Book Reviews
Comptes rendus

Haldane — Statesman, Lawyer, Philosopher.

By JEAN GRAHAM HALL AND DOUGLAS F. MARTIN.
Chichester, England: Barry Rose Law Publishers, 1996.

Reviewed by S. M. Wexler*

Richard Burden Haldane is a very important figure in Canadian constitutional history. From 1911, when he became Lord Chancellor, till his death in 1927, Lord Haldane sat on the Privy Council in London. As an Imperial judge, he decided a long series of Canadian constitutional appeals which determined the relationship between the federal and provincial governments. I have worked on Haldane's life and when I saw this new biography, I hoped it would be interesting and significant. It is not. It does give the basic facts of Haldane's life in an acceptable way, but it completely misses the point of his life.

The central, dominating fact about Lord Haldane is that he was a romantic, an idealist who thought the Meaning in life was not only more important than the mundane reality, but more Real. On the first page of his autobiography, Lord Haldane describes himself in precisely these terms. He says:

> I have been throughout [my life] more absorbed and immersed in the study of the meaning of life taken as a whole than with its particular occurrences.[1]

Haldane thought life's "particular occurrences" — what actually happened — meant nothing; in a sense, he thought they weren't even real. The whole point of Haldane's life was to try to see things not as they were, but as they Really Were. Later in his autobiography he says that he believed:

> that the more experience is spiritual the more it is real .... There is little that matters when that principle is grasped and held to, and hesitation and unhappiness become replaced by a life that is tranquil because freed from dependence on casual ups and downs.[2]

For Haldane, the petty affairs of day-to-day reality — the casual ups and downs — only existed as manifestations of Ideal Reality. He spelled this view out in his extensive philosophical work which the authors of this new biography have the grace to admit they found "difficult to comprehend"[3]. This is not surprising. Haldane's philosophy is quite complicated and very dense, but the basic point of it is easy to understand. Indeed, it is broadcast in the title of his major philosophical work: *The Pathway To Reality*.[4] Get it? The ***pathway*** to reality.

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[1] *Autobiography* (Hodden and Stoughton, London, 1929) at 1.

[2] Id. at 3489.

[3] Hall and Martin at viii.

[4] (John Murray, 1904).

For Haldane, reality was never right here; it was always somewhere out there, up the road. This is the whole point of Haldane's philosophy and the whole point of his life. Reality is not something we touch with our hands, it is something we touch with our minds, something we reach when we understand the day-to-day occurrences in terms of their Real meaning. This idealist philosophy replaced religion for Haldane. It is not particularly sympathetic to modern ears, but Haldane not only believed it, he lived by it. Things might seem one way to the casual eye, but for Haldane they were not Really that way. For him, things Really were how they were Ideally, and his goal was always to see things in this light. This, for instance, is what he did with the Constitution of Canada.

Sections 91 and 92 of the *British North America Act* say that the relationship between the federal and provincial governments in Canada is the relationship between a general and lieutenants. Thus we have a Governor *General* of Canada and *Lieutenant* Governors of the provinces. In the *B.N.A. Act*, the powers of the federal government are sovereign powers and the powers of the provincial governments are derivative powers. Thus the Queen is never mentioned in connection with the powers of the provincial governments, but only in connection with the powers of the federal government. All this is clear in the act, but in the cases he decided, Lord Haldane held that what the *B.N.A. Act* Really said was that the relationship between the federal and provincial governments was one of equals. In other words, he read the *B.N.A. Act* as though it said what it does not say. He did this because of certain Ideals to which he was deeply committed. He lowered the status of the federal government in accordance with the ideal of British Imperialism and raised the status of the provincial governments in accordance with the ideal of Home Rule. In doing his, he did not see himself as remaking, rewriting or reforming the Canadian constitution, but simply as revealing what he once called "the real Constitution of Canada".[5]

I explained all this in *The Urge to Idealize: Viscount Haldane and the Constitution of Canada*[6] and perhaps my reaction to this book can be attributed to the fact that Hall and Martin do not cite my work or even appear to have read it. Their biography of Haldane contains absolutely no indication that Haldane had a tendency to idealize things. They treat Haldane's life as if it were just so many facts — so many particular occurrences. This was not the way Haldane treated his own life and treating Haldane's life this way not only makes Hall and Martin misunderstand Haldane, it actually leads them to get the facts wrong. For instance, in my article on Haldane I pointed out that in his autobiography, Haldane romanticized his first Canadian case. He says he was compelled to

[5] Haldane actually used these words "the real constitution of Canada" — but he did not use them to describe what his own judicial work had revealed. Rather he used them to describe what Lord Watson had "expounded and established". Haldane, *Lord Watson* (1899) 11 Jurid. Rev. 278, 280. Watson decided a series of Canadian constitutional appeals before Haldane went to the bench. Haldane appeared as counsel for the provinces in many of the cases decided by Watson and his own decisions followed and amplified Watson's. I think it is fair, therefore, to say that Haldane would have seen himself as doing exactly what he said Watson had done.

[6] 29 McGill L. J. 608 (1984).

argue the case, an appeal from Quebec, on a moment's notice when his senior was called to continue an appeal in the House of Lords. He won the case but says that when he finished, his clients "went away as persons aggrieved".

> But who should climb the narrow stairs to my garret at Lincoln's Inn but old Mr. Wiseman himself, the venerable representative of the great firm of Freshfields. He said the partners had read the shorthand note of the brief argument at the Privy Council, and now sent me a brief for the Province of Ontario in a great case. There might, he said, be more to follow, and indeed it so turned out. This particular brief was marked 150 guineas, and it introduced me to many Canadian cases over here.[7]

This is a wonderful story but it is not exactly true. On the day of the Quebec appeal, 13 July, 1883, Haldane wrote to his mother and said:

> I have just won single handed an important case of Davey's in the Privy Council which he handed over to me to argue on behalf of the Government of Quebec. I got through it excellently and the Solicitor General of Quebec, who was there but too nervous to argue it — so important was the issue, was delighted as were the Freshfields, his agents.

So there were no "parties aggrieved" and more important, Haldane's letters and his fee books reveal that the 150 guinea brief from Ontario did not come "three days" after the Quebec appeal, but nearly a year later. Haldane shortened the time between the Quebec appeal and the Ontario brief because it made the story more dramatic and more expressive of the meaning he later came to see in the events. Because they do not understand Haldane, Hall and Martin quote the story in his autobiography as if it were the simple truth.

I do not think it is good scholarship to miss something like this and quite frankly I cannot understand how Hall and Martin did so. Haldane wrote to his mother ***daily for 48 years!*** and she kept all his letters. They are now in the National Library of Scotland along with many of Haldane's other papers. Hall and Martin refer to the letters in their biography so they must have read them, but they do not seem to have noticed that the story Haldane tells in his autobiography is not the same as the story one finds in the letters. Even if I had not pointed this out in my article, the evidence is there and they should have found it.

The same thing is true for the story of Haldane's love life. Hall and Martin get that wrong too. They get it so wrong that they wind up making up a story of their own. Here is what Haldane said in his autobiography.

> I will for the moment revert to the year 1890. I had fallen deeply in love with a remarkable girl of distinguished quality and of good position. The response to me on her side came slowly, but when it did come it seemed to have come very surely. We had many tastes in common and much the same outlook on life and affairs. We became engaged in March 1890 and there followed some weeks of unbroken happiness. Towards the end of April I had left her, in order to return to my duties, after a visit we made together in Devonshire. Suddenly, without previous warning, and as a bolt from an unclouded sky, there came to me in London a note saying that all was over. She felt she had misunderstood herself, and her decision to break the engagement must be taken as final. Our friends urged on her that the original decision, working out admirably as it appeared to be doing, was right and this second and sudden decision a mistake. Her family, who were intimate friends of mine, and some of her friends asked whether she was sure of her new declaration. The attempt to shake her resolution proved to be useless.

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[7] Op. cit. *supra* footnote 1 at 38-9.

> The decision was as irrevocable as it was rapid, and she would not go back by a hair's breadth on what she had intimated to me in writing. Only once or twice again in the course of my life did I see her, and then only momentarily and casually. After five weeks of uninterrupted happiness, happiness, to the best of my judgment then and now, for her as well as for me, all was over and at an end.
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> My grief was overwhelming, for I had a strong sense of the irrevocableness of the decision. The shock upset me. I could find relief only in constant work, and for long not much even in that. Sleep, when it came, was the only deliverance from black depression. But there was no moment in which I either blamed her or pitied myself. My feeling was that somehow I had failed. I had read and thought so much that I knew this might well have been so, notwithstanding that I was unconscious of it.
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> To this hour I treasure these five happy weeks, and bless her name for the return she made in them to my devotion to her, and for the feeling inspired apparently in both of us. I came to realise afterwards, when the pain was past, that my love for her, though it failed, had brought to me not loss but great gain. For it enlarged the meaning and content of life for me. All is now over. She died in 1897, but the memory of her is a precious possession.[8]

Hall and Martin treat this story as if it were simply true. It is not. Reading this story, you would think there could only have been one love in Haldane's life and this misled me when I first read Haldane's letters and discovered that while he got engaged in 1890, he proposed to Agnes Kemp in *1881*! Since he says "the response to me on her side came slowly" and since I assumed he had had only one love, I figured that Agnes Kemp had been very nasty: she had taken nine years to accept Haldane's proposal and then broken their engagement after five weeks.

But this is not what happened. The woman to whom Haldane was engaged in 1890 was not Agnes Kemp. She was Valentine Munro Ferguson. Haldane combined his love for these two women into One True Love. He took elements from one story and elements from the other story and put them together to make the Real Story. The black depression, for instance, has to do with Agnes Kemp, not Valentine Munro Ferguson. After Agnes Kemp rejected him, Haldane did go into a very deep depression that lasted eight years. Nothing like this happened after Valentine Munro Ferguson broke their engagement. That is not to say Haldane was not hurt when she broke the engagement, but he got over Valentine Munro Ferguson much more quickly then he got over Agnes Kemp.

He was aided no doubt by the fact that Miss Ferguson wrote and published a novel containing a thinly disguised Haldane who is rejected by the woman to whom he is engaged because she thinks her widowed father needs her. Betsy, the women for whom the novel is named, comes to regret her decision when her father decides to remarry, but her pride will not allow her to approach her old fiancé. The novel ends happily when the Haldane-figure is brave enough to overcome his pride and approach her directly without intermediaries. Haldane, who had sent friends to try to get Miss Ferguson to change her mind, wrote to his mother and said it was tasteless and bad of Miss Ferguson to write this book.

Haldane never did blame Agnes Kemp for failing to love him but he wrote to his mother about Valentine Munro Ferguson:

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[8] Op. cit. *supra* footnote 1 at 117-8.

> The world has come too lightly to her, good and wise as she is — and the new world with me came too lightly to her. It was simply a pleasant incident instead of an entire life business. This was what I never understood in her till afterwards, but I see it clearly now.

You would never guess that Haldane had talked this way about the woman he describes in his autobiography. This kind of comment does not fit in a story of a Sad But True Love. Neither does the novel or the prior proposal to another woman. No one can say, of course, whether Haldane actually forgot these details in the sense that he could not remember them, but he certainly forgot them in the sense that he did not mention them when he wrote his autobiography. In accordance with the urge to idealize that dominated his life, Haldane merged the story of his first love with the story of his second love to create the Real story of his One True Love. He conflated two actual events in his life and made one Ideal Love out of them.

All of what I have said is in Haldane's letters. Hall and Martin missed it. Because they do not understand Haldane, they accept the story of his love as he told it in his autobiography and they have this comment to make about the earlier proposal:

> In his letters to his mother the name of Mrs. Garrett Anderson was frequently mentioned. From one written on March 1, 1881 it is clear that he was infatuated with someone. Could it have been Mrs. Garrett Anderson, the first woman doctor? Twenty years older than Haldane, but at 45 she was by all accounts an attractive and intelligent woman and it is not uncommon for a man who has been greatly influenced if not dominated by his mother, to be attracted to an older woman.[9]

This is amazing! Not only have Hall and Miller missed the real story, they have made up a story of their own. There was no infatuation in 1881, especially not for Mrs. Garrett Anderson. There was a very deep love for Agnes Kemp. I suspect the reason Hall and Martin don't know this is that they only read Haldane's letters to his mother. One of the saddest things about Haldane's life is that, though he wrote to his mother every day for forty eight years, he was initially afraid to mention Agnes Kemp to her. He told her eventually, but only after his first proposal was refused. The whole story is contained in his letters to his Aunt Jane.

17 February, 1881

> Dearest Aunt Jane,
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> I have really mistaken Mother when I feared how she might take this matter of mine. The moment I began to speak to her she said, divining what was coming, in an agonized tone of anxiety, 'who is it'. When I told her all she said was "I cannot express how thankful and glad I am'. It appeared that she has all along admired Miss Kemp very much ....

Haldane's letters to his Aunt Jane are in the same collection as his letters to his mother. There aren't many of them. If Hall and Martin had read them, they would not have made up their story about Haldane's being infatuated with an older woman, but I suspect they would probably still have missed the point of his life.

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[9] Hall and Martin at 56.

Minor's Consent to Health Care.

By MANITOBA LAW REFORM COMMISSION. (Free of charge).

Reviewed by Diana Ginn*

Summary of Recommendations

In its December, 1995 Report on *Minors' Consent to Health Care*, the Manitoba Law Reform Commission tackles the thorny issue of whether and to what extent minors should be entitled to make their own health care decisions. This issue raises a number of (sometimes) competing interests: there is the potential for tension "between a minor's right to autonomy"[1] and the interests of parents, health care providers and the general public.

A young person's autonomy interest encompasses the desire to control health care decisions affecting oneself, and the need for "unimpeded access to health care on a confidential basis".[2] Parents "have legal, social and moral obligations to act in the best interests of their minor children",[3] and there may be times when concern for a minor's welfare will conflict with the decision which the minor wishes to make. Furthermore, some parents may find it difficult to relinquish control as children grow older. Health care providers presumably would favour "a clear and predictable legal framework",[4] allowing them to "provide health care which is in the best interests of the minor's welfare in a way that minimizes ... exposure to legal liability".[5] The public interest is identified in the Report as increasing access to health care, particularly regarding "sexually-transmitted disease, alcohol and drug abuse and pregnancy prevention and termination".[6]

Traditionally, Canadian courts balanced these competing interests by using the test of the "emancipated minor" to determine whether the young person "has adopted a lifestyle which indicates that he or she has accepted responsibility for his or her own life";[7] for instance having married, left home or found employment. More recently, two other approaches have developed:

> The first is that of the common law, which favours an individualized assessment of the minor's maturity and capacity to consent [the mature minor rule]. The second is to use

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[1] Manitoba Law Reform Commission, *Minors' Consent to Health Care*, (Report #91) (Winnipeg, 1995).

[2] *Ibid.* at 31.

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] *Ibid.* at 3.

> a fixed age to determine definitively when a minor may consent to health care without parental involvement.[8]

A number of provinces have dealt with this issue in legislation, either by setting an age below which substitute consent will always be required, or by codifying the common law (sometimes with variations or clarifications). Other provinces, including Manitoba, have no legislation directly on point;[9] therefore the mature minor rule, as it has developed at common law, is the applicable standard.

After a comprehensive survey of legislative initiatives and recommendations for reform in other jurisdictions (both within Canada and internationally), the Commission determines that the current state of the law in Manitoba represents the best approach.

First, the Commission finds that the mature minor rule is more appropriate than setting some arbitrary age limit on minors' rights of decision making.

> It provides sufficient flexibility and discretion to evaluate the individual minor's capacity to understand the proposed treatment, its risks and benefits and the consequences of inaction. The different pace of a child's development, the vast array of medical procedures of varying seriousness and significance and the differences in family relationships and socioeconomic circumstances of children all support a process of individualized assessment.[10]

Secondly, the Commission recommends against codifying the mature minor rule in legislation, preferring instead to see the principle develop incrementally at common law.

There is one area in which the Commission feels that change is warranted; legislation is recommended to protect a health care provider from legal liability, where that person "acted in good faith in accordance with the minor's instructions and believed in good faith that the minor possessed the necessary capacity".[11]

Discussion

Mature minor rule

I would agree with the Commission that "the benefit of the mature minor approach is its recognition of the fact that each child will mature at a different pace"[12]; this approach is attractive because it does not make arbitrary or

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[8] *Ibid.* at 32.

[9] Manitoba does have legislation such as the *Human Tissue Gift Act*, C.C.S.M. c. H180, the *Mental Health Act*, C.C.S.M. c. M110, and the *Child and Family Services Act*, C.C.S.M. c. C80, which have some bearing on minors' consent to health care in specific contexts. For a useful discussion of these provisions, see pp. 7-12 of the Report.

[10] *Ibid.* at 33.

[11] *Ibid.* at 35.

Since this third recommendation seems fairly uncontroversial, the focus of this review is the first and second recommendations of the Commission.

[12] *Ibid.* at 32

rigid[13] assumptions about all individuals under the legal age of majority (or even all individuals under a younger age such as 14 or 16). Instead, as with adults, the focus is on the patient's capacity to understand the nature of the illness or condition, and the benefits and risks of the proposed treatment and of alternative treatments.

The Commission does note that the mature minor rule is not without difficulty: in fact, the chief disadvantage of the rule — uncertainty — "flows directly from its strength" — flexibility. It probably goes without saying that some degree of uncertainty is inherent in any assessment of nebulous concepts such as decision-making capacity; there is no litmus test which definitively separates those with the ability to understand the risks and benefits of a medical treatment from those who are unable to do so.

This uncertainty is only one of the potential problems raised by the mature minor rule as it has developed in Canada. Others identified by the Commission include:[14]

1. The extent to which the courts might see the "welfare principle" — that is a requirement that the treatment decision be in the best interests of the minor[15] — as overriding the minor's right to autonomy in decision making. Unlike some English cases which contain specific references to the best interests of the minor,[16] Canadian cases have tended to focus more exclusively on the capacity of the young person to give or withhold consent; however, as the Commission notes, in most of these cases, both the child and the parents were agreed in refusing treatment and there was some uncertainty as to how beneficial the treatment would actually be;

2. The "precise scope, interpretation and application" of the rule is still uncertain.[17] Specifically, does maturity "involve more that an intellectual

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[13] This is not to say that any reference to age in consent legislation leads automatically to rigidity and precludes individual assessment. It would be possible to set a fairly young age, under which substitute consent would always be required. Presumably, this is what happens informally — it seems unlikely that health care providers perform any sort of individualized assessment of 4 year olds, to determine they are capable of making their own treatment decisions. Thus, while there might be significant disagreement as to where the line should drawn, it seems that there is probably general agreement that a line might be drawn somewhere. It must also be remembered that even where such an age is set, persons over that age will not automatically have the power to make all treatment decisions; instead, whether explicitly stated or not, there is at most a rebuttable presumption that anyone over that age has the capacity to make decisions regarding health care. As with adults, substitute consent would be required for a young person who is found to lack the requisite capacity. In fact, establishing a fairly low age is really a version of the mature minor rule, for there would still be individualized assessment of those young people who are most likely to able to make treatment decisions.

[14] The Report also lists as a possible concern the fact that the mature minor rule may not take sufficient account of the rights of children to make autonomous decisions. However, this seems largely to be a reformulation of some of the more specific concerns raised.

[15] *Ibid* at 6.

[16] For discussion of these cases, see *Ibid.* at 4-6.

[17] *Ibid.* at 13.

appreciation of the nature and risks of the medical treatment *per se*"?[18] If so, the court should also consider "ethical [and] emotional maturity particularly in difficult and controversial areas such as contraceptive treatment, abortion and the treatment of sexually transmitted disease";[19]

3. The present law may "provide impediments to children receiving essential medical treatment".[20] There is little case law on the ability of children under 16 to make health care decisions, yet "much younger minors encounter medical problems for which they may seek treatment without parental involvement"[21] and some of these young people might decide to forgo treatment if parental consent is required;

4. Assessing a person's ability to make health care decisions is made more difficult where, as with a walk-in clinic, the health care provider does not know the young person;[22]

5. Since the law is "technically unforgiving of a mistake in the determination of maturity",[23] health care providers may be reluctant to allow young people to make their own decisions.

Unfortunately, the Commission does not fully differentiate between those difficulties which are inherent in any approach based on decision-making capacity and those which could be clarified; therefore the Commission does not fully respond to most of the problems which it identifies.[24] Important and controversial policy issues are raised in a number of the points listed. While coming to any consensus as to the appropriate approach would not be easy, I would argue that further discussion is needed, to make the mature minor rule as fair, consistent and useful as possible.

For instance do we, as a society, want the welfare principle to come into play when it is felt that a minor is not deciding in his or her best interests, or do we say that, as with adults, once a person is found to possess the requisite decision-making ability, then he or she has the right to make questionable or even bad decisions? If we do want to incorporate some aspect of a welfare principle, can this be done without undermining any real decision-making authority for minors (i.e.

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[18] *Ibid.* at 6.

[19] *Ibid.*

[20] *Ibid.* at 13.

[21] *Ibid.*

[22] *Ibid.*

[23] *Ibid.*

[24] The Commission does, at least partially, respond to the concern that health care providers may practise defensive medicine. The Commission states that the mature minor rule was favoured by a number of health care providers who were informally consulted:

> the mature minor rule is well-known, well-accepted, and workable principle which seems to raise few difficulties on a day to day basis....The interviews revealed no reason for concern in respect of the operation of the mature minor rule". *Ibid.* at 33.

While it is certainly useful to know how health care providers view the rule which they are expected to apply, it would be helpful also to have information on how minors and parents view its application.

you can decide so long as we approve) and who would decide whether or not a particular decision was appropriate — parents? health care providers? courts?

Similarly, there seems to be real grounds for debate about whether capacity to understand should be seen as including moral and emotional maturity. If we do want to incorporate some judgement of a minor's ethical development, would we also require this in assessing the capacity of adults to make treatment decisions? Or would we wish to hold minors to a more stringent standard than adults, and if so, what is our justification for doing so?

Difficult determinations must also be made when we are forced to weigh any uneasiness about very young people making health care decisions which could seriously affect the rest of their lives, against the realistic realization that, if parental involvement is required, some of these young people may choose not to seek medical attention at all.

None of these issues is an argument against the mature minor approach; instead, my point is simply that these are difficult questions that need discussion and it is unfortunate therefore that the Commission identifies but does not fully discuss them.

No Codification

Having concluded that the mature minor rule is the appropriate approach, the Commission recommends against codification, despite finding that codification of some version of the rule seems to be "the current trend".[25]

The Commission acknowledges that legislation would allow for "a definitive declaration of the maturity standard"[26] and provide "an opportunity to clarify some of the less certain aspects of the maturity doctrine";[27] however, the Commission concludes that potential benefits are outweighed by the disadvantages: legislation brings with it "a new set of issues of interpretation"[28] and may lead to "unforseen and unintended consequences";[29] furthermore, legislation may become "too comprehensive and complex".[30]

Therefore, the Commission concludes that the issue should continue to be dealt with at common law and "in an incremental process, the courts will address difficult questions in a manner which best resolves the individual cases presented to them".[31]

Once again, it seems that a fuller discussion would have been useful. While recognizing that legislation is not a panacea, some readers (including myself) may feel that the benefits of legislation would outweigh the possible

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[25] *Ibid.* at 33.
[26] *Ibid.*
[27] *Ibid.*
[28] *Ibid.* at 34.
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

disadvantages; after all, legislation presumably does not have to be burdensomely complicated, and while courts would have to interpret and apply the statute, interpretation is also required in applying common law principles to individual cases. Above all, however, legislation might provide some direction for courts in answering difficult questions such as whether minors who have been assessed as mature enough to make treatment decisions then have the same authority as do adults or whether some limits (such as the welfare principle, or the requirement that the minor display ethical as well as intellectual maturity) should be imposed.

There is no right or wrong answer in the codification debate — there are strong arguments on both sides; my concern therefore is not that the Commission weighed the pros and cons somewhat differently than I might have done, but that there was insufficient discussion of the arguments themselves.

Ultimately, the usefulness of this Report lies in its thorough discussion of the development of mature minor rule at common law and the comprehensive survey of relevant legislation and reform initiatives in other jurisdiction.[32] These provide a useful basis for further discussion on the difficult issues at stake in any determination of the rights of minors to make health care decisions.

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Dirty Money [:] The Evolution of Money-Laundering Counter-Measures

By W.C. GILMORE.
Strasbourg: Council of Europe Press, 1995.

Reviewed by Lionel D. Smith*

Crime has changed in recent years. Organized crime has become increasingly sophisticated and increasingly international.[1] Most notoriously from drug trafficking, but from other illegal activities as well, transnational criminal organizations are able to generate huge amounts of money. In many ways, the profitability of crime creates more serious problems than the crime itself. Most obviously, profits can serve as an incentive for further wrongdoing. They can also finance further and more extensive criminality. But the profits of crime create even more serious problems, which can threaten the very fabric of society. In some countries, where political influence can be purchased, criminal organizations may be able to control governments. Even in more stable polities, profitable criminality can be a serious threat to the legitimate economy. Used

[32] Together, these take up about 24 of the Report's 34 pages of discussion.

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[1] Every major organized crime group operating in Canada is considered "transnational" by the R.C.M.P.: Insp. T.G. Killam, "Transnational Crime and Policing," paper delivered at the Canada-United States International Money Laundering Conference, Windsor, Ont., 1-3 May 1996, at 2-3.

in trade, ill-gotten gains give criminal organizations a huge competitive advantage over law-abiding businesses. Moreover, to the extent that criminal profits are integrated into the general economy, the legitimacy and even the soundness of financial institutions may be affected. This book gives an introduction to the nature of this problem, and tells the story of how the governments of the world have responded and are continuing to respond to it.

The first chapter outlines the transformation of criminal activity over the past several decades, assisted by technology and by the increasing irrelevance of national borders in matters economic. It also explains, in general terms, the strategy which has been adopted by concerned members of the international community. First, domestic governments need legislation which permits the forfeiture or confiscation of the proceeds of crime. In order to be effective, this strategy requires the criminalization of money laundering: that is, attempts to conceal the origin of criminal profits.[2] To be able to detect and to counteract money laundering, financial institutions and other businesses must be made subject to reporting or record-keeping requirements.[3] Finally, and perhaps most importantly, international cooperation is required if any but the most trivial of offenders are to be brought to justice.

Chapter II provides an overview of the process of money laundering. This is of course interesting in itself, but it is also essential to an understanding of the counter-measures which can be deployed. Gilmore sets out the standard model, which sees the process in three stages: the *placement* of the immediate proceeds of crime into the economy; the *layering* stage, in which an attempt is made disguise the source of the funds; and finally the *integration* stage, in which the funds may be removed from the laundering scheme, and (if it has been successful) used in any economic transaction without fear that the source of the money is discoverable. The layering stage is the one which corresponds to the usual idea of money laundering: it may involve a multitude of bank accounts, trusts, and corporations, and will probably include not only multiple substitutions of assets, but also the passage of the funds through jurisdictions where bank secrecy laws will hinder investigation.[4]

Gilmore's third and fourth chapters focus on global responses to money laundering. The most fundamental of these is the 1988 U.N. Convention

[2] For Canada, the forfeitability of the proceeds of crime and the criminalization of money laundering are effected by Part XII.2 of the *Criminal Code,* R.S.C. 1985, c. C-46, enacted in 1989.

[3] For Canada, see the *Money Laundering (Proceeds of Crime) Act,* S.C. 1991, c. 26, and the Proceeds of Crime (Money Laundering) Regulations, SOR/93-75.

[4] In what may be a typical collective-action problem, some countries seek to benefit from the money laundering industry. The Seychelles recently enacted an Economic Development Act, under which anyone who invests US$10 million (and who has not committed acts of violence or drug trafficking in the Seychelles itself) can receive immunity from prosecution and extradition for any criminal proceeding, and can have their assets in the Seychelles protected from any foreign enforcement proceedings. See O.E.C.D. Press Release, "Financial Action Task Force on Money Laundering Condemns New Investment Law in Seychelles," 1 February 1996.

Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("the Vienna Convention"). This instrument, to which over 100 states are now party, requires the criminalization of the laundering of drug trafficking proceeds and the adoption of forfeiture or confiscation provisions in relation to such proceeds. It also mandates the availability of banking records in investigations, and specifies that "bank secrecy" is not a sufficient reason to avoid taking action in this regard. The other major global response was the formation in 1989 of the Financial Action Task Force (F.A.T.F.). This ad hoc body was formed to study the money laundering problem and to make recommendations for efforts to fight it. It produced a list of 40 recommendations in 1990, and since then the F.A.T.F. has been continued and expanded from time to time. It now has 28 members, including the states containing all major financial centres, and F.A.T.F. members test each other for compliance with the recommendations. Some of these recommendations reflect the principles in the Vienna Convention, which was not in force when the F.A.T.F. was formed. Others go beyond the Convention. Some of the most important of these deal with the involvement of the financial system in the fight against money laundering. Whether they like it or not, financial institutions are now treated as partners to law enforcement agencies in those countries which adopt these recommendations.[5] Other recommendations encourage the strengthening of international cooperation. Indeed, there is now in place a web of bilateral "mutual legal assistance treaties" by which one party can obtain assistance from another in the investigation, prosecution or enforcement of a money laundering case.[6] The F.A.T.F. also recommended that money laundering legislation should include serious crimes other than drug trafficking, to which the Vienna Convention is limited. Gilmore says that the F.A.T.F. "has become the single most important body in terms of the formulation of anti-money laundering policy."[7]

Subsequent chapters deal with more localized initiatives. These include the Council of Europe's 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime;[8] the European Union's 1991 Directive

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[5] For Canada, see above, note . In addition to the record-keeping requirements imposed by the *Money Laundering (Proceeds of Crime) Act,* the Canadian Bankers Association has entered into a Memorandum of Understanding with the R.C.M.P. under which the members of the C.B.A. voluntarily report suspicious transactions: Insp. T.G. Killam, "Canadian Proceeds of Crime Enforcement — An Update," paper delivered at the Canada-United States International Money Laundering Conference, Windsor, Ont., 1-3 May 1996, at 5-6. Section 462.47 of the *Criminal Code,* above footnote , provides immunity from criminal and civil liability for such voluntary disclosure.

[6] Canada is now party to 15 of these "MLATs": D.T. Murphy, "An Overview of Canada's Proceeds of Crime Provisions," paper delivered at the Canada-United States International Money Laundering Conference, Windsor, Ont., 1-3 May 1996, at 16n41. These, and the similar multilateral obligations under Articles 5 and 7 of the Vienna Convention, are implemented by the *Mutual Legal Assistance in Criminal Matters Act,* R.S.C. 1985 (4th Supp.), c. 30. The Vienna Convention also contemplates and encourages bilateral treaties in place of its more general provisions: Art. 5, para. 4, subp. g; Art. 7, para. 20.

[7] At 122.

[8] The Council of Europe is an organization which predates the European Union and which has a larger membership.

on Prevention of the Use of the Financial System for the Purpose of Money Laundering; and an examination of various projects in Central and Eastern Europe and in the Caribbean basin.

It is worth noting what this book is not (and does not purport to be): it is not a legal text. It will not provide a solution, or even the beginning of a solution, to a particular legal problem. There are some references to the legislative or decisional law of particular jurisdictions, but these are used to illustrate various points, and do not purport to be exhaustive. There is no index, and many of the sources cited in the notes are unpublished conference papers.[9]

But what Gilmore seeks to do, he does very well. A reader seeking an introduction to the problem of money laundering in the international context could do no better than to start with this book. It is as though one had access to a first-rate briefing prepared for a head of state on her way to an international summit. No prior knowledge of international law, or of the alphabet soup of international organizations, is required. As an added bonus, the book's appendices include the texts of the Vienna Convention, the F.A.T.F. recommendations, the 1990 Council of Europe Convention, and the 1991 E.U. Directive. The book is therefore highly recommended to those wishing to learn more about the increasingly serious problem of money laundering, or about the impetus for the relatively recent Canadian legislation on the subject.

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A Legal History of Scotland. The Seventeenth Century.

By DAVID M. WALKER.
Edinburgh: T. & T. Clark, 1996, Pp. xviii, 919 (£105).

Reviewed by M.H. Ogilvie*

The appearance of the fourth volume of Professor David M. Walker's *A Legal History of Scotland*, covering *The Seventeenth Century*, is further testimony to Professor Walker's tremendous industry and unrivalled, prodigious knowledge of Scots law and its historical evolution. Coming as quickly as it has after the publication of the three previous volumes suggests that Professor Walker might well accomplish his goal of publishing in seven volumes a history of the law and

[9] Another interesting feature of the book is that it is couched in very diplomatic language. This is no doubt derived from the book's concern (and the author's involvement) with agreements reached in the international sphere; and the book's publisher and its intended audience are probably factors as well. In any event, the result is a rather indirect style. For example, where countries have failed, for whatever reason, to take serious action against money laundering, Gilmore will say that progress has been "less impressive" (at 214) or "modest" (at 219). He does, however, raise (diplomatically) the possibility of international sanctions against such countries (at 228-229).

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its institutions in Scotland to the year 2000 by the year 2000. To date, each volume has averaged about 800 pages.

The seventeenth century was of particular importance in the evolution of the Scottish legal system. The departure of James VI to England in 1603 removed the crown and its personal direction of government for good and allowed for increasing roles in national life for both the Scottish Parliament and the established Kirk. The former grew in confidence, independence and power as the century progressed, casting aside the trappings of its previous character as a retarded medieval side show to the royal court, while the latter provided for much of the local government and law and order throughout the country through its system of church courts providing for schools, social welfare and the control of morals all at the parish level.

This century was at least as turbulent in Scotland as in England as the fates of both countries became increasingly interdependent and were subjected to similar economic, social, ecclesiastical and royal pressures. The resistance to the Stuart kings' attempts to impose a continental-style absolute monarchy on both met with resistance in both countries throughout the century through civil war, local uprising, outright disobedience, and finally, revolution, in favour of a new-style constitutional monarchy at the end of the century. The outstanding difference at century's end between the two nations was not so much the form of civil government, as each have achieved a sovereign parliament by the Revolution Settlement, as in the form of ecclesiastical government. Attempts periodically to impose a presbyterian polity on the English established church failed as miserably as attempts by the Stuart kings throughout the century to impose an episcopal polity on the Scottish established church.

The extant records for the seventeenth century are voluminous in relation to government and law, and it is probably not possible for one person to have complete command of these, as it is for earlier centuries. Records for the Parliament, Privy Council, church courts, local authorities, franchise jurisdictions, law courts and personal or professional records burgeon and a significant proportion remain unprinted. Professor Walker, as in previous volumes, relies on published materials, so that while his volumes are authoritative, in time it may be expected that particular monographs and studies based on unpublished sources will change our understanding of the century, at least in part.

While earlier centuries had seen in Scotland, as in other European countries, the beginnings of a legal literature, mostly in court tolls and a handful of treatises usually stating elements of procedure, the seventeenth century in Scotland sees several notable developments, including the start of various nominate report series, volumes of selected cases, mostly criminal, and the production of more collections of "practicks", or practical notes, such as Hope's *Major Practicks* and Spottiswoode's *Practicks*. But most notable is the publication in the course of the century of the fist four of the "institutional" works of Scots Law: Thomas Craig's *Jus Feudale*, completed about 1605 and published in 1655; Viscount Stair's *The Institutions of the Law of Scotland, deduced from its originals and collated with the civil, cannon*

and feudal laws, and with the customs of neighbouring nations (1681); and George MacKenzie's *Matters Criminal* (1678) and *Institutions* (1684).

In contrast to earlier English treatises by Glanvil (c. 1180) or Bracton (c. 1250), or by contemporaries such as Finch, Bacon, Wingate and Coke, the first generation of Scottish Institutional writers were concerned less with simply re-stating legal rules devised by the courts of common law and more with setting out in a systematic and integrated fashion a national system of law within a jurisprudential framework that drew not only on national legal traditions but also was informed by Roman and Christian legal and theological traditions. In the case of Stair, the most influential writer on Scots Law in the seventeenth and all succeeding centuries, Professor Walker persuasively argues that his general view of law was largely influenced by Aquinas, the sixteenth century neo-Thomists, especially Molina and Suarez, and by the Westminster Confession of Faith (1647). Law had a religious basis and human law was to be deduced from natural law and divine law, and judged by its consistency with these.

The direction given by these writers at the foundation of the modern system of Scots Law pointed in the way it would subsequently take as a logically-arranged and principle-driven system of law, capable of incorporating single rules, but providing principled criteria for their acceptance as law. Drawing on continental jurisprudential and theological literature at this date, Scots Law became distinguishable from the common law approach which thrashes about to this day in a less principled fashion.

While approximately the first third of the book provides a very detailed narrative account of the political background against which the evolving nature of the Scottish legal system is subsequently discussed, the remaining 600 or so pages are the most interesting for the legal reader. The account of the political events of the century in relation to the Crown, the court, Parliament and the church are useful and interesting in their own right, reflecting the structure of the earlier volumes. However, in contrast to the chapter on the church in the third volume, *The Sixteenth Century*, the chapter in the volume under review is less satisfactory insofar as the evolution of the social and economic role of the established church as an institution is emphasized to a considerably lesser degree than the political maneouverings within the public realm which were largely recounted in the earlier political history of the century. To some extent, this is compensated for by the discussion of the cases before kirk sessions in chapter 19 about the law of persons, although by separating the two chapters, the moral sources and authorities for the kirk sessions' actions tend to be discounted.

The chapters comprising the last two-thirds of the book are more interesting as they describe and explain the evolution and growth of the legal profession in Scotland, the sources of law, legal writing, the structure and organization of the law courts and finally, of course, the substantive law and procedure, both civil and criminal, applied in the courts. In contrast to the previous volumes, it is now possible in the seventeenth century to integrate contemporary legal texts with law reports, and Professor Walker provides, especially in the two chapters on the laws of obligations and property especially, a valuable descriptive and synthetic analysis

of the evolution of these two areas of Scots law. Somewhat surprisingly, only the evolving law of contract is canvassed in the law of obligations chapter and no discussion of delict is found. However, the chapter is extensive in its analysis of various kinds of contracts and valuable for that reason.

As with the previous three volumes, the fourth volume of Walker's *A Legal History of Scotland* is written primarily as a work of reference. Although read from cover to cover in order to write this review, it is clear that this is not how the volume is meant to be used, except by enthusiasts. Its structure and organization are virtually identical to those in the previous volumes, proceeding from government in all its parts, through church, to law in all its parts, personnel, fora, practice and principles. It may be anticipated that as the volumes approach the present century that law will come to dominate the coverage. It might also be hoped that Professor Walker will provide definitions for the Scots law terms used throughout the text. While he does frequently explain meanings in the course of the text, there are many words whose meaning he appears to assume readers will know. A set of brief definitions in one appendix would solve the difficulties for the non-Scots Law educated reader.

Like the previous volumes, the fourth volume *A Legal History of Scotland*, on *The Seventeenth Century*, is well-written and contains fascinating contents and insights. As usual, I look forward to the next volume.

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The Right to Privacy.

By ELLEN ALDERMAN and CAROLINE KENNEDY.
New York: Alfred Knopf, 1995. Pp. xvi, 405. ($37.50 — hardcover).

Reviewed by Patricia Hughes*

Respect for privacy, this survey of American privacy jurisprudence intimates, may be more a cultural than a legal matter. Indeed, it may be said that the greater *legal* status accorded to privacy in the United States compared to Canada, reflects the greater *cultural* willingness both to invade others' privacy and to abrogate one's own privacy in that country than is still the case here. This difference may be why privacy law appears to have only middling impact: it is fighting a cultural propensity to disclosure. For Canadian readers, *Right to Privacy* serves as an object lesson in how easily privacy is risked.

The authors, one of whom "grew up with little privacy" as the daughter of John and Jacqueline Kennedy, and the other of whom has led up to now the life of an obscure citizen, concluded from their research that their initial sense that "there is less privacy than there used to be" underestimated the increased

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invasion of the lives of ordinary individuals, particularly in the interests of public "knowledge" (otherwise often known as idle curiosity or voyeurism). At the same time, of course, many "ordinary" individuals have sought their own "moment in the sun" or "15 minutes of fame" through disclosure of the most intimate and sordid experiences on various television talk shows. This occurs, I gather, on Canadian television, as well; a rather milder version may be found on the back page of the country's "national newspaper", *The Globe and Mail*, as people tell thousands of us what we once would not have told our most trusted friends. It is equally clear that there is a market for all this, however, and those who listen (or read) will be equally to blame as those who talk (or write) when voluntary exposure evolves into imposed exposure in aid of the "public's right to know" or other highly valued social goals.

Right to Privacy is divided into chapters addressing various ways in which privacy may be invaded (by law enforcement, the press and the voyeur and in the interests of an efficient workplace) or expressed (in decisions relating to family life, reproduction and dying). Each chapter includes detailed stories to illustrate particular aspects of "privacy" and a discussion of the relevant law, followed by a brief summary of subsequent related cases. This is a "popular" book meant to appeal to the general public and the authors do explain the jurisprudence in language easy to understand for those not legally trained; yet they carefully place these stories in an evolutionary legal context for more legally aware readers for whom this book may be a constructive, albeit quick, read.

An appealing aspect of the book for many readers who seek "the human face" of law by going outside the four corners of the case, is the authors' attempt to communicate what these cases mean to those who were involved, through their own words. As the authors themselves recognize, "[t]here is an inherent irony" that it is only their willingness to reveal themselves (sometimes with a changed name) which permits these plaintiffs to tell Americans how much at risk their privacy is. It is these "stories", however, which most successfully communicate how invasion of privacy "assaults" the well-being of ordinary citizens going about their everyday lives or, indeed, as they leave life. We read about the humiliating experience of Joan, picked up by the police on her way to the museum, for not paying parking tickets, and forced to undergo a body cavity search; the agonized ambivalence of Angie, who had lived half her life fighting cancer and who, as she lay dying, had first her family taken from her bedside to attend legal proceedings and was then compelled to undergo a Cesarean section to allow the birth of a foetus which had reached viability as Angie lay on her death bed; the horror and desolation felt by a daughter and widow as they unintentionally viewed their father and husband's dying hours, filmed and broadcast without permission as part of an exposé of Los Angeles' emergency medical services.

While the authors acknowledge "the other side" of the debate (the value of public discussion or "the difficulty that the police sometimes encounter in trying to do their day-to-day jobs within the often confusing confines of the Fourth

Amendment and state law"), their emphasis is assuredly on how plaintiffs have been hurt by invasions of their privacy, often hurts which the law has not been able to assuage or even recognize.

The right to privacy in the United States is in part guaranteed under the Fourth Amendment's unreasonable search and seizure provisions (like section 8 of the *Charter of Rights and Freedoms'*, a protection against invasive action by government of property and person). There is also established more definitely than in Canada a privacy guarantee drawn from the liberty interest of the Fourteenth Amendment's Due Process Clause which protects "personal" decisions such as the use of contraception and abortion. Its grounding of a right to abortion has no doubt contributed to the tenuous nature of this guarantee and the continuing attack on it as a misplaced example of judicial activism.

In addition, tort law, in common law or in statute, provides a basis of claim against private individuals for breach of the right to privacy. The authors point out the criticisms of the four commonly recognized privacy torts: confusion and overlapping with other torts (intentional infliction of emotional distress, trespass or defamation, for example) and the ambiguous standards which have been developed. These acknowledged problems in large measure underlie the fact that in Canada, "[t]he first three types of privacy invasion [intrusion, public disclosure of private facts and false light] have not found favour with Canadian courts, but the fourth one [appropriation] has under the description of the tort of 'appropriation of one's personality'", although not particularly successfully.[1] In Canada, we have tended to protect privacy interests in specified contexts, such as a ban on the publication of sexual assault complainants' names or statutory restrictions on personal intrusions in the workplace, rather than extend the range of torts.

Right to Privacy ends with a brief consideration of issues which are only just beginning to have serious impact as a result of the unremitting march of technology. Do employees have a reasonable expectation of privacy in their e-mails? (It appears not in the United States from cases to date.) Can an employer require an employee to wear a badge which emits an infrared signal every so many seconds, allowing the employee to be tracked? Today's technology makes invasion of privacy a relatively easy task and tomorrow's technology will make it even easier. Invasion of privacy will be presented as the price of safety or of advancing important social goals. *The Right to Privacy* makes it clear that, not for the first time, prevention is more valuable than cure if we care about maintaining part of our life which we can truly call our own.

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[1] Allen M. Linden, *Canadian Tort Law* (5th ed.) (Butterworths: Toronto, 1993) 53. As Linden points out, there are statutory creation of tort of privacy or other statutory provisions that create in effect a statutory right of privacy, albeit in limited contexts (such as the interception of private electronic communications).