Book Reviews
Comptes rendus

Current Developments in International and Comparative Corporate Insolvency Law.

Edited by JACOB S. ZIEGEL.
Oxford: Clarendon Press, 1994. Pp. vii, 783. ($225.00).

Reviewed by Richard W. Bird*

In 1975 a group of law teachers in Toronto founded an Annual Workshop on Commercial and Consumer Law. In 1993, the Workshop selected bankruptcy and insolvency in an international and comparative context for indepth study. The papers presented have now been published in *Current Developments in International and Comparative Corporate Insolvency Law.*

Even more than the title implies, the focus of the Workshop was on current developments of a broad range of bankruptcy and insolvency topics including corporate reorganizations, voidable transactions, priorities, personal liability of directors and officers, and conflict rules in international bankruptcy. The geographic area represented was equally diverse. Papers cover Great Britain, United States, Australia and to a lesser extent Japan, New Zealand, Vietnam and the Nordic countries.

With such diversity of sources, topics and authors, it should not be surprising that the text is not, nor does it profess to be, a complete or systematic treatment of insolvency and bankruptcy law. What the Workshop, and the subsequent publication intended, was to raise a number of current legal issues and examine the various ways countries have approached them. And here one paper stands apart from the rest. LoPucki and Triantis presented a paper "*A Systems Approach to Comparing U.S. and Canadian Reorganization of Financially Distressed Companies*". It is a splendidly written comparative analysis of the U.S. *Bankruptcy Code*, the new Canadian *Bankruptcy and Insolvency Act* and the older Canadian *Companies' Creditors Arrangement Act.* The authors undertook to explain the reorganization "systems" under each regime rather than merely discuss "legal doctrines". To some this borders on the now popular critical legal analysis, while others will find it more in the nature of just clarity of thought and good writing. Either way, this paper stands apart from the rest and is highly recommended. It must, however, have been a great disappointment for the editor to have to seen this paper first published in the Harvard Journal of International Law. In any event, the paper provides a

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readily readable description of the three systems. It could serve as a model for comparative legal analysis.

The varied nature of the papers tends to remind the reader that insolvency and bankruptcy law is not just for the purview of specialists. Wage earners, directors, landlords and tenants, environmentalists, family practitioners and bankers, are just a few of the groups that encounter insolvency and bankruptcy problems. It is for these groups that the book could be of the most use and yet this group will be the least likely to draw upon it. The reference to "corporate" insolvency in the title is a bit misleading. There are good papers on voidable transactions, priorities, privately appointed receivers and "ring fencing" in international insolvencies. A good example of a paper that should be of general interest is Hayes, "Executory Contracts and Proposals Under the Bankruptcy and Insolvency Act (Canada): A Comparative Analysis with the Companies' Creditors Arrangement Act (Canada)." Do you know how they are treated? If not, you will find the article informative.

There is a danger, that despite its quality, a book of conference papers such as this will soon be lost on the shelf. As a ready reference, it is not like the Canadian Tax Conference Reports where the papers are indexed with the other publications of that foundation. Nor are the papers likely to be found in an index to periodicals. Thus, without some promotion, some good material may not be seen by many.

There are some negative lessons to be learned from the Workshop papers. If you were to ask yourself, what might someone in a foreign country want to know about Canadian insolvency and bankruptcy law, I doubt you would consciously decide to dwell on technical rules or Canadian statistics. In some of the articles, too often we encounter such detail. While the home jurisdiction might appreciate this, it lacks the comparative insights that we expect to find. The papers from non-common law jurisdictions are particularly susceptible to this criticism. It is the contrasting paper by LoPucki and Triantis that makes this point even more vivid. Finally, some papers do not seem to provide much more than a restatement of current legislative reform.

On the other hand, there are some detailed papers that deserve study. The role and problems of the privately appointed receiver has always been of concern in insolvency and bankruptcy. It is an office unknown in American law and of major significance in Canada and England. The topic is dealt with in two papers, one by the Editor, Jacob Ziegel, the other by F.H. Buckley. Both papers provide good reading on the subject.

Earlier in this review, I suggested that the subjects covered in the book are more varied than the title indicates. The three papers on voidable transactions and the three papers on the ranking and priority of creditors are not in any way limited to corporate insolvency. The coverage and depth of analysis should be of general rather than specific interest.

The book is like an extended special issue of a law journal. And although they were "presented" at a conference, I doubt many of them were presented in

the form in which they are published. I doubt a three-day conference would admit to that format. No matter how fast they spoke, 722 pages of text would be difficult to read in that time frame, let alone comprehend. Some are more specialized than others, some are better than others, some will be of more interest than others. It is not and never purported to be a substitute for a treatise on bankruptcy and insolvency. If you want a good comparative analysis of corporate reorganization, LoPucki and Triantis is a great place to start. After that, many of the other "papers" will provide some more food for thought.

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Caught in the Act — A User's Guide to the Youth Justice System *and Young Offenders Act.*

By LEE TUSTIN.
Toronto: Addison-Wesley Publishers, 1994. Pp. 150. ($18.95).

Reviewed by Stephen G. Coughlan*

The Youth Justice System is probably the most widely misunderstood, as well as the most controversial, portion of the criminal justice system today. There is therefore a need for books which make clearer how the system works in practice, and which address some of the dilemmas in seeking a compromise between the rights of young people and the need for special types of intervention into their lives.

This book, however, has more modest goals. It aims only at being a general guide to the youth justice system, providing a very limited introduction to each area.

The book is arranged around the aspects of the system in the order in which a young person charged with an offence would encounter them: being charged or arrested, getting counsel, appearing in court, sentencing, and appeal. Various short scenarios are spread throughout the book, which liven up the text. The author's style is quite clear, and the book is quite easy reading. Since the author seemingly has a wide audience in mind, this is a practical approach.

Unfortunately, this simplicity comes at the cost of oversimplification at times. The author states that the book is intended for those who are a permanent part of the youth justice system, as well as for parents and youths. It is unlikely, however, to be very enlightening to those who are a permanent part of the system. It is written at a level of generality that, while in rough outline accurate, will probably not provide "insiders" with knowledge they did not already have of the roles of the other players. More realistically, those for whom the book

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might be useful are young persons charged with offences, or even more plausibly, their parents.

A further consequence of having kept the book so simple is that it really only deals with Ontario. The author acknowledges a "slight" Ontario bias, and then writes with confidence about the most minute details (the court clerk is "usually on the judge's left", for example). Some matters of course are the same across the country — the sentences available, or arrest powers — but the author does not seem to recognise in how many ways practise differs from province to province. The description of how to obtain a lawyer, for example, deals exclusively with Ontario's judicare model, without any recognition that things are different elsewhere. It is not accurate for provinces which have staff lawyers, such as Saskatchewan, Newfoundland, and Nova Scotia, for provinces which have special programs for providing counsel to young persons, such as Alberta and Manitoba, or even for other provinces where most legal aid work is done by private counsel, such as British Columbia. The description of open custody facilities is one potential model, but is not accurate at least for Nova Scotia. The description of the bail process and the use of section 7.1 of the *Act* in practice is certainly not universally true, if it is even true through all of Ontario.

The author indicates that she does not discuss regional differences because to do so would require that the book be constantly updated. This is a curious rationale. In any event, the book would require constant updating to keep up with the changes to the *Young Offenders Act* and the *Criminal Code* (some of which have already made the book inaccurate on small points). And the problem with not discussing regional variations is that the reader who is not in Ontario is left with no way of knowing whether the information is correct or not. Indeed readers not in Ontario have every reason to expect the information is correct for their own province. At the very least, it would have been possible to point out which aspects of the system are in provincial control, and therefore most likely to differ from what is set out in the book.

Another reflection of the simplistic approach of the book is its failure to address any of the difficult issues in youth justice. It might be that this is so because the author does not see any difficult issues. Rather, it appears that the issues are easy for her, because of two unconscious assumptions: the assumptions that; 1) every young person charged with an offence is guilty, and that; 2) the involvement of the youth justice system in a young person's life has no disadvantages.

The presumption of guilt is reflected in many ways in the book, from the largest structural level to the smallest detail. Chapter 3, entitled "At Court", is about pleading guilty: the advice given deals with what things a young person might do to make a better impression at sentencing.[1] Similarly, the section "What a Lawyer Should Do" commences with the advice "A young person's lawyer should collect the appropriate evidence to show the judge the client's special requirements that need to be considered at disposition", and concludes

[1] And to give the book its due, the advice is sound.

with a plea to lawyers to "let" their clients plead guilty. In dealing with statements on arrest, the author suggests that the police will write down inculpatory statements, though they "will not even bother taking a self-serving statement but will rely on other evidence for a conviction". There is a three page section acknowledging that the young person might *plead* not guilty, but nothing allowing for the possibility that the young person really *is* not guilty.

Related to this assumption is the belief that no disadvantages flow from being involved in the youth justice system. The author addresses lawyers directly at one point, suggesting that sometimes they should look to their clients' needs for guidance, assistance, or support, rather than to whether the client can be acquitted or given an absolute discharge. But the author does not see that it is reasonable to want the client to get guidance, assistance, or support without also getting a youth court record. The author describes, for example, a fight between two twelve-year-old boys, who are equally responsible for the fight, are both punished at home and at school, and who make up and are friends afterward. Leaving aside the legal question of whether an assault charge against one of the boys could succeed on these facts, surely as a policynmatter this is exactly the type of situation in which the Young Offenders system ought not to be involved. We can respond appropriately to childish misbehaviour without criminalising it.

This belief that being dealt with under the Young Offenders system has no disadvantages arises a number of times. One scenario presents a young boy who is mistakenly thought to have taken something from a store, when he did not in fact do so: the author seems to think him an appropriate candidate for alternative measures. At another point, the author discusses the difficulties that arise for schools when they contemplate suspending a student who is required to attend school under a probation order. The possibility that such a requirement should not have been imposed in the first place — that although it would be desirable for the young person to attend school, it should not a criminal offence to fail to do so — does not occur to her.

The author describes how "professionals in the `helping' field" can tell who really wants help and who is just trying to look good before sentencing: she indicates that many professionals are reluctant to begin actual counselling sessions until any outstanding charges are dealt with by the court. While this is true, it is not the purely good thing that the author considers it to be. Many parents find it a source of extreme frustration that they cannot get the help they desperately want for their children unless that help is ordered by a court — that is, as part of a sentence. Many agencies, motivated probably by a tight financial situation, severely limit the assistance they give. Further, some agencies, upon being aware of the involvement of the youth justice system, leave the matter to be dealt with in that forum. The net result is that parents are unable to get help for problems that they can foresee arising: it is only after their child commits an offence, and indeed after sentencing, that they can get the help that they have known all along was needed. That this assistance will only be given when it is

too late to prevent the difficulty might well be true, but is not something we should proudly point to as an advantage of the system.

Finally, it should be noted that as well as being coloured by the author's attitude toward young persons charged with offences, the book presents a very particular view of defence lawyers. The author says that when the players do not understand one another's role everyone loses". Given this opinion, it is curious that the author seems unwilling to allow even the possibility of a useful role for defence lawyers. Lawyers are only shown insisting on the pre-trial release of their client despite the client's wish to remain in custody, misleading the court about the suitability of a pre-trial placement, providing inexpert assistance and then overcharging for it,[2] or simply providing clients with misinformation.

In another book, the title "Caught in the Act" would have been a clever ambiguity, describing both the fate of the young person who has been arrested, and the difficulties that professionals face in dealing with the conflicting goals of youth justice. This book has no such ambitions, and settles for being a roughly, if not entirely, accurate overview: in the end, the title is a single entendre.

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Everybody Does It! Crime By the Public.

By THOMAS GABOR.
Toronto: University of Toronto Press, 1994. Pp. 393. ($19.95).

A Reader on Punishment.

By ANTONY DUFF AND DAVID GARLAND.
Oxford: Oxford University Press, 1994. Pp. 360. ($32.50).

Reviewed by Sidney L. Harring*

What used to be called "white collar crime" or "corporate crime" is given a broader cast by Thomas Gabor. Crime by the public is a broad discussion of the criminogenic forces found everywhere in western societies. It is a sweeping, thought-provoking, and imaginative work by a criminologist, one that commends itself to lawyers and law professors. For all the media focus on these types of

[2] A particularly unlikely scenario, given that every young person, by section 11 of the *Act*, is entitled to legal counsel at no charge.

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crime, graphically illustrating the cost of non-traditional forms of crime, there has been little research, and even less policy analysis of appropriate social responses.[1]

By and large the subject matter of "crime by the public" is not at the heart of law school courses in criminal law or criminal procedure, yet there are compelling reasons why it should be. Stevie Cameron's allegations in her "On the Take: Crime, Corruption and Greed in the Mulroney years"[2] and the libel suit launched by the former Prime Minister[3] against the government of Canada and the R.C.M.P. with respect to related investigations speak to the seriousness of the crimes alleged. The R.C.M.P. began a criminal investigation by detailing an officer to purchase a copy of this book. A congressional investigation is under way in the United States of President Clinton's involvement in "whitewatergate". Somehow, Mr. Clinton, as an underpaid Assistant Professor of Law beginning his political career, speculated in undeveloped recreational property to the tune of about four times his annual salary, with these unsecured loans held by savings and loan associations which failed to keep order records of this and other transactions. Unrelated to this, Mr. Clinton's point-man in the Justice Department, Webster Hubbell, Deputy Attorney General of the United States, lost his job and plead guilty to fraud charges arising from his misappropriation of over $400,000 from the elite law firm he had headed. Up until about ten years ago few large corporate law firm handled criminal matters. Now virtually every such firms has a department specializing in these types of crimes: their clients' cases are both too confidential to send to outside attorneys and the potential earnings too lucrative to send out.

All of this is preface to Professor Gabor's analysis of the underlying causes of such commonplace behaviour and its place in our legal order. The forces that shape such behaviour are not only socially complex, but also raise important policy issues in criminal law. Anglo-Canadian criminal law is deeply rooted in Judeo-Christian morality: it is aimed at social deviance, at immoral behaviour committed by immoral people. These people, in turn, deserve punishment, very often severe punishment in the form of being held in prison under stark conditions, subject to violence and sexual abuse, deprivation of civil rights, access to loved ones, and social censure. Because Canadian values are humane, this punishment regime is combined with a regime of therapy and rehabilitation. Prisoners meet with professional social workers and are treated for their anti-social tendencies.

While these basic themes could be drawn out, they are distinguished from the general run of crime by the public. The idea of prisons full of income tax evaders or rehabilitation schemes aimed at false advertisers seems a parody, yet that is Gabor's point. Indeed, this may even reflect public policy: while there is

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[1] But see Schlegel and Weisburd eds., *White Collar Crime Reconsidered* (Boston: Northwestern University Press, 1995).

[2] Toronto: Macfarlane Walter & Ross, 1994.

[3] P. Koring, "Mulroney Plans Libel Suit over Justice Allegations" *Globe & Mail* (20 November 1995) A1.

widespread political support for more severe anti-crime measures, virtually none of this is directed at increasing law enforcement efforts against income tax evasion, various repair frauds, and computer crime. In Gabor's analysis this reflects a class-bias in the criminal law. While losses to embezzlement are about equal to burglary, larceny, and car theft in the United States, there are one hundred thirty-three times the arrests for the latter three offenses. For obvious reasons, once an embezzlement is discovered, it is far easier to arrest the perpetrator than for most other property crimes. The rest of the criminal justice system, however, is highly selective at each discretionary stage. Each of these decisions represents an opportunity to drop the case from the system. This process not only reinforces existing class divisions, but it continues to encourage the repetition of existing patterns of crime by the public.

Everybody Does It! is richly empirical, effectively building on dozens of research studies of common types of crime. These studies are not easily accessible to the general reader and Gabor's thorough account of the various types of common "crime by the public" is useful and thought provoking. Most audiences are unaware of the extent and range of such behaviour, let alone its significance. Just reading Gabor's rich account of these studies makes one re-think her conception of crime and criminal justice. The commonplace quality of these acts among respectable people undermines the whole "us versus them" quality of conventional anti-crime measures.

Gabor's prescriptions call for more social equality and measures to combat the intense alienation that arises in Canadian and other western societies. He does not call for more prosecution, more rigorous penalties, and the imprisonment of more white collar criminals. While this makes sense on a number of grounds, we cannot say that the same logic that supports increasingly punitive measures for ordinary criminals would not support similar measures for all types of crime. The converse, that reducing social inequality and alienation would reduce all kinds of crime, also follows from the same logic: the general run of "crime by the public" is therefore not theoretically distinguishable from the common crimes now prosecuted.

This makes it both interesting and important to include these kinds of crimes in large numbers in law school criminal law classes and other places in the curriculum. All of the traditional assumptions that lawyers make about *mens rea*, *actus reus*, and "harm" are class and culture bound, tied up in generations of cases and casebooks that overemphasize a few kinds of traditional crime, especially murder, at the expense of a wide range of other types of criminal behaviour that produce a much more complex analysis of traditional criminal law concepts. For example, while the "guilty mind" is at the core of modern criminal law with the "mental element" most often the key determinant of criminal culpability, few of the common criminals now in prison in Canada engaged in the kind of prolonged and meticulous planning of serious criminal behaviour that is common in "crimes by the public." Doesn't this mean that we should rethink all the emphasis that the criminal law puts on the guilty mind? The same thing is true of the assessment of harm: aren't all kinds of non-violent property crimes roughly equal in terms of harm? Isn't the simple amount of money involved the major variable? Neither Gabor, nor perhaps any of us, have the answers to these questions. But that is the

point these are the kinds of questions that the criminal law needs to better address. *Everybody Does It* helps to frame these tough questions.

Once one has determined the essence of criminality then we must turn our minds to the proper treatment of the criminal.

A Reader on Punishment is a book on punishment, one that could not be more prosaicly titled. There is a huge literature on punishment, including probably too many readers. Yet, behind all this scholarly activity rests one of the most disturbing of the moral problems of law, and one of the most hopeless, depressing, illiberal and undemocratic of liberal democratic social institutions: punishment. Millions of ordinary youthful and adult human beings, mostly men, are locked up in prisons and jails in every country in the world, well over two million in the United States. The very existence of the penal institution raises profound human rights questions. And even if the existence of those institutions does not raise human rights problems, the daily things that go on within penal institutions repeatedly raise human rights issues. What kind of a duty of safekeeping from harm does the state owe prisoners facing assaults and rapes? Do sentences have to be equal to be fair? What kinds of social and political activities should prisoners (and probationers) be forbidden to engage in? Should condoms be issued in prisons where AIDS is rampant? These issues extend beyond the simple logic of punishment. The reliance of the entire criminal justice system, our most visible symbol of law and justice, upon penal punishment arguably has a corrupting effect upon the entire legal order. At best this is all justified in utilitarian terms, thus it is both a lesser evil than any of the alternatives and that society has no other choice.

Most criminal lawyers, like most teachers of criminal law, have strong feelings about punishment and about prisons. But legal thinking about punishment remains stuck in the nineteenth century, when the modern prison was designed. The collection of readings that Duff and Garland present here is thought-provoking almost in that classic nineteenth century context the essays go deep in asking the important questions. Their collaboration crosses perhaps the most important disciplinary boundary in the literature of punishment, philosophy and the sociology of law. The logic of this is set out up-front in the introduction: when scholars make philosophical judgments about punishment they are also implicitly making empirical judgments about society: "punishment may not be nice, but it works" is one of these common sociological assumptions.

Punishment, as a philosophical and sociological concept, raises a whole range of issues in its own right. We take it for granted that certain adults may punish children as a necessary part of their protection and socialization. This punishment can be fairly extensive, including moderately severe beatings. At some point in time, however, punishment of children has served its purposes. Exactly how all of this follows over into justifying our modern system of criminal punishment is not clear and raises important issues. If the initial conception of the prison was to substitute the state for the parent, and punish the offender with the idea of reforming him (since 90% of criminal defendants are men), then penal punishment is an extension of the reformative punishment of parents. Generations of sociologists and lawyers were trained in that tradition — and many of us are reluctant to let it

go because its humanity offers much more than the narrow idea of retribution which is now so popular. Yet, that conception of punishment now seems hopelessly naive, even immoral. Retribution, for all of its meanness, has its own attractions: people who hurt other people deserve to be hurt themselves, a kind of simple logic extending back to the playground.

Beyond the complex issue of punishment itself is a second layer of issues of proportionality, inequality, hierarchies of punishment, racial and ethic discrimination. How many years in jail is a rape, without additional physical injury, worth? How many years is a small bank robbery worth? What punishments for income tax evasion of $10,000 due the Crown or the killing of a child in a drunken family squabble? In many jurisdictions each of the above is worth a matter of several years in prison, but they are not equal offenses, are they? And what of the characteristics of the individual offenders? Young or old, experienced criminals or first offenders, well educated, or drop-outs, white, black or native? There are no easy answers.

All of this is the substance of the broad ranging articles brought together in *A Reader on Punishment*. Each is introduced with a short analysis of the context of the article in relationship to the literature on punishment. Short bibliographies following each article locate it within the context of the voluminous literature on punishment. The articles are short and very sharp, raising a broad range of issues clearly and in depth. The interdisciplinary focus holds evenly throughout. The result is a reader that avoids most of the pitfalls of such compilations, holding itself together, and maintaining a high quality of analysis. The balance between philosophy, law, and sociology is a reasonable one, with short introductions helping the general reader understand the connections between the two disciplines.

Inexplicably missing is a chapter in the book by Garland himself, one of the best writers on the sociology and history of punishment in western society. While he modestly avoids the trap of overusing his own work in his anthology, probably a rare occurrence in this business, there can be no question that his capacity to carefully work so much disparate material into an anthology derives from the breadth of his own work in *Punishment in Modern Society: A Study in Social Theory (1990)*. Similarly inexplicable is the absence of any historical chapters in an interdisciplinary work in a field that has been enriched by historical studies of punishment, law and justice. But these are small criticisms in an anthology with the depth of substance of *A Reader on Punishment*.

Finally, punishment cannot be discussed as an abstract concept independent of the actual kind of punishment commonly administered. Thus, without any explicit discussion of this, "punishment" has come to refer to penal punishment in western society. Even if the actual punishment in a particular case might be fine, probation, or restitution, it is the spectre of prison, the possibility of imprisonment, that drives the whole modern punishment discussion. Death is different. Canada, Europe, and Latin America have succeeded in removing the spectre of death as legal punishment from state policy. But the United States, Africa (with the important exceptions of South Africa and Namibia) and Asia largely have not. No punishment anthology should be silent on any discussion of the death penalty, the ultimate symbol of the power of the state to inflict the ultimate punishment.