] and John Willis in his book on the history of the Dalhousie Faculty of Law[2] have demonstrated the fascination that lies in the history of legal education in Canada. The account of the evolution of Osgoode Hall Law School up to 1957 by Brian Bucknall and his colleagues gave us every hint that the history of legal education in Ontario during the present century was equally compelling.[3] In their book Kyer and Bickenbach have revealed just how compelling and important the fuller record is. They have shown us that the battle between Caesar Wright and his allies on the one hand and the Benchers of the Law Society of Upper Canada on the other for the mind and soul of legal education in Ontario is both an intensely interesting human drama and crucial to an understanding of the face of modern Canadian legal education.

One's interest in the topic is piqued, even before the substance of the story is told. In their preface the authors, a former history professor and a professor of philosophy, describe how, as fellow law students, they were able by a combination of personal detective work, tips from

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[1] G.B. Baker, Legal Education in Upper Canada 1785-1889: The Law Society as Educator, in D. Flaherty (ed.), Essays in the History of Canadian Law, Vol. II (1983), p. 49.

[2] J. Willis, A History of Dalhousie Law School (1979).

[3] B. Bucknall, T. Baldwin and J. Lakin, Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957 (1968), 6 Osgoode Hall L.J. 137.

interested faculty and the casual references of colleagues to amass a significant collection of C.A. Wright's papers from the nooks and crannies of Falconer Hall and Flavelle House, the dual homes of the University of Toronto Faculty of Law. These finds enabled them to reconstruct the role of both Wright and the Benchers in the dispute on who should control legal education in the province, and to elaborate on the nature of the competing philosophies involved and the sources of inspiration and support on which each side relied.

In their introduction the authors describe the two basic approaches to legal education in the Common Law world: the long standing apprenticeship tradition of England and the much more recent university educational tradition which has had its finest flowering in the United States. As well as offering a useful primer on the practical and philosophical roots of our educational heritage, it provides an essential background to the conflict in Ontario because the combatants, the Benchers on the one hand and Dr. Wright on the other, received a great deal of their inspiration from these two sources. The authors also show how these two traditions took hold in Canada through the rather different organization of legal education in Upper Canada/Ontario and in Nova Scotia. Although they draw upon the work of Blaine Baker in tracing the Upper Canadian experience, they fail to capture fully the sense of professional identity and cohesion which the centripetal system of articling and training at Osgoode Hall during the nineteenth century produced. While it came under increasing fire towards the end of the last and into the present century from the profession outside Toronto, the fact that it took hold so early and was such a dominant feature of Law Society politics and administration over many decades meant that it became an important part of the tradition of the legal profession in the province. The ingraining of that approach goes a long way to explaining the tenacity of the leaders of Bar in seeking to preserve it.[4]

The outline of the career of Caesar Wright and his feud with the Benchers is well known. After a brilliant academic career at Western Ontario, Osgoode Hall and then the Harvard Law School, he was hired to the Osgoode Faculty in 1927. Known for his demanding and penetrating teaching, his commitment to legal scholarship, especially his editorship of the Canadian Bar Review and analysis and critique of the law of torts, and his tireless advocacy of the necessity of a thorough grounding of students in a program of legal studies in a university setting, he developed an increasing sense of frustration at what he considered to be the antediluvian and obstructionist tactics of the Benchers. The denouement came in 1948 when Wright replaced John Falconbridge as Dean and

[4] Willis, *op. cit.* 2, p. 145, has pointed to the power of tradition in the context of university legal education, in particular at Dalhousie, as being crucial to the survival of that approach during the uncertainties of the Depression and World War II.

outlined his plans for full-time academic legal education at Osgoode Hall Law School, only to be thwarted once again by Benchers committed to the apprenticeship system. He and three of his colleagues resigned in protest. Wright with two of them, Bora Laskin and John Willis, took up appointments at the Law School of the University of Toronto with Wright as Dean. After a period of some eight years during which the graduates of that school were penalized by the requirement that they do an extra year at Osgoode, Wright's dreams were finally realized in 1957. A compact was reached between the Benchers and the representatives of several universities in the province which accepted the principle of three full time years of academic legal education as a necessary prelude to articling and bar admission, and allowed for the recognition and establishment of university law schools as co-equal with Osgoode. Caesar Wright died in 1967. An honorary degree from Osgoode, the grant of which had been announced shortly before, was bestowed posthumously.

The great contribution of Kyer and Bickenbach is that they have provided a rich background of events, relationships and influences to flesh out the skeleton. In the first place they show how important to Wright's campaign for University legal education were the insights, advocacy and, during his years as teacher and Dean, the support of other legal academics in both Canada and the United States.

The contribution of Dean MacRae of Dalhousie, later Wright's colleague at Osgoode, to the evolution of a common law school curriculum in Canada has been fully exposed by John Willis.[5] Less well known are the roles of successive Deans of the McGill Faculty of Law, R.A. Lee and H.A. Smith, in supporting the cause of academic legal education. Both of these scholars, who were trained in England, admired the quality of American legal education, especially as practised at Harvard, and during their tenure in Canada in the 1910s and 1920s pressed hard through the Canadian Bar Association for the upgrading of the education of lawyers across Canada. Another figure who features as a strong proponent of the superiority of academic legal education is Fred Cronkite, the second Dean of the University of Saskatchewan College of Law, and one who was energetic in his advocacy of his beliefs and generous in his support of Wright in some of the darkest days of the latter's battle with the Law Society of Upper Canada.

Mention of Dean Cronkite brings me to a second point of criticism about the book. The casting of legal education in both Saskatchewan and Alberta in the Dalhousie mold was significant for the future of legal education in Canada because it meant that there was a countervail in more than one part of the country to the supposed superiority of apprenticeship. Unfortunately, the authors are not sufficiently tuned in to events

[5] *Ibid.*, pp. 82-86.

in the early history of legal education in those provinces and their broader significance. As a consequence they are guilty of several errors or omissions of fact, and of overlooking the important role of the two provincial universities in pressing for strong programs of academic legal education.

T.D. Brown is described in the book as the Dean of the University of Saskatchewan Law School in 1918.[6] He was in fact the Dean of the provincial Law Society's school in Regina, known as Wetmore Hall, which folded in 1922 with the introduction of a requirement of three years full time university legal education. The man appointed to be the first Dean at the University of Saskatchewan in 1920 was Arthur Moxon, a classicist and graduate of the Dalhousie Law School, who had been brought to Saskatoon earlier by President Murray as a professor of classics with a view to him eventually heading the College of Law. Not only do the authors miss that fact, they ignore the reality that Ira Mackay whom they record as having been a faculty member at McGill, previously served in the College of Law at Saskatchewan. Like Moxon he was hired initially to teach philosophy and political science for later transfer to the College of Law. Both Moxon and Mackay gave lectures in the College of Law in Saskatoon from its founding as a part time school in 1913.[7] Mackay is interesting, not only because he fell out with President Murray on how the University should be administered and felt compelled to resign, but also because he was publicly advocating the virtues of university legal education a full ten years before Hebert's seminal article on the topic.[8] Indeed, Mackay's article, The Education of a Lawyer, which the authors note as being published in 1941, was in fact a reprint of an inspirational address he gave to the Calgary Bar Association in 1913.[9] The latter was originally published as an appendix to a volume of the Western Weekly Reports for that year.[10]

The careers of both Moxon and Mackay demonstrate the important role that University presidents could and did play in establishing the pattern of legal education during that early period. Equally impressive as the Murray story in Saskatchewan was the unrelenting campaign of the first President of the University of Alberta, H.M. Tory, to have professional legal education in that province located on campus. As Peter Sibenik has shown, Tory was particularly adroit at exploiting the tensions between the legal communities in Edmonton and Calgary and the

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[6] P. 69.

[7] The early days of legal education in Saskatchewan are dealt with at some length in W.H. McConnell, Prairie Justice (1980), pp. 103-116.

[8] See J.T. Hebert, An Unsolicited Report on Legal Education in Canada (1921), 41 Can. Law Times 593.

[9] P. 71. See I. Mackay, The Education of a Lawyer (1940-41), 4 Alta. Law Q. 103.

[10] (1913-14), 5 W.W.R. (Appendix) 8.

fiscal worries of the Law Society of Alberta in order to show the merit of giving the university responsibility for the major portion of the education of prospective lawyers.[11] While conditions in these fledgeling provinces were very different from those in Ontario, the activities of these two presidents were important in spreading the gospel of university legal education, as well as providing interesting parallels with the proselytizing work of Sidney Smith, the President of the University of Toronto in the late 1940s and the close friend and ally of Wright.

It is in their handling of the relationship between Smith and Wright that Kyer and Bickenbach are at their most penetrating. They note that the initial bond between the two was established when they met at Osgoode Hall in 1927. Both had gone to Harvard and had returned enthused by the philosophy of the school and committed to the case method of teaching. They remained the closest of friends thereafter. From their correspondence it is clear that Wright felt perfectly comfortable opening up his heart to Smith, even in his most depressed moods. Smith, for his part, was always ready to listen and provide genuine encouragement and support. One senses that Smith saw very clearly the importance of the role Wright had taken upon himself and of the need for ultimate victory. Nevertheless, as the authors make clear, Smith was only too well aware of the dangers inherent in Wright's pugnacious approach to legal education. This alliance of the academic "streetfighter" and the statesman-scholar was to provide the basis for the most remarkable pattern of manoeuvering after Smith became President of the University of Toronto in 1945.

Although their adversaries were inclined to talk of a conspiracy which manifested itself in the events of 1948, Kyer and Bickenbach reject that simplistic interpretation. What they portray is the working out of a full time academic program in law designed for those contemplating practice as lawyers, in the context of a flexible strategy which left it open whether it would be based at Osgoode, on campus or both. This approach reflected very much the diplomatic instincts of Smith and proved crucial to dealing with the changing situation as the heat between Wright and the Benchers increased in intensity. He would not and could not deny his close friend the prize that he had struggled so hard for, but he could, through his own skill and ability to develop and nurture contacts within both the political and legal communities, create an environment in which other options were explored and channels of communication kept open. Given the single mindedness and super-sensitivity of some of the Benchers this was not an easy task, and there were times when Smith must have wondered whether ultimate victory would not elude

[11] P. Sibenik, The Doorkeepers: The Governance of Territorial and Alberta Lawyers, 1885-1928 (M.A. Thesis, Univ. of Calgary, 1984), pp. 99-132.

them. However, his tactical sense seems never to have left him, and even though it meant sidelining Wright as an active partner in discussions on behalf of the university in the early fifties, and relying on the goodwill enjoyed by several senior academics from outside the University of Toronto in the legal community, he was able to secure the educational aims which he shared with Wright, to preserve and strengthen the University of Toronto Faculty of Law and to ensure the future of academic legal education in Ontario.

As one would expect, Wright's American confidants had less direct impact on day to day events in Canadian legal education. However, the authors show what important sources of both inspiration and moral support they were and how much Wright appreciated their interest. They included the Harvard faculty members who had made the greatest impact on him during his sojourn here, especially Roscoe Pound and Francis Bohlen, with whom he studied Jurisprudence and Torts respectively, and men like Erwin Griswold of Harvard and Arthur Vanderbilt of New York University whose acquaintance he made later. The relationship with his mentors at Harvard is, the authors suggest, crucial to an understanding of Wright's philosophy of education. Although tarred by his opponents as a wild eyed radical in matters of legal education, his purpose was not to revolutionize it, but to give it the intellectual content and context which he believed was essential to the understanding of law as a living, changing instrument for social ordering. In this he had clearly in mind that the teaching of law in a law school was related to the formation of future professionals who needed to look beyond the mere storing of received doctrine to the influences of social policy and values on legal development and the role of the lawyer in that instrumental process. In this he was very much the disciple of Pound and his theory of sociological jurisprudence. In common with the latter he saw the importance of relating the law and its evolution to external social realities and trends, but viewed this as a process whereby the student was challenged to look outwards from a vantage point in the law school, not, as the realists suggested, by leaving its corridors for those of the social sciences. As Wright's dissatisfaction with W.P.M. Kennedy's efforts to establish law as a mainstream academic liberal arts and social science discipline at the University of Toronto shows, he was suspicious of inter-disciplinary initiatives which might compromise the objectives of a rigorous professional education in the law.

The authors also examine the influence of Bohlen on Wright. Bohlen, who subscribed to Pound's characterization of law as a form of "social engineering", is described by them as a "transitional figure", sharing some of the scepticism of the realists about the traditional treatment of tort law but accepting as almost axiomatic the existing conceptual framework as the basis for his critique of the law. Wright, whose work on tort law was always refreshingly critical and suggestive of ways

in which the law should move in the future, was similarly disinclined to question the conceptual framework in which the courts in particular operated. True, as he argued in his Harvard thesis on Gross Negligence, a concept to warrant application had to have substance and meaning. In general, however, his objective was not to question the conceptual framework, but to provide greater insights into it by emphasizing what the courts were actually doing within it. Kyer and Bickenbach correctly observe that, while Wright owed much to Bohlen's view of the law and its development, his challenge was much greater, the use of that critical methodology in analyzing Anglo-Canadian jurisprudence. Although Bohlen could expect and received both judicial and lawyerly approbation of his views (his major critics were realists), Wright had to battle the strongly entrenched view that English precedent somehow represented the everlasting quintessence of wisdom and should not be subject to judicially engineered change. This he did with vigour, persuasiveness and style, in the process producing what is in some ways a uniquely Canadian view of tort law, one which combines English tradition and American creativity and deftly blends concept and policy. The result is that his writing on torts has withstood the test of time, and perhaps for that reason represents a more enduring legacy than some of his writing on legal education.

To his opponents among the Benchers Wright's views on legal education were both wrong-headed and dangerous. It is not difficult to dismiss these men as a group of legal "luddites" standing in the way of progress and reason. The authors resist that temptation. First of all they note that there was a minority sentiment within the Benchers in the late 1940s which was sympathetic to a move to a full-time academic law school. Percy Wilson and John Cartwright stand out in particular as moderates counselling accommodation. Secondly, by examining carefully the statements of Wright's leading detractors they seek to show that the reaction of the Benchers to academic legal education was not entirely unprincipled. In particular they note that there were men among them like R.M.W. Chitty who took a scholarly interest in the law, and that the Benchers had a view of the needs of practice in Ontario which suggested to them that the Harvard model of legal education was inapt. In the latter context they refer especially to a statement of Shirley Denison that, unlike the student constituency at Harvard which had impeccable academic credentials and were in a sense marked out for specialized service of one sort or another, Osgoode Hall was in the business of training journeymen generalists for service in widely differing legal, economic and social milieus. Neither their academic credentials nor their anticipated mode of practice warranted the sort of program laid on at Harvard. Moreover, the introduction of such a program might, it was thought, place insuperable barriers in the face of those of talent, but slender means, especially where they came from outside Toronto. While no doubt there was a strong feeling among the Benchers that the Har-

vard model would be too exclusive, an explanation of motives primarily in those terms strikes me as too simplistic. After all there was living proof in the existence of university law schools elsewhere in Canada that academic legal education could work in the context of training students for general practice. My sense is that reasons for Bencher opposition to an academic law school focusing on its inaptness to the needs of Ontario practice was by and large special pleading. Blaine Baker in his examination of changes in Upper Canadian legal thought in the late nineteenth and early twentieth centuries suggests that the elitist assumptions of the legal profession in the province came increasingly under attack both from within and outside the profession as social mobility increased and industrial development, resettlement, immigration and population growth changed its demographic character.[12] He opines that reaction to these changes by the legal profession, and especially its leaders, included the development of a penchant for formalism and of a strong sense of attachment to English doctrine and institutions. In essence there was an unquestioning retreat to the established and familiar in both the substance, process and institutions of the law. Some of this is evident in what Kyer and Bickenbach have to tell us about the ideology of the Benchers and their motives in particular instances. It would have been helpful for them to have elaborated more generally on what looks like a more complex set of impulses and influences which conditioned Bencher actions.

The authors give a detailed and eminently fair account of the events and manoeuvres leading up to the compact of 1957. They are able to fill in some of the detail surrounding the important initiatives of both W.A. Mackintosh, the principal, and Alex Corry, the vice-principal, of Queen's University in pressing for and negotiating the compromise. They also make it clear that Alan Leal, the Vice-Dean of Osgoode Hall, played what looks like a key last minute role in establishing an acceptable pattern and progression of pre-law university work, law school experience, articling and bar admission training. The role of the students of the University of Toronto in protesting their second class status is also examined, providing yet another example of the collective ability of law students to effect change in their condition, a phenomenon noted in other contexts by Baker and Sibenik.[13]

Caesar Wright emerges from this book as a hero, but as a human hero. One comes away from reading it with an immense sense of respect for the courage and tenacity of the man. Where others would have removed themselves from the field of conflict or accepted defeat, he soldiered on

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[12] B. Baker, The Reconstitution of Upper Canadian Legal Thought in the Late Victorian Empire (1985), 3 Law and Hist. Rev. 219, at pp. 274-292.

[13] Baker, in Flaherty, *op. cit.*, footnote 1; Sibenik, *op. cit.*, footnote 10.

until victory was achieved. It is difficult to speculate on what would have happened to Canadian legal education without his confrontational approach. Kyer and Bickenbach suggest that change would probably have occurred in time in any event. However, they make it clear that the presence of Wright brought the issue to a head earlier than would otherwise have been the case and in a way which left no one in any doubt as to what was at stake. Wright's sense of mission and his courage were not always attended by the sort of political wisdom which allowed for accommodation. In some instances he was able to use his polemicism to good effect, especially immediately after the contretemps with the Benchers in 1948. At that point the Benchers were entirely lacking in a public relations strategy and were quite simply "on the run". Later, when the opposition had regrouped and had developed greater sensitivity in using the media, Wright's pugnacity and stubbornness began to undermine the wisdom of his message and he became, in the authors' words, a "liability". Fortunately, there were others like Smith who were also convinced of the wisdom of what Wright stood for and were able to apply their skills to compensate for his political shortcomings. Wright, for his part, had the sense to recognize the value of the friendships he had made, and to accept good advice.

As one might have expected, given the backgrounds of the authors, they are critical of Wright's limited vision of the relationship of law to other bodies of knowledge. Indeed, they speculate that he would not have appreciated the disparaging comments of the Arthurs Committee on the state of legal education and scholarship in Canada and its relative poverty in theory, empiricism and interdisciplinary insight.[14] However, that having been said, they are quick to recognize that had it not been for Wright and his associates and their belief that the proper place for the study of law is the university, "fundamental legal scholarship" would have little or no opportunity to take root in this country, and the recommendations of the Arthurs Committee would have been, in a sense, "academic". It is always tempting to interpret historical events in the light of one's own sense of what is right now. Theories and practices of legal education have evolved and continue to evolve with changes in perceptions about the relationship between law, lawyers and society. Caesar Wright's career is testimony to the fact that the process of change is affected at some points by the vision of great individuals. Although the efforts of such individuals will often be seen as radical by their contemporaries, particularly by conservative professional colleagues, the truth is that more often the reformer's guiding thoughts and impulses are rooted in the mainstream of progressive thought and conditioned by the perceived realities of time and place. This was true of Wright as it has

[14] Consultative Group on Research and Education in Law, Law and Learning (Ottawa: Social Sciences and Humanities Research Council of Canada, 1983).

been of other innovators. It is, therefore, difficult to criticize him for not espousing a view of his world, which while it had achieved some acknowledgement by that time, would have seemed altogether too daring for and inappropriate to the circumstances. The greatest contribution of Wright is that he showed by his example in teaching, scholarship and advocacy the advantages of treating law as a living, changing body of knowledge worthy of intellectual analysis and critique in the academy. In that sense, while his own vision was limited, he represents the harbinger of further change and an inspiration to later generations of reformers who have their own vision of the function of legal education. It is encouraging to observe that, despite the rather pessimistic tone of the authors about the state of contemporary legal education, there is evidence that the example which Wright set is being followed in a number of Canadian law schools as a new generation of legal academics seek to respond creatively and sensitively to the challenges of legal education in the late 1980s and 1990s. Indeed, it can be argued that the writing of this book is itself proof that the character of legal education is undergoing the sort of further beneficial change which the authors seek. As a law teacher one is frequently struck by the ease with which law students put behind them or forget their previous academic experience in their desire to "learn the law" and to strive for professional identity. This book stands as eloquent testimomy to the value of and challenge in sustaining prior interests and relating them to legal knowledge. The authors have shown that there is indeed "life before law school" and that knowledge in other fields of intellectual endeavour can inform and enrich our appreciation of the law, its practitioners and institutions.

Notwithstanding the criticisms, this is a very good book. The authors have succeeded in infusing an important episode in Canadian legal history with life and colour and in the process have made what promises to be a lasting contribution to our understanding of the dynamics and statics of legal education in this country.

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Canadian Criminal Justice History: An Annotated Bibliography.
Edited by: R.C. SMANDYCH, C.J. MATTHEWS and S.J. COX.
Toronto: University of Toronto Press. 1987. Pp. xviii, 332. ($65.00)

Reviewed by Peter M. Sibenik*

Canadian criminal justice history has become a veritable growth industry. The popular literature has been increasing in the past two decades, as has the academic output from such diverse disciplines as criminology,

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history, law and sociology. Canadian Criminal Justice History purports to locate and collate the "scholarly historical-research" literature in the field.[1] To this end, the editors of this annotated bibliography have methodically scoured bibliographies, dissertation and periodical indexes, and learned journals for literature published between 1867 and 1984. The work contains literature on all areas of Canada and for all time periods, although most of the entries are concerned with central Canada between 1867 and 1939.

Academic scholarship (from at least four disciplines), commissioned works, and the popular literature put out by regional and local presses and journals are all well represented here. So are theses, undergraduate essays, and other unpublished works. Among the writings from other countries is a working paper on policing published under the auspices of the University of Michigan's Center for Research on Social Organization. There are also Ph.D. theses from American and Commonwealth universities on such topics as the 1838 rebellion in Lower Canada, and pre-Confederation penitentiaries and asylums. An appendix contains a list of the sources examined to compile the entries, and it should be used by those wanting to conduct more extensive and more recent research.

The editors have made a commendable effort to ensure that a wider readership becomes acquainted with the rich French-Canadian literature. (The annotations for these entries are in English). Those who work in the field of criminal justice history are probably familiar with the many works of J. Dickinson, A. Lachance and A. Morel. They may be less familiar with the prolific writings of an older generation of Quebec historians identified by the volume—for example, E.-Z. Massicotte and P.-G. Roy.

The 1,104 entries are organized around four chapters, although the entries can also be accessed by the useful author and subject indexes. The chapter on policing is, not surprisingly, dominated by histories of the RCMP. But there are also many entries on municipal and provincial policing; like the RCMP histories, most are popular, in-house, or commissioned works, but of sufficient merit to meet the editors' criteria for inclusion in the volume. The literature identified in the chapter exemplifies the extent to which recent writing has begun to examine not only the crime-control function of the police, but also the role of the police in the provision of social services, the control of drunks, vagrants and other undesirables, and the settling of the prairies. Thus, the editors have eschewed a legalistic approach to their task in favour of a broad one that embraces social history.

The second chapter, Crime, Deviance, and Dependency, reinforces this broad focus. In fact, it is the writings of R. Allen, J. Fingard, S.

[1] P. xi.

Houston, and other social historians which are the most important contributions to the chapter. Thus, poverty, the social gospel, prohibition and temperance, prostitution, narcotic control and addiction, juvenile deliquency, and the child-saving movement—all these are dominant themes.

Many of the entries in the third chapter, Courts and Administration of Justice, were written by lawyers-cum-amateur historians, notably W.R. Riddell and R. St. George Stubbs. The major themes are: the courts (including seigneurial, police, and juvenile courts), juvenile justice, offences involving women, reception of laws, sedition and treason, and the legal profession. Among the pleasant surprises are H. Neary's 1977 bibliographic study of Riddell's writings, and J. Power's 1924 study of the 1892 Criminal Code.

If the influence of historians and lawyers is strong in the area of offensive behaviour (chapter two) and the administration of justice (chapter three) respectively, it is the sociologists and criminologists who have written most of the entries in the final chapter, Prisons and Social Welfare Institutions. Most of the literature is on federal penitentiaries, especially Kingston Penitentiary. This is, in part, a reflection of the extent to which Parks Canada, the Solicitor General's Department and other federal agencies fund the research. (There is comparatively little writing on the provincial reformatories and local lock-ups). Other large themes in the chapter are: capital punishment, probation, parole, transportation (exile), industrial schools, unemployment relief/welfare, asylums, and mental health.

It would be unfortunate if practising lawyers think that this book is only of interest to non-practitioners. It will be of great benefit to the academy, but it is of more than academic interest. In recent years, law reform commissions, royal commissions, and other government bodies have begun using social and legal history in their reports. For example, J. McLaren has recently published several articles on prostitution, and some of the views he presents in them are also reflected in the 1985 report of the Fraser Committee, of which he was a member.[2]

But the market for criminal justice history can be even wider. In recent years, public historians have been retained as expert witnesses in civil litigation involving the extension of public funding for separate schools.[3] It is not at all inconceivable that they could also be used in

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[2] See generally, Pornography and Prostitution in Canada: Report of the Special Committee on Pornography and Prostitution (Ottawa, 1985); J.P.S. McLaren, Chasing the Social Evil: Moral Fervour and the Evolution of Canada's Prostitution Laws, 1867-1917 (1986), 1 Canadian Journal of Law and Society, pp. 125-165.

[3] For background, see D. Bourgeois, The Role of the Historian in the Litigation Process (1986), 67 Canadian Historical Review, pp. 195-205; G.M. Dickinson and R.D. Gidney, History and Advocacy: Some Reflections on the Historian's Role in Litigation (1987), 68 Canadian Historical Review, pp. 576-585.

criminal proceedings, perhaps in a constitutional context where the courts are now more willing to admit extrinsic evidence for certain purposes.[4] Finally, N. Boyd's historical research had a significant impact in the debate on capital punishment in 1987.[5] In Riddell's day, much of the writing had an entertainment and a subtle didactic purpose; recent writing often has a similar purpose, but it can also play a role, or a larger role, in litigation and policy-making.

In conclusion, this handsome volume is well organized and thoroughly researched. No doubt the close association of the editors with the University of Toronto's Centre of Criminology—which has developed considerable expertise in the field of criminal justice and in organizing bibliographies—has enured to the benefit of this impressive effort. Canadian Criminal Justice History now becomes the undisputed starting point for identifying the burgeoning literature in the field.

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Canadian Criminal Jury Instructions.
By GERRY A. FERGUSON and JOHN C. BOUCK
Vancouver: The Continuing Legal Education Society of British Columbia. Revised Edition 1988. Pp. xix, 600 (Volume 1), ix, 898 (Volume 2). ($135.00 for both volumes)

Reviewed by M. Anne Stalker*

This two-volume looseleaf set of sample jury instructions for criminal trials is a new venture in Canadian criminal law. The authors (one is a law professor at the University of Victoria and the other a judge of the Supreme Court of British Columbia) themselves point out that similar volumes have existed informally, but none has been formally published and none is as widely-available as this one is. If it is accepted by the legal community, it has the power to affect criminal law in a profound way and, even if it does not have that effect, it will be a useful tool for anybody who, as judge, lawyer, law professor or law student, deals with the criminal law.

[4] See generally, *Reference Re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Reference Re Legislative Authority of Parliament to Alter or Replace the Senate*, [1980] 1 S.C.R. 54; *R.* v. *Vasil*, [1981] 1 S.C.R. 469; *Reference Re The Residential Tenancies Act*, [1981] 1 S.C.R. 714; *Reference Re the Amendment of the Constitution of Canada*, [1981] 1 S.C.R. 753; *Attorney General of Canada* v. *Canadian National Transportation Ltd.*, [1983] 2 S.C.R. 206; *Churchill Falls (Labrador) Corp.* v. *Attorney General of Newfoundland*, [1984] 1 S.C.R. 297; *Reference Re Section 94(2) of the Motor Vehicle Act*, [1985] 2 S.C.R. 486. These decisions also suggest that courts are cautious about giving substantial weight to such evidence.

[5] See generally, The Globe and Mail, April 10, 1987, p. 1.

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Although the set was first published only in the fall of 1987, it is already in its first revision due to the renumbering of the Criminal Code in the 1985 Revised Statutes of Canada. The revision includes the new numbering and, at the same time, updates and revises the substantive material. Many of the changes add new case law that has been decided since the first edition. As an example, *R.* v. *Petrozzi*[1] has been added to the discussion of the type of fraud which may vitiate consent to assault in Section 6.06. Before this case, there was nothing directly on point.

The main purpose of the book is to provide judges in Canada with sample jury instructions. The evidence that such jury instructions are necessary is provided by the authors in the Introduction. They point to the fact that instructing a jury is a very complex task, especially in Canada where detailed references to the evidence are expected. It is also a task that must be done as soon as the giving of evidence is complete, and without much input from the legal counsel. As a result, it is little wonder that the authors' survey of reported cases indicates that more than one half of jury charges that are appealed are found to be in error in some respect, many significantly enough to lead to a new trial.[2] The authors make the point that the surveys only related to appealed cases; since many are not appealed, it is impossible to determine accurately how often errors are made in jury instructions. Nevertheless, it is not hard to imagine that there are errors in a majority of cases. The task of creating jury instructions is so complex and the important points of law that would apply to any one case are so slippery that it is amazing that the judges are able to do as good a job as they do.

Of course, even now most judges work with the aid of precedents, either their own set or the informal ones mentioned by the authors. However, such haphazard precedents do not allow for consistent testing of jury instructions by the appellate courts. If one set of precedents were widely used across Canada, it could be tested in a variety of cases and court systems right up to the Supreme Court of Canada, thus ultimately providing both lawyers and judges with a reliable and proven set of precedents. There is really no way of achieving this other than through a published set of jury instructions that is available all across Canada as this book is. This book, therefore, provides the judges with an opportunity to work towards a more consistent criminal law in Canada. Surely that is not an opportunity that should be missed.

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[1] (1987), 35 C.C.C. (3d) 528 (B.C.C.A.).

[2] Note that, for some reason, the authors compile their statistics relating to appeals of jury charges differently in their first revision than they did in the original text. In the original, the authors considered that the charge failed only when a new trial was required; in the revision, they indicate there was a failure in any case where an error was found even when no new trial was ordered. Therefore, one must be careful in comparing the statistics.

There is no doubt, therefore, that this book fills a real need in Canada. However, there is still the question of whether this particular set of jury instructions is well done. The answer to that is an unequivocal yes. In the first place, the book is well designed for use. It is arranged in a number of major categories. There are general sections devoted to "Opening Comments", "Trial Instructions" and "Introductory Instructions and Instructions on Evidence" as well as "Closing" and "Post-Charge" instructions. There are also special sections dealing with "Directed Verdicts", "Parties" and "Included Offences". However, the bulk of the material is found in the sections on "Offences" and "Defences", each of which is arranged alphabetically. The authors have provided clear internal instructions for the judges to help them in arranging the material; there are directions as to when each instruction should be used, as well as indications as to how to fit the instructions from various sections together and when to refer to the evidence. Under each heading the instructions are broken down into numbered paragraphs so that the judge can be as selective as he or she wishes to be. While it is not true that each numbered paragraph is a unit in the sense that it can stand independently, the paragraphs have been designed to be relatively easy to omit or move around, thus eliminating much of the taxing work of organizing remarks and providing continuity. The result is that, with the general approach taken care of, the judge using this book would be free to spend more time tailoring the provisions to the specific case being heard.

In addition to a well thought-out format, the book's contents are well-devised for the function they are to perform. The book is designed to do two things at the same time—to provide the layperson with comprehensible instructions on issues that can be very complex, and to provide the expert with the source of those instructions so that she or he is able to make selections based on the most thorough and up-to-date review of the relevant law. This the authors accomplish by setting out the instructions themselves as plainly and with as little legal jargon as possible, and confining the detailed analysis of the cases that contribute to the law to the footnotes. There is a serious attempt here to explain the complex as simply as possible. The authors use the techniques of short sentences, little legal terminology, a great deal of repetition and frequent use of examples to get the points across. In addition, as often as possible, they use the wording from an actual case which an appeal court has approved. At times, indeed, they carry this to a ridiculous extreme. In the section on Aiding and Abetting (section 5.00), the authors use *Thatcher* v. *The Queen*[3] as the source for a charge on what the jury is to do when the other party to an offence is unknown. Paragraph 24A uses a direct quote

[3] [1987] 4 W.W.R. 193 (S.C.C.).

from *Thatcher* when it states that the Crown need not "point to a specific, identified person as the personal assailant of the victim".[4] While the word assailant was appropriate in *Thatcher*, it may not be appropriate in all cases and a more general reference should be found.

Over the years, I would expect that it is in this aspect of the book that the most refinement will take place. It is a formidable task to state complex and subtle ideas simply. The authors have done a very creditable job of it, but it is the type of thing that can be improved with more input. There is no doubt that this is worth working on because it is a valuable aspect of the book, one that makes it useful to those other than judges and the counsel appearing before them. The simplified statements of law would be helpful to lawyers who may want to explain complex points of law to their clients, helpful to law professors and law students, who need at some point to extract from all the subtleties with which they work a clear line of analysis. This book excels in analyzing complex law and distilling it to clear directions. It is not only judges who could use the results to their advantage.

However, it should be noted that the instructions themselves can only be as good as the legal analysis that is behind them. That legal analysis is to be found in the footnotes. It is in the footnotes that the authors provide sources for their statements and give the judge adequate information to make an assessment on whether the charge is appropriate to the case. They provide good coverage of the area, often with mention of alternative approaches and contrary opinions (the notes on similar fact evidence in section 4.60 provide a good example of this). Because of the importance of the footnotes, I might have wished that they were somewhat easier to find; since they follow each small part, it can take more searching than one wishes to do to locate them. However, that is a small quibble. Overall, the quality of the research and analysis to be found in the footnotes is excellent, and the result, an important one, is that this is a book on which one can safely rely.

One final element of this book that is invaluable is that there is going to be a yearly supplement. This year, because of the renumbering of the sections of the Code done by the 1985 Revised Statutes of Canada, the supplement is in fact a complete revision. However, the annual update will be a continuing feature of the book that will greatly enhance its utility. Moreover, the authors are careful to indicate at what point their research stopped so that readers know where to start their own updating.

This publication, then, has been carefully designed to be as useful as possible to both judges and others working in the criminal law field. One potential undermining factor relates to the idiosyncracies of the

[4] P. 219.

authors and the extent to which those idiosyncracies affect the accessibility of the material. In any publication that covers a significant amount of current criminal law, there are going to be difficult issues of coverage and organization. If the authors make the wrong choices in these areas, it could frustrate those who wish to use the book. There are traces of such idiosyncracies here. For instance, the Introductory Instructions specifically mention the problems of line-up and photographic identification but not of other methods of identification. Given that at least part of the reason for concern about line-ups and photographic evidence applies to other techniques of identification as well, the discussion should be directed more broadly. As another example, the authors have chosen not to include an instruction on challenging for cause, although they refer to one. This omission makes the Jury Selection part of the book much less useful than it might be. There are other examples of substantive choices that might be questioned. There are also organizational idiosyncracies, but they are less important because the whole design of the material is to help the judge in selecting and shuffling the material to suit his or her own purposes. Ultimately, while there are a few idiosyncratic glitches, they are not significant enough to undermine the immense value of the book.

The strongest roadblock in the way of the acceptance of this book has nothing to do with any defects in the volumes themselves; they are minor in nature. The roadblock is the independence of those who might use it. However, the use of an aid such as this helps creativity more than it hinders it. A judge can use those parts he or she likes, thus leaving more time to develop other aspects of the jury charge in the short time available. In addition, as these instructions are used, they will become more and more reliable, and not only the judges but the counsel arguing before them will find the instructions invaluable. This is an opportunity to improve the charging of juries in Canada. It is to be hoped that judges and others will make use of this new and exciting tool.

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Criminal Evidence Handbook.
By HAROLD J. COX.
Aurora, Ontario: Canada Law Book Inc. 1988. Pp. lxxv, 339. ($60.00)

Reviewed by Jim Hanson*

Criminal Evidence Handbook must be evaluated as an in-court reference source, and not as an attempt to state comprehensively the Canadian law of Criminal Evidence. The Preface sets this limit: "It is intended to be a

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handbook only and as such is meant to be used as a tool to be able to find the rules of evidence expeditiously and conveniently."[1] The book is well suited to its purpose.

There is no shortage of texts on Evidence, but most tend to be voluminous, and inappropriate for speedy use. For example, the very bulk of McWilliam's Canadian Criminal Evidence[2] would discourage a practitioner from taking it to court. Unlike such texts, this volume is compact and will fit even into the most crowded briefcase.

The organization of the book is also well suited to in-court application. The text may be modelled to some extent on the English text, An Outline of the Law of Evidence,[3] by Sir Rupert Cross and Nancy Wilkins, which also seeks to set out the law of evidence in a manner which will facilitate in-court reference. Criminal Evidence Handbook divides the subject into various chapters. "Burden of Proof", "Circumstantial Evidence", "Corroboration", "Similar Fact Evidence", are all covered within their own chapters, easily found in a clear table of contents. Each chapter begins with a rule labelled in bold type as the "General Rule", and a cluster of seminal authorities is provided in support. Underneath the author sets out a series of subsidiary principles, each labelled with their own bold-faced heading, and each supported by their own cluster of authority, generally commencing with a classic, often English, case and progressing to more modern, specialized Canadian authorities. The book then avoids analysis entirely in favour of stating the relevant propositions of law in simple, straightforward language, with ample references.

For example, in this handbook, a reference to the index would quickly direct the searching reader to the chapter on similar fact evidence. In this six-page chapter, we find, first, the statement of the "General Rule", which is phrased as an exclusionary rule, with an exception allowing for admissibility. Then, the classic cases of *Makin*[4] and *Boardman*,[5] and the modern Canadian case of *Clermont*,[6] are cited. Underneath this "General Rule", are a series of more specialized propositions, under such headings as "Prejudice to the Accused", "Identity in Issue", and "Scheme, Design, or Plan", just to use some randomly chosen examples. Each specialized proposition is equally supported by authority. For example, under the heading "Prejudice to the Accused" the rule is stated that similar fact evidence will be excluded if its "probative value is far

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[1] P. ix.

[2] P.K. McWilliams, Canadian Criminal Evidence (2nd ed., 1984).

[3] Sir Rupert Cross and N. Wilkins, An Outline of the Law of Evidence (4th ed., 1975).

[4] *Makin and Makin* v. *A.G. of New South Wales*, [1894] A.C. 57 (P.C.).

[5] *D.P.P.* v. *Boardman*, [1975] A.C. 421 (H.L.).

[6] *R.* v. *Clermont*, [1986] 2 S.C.R. 131.

outweighed by prejudice to the accused'', and the English case of *Kilbourne*[7] and Canadian cases of *Wray*[8] and *Sweitzer*[9] are cited. In this way, the Canadian law of Criminal Evidence is stated in a concise, descriptive and logical fashion.

A most valuable part of the work is its Table of Contents and Index, both of which are thorough and clearly set out, making effective use of bold and light type faces. There is also an extensive Table of Cases. There is, however, no Table of Statutes, whose inclusion would allow the reader to identify the evidentiary rules influenced or created by a given statute, and in view of the large and increasing legislative influence in the law of evidence, this oversight may be unfortunate.

Given the book's limited purpose, it is almost beyond criticism. As a matter of form, it might have been desirable had the author when citing cases in support of his propositions, directed us to page references within those cases, so that counsel could quickly find the precise judicial passages which support the propositions, if required to do so for a sceptical judge during a brief adjournment. Another criticism of form pertains to the use in citing the cases of the letters ''*R* '', ''*D.P.P.* '', ''*The Queen* '', and the like. The modern trend in books exclusively dealing with criminal law has been towards the deletion of such references as they contribute unnecessarily to confusion in the Table of Cases. But these are minor points.

As a matter of substance, the book has some omissions. The chapter on confessions makes no reference to the special provisions of section 56 the Young Offenders Act.[10] This section, which provides a form of *Miranda*[11] rules for statements taken from young people in Canada, is clearly critical to any case involving young persons, and it would be unfortunate if inexperienced counsel were not alerted to this provision because of its omission from this text. Similarly, the portions concerning the doctrine of recent possession make no reference to two statutory provisions, sections 359 and 360 of the Criminal Code,[12] which allow the Crown to buttress the doctrine by calling evidence of similar possessions in the preceding year, or of a related conviction in the preceding five years. Section 359 is referred to under the heading ''Charter Approved Reverse Onuses'', but this may not be a happy placement, given that the effect of these sections is to permit an inference, and not to reverse the burden of proof.

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[7] *D.P.P.* v. *Kilbourne*, [1973] A.C. 729 (H.L.).

[8] *R.* v. *Wray*, [1971] S.C.R. 272.

[9] *Sweitzer* v. *The Queen*, [1982] 1 S.C.R. 949.

[10] R.S.C. 1985, c. Y-1.

[11] *Miranda* v. *Arizona*, 384 U.S. 436 (1966).

[12] R.S.C. 1985, c. C-46.

As for the actual formulation of the statements of the law, one could be tempted to argue at certain points. The book makes no attempt to flesh out principles with analysis, and accordingly some of the principles may be considered bold. Although this conforms to the spirit of this little book, it must be recognized that the attempt to state succinctly rules whose scope remain uncertain, and which may be analyzed from competing points of view, is a dangerous exercise. It might have been desirable if the author actually flagged certain propositions as being open to argument. Certainly this reviewer submits—and the author would no doubt concur—that a lawyer would be wise, if facing an issue of any controversy and significance, to bring texture to the bare propositions of this handbook with fuller references available from other sources. This will allow the historical development and public policy dimensions of the law to be argued, and may invite important refinements to the statements of law in this book.

The formulation of a handbook of this type is a daunting task, requiring thorough research, exactness of language, clarity of thought, and an intuitive grasp of this very practical side of the law. In Criminal Evidence Handbook, Mr. Cox has shown himself ready for this challenge, and the book can be welcomed as a fortunate and timely contribution to an increasing collection of Canadian Criminal law handbooks.

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Family Mediation: Theory and Practice of Dispute Resolution.
By HOWARD H. IRVING and MICHAEL BENJAMIN.
Toronto: Carswell. 1987. Pp. xv, 316. ($46.00)

Reviewed by Susan B. Boyd*

Mediation and other forms of "non-adversarial" methods of dispute resolution are trendy topics in the 1980s. Books and articles abound on the subject. Although Canada has lagged behind in this respect, the authors of Family Mediation propound mediation as a solution to many problems of modern family law in as vigorous a fashion as earlier American literature. The book is not the first contribution to the field by Howard Irving and Michael Benjamin, who have both been affiliated with the University of Toronto Family Mediation Programme and Family Mediation Canada.[1] As Howard Irving has taught and influenced many of the

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I would like to thank Elizabeth Pickett for her as always insightful comments which helped to shape this review.

[1] See, for example, H.H. Irving, Divorce Mediation: The Rational Alternative (1980); H.H. Irving, M. Benjamin, P.E. Bohm and G. Macdonald, A Study of Conciliation Counselling in the Family Court of Toronto: Implications for Socio-Legal Practice, in H.H. Irving (ed.), Family Law: An Interdisciplinary Perspective (1981), p. 41.

mediators currently offering mediation services in Canada, it is particularly important to take note of his written work.

This book is useful in providing an understanding of mediation models currently available for mediators, clients and lawyers. It is accessible and steers a course between academic credibility (there are lots of references) and layperson readability.[2] It contains some case studies (which tend to reflect the financially comfortable middle class character of the authors' clients) and helpful addenda[3] and appendices.[4]

The first five chapters establish the tone of the book with a discussion of the process of divorce and its consequences, including quantitative data (chapter 2), a selective history of the adversarial system and a delineation of its (negative) consequences (chapter 3), the more recent history of family mediation, its basic process and its predominant models —structural, labour mediation, social psychological and strategic (chapter 4), and the authors' preferred theoretical base for mediation—the systems theory of family processes (chapter 5).

The remainder of the book elaborates upon the authors' favoured model of "therapeutic family mediation", based upon the family systems theory. Chapters contain a clinical overview of the model (chapter 6), a full length case illustration (chapter 7), a discussion of financial and property matters (chapter 8) and child custody and access (chapter 9). In chapter 10, the authors "explore the controversy surrounding joint custody"[5] while in effect stating their clear preference for "shared parenting". Chapter 11 suggests that the appropriate role for lawyers is as partners in the mediation process, while chapter 12 reviews the research literature and finds that most empirical evidence on mediation is "quite positive".[6] The "Final Word" in chapter 13 confirms the authors' bias in favour of mediation, and in particular "therapeutic family mediation", as part of the larger trend towards private ordering, or the use of methods of dispute resolution which do not involve direct use of (public) courts. Other parts of the book indicate that mediators in private practice (rather than court-based practice) are the way of the future.[7]

While the book will no doubt be useful to those interested in mediation, readers should be aware that some of the assumptions underlying

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[2] The format of the book is marred by typographical errors (for example on p. 53) and the omission in the bibliography of at least one reference, cited on p. 47 (McWhinney, 1985).

[3] A draft financial statement, check lists and questionnaires on mediation.

[4] A contractual agreement between a mediator and a client couple, the Family Mediation Canada Code of Professional Conduct, a sample mediated agreement and selected excerpts from the federal Divorce Act and the Ontario Family Law Act.

[5] P. 5.

[6] P. 6.

[7] Pp. 245-246.

Family Mediation are contested. While the authors rightly emphasize the need to develop theoretical underpinnings to techniques such as mediation, in developing such theories researchers must be attentive to problematic assumptions underlying them.

First, in advocating that the resolution of family disputes be relegated primarily to the "private" sphere, and in applauding the privacy of contractual resolution of disputes, the authors perpetuate the notion that family relations can and should be unregulated by state and law. There has been criticism of this notion[8] as well as of the suitability of contractual resolution of disputes for disadvantaged groups in society such as women.[9] In uncritically advocating private and contractual dispute resolution for divorced families, and cloaking it in attractive terms of "autonomy" and "persuasion", Irving and Benjamin ignore and thereby perpetuate unequal relations of power within the family, which tend to disadvantage women and children. Mediation is based on an assumption that parties have relative equality. This assumption obfuscates power imbalances within couples, resulting in agreements which in fact reflect relations of "dominance and acquiescence".[10] In stating that they will not mediate with couples who have had an abusive relationship, the authors assume that such relationships are readily identifiable, which is doubtful given current statistics on wife abuse. Moreover, if wife abuse is viewed as one end of a continuum of patriarchal relations between men, women and children, drawing a line between relationships of abuse and "normal" relations becomes difficult if not impossible.

Second, while the authors point out methodological problems with the studies of divorce and mediation reviewed in their book, they tend to ignore these difficulties in their own discussion. Readers should refer also to more critical literature on social science findings concerning divorce, custody and mediation which questions the unbiased character of such research and the assumptions underlying it.[11] For instance, Irving and Benjamin unproblematically embrace assumptions concerning the "normality" of heterosexual behaviour, making such behaviour the benchmark of healthy development in children.[12]

More generally, the authors' "neutral" treatment of men and women as "parents" illustrates their reluctance to consider concerns arising from

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[8] M.D.A. Freeman (ed.), State, Law and the Family: Critical Perspectives (1984).

[9] S. Silk Klein, Individualism, Liberalism and the New Family Law (1985), 43 U.T. Fac. L. Rev. 116.

[10] L.K. Girdner, Child Custody Determination: Ideological Dimensions of a Social Problem, in Ed Seidman and J. Rappaport (eds.), Redefining Social Problems (1986), 165, pp. 180-181.

[11] For example, M. Fineman, The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce, [1987] Wisconsin L. Rev. 107.

[12] P. 71.

critical and feminist literature on informal dispute resolution. It is regrettable, but true, that even in current Canadian society, men and women do not participate equally in child rearing in most families.[13] Nor do men and women leave marriage in a similar fashion emotionally and economically. Women are more likely to feel more intense emotional connection with their children due to their still predominant role in primary caregiving, even when in the labour force. And they are far more likely to leave a marriage in a disadvantaged economic state in terms of income-earning ability and assets. These problems cannot be solved through mediation which focuses on internal family dynamics, and, furthermore, they can negatively affect children if not addressed.[14]

Third, while the "therapeutic family mediation" model may well have advantages over other models of mediation, the family systems theory it is based on tends to isolate the family from its social context, and regards the family rather than the individuals constituting it as the main unit even after divorce. This model not only accepts the heterosexual nuclear family model as the norm in society, it also obscures the often conflicting interests and relations of domination within the typical nuclear family.[15] The family systems model portrays wife abuse "as a family phenomenon necessarily involving the participation of all family members",[16] thereby degendering family violence and dislocating it from its wider social context.

In the same way that wife abuse may be reframed as a family problem rather than as a social problem connected to patriarchal relations between men and women; mediation on a family systems model may lead to a denial of gendered patterns of behaviour within a family. Clients are encouraged to reframe the behaviour of their spouses from a negative to a positive connotation:[17]

> The husband who continually criticizes his wife's appearance may be seen as "sensitive and concerned about her appearance". . . The workaholic spouse may be described as "deeply concerned about the welfare of the family".

While it may indeed be self-defeating for spouses to continue blaming each other after divorce, it may not be particularly healthy for a woman to blame herself for destructive male behaviour (such as criticism of her

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[13] Canadian Advisory Council on the Status of Women, Integration and Participation: Women's Work in the Home and in the Labour Force (Ottawa: Canadian Advisory Council on the Status of Women, 1987), pp. 2-6.

[14] C. Rogerson, Winning the Battle, Losing the War: The Plight of the Custodial Mother After Judgment, in M.E. Hughes and E.D. Pask (eds.), National Themes in Family Law (1988).

[15] M. Barrett and M. McIntosh, The Anti-Social Family (1982).

[16] A. McGillivray, Battered Women: Definition, Models and Prosecutorial Policy (1987), 6 Can. J. Fam. L. 15, at p. 26.

[17] P. 89.

failure to conform to societal expectations of female beauty) in a relationship. While some recognition of power imbalance is indicated in the book,[18] it is often an ungendered recognition that diminishes the significance of the greater power which men tend to hold in a society still characterized by unequal gender relations, particularly within the family.

The ways in which issues and behaviour are reframed also have consequences when issues such as custody are negotiated. If a workaholic husband is reframed as a father concerned about the welfare of his family, then the stage is set for a mediator urging joint custody on an unwilling mother who has in the past been primary caregiver to her children. Given the authors' open bias in favour of joint custody, this scenario is not unlikely. Reframing of behaviour within a relationship may defuse current anger and enhance ability to reach a mediated agreement, but it also diminishes recognition of important differences between men and women within marriage, and renders invisible the potential for custody to be used as a form of power after divorce.[19]

Fourth, in arguing that joint custody should be a presumption in custody legislation,[20] the authors ignore serious concerns about the wisdom of such a presumption. It can affect negatively the bargaining power of a primary caregiver in negotiation, and impose a duty to share decision-making power with a father despite the mother's typically greater responsibility for caring for children. While the authors purport to refute concerns about joint custody, they have not taken seriously concerns about still unequal relations betwen women and men in the family and in the labour force. They advocate universal recognition that it is in the best interests of children to maintain frequent, reliable and on-going contact with both parents without cautioning that the importance of such contact depends on what kind of relationship the father had to the family in the first place. Whether there was wife or child abuse, for instance, would be significant. In addition, the ability of judges to order joint custody even where one or both parents object is advocated without discussion of the implications such an involuntary order could have for women and children.

Finally, the aversion to lawyers evidenced in chapter 11 means that the authors overlook the beneficial aspects which the adversarial approach to dispute resolution can offer to some clients, especially those in an unequal bargaining position. The fact that most family disputes are settled through lawyer negotiation rather than litigation is also obscured.

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[18] Pp. 82, 103.

[19] See forthcoming issue of the Canadian Journal of Women and the Law (volume 3, #1), which contains articles dealing with the connections between custody and patriarchal relations between women and men, and the collection of custody articles edited by C. Smart and S. Sevenhuijsen, Child Custody and the Politics of Gender (forthcoming).

[20] P. 204.

Lawyers may be in a better position to do such negotiation due to their awareness of their clients' formal and substantive rights under the law. Some authors have argued that the due process model of the adversary system, despite its well known problems, may address women's needs better than the mediation model of compromise and persuasion.[21] Few people would argue that the adversarial system is a perfect or pleasant process. However, it is problematic to denigrate that system with scant consideration of the advantages it may hold for those in a disadvantaged position economically, socially, and in terms of power. The privacy of the mediation system largely removes the due process, fact-finding and public record functions of the adversarial system. Access to independent legal advice may also be discouraged by the added expense of hiring both a mediator and a lawyer.

I do not mean to imply that mediation should never be used. In order for mediators to deal effectively with the implications of power relations between women and men, however, they must develop a better understanding of the dynamics of gender-related power in our society and its manifestations in the mediation process.[22] In failing to acknowledge these power relations, literature such as Family Mediation can only reproduce them.

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Indigenous Law and the State.
Edited by BRADFORD W. MORSE and GORDON R. WOODMAN.
Dordrech, Holland; Providence, U.S.A.: Foris Publications. 1988. Pp. vi, 472. ($US34.90)

Reviewed by Abdullahi Ahmed An-Na'im*

Each one of the essays published in this volume addresses some aspect of the relationship between the laws of indigenous peoples, on the one hand, and the legal norms and processes of the states which have emerged upon their territories, on the other hand. While expressly disclaiming comprehensive global coverage, the editors claim that the volume reflects considerable regional diversity. However, except for one essay on India,

[21] For some advantages of "formal justice" see, A. Bottomley, What is happening to family law? A feminist critique of conciliation, in J. Brophy and C. Smart (eds.), Women in Law: Explorations in Law, Family and Sexuality (1985), 162, pp. 184-185.

[22] M. Shaffer, Divorce Mediation: A Feminist Perspective (1988), 46 U.T. Fac. L. Rev. 162, at p. 181.

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another on Ghana and Nigeria, and a third essay on Greenland, all the essays in this volume deal primarily with the situation in the Americas and Australia.

The twenty essays of the volume are organized into the following five groups. The first two groups of essays address the general relations between indigenous law and the state in terms of policy arguments, in Part I; and analysis of current or past practice, in Part II. Discussions of more specific issues are grouped into three categories: Part III on actual or potential constitutional laws; Part IV on family law and associated questions; and Part V on criminal justice issues.

Since space would not permit a detailed discussion of all the essays in this volume, I propose to focus on a few key essays. In doing so, I wish to emphasize that I share the editors' and authors' enthusiasm for according greater recognition and respect for indigenous laws. I would also like to add that I find that this volume makes a welcome and significant contribution to the field.

It is probably true, as noted by Morse and Woodman in the first essay of the volume, that it is not yet possible to propose a full comparative theory of state policies towards customary law in a global sense.[1] However, I am not sure that their proposed preliminary and relatively simple classification of the types of measures constituting an operative state policy towards customary law is a useful first step in the development of a full comparative theory of state policies. In particular, it seems to me that it is not helpful to identify and classify types of positive and negative measures without taking into account the nature of the state in question, and its motivation and justification in adopting the particular policy. After all, such a full comparative theory would be concerned with the practically viable and realistic rather than the purely theoretical policy options open to the state. I would therefore suggest that the different analysis recommended by the authors for the next stage, namely the classification of underlying policies and their discussion in relation to social, economic and political circumstances as well as their comparison in cross-cultural terms,[2] is essential for any meaningful first step towards a full comparative theory of states options towards customary law.

Given the difficulty of breaking away from one's own cultural mould, and the consequent limitations of legal understanding and imagination, it may be exceedingly difficult to conduct cross-cultural comparisons. Even those sensitive to the need for cross-cultural perspectives, such as Morse and Woodman, unwittingly reflect their ethnocentricity in attempting to compare and generalize about the experiences of other peoples.

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[1] P. 6.

[2] P. 21.

Thus, in their attempt to contribute to a general comparative theory, the authors of this first essay propose to follow with some modification Hart's (1961) analysis of norms.[3] It is obviously true that any author would have to start somewhere, and that any author's starting point would be somewhat conditioned and limited by her or his cultural background and training. Nevertheless, such ethnocentricity is bound to preempt and undermine the validity of cross-cultural analysis. In any case, I submit, the authors should have attempted to justify and explain the use of Hart's analysis as a valid approach to the global study of relationships between the state and customary law. Even if we assume that the proposed analysis contemplated the nature and structure of the state in question, it is highly doubtful if it also anticipated all the varieties of the relevant customary laws and their cultural contexts.

Despite the inadequacy of the first step towards a full comparative theory proposed by the editors of this volume, and the undeniable difficulty of developing such a theory, various essays in the volume contribute to broadening and deepening our understanding of the issues and problems of according recognition to and fostering respect for indigenous laws. In particular, I find the several essays on the Australian experience particularly helpful in this regard.

For example, the concise and informative essay by Crawford, Hennessy and Fisher, entitled, Aboriginal Customary Laws: Proposals for Recognition,[4] skilfully introduces the reader to the 1986 pioneering Report of the Australian Law Reform Commission on the subject. As we can see from the eloquent essay by Rob Riley,[5] the Commission's work is supported and encouraged by the leaders of the Aboriginal peoples of Australia. The Australian experience is also discussed in five other essays in this volume.

Central to the basic message of the volume as a whole, namely the enhancement and support for greater recognition of and respect for indigenous laws, is the question of the compatibility of these laws with national and international standards of human rights. Whether used as a genuine reason or mere pretext for resisting efforts to accord recognition to and establish respect for indigenous laws, real or perceived human rights objections to such laws must be addressed by the advocates of indigenous laws.

It is heartening to those who have to undertake this task to see that some of the alleged human rights objections to indigenous law were alien phenomena superimposed or introduced into the traditional cul-

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[3] P. 7.

[4] P. 27.

[5] Aboriginal Law and its Importance for Aboriginal People; Observations on the Task of the Australian Law Reform Commission, p. 65.

tures by European colonizers and their scholars, against the historical traditions and actual experience of the people concerned. Thus, as demonstrated in the essay by Diana Bell, Aboriginal Women and the Recognition of Customary Law in Australia,[6] the stereotyping of Aboriginal women as dominated and exploited pawns in the game of male gerontocracy is belied by the traditions and actual experiences of these women.[7] To these women, external factors, such as the fact that most white field officers and other officials were men who had strong preconceptions of women as secondary in Aboriginal society, have been the real obstacles frustrating their efforts to assert and exercise their fundamental human rights.[8]

However, to note this positive feature of a particular indigenous tradition is not to deny that there are some human rights problems with some indigenous cultural traditions and their customary laws. With regard to this vital concern, the Australian Law Reform Commission's Report concluded that "the need for consistency with fundamental human rights does not preclude the recognition of Aboriginal [indigenous] customary laws. Whether human rights are preserved or infringed by a particular proposal [for recognition of indigenous law] depends on the detailed proposal in question".[9] This seems to be a sensible and practicable proposition.

Nevertheless, more may need to be done with regard to human rights concerns with a given customary norm than simply to deny it recognition and respect by the state. In so far as such a norm would continue to influence the practice of the particular indigenous community, and probably violate certain human rights of some of its members in hidden or indirect ways, I would suggest that the offending norm has to be addressed and reformulated in order to avoid or overcome its negative human rights implications. However, as I have emphasized elsewhere in relation to the Islamic tradition,[10] such reformulation has to be done from within the cultural tradition itself if it is to have the desired effect of transforming attitudes and actual behaviour.

As correctly stated by the Australian Law Reform Commission, the welfare of the Aboriginal/indigenous peoples is a national issue which should, as far as possible, be dealt with through a coherent national

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[6] P. 297.

[7] Pp. 298-299.

[8] *Ibid.*

[9] P. 43, referring to paras 171-193 of the report.

[10] Abdullahi A. An-Na'im, Religious Minorities under Islamic Law and the Limits of Cultural Relativism (1987), 9:1 Human Rights Q. 1; and Islamic Law, International Relations, and Human Rights: Challenge and Response (1987), 20:2 Cornell Int. L.J. 317.

policy.[11] The volume under review is a valuable contribution not only as an inspiration for developing coherent national policies, but also for providing informative and insightful discussions of the experiences of several countries. It is through such international exchange of ideas and experiences that national, and possibly international, policies are best informed and guided into greater sensitivity for the genuine concerns of indigenous peoples throughout the world.

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Modern Banking Law.
By E.P. ELLINGER.
Oxford: Clarendon Press. 1987. Pp. LXV, 616. ($50.95 paperback; $135 hard cover)

Reviewed by R.D. Gibbens*

This is the first volume of a proposed two volume set dealing primarily with English banking law. The first volume concentrates on domestic banking law, although there is the occasional digression on international banking activites.[1] The proposed[2] second volume will concentrate on international banking law. Therefore anyone seeking a detailed discussion on bills of exchange, guarantees and indemnities, mareva injunctions and the like will have to await patiently the arrival of the second volume.

In any relatively new legal subject like "banking law" there is always a preliminary question the author must address, and that is how he or she is going to develop the materials. In a conceptual subject like contract(s) or tort(s) the issues gravitate around the concept of, say, contracting or the causing of harm. These topics have, fortunately or unfortunately, well defined patterns of analysis which most orthodox textbooks routinely follow. But banking law is a contextual subject; the issues gravitate, not around a legal concept, but around a commercial function. The banking function cuts across various legal boundaries.

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[11] P. 57.

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[1] *E.g.*, within the context of the electronic transfer of funds, the SWIFT (Society for Worldwide Interbank Financial Telecommunications) transfer system is discussed (pp. 361-363). Incidentally, the American systems, CHESS, CHIPS, Bank Wire and Fedwire, are not discussed.

[2] Prefatory announcements of proposed second volumes generally come with no time guarantees (see P. Atiyah, The Rise and Fall of Freedom of Contract (1979), p. vii).

This, for the law at least, produces a constant tension as to the motivating forces in specific areas of the law. The conceptual aspect of the subject exerts a centripetal force. This force encourages the pure and the harmonious in the contract, tort or property development of the subject. But in forcing the contextual subject into the conceptual pattern the occasional legal fiction results. The contextual aspect of the law exerts a centrifugal force on the legal principles, allowing them to develop within the context of the banking function. But an apparent loss of certainty seems to result, where everything is relative but nothing determinative.[3] The difficulty in trying to define newly evolving payment methods within already established agency or debt assignment (species of contract) concepts is just one of the many examples of this problem in banking law.[4]

A second problem is one of definition. Banking law is not self-defining; one must not only decide what material to include and exclude but also how to order the included material in such a way as to make

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[3] F. Kessler and G. Gilmore, Contracts Cases and Materials (2nd ed., 1970), pp. 1-2, make the same point as the above paragraph, except in the reverse situation. Their focus is on the conceptual legal subject of contracts. Starting with a quote from Williston they state:

> "The law of contracts,. . . after starting with some degree of unity now tends from its very size to fall apart. The simplest applications of fundamental principles of contracts when found in an insurance policy or a contract of suretyship are often considered by writers on those topics as peculiarities of the law of insurance or of suretyship, controlled by no general rules. It therefore seems desirable to treat the subject of contracts as a whole, and to show the wide range of application of its principles." [Williston on Contracts (rev. ed., 1936), p. vii].

Such a monistic approach serves only to distort the real role which contract has played in the evolution of our society. It results in more or less lifeless abstractions. A realistic understanding of the law of contracts can be achieved only through an awareness of the different functions fulfilled by the various kinds of contract in our society. This diversity of function leads inevitably to a polytheism of ideals governing the law of contracts. A pluralistic approach may help to explain the many tensions and inconsistencies which become apparent upon a close study of the case law and which cannot be explained satisfactorily under a monistic approach.

The recent English case of *Kleinwort Benson Ltd.* v. *Malaysian Mining Corp.*, [1988] 1 All E.R. 714 (Q.B.D.), arguably reveals this monistic approach. The case is the result of the collapse of the International Tin Council in 1985. In it the court enforced a letter of comfort as if it were tantamount to a guarantee. To some commentators, little attention was paid to the commercial environment in which these documents are given: C. Bright and S. Bright, Letters of Comfort (1988), 138 N.L.J. 365. But see my comments, Letters of Comfort (1989), 3 B.F. L.R. 222.

[4] See pp. 363 *et seq.* Also see E.P. Ellinger, The Giro System and Electronic Transfer of Funds, [1986] L.M.C.L.Q. 178; E.P. Ellinger, Documentary Letters of Credit: A Comparative Study (1970), pp. 39 *et seq.* Detailing the theoretical problems in defining documentary credits, the author outlines the guarantee theory, anticipatory acceptance theory, contract for the benefit of a third party theory, agency theory and the assignment theory, among others.

coherent sense of it. The method employed by Falconbridge[5] is to work the materials around the Bank Act (Volume 1) and the Bills of Exchange Act (Volume 2). As a result, items which do not fall easily into these subjects, like guarantees and mistaken payments, tend to be relegated to minor roles in the text.[6] Professor Ellinger has, however, set as his task the writing of a text suitable for students, which raises the question of whether a course on banking and bills of exchange is a common item in most law school calendars.[7] He has therefore organized his first volume on domestic banking along three functional lines, Banks and Banking Business, the Bank as a Monetary Agency in Domestic Transactions, and the Bank as Financier and Lender in Domestic Transactions. The part dealing with the Bank as a Monetary Agency in Domestic Transactions is by far the largest, encompassing almost two-thirds of the book. The discussion here covers the legal aspects of the various types of accounts, the role of a paying and collecting bank, cheques and electronic monetary transfers, credit tokens and mistaken payments. The first part of the book, Banks and Banking Business, deals with the banking environment in England and a discussion of the bank-customer relationship. The final part of the book, the Bank as Financier and Lender in Domestic Transactions, deals primarily with loans and securities.

This book is, however, geared to an English audience, notwithstanding the occasional discussion of Canadian cases.[8] So while the book has relevance to an interested Canadian reader, the usual warnings apply. Differences between the Canadian and English clearing system[9] and chequing system[10] should continually be kept in mind. The different banking and

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[5] J. Falconbridge, Banking and Bills of Exchange (8th ed., by B. Crawford, 1986).

[6] Compare Ellinger, who dedicates an entire chapter (c. 11, 26 pp.) to the recovery of money paid by mistake, with Falconbridge, *op. cit.*, footnote 5, where the subject is dealt with in five paragraphs. See also the following works, which deal with the subject in an entire chapter: G.A. Weaver and C.R. Craigie, Banker and Customer in Australia (1975), (c. 14, pp. 423-473); M. Megrah and F.R. Ryder, Paget's Law of Banking (9th ed., 1982), (c. 18, pp. 283-322). Falconbridge states, *op. cit.*, footnote 5, p. 775: "Mistakes by banks in the administration of their accounts with customers raise issues more properly the subject of texts on the law of restitution than of banking . . .". This comment seems to reveal some confusion in quadrating the conceptual-contextual matrix. If taken to an extreme such comment would leave very little scope for banking law.

[7] My own sense of the matter is that it is not.

[8] For example, *Arrow Transfer Co. Ltd.* v. *Royal Bank of Canada*, [1972] 4 W.W.R. 70 (S.C.C.); *Royal Bank of Canada* v. *Concrete Column Clamps (1961) Ltd.* (1976), 74 D.L.R. (3d) 26 (S.C.C.); *Columbia Gramophone* v. *Union Bank of Canada* (1916), 34 D.L.R. 743 (Ont. S.C.), receive extended treatment.

[9] Compare pp. 230 *et seq.* (discussing the English clearing system) with Crawford and Falconbridge, *op. cit.*, footnote 5, pp. 1110 *et seq.* (discussing the Canadian cheque clearing system).

[10] On certified cheques, compare B. Geva, Irrevocability of Bank Drafts, Certified Cheques and Money Orders (1986), 65 Can. B. Rev. 107, at p. 123, with Ellinger, pp.

business practices of the two countries have a centrifugal effect on the governing legal policy, and even superficially similar legal questions may point to different legal responses depending on the banking practices prevailing in the country.[11] Conversely, the discussion of unique operations like the European giro transfer system[12] is informative in the context of a discussion of the electronic transfer of funds.

Specific criticism has already been levelled at various arguments advanced by Ellinger in this book.[13] At a more general level, one may find the rather infrequent reference to academic articles, even to the author's own, either a blessing or a curse.[14] As far as the form is concerned, there are the rare proofreading errors,[15] but the general quality of the work, like most Clarendon productions, is high. In the best of worlds it would have been preferable that the two volumes could have been issued simultaneously, allowing not only inter-volume citations, but also filling out some of the unfinished discussions in the first volume.[16] These reservations aside, the book is an important work that will be read by all those interested in the subject.

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250 *et seq*. On crossed cheques, compare Crawford and Falconbridge, *op. cit.*, footnote 5, pp. 1804-1805, with Ellinger, pp. 252 *et seq.*

[11] For example, see E.P. Ellinger, Reflections on Recent Developments Concerning the Relationship of Banker and Customer (1988), 14 Can. Bus. L.J. 129, at p. 137 (trying to explain the duty imposed on the customer to peruse his banking statement under U.C.C. s. 4-406 in the U.S. and the absence of such a duty in England, on the different banking practices prevailing in the two countries).

[12] See pp. 347 *et seq*. The post office giro system in the U.K. is slated for privatization.

[13] See Symposium, Recent Developments in the Relationship of Banker and Customer (1988), 14 Can. Bus. L.J. 129, for comments on Professor Ellinger's views on the bank and its customer (c. 4). Also see B. Geva, The Evolving Law of Payment by Wire Transfer—An Outsider's View of Draft Article 4A (1988), 14 Can. Bus. L.J. 186, at pp. 190-193, for a brief discussion of Ellinger's views on money transfer payments (c. 12).

[14] When discussing travellers' cheques (pp. 262-263), Ellinger does not even cite his own article on the subject, Travellers' Cheques and the Law (1969), 19 U.T.L.J. 132. When discussing the recovery of money paid by mistake (c. 11), he only cites Professor Luntz's twenty year old article, The Bank's Right to Recover on Cheques Paid by Mistake (1968), 6 Melb. U.L.R. 308. There appears to be no citation in the entire book of any article appearing in the American Banking Law Journal.

[15] For example, pp. 259 and 277.

[16] For example, the mareva injunction discussion at p. 275 is seven paragraphs long, and one is left to wait for a more detailed analysis until the second volume appears.