Three reviews of R. M. Burns (ed.), One Country or Two?

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Reviews


One Country or Two is an excellent book on the most critical subject faced by Canadians. It discusses Canada’s nationhood and the issues of its survival as a political marriage of two peoples and two cultures. Ten main essays are edited by R. M. Burns, introduced by Principal John Deutsch, and provided with a reflective postscript by one of the essayists, Richard Simeon, who reviews some features of Quebec society in the light of the October crisis of 1970. All contributors are English-speaking Canadians and all except three are on the faculty of Queen’s University.

The essays are not uniform in pattern, present no common thesis, and do not pretend to cover every segment of the subject. They are distinct and individual explorations of certain important facets of French-English relations and the consequences for Confederation of contemporary French-Canadian nationalism especially in its most radical form. All the authors believe in one country, and in their several ways present a liberal-minded case for it. In the opening essay Professor W. R. Lederman shows how the basic Canadian traditions of parliamentary government and federalism were fashioned by the joint efforts of French Canadians and English Canadians, and how from the outset they were adapted to the need of combining the two peoples within one state. Dean R. L. Watts follows with a wide-ranging analysis of the factors contributing to either the disintegration or strength of modern federations and the relevance of this to Canada. He finds that the forces of disruption usually arise from distinct differences in language, race, culture, social structure, and regional wealth. Such divisive influences are specially strong whenever one or more of them coincide with geographic regions. The supreme requisite of federal statecraft is the capacity to diminish tensions and depolarize conflicts between the regional groups and governments and the national authority. This acute study offers no general panacea for federal health and security, except the
necessity for a spirit of compromise. Each federation according to its temper and circumstances must find its own institutional contrivances for achieving an equilibrium between the centre and the periphery, between the national and local units of government. Dean Watts passes one sombre verdict: "When we look at the conditions and processes which have contributed to the disintegration of other federations, the closeness with which the situation in Canada parallels them is chilling."

Richard Simeon is concerned with the question whether separation between Quebec and Canada, if by ill chance it should occur, can be achieved without bitterness, mutual reprisals, and bloodshed. He sees separation, not as inevitable, but as possible in some form, and suggests that English Canadians give it hard thought in order to be better able to confront and control events as they occur. This view is reasonable, although inevitably it leads to much speculative analysis and many assumptions which some readers will reject. The author sketches two alternative scenarios, one optimistic and one pessimistic. The first, like René Lévesque's, is that separation can be negotiated amicably by English Canada and Quebec and that the two states would then continue to cooperate for their mutual benefit. The second postulates that English Canada would strongly react against any separation of Quebec and would adopt punitive policies of one kind or another although not necessarily to the extent of warfare.

The assumptions and arguments which Mr. Simeon skilfully employs cannot be examined in detail here, but it should be noted that for him the optimistic scenario is closer to reality. With this many readers will agree. Indeed, most of us as individuals always want political change to come rationally and sensibly without bitterness or violence. The method of the ballot box is more attractive than that of the barricade. Unfortunately, however, organized mankind does not always select the attractive road. "Nations are like men," wrote Tocqueville, "they love still more that which flatters their passions than that which serves their interests". Smooth and rationally contrived change is likely to be extremely difficult whenever it involves the break-up of a national state that has existed for generations, wounding deep instinctive loyalties in many millions. What René Lévesque, the chief proponent of the optimistic scenario, says in An Option for Quebec, is scarcely
reassuring that separation could come without intense popular exasperation and antagonism on both sides. He himself, in leading a party dedicated to separatism, rides a tiger that in the future may, if it survives, lose all resemblance to a domestic cat. The fate of his party depends mainly on the ferment of revolutionary forces and ideologies within his province. Mr. Simeon in his postscript comments on the sharp and complex fissures already present in Quebec society. If the links between nationalism and radicalism tighten, such relatively moderate and agile leadership as Lévesque’s would promptly crumble under the pressures of less reasonable and more fanatical men.

These facts illustrate the difficulty of predicting political events or even moods in a situation so fluid as Quebec’s. It is always uncertain how collections of men will respond to complicated situations until they actually occur, and then their response may be determined merely by the swift impulses of the moment. This fact remains hardly less true today when J. S. Mill wrote his *Logic*. To say so is not to destroy the utility of the analysis that Mr. Simeon attempts, but merely to suggest that the stream of history will seldom flow smoothly within the boundaries we prescribe for it.

One hard reality that Canada and a separatist Quebec would face is discussed in F. J. E. Jordan’s essay on “Sharing the Seaway System.” The St. Lawrence basin contains the largest fresh water system in the world and perhaps the most industrialized and urbanized area of North America, inhabited by more than 36 million people, 10 million of whom reside in Canada. The combined growth of population and industrialization in the region must inevitably multiply the conflicting demands on its water resources. The waterway is geographically a unit, but two national authorities and a cluster of provinces and states are responsible for the laws that regulate it. At intervals it has been impossible to reach agreement between the different jurisdictions without strenuous bargaining. Yet the closest co-operation between them has been and will remain imperative for their optimum advantage. All must invest funds, share many transactions in common, and broadly agree on how best to utilize their water for power, navigation, and a variety of industrial and domestic purposes. To former public responsibilities is now added the complexity of pollution control.
It hardly needs arguing that difficulty in negotiation and in resolving disputes would be greatly augmented by the presence of three rather than two sovereign states. However great the trouble in securing a consensus between the members of a federation, it is compounded in the case of separate sovereign nations, especially if one of them is new-born and eager to demonstrate its distinctive interests. No doubt in time by stiff bargaining an appropriate tripartite adjustment would be reached. Yet it is difficult to see how in this matter Quebec could gain any advantage from acting as an independent state rather than as a province of Canada. It is reasonable to assume that in negotiations with the United States a government in Ottawa could bring more decisive weight to bear than a Quebec standing alone.

In a thoughtful essay central to the theme of the whole book, John Meisel discusses Canada's present options in view of a rising French-Canadian nationalism. He examines what is happening to the character and outlook of the two chief linguistic communities, what each thinks of itself, what each thinks of the other, and what their relations imply for federalism and the continued existence of Canada. He rightly emphasizes that the key to an understanding of contemporary French-Canadians is the profound change in those circumstances which hitherto had nourished their confidence in survival. Their traditional high birth-rate has declined, their political isolation from the mainstream of North American life has diminished, their dependence on the church has weakened, and the simplicity of their social structure has given place to the complexity of industrialism and post-industrialism. Even in Quebec itself the French Canadians feel increasingly compelled to learn and often work in a language other than their own. This experience deepens their anxiety as to whether they are losing their most cherished cultural endowment, the language of their ancestors. In addition a practical economic issue is involved. In some sectors of the Quebec economy it becomes a positive handicap to know only the mother tongue. As the Royal Commission on Bilingualism and Biculturalism has shown, Francophones in their homeland operate at a distinct economic disadvantage, an irritating situation to a people whose self-consciousness is now aroused by the events of the contemporary world. Consequently a minority among them is convinced
that the most direct solution is to separate into a statehood of their own.

Professor Meisel is sympathetic with the struggle of the French Canadians for cultural survival, and shows good sense in setting forth how their aspirations may be reconciled with those of Anglophone Canadians who also have legitimate national ideals although of a different kind; they too are very anxious about survival. A deep mutual understanding is basic to any political or other schemes of accommodation between the two peoples, and the primary purpose of his essay is to foster this by carefully examining the diverse strands of opinion and attitude found in both communities. Equally suggestive and provocative is his dispassionate analysis of the varied attitudes on the country's nationhood found among the Anglophones.

John Meisel notes how Quebeckers often nourish the illusion that English-speaking Canada is a single entity with one mind. The fact is that in their regional communities the Anglophones exhibit a wide variety of interests and attitudes, rooted in peculiar circumstances of geography and history. Five chapters in the book illustrate this marked diversity of outlook. J. R. Mallory, in discussing the English-speaking Quebeckers, relates with discernment how as a fifth of the provincial population they are now being forced by the logic of current events into confrontation with the remaining Francophone four-fifths. Should Quebec become independent this minority would remain and with it the thorny problem of two linguistic communities.

Tom Symons in his essay on Ontario describes a different type of experience. He studies the significant change in this province's attitude towards its Francophone citizens and the refashioning of educational and other practices that resulted. The development he discusses is in notable contrast with the recurrent frictions and tensions between the government and the Francophone early in the present century, when Orange leaders influential in politics assailed the separate and bilingual schools as a menace to Canadians unity. The present shift in policy is a response, not merely to the energetic and constant pressure of the local Franco-Ontarians, but to the recognition by provincial leaders that linguistic dualism is essential to Canada's survival.
The depth of regional differences on this issue is shown in John Archer’s essay on the prairie perspective. He argues that the special traditions and the different ethnic origins of their people have made it hard for the prairie provinces to grasp the deep emotional roots of Quebec nationalism. Hence they hesitate to make any prompt accommodations with Quebec that might appear to jeopardize traditional federalism. Similarly in the next chapter Ron Burns gives the impression that residents of British Columbia are even more strongly detached from Quebec’s problems and anxieties. They are inclined to view their fellow countrymen in central Canada, whether in Quebec or Ontario, as remote and absorbed in their own interests, much as they are themselves absorbed in coping with the practical worries of a relatively small population on the Pacific slope, thousands of miles from the parishes of Quebec or the board rooms of Montreal and Toronto. At such a distance the nationalist problem of Quebec seems to shrink in dimension. It was hardly surprising for Premier W. A. C. Bennett to declare in the constitutional discussions of the late 1960s that he saw no crisis in Confederation nor any danger of Quebec’s secession.

The Maritime Provinces, as discussed by G. A. Rawlyk, differ from the western provinces in having a more direct interest in Quebec’s position and in a strong federal régime. In perhaps no other region of the country would Quebec’s separation have more profound and shattering consequences. For this reason public men in the Maritimes have been ready to recognize the grievances of French-Canadians and to support measures contributing to a greater degree of cultural and linguistic equality, although it is uncertain how much popular backing they have for this. On one matter they are united: They show no sympathy with drastic changes in the constitution that would reduce the power of the federal government or the capacity of its treasury to help them in a constant fight against regional economic disparity.

One Country or Two perhaps understandably makes no attempt to discuss and assess the recent federal policies designed to reconcile the two peoples in one country. But in examining and illustrating regional attitudes and traditions it deepens an understanding of the contemporary difficulties and limitations of these policies, especially in the critical matters of the
constitution and language. The constitutional review conducted jointly by all governments between February 1968 and June 1971 hardly warrants the cynical description as an elaborate exercise in futility, for after all it accomplished a constitutional exploration never attempted before. Yet, despite the prolonged efforts of successive federal-provincial conferences and a medley of sub-committees, Mr. Trudeau's government failed to achieve agreement in the final and momentous conference in Victoria. Quebec is usually blamed by English-speaking Canadians for its veto on what was expected to be a successful package deal, ushering in a new constitution. Actually, the federal government and other governments supporting it were just as culpable by prescribing the kind of conditions that Quebec had to reject. In refusing his adhesion to the Victoria Charter Mr. Bourassa was primarily concerned with maintaining a firm stance on his social policy consistent with that of his Quebec predecessors, and for political reasons he could do little else. In the future, however, the task of resolving the differences in social policy on some basis of logical compromise must be tackled afresh.

In language policy, more far-reaching and concrete achievements seem possible, a matter so important as to merit an extended comment. Language is the most conspicuous symbol of an ethnic and national group's existence. A nationality can exist without a distinct language; it may, as often in the contemporary world, simply share a language with one or more other nationalities. But when, as in the case of the French Canadians in a continent dominated by English, the mother tongue differs from that of powerful neighbours it becomes a crucial bond. For the French Canadians its loss would mean the loss of their identity. It was, therefore, to be expected that, when their self-consciousness was aroused to new vitality in the Quiet Revolution of the 1960s, they should exhibit a new and quickened anxiety for their language in Confederation and in Quebec itself. Most of their spokesmen felt that the old federal linguistic arrangements were unsatisfactory and some rejected them outright. Their dissatisfactions impressed the Royal Commission on Bilingualism and Biculturalism, which after long and laborious study produced the recommendations embodied in the Official Languages Act of 1969. This statute is a landmark in federal history. It expresses conceptions not merely remote from those in the minds of the
Fathers of Confederation but never seriously considered by governments in the interval since 1867.

The statute was intended to guarantee French Canadians two rights: the right to communicate with the national government in their own tongue; the right in the public service to work as much as possible in their own tongue. The formal assurance of these rights in law is simple enough, but obviously on government it imposes an administrative task of immense complexity. Dictated by good will, it won prompt support from all federal parties. Yet it also provided an opportunity for exploitation of ancient passions and prejudices that die hard. What we have already observed about the tenacity of regional attitudes helps to explain the initial difficulties in implementing the programme. In certain areas a few have viewed it with deep suspicion as a special protection for one ethnic group and a costly and troublesome encumbrance for others. The presence of such attitudes demonstrates that the public justification and implementation of the programme requires prolonged and sage effort, skill, tact, and patience. In its basic nature it is a long-term programme, and should never be distorted by hastily devised and unrealistic targets. Canada’s experience in this matter resembles that of some other national governments compelled to protect minority languages. In all these cases it is an exacting task demanding constant attention. Success results usually from the accumulated strength of educational institutions fostering over the years a wide knowledge of both languages and also from the persistent, cool, and patient pragmatism with which the endeavour has been undertaken. Canada’s experiment with official bilingualism is young, and should improve with time.

Language, however, is not merely a federal concern, but extremely critical for the province of Quebec. Here it is intertwined with major social developments — the decline in the birth-rate of the Québécois, the growing concentration of people in urban areas especially in Montreal, the inflow of European and other immigrants who for economic reasons prefer their children to learn English rather than French, and the increasing pressures of an immense North American society that expresses itself only in English. The declining birth-rate and the attraction of immigrants to the English tongue raise in the minds of some Québécois the frightening spectre of a Montreal
where ultimately French-speakers might become a minority. This grim vision has helped to foster a unilingual movement whose sponsors would adopt coercive measures to make French in the province the unchallenged language of work. In the meantime a royal commission, chaired by Jean-Denis Gendron (appointed in 1968), reported on the issue to Premier Bourassa at the end of 1972. We may consequently in 1973 expect some fresh reformulation of Quebec’s linguistic policies.

The survival of Canada will certainly in time require important constitutional changes. These are now likely to come in the characteristic pragmatic and unsensational way that Canadian federalism has evolved in the last hundred years. Critical individual situations will force changes. The more critical the situation the more substantial the innovation. This may not seem the most imaginative and heroic method for moulding a nation’s supreme law, but under Canada’s peculiar conditions it appears to be the sole method that works.

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Comme son titre le laisse entendre, il s’agit là d’un ensemble d’essais sur l’avenir du Canada comme entité politique et plus particulièrement sur la portée du séparatisme québécois. Avant d’aller plus loin, disons immédiatement que la qualité de ceux qui ont collaboré à cet ouvrage n’a d’égal que la sincérité et l’intérêt de ce qu’ils ont écrit.

Partant d’un éditorial du Toronto Daily Star qui qu’lendemain de la Conférence constitutionnelle de Toronto de 1967, sur le thème “La Confédération de demain” en avait tiré la conclusion qu’il fallait faire face à l’éventualité d’une sécession possible du Québec; un groupe d’intellectuels du Canada anglais s’est donc arrêté à considérer aussi froidement que possible cette éventualité et à en analyser les conséquences pratiques. Exercice futile et d’un pessimisme outrageant diront les uns. Attitude réalistre et prudente diront les autres qui, tout en souhaitant que survie le fédéralisme actuel et en y consacrant tous leurs efforts, ne peuvent exclure dans l’éventail des probabilités prochaines la scission politique de notre pays.
Il s’agissait donc d’analyser directement et franchement un certain nombre de points cruciaux qui peuvent difficilement, comme le dit M. John J. Deutsch dans son introduction, faire l’objet d’un débat public ou d’une étude officielle, comme d’analyser les courants majeurs du nationalisme canadien et d’y rechercher la dynamique du fédéralisme actuel pour en extraire les mécanismes et les possibilités d’adaptation aux changements qui s’imposent même s’il faut en arriver à constater l’échec et faire face au partage. Il ne faudrait pas croire cependant que cet ouvrage repose sur une documentation spéciale et sur des recherches nouvelles. Au contraire, il ne s’agit pas d’une commission royale d’enquête et sous la direction du directeur de l’Institut des Relations Intergouvernementales, Monsieur Burns, cette étude est tout simplement le fruit d’une réflexion honnête d’hommes compétents et renommés, d’universitaires qui se sentent engagés dans l’avenir de leur pays et qui veulent ainsi contribuer à mieux éclairer la réflexion des autres sur un tel sujet.

C’est ainsi que successivement ces dix auteurs abordent chacun un aspect différent selon son intérêt et son domaine particulier de compétence. Ainsi, le doyen Lederman s’attache d’abord à décrire la place et l’esprit de nos institutions politiques dans la préservation de l’unité du pays. A son avis, le parlementarisme britannique allié à la structure fédérale donne à nos institutions une souplesse et une capacité d’adaptation qui leur permettraient d’affronter cette disparité culturelle et cette dispersion géographique du peuplement. Essentiellement, il conteste la possibilité de maintenir cette notion d’un dualisme politique étroit, où fédéralisme signifie surtout exclusivisme des compétences, pour y suggérer le développement de méthodes de consultation qui sans nier les responsabilités juridiques et politiques de chaque niveau de gouvernement, en atténueraient les affrontements et en assureraient le développement efficace pour l’avenir.

Pour le professeur Jordan, il se penche sur ce trait d’union physique que constituent le fleuve St-Laurent et ses installations de navigation et qui permettent aux navires transatlantiques de se rendre jusqu’aux Grands Lacs. Certes, il s’agit là d’une force de cohésion et d’une valeur d’unité qu’aucun des partenaires n’a intérêt à briser puisqu’il en surgirait pour tous d’énormes problèmes que l’auteur analyse ensuite en essayant d’y voir les
solutions possibles dans le cadre d'une révision à trois (États-Unis, Canada et Québec) des accords sur le bassin hydrolique du St-Laurent.

Quant à messieurs Rawlik, Archer et Burns, ils analysent successivement la réaction des Maritimes, des Prairies et de la Colombie-Britannique à une éventuelle séparation. Pour le premier, malgré que cette séparation constitue une barrière entre les provinces maritimes et le reste du Canada, l'opinion publique demeure en général fort désintéressée à toute cette question. Pour leur part, les gens de l'ouest demeurent dans une position d'indépendance face à ce problème qui leur fait voir la situation un peu comme si elle ne les concernait pas. Après tout, il n'y a pas de problème de bilinguisme et de biculturalisme dans l'Ouest puisqu'il n'y a presque pas de francophones! Ils sont donc en général favorables au fédéralisme actuel et même à son adaptation mais pas à n'importe quel prix. Après tout, si Québec se sépare rien n'empêche qu'ils pourraient le faire aussi et avec autant sinon plus de succès, considérant les richesses de leur territoire immense. Enfin, la Colombie-Britannique partage dans ses grandes lignes la pensée des provinces voisines. Après tout, depuis sa création elle ne s'est jamais sentie choyée par le pouvoir central et elle non plus n'a rien à perdre du départ du Québec; rien, sauf cette entité canadienne qu'elle pourrait bien contribuer à maintenir par sa position stratégique sur l'océan pacifique.

Ces réactions extérieures sont ensuite étudiées auprès des Ontariens et des anglophones du Québec par deux experts en la matière, messieurs Symons et Mallory. Beaucoup plus intéressée que les autres provinces, l'Ontario, voisine du Québec et pivot de cette unité canadienne, s'est engagée nous dit-on dans une “révolution tranquille” qui démontre une ouverture d'esprit sans précédent aux aspirations québécoises qui, de fait, s'est concrétisée par tout e une série de réformes sur les plans culturel et linguistique. De même en est-il, d'après Mallory, chez les anglophones du Québec qui cessent de se préoccuper uniquement des affaires de leurs commerces pour s'intéresser aux problèmes sociaux et politiques qui les entourent. Toutefois, ce que ces deux études laissent entendre nous laisse songeurs sur la compréhension du problème québécois même chez ceux qui sont supposés mieux connaître le Québec. Comment est-il possible en effet de croire encore aujourd'hui
que la compréhension et les réformes exigées pour maintenir le Canada uni puissent se limiter à des mesures d’ordre linguistique et culturel. Il y a longtemps que chez les québécois ces aspects sont dépassés par des prétentions qui portent beaucoup plus sur le partage équitable des domaines économiques et politiques. Après tout, il n’est pas nécessaire de se séparer pour parler français.

Sur ce point, il faut souligner l’excellente rétrospective de John Meisel qui, reprenant les données de base des positions du Canada français à travers l’histoire, étudie ensuite les perspectives possibles d’un compromis en tenant compte des intérêts et de la souplesse de la majorité. À mon avis, il a mieux que tout autre réussi à comprendre ces aspirations du Québec et conséquemment les nécessités de réforme. Comme il le dit si bien, l’idée de base qui doit guider les anglo-canadiens consiste à bien réaliser que leurs partenaires francophones n’ont pas bénéficié autant qu’eux de l’unité canadienne comme collectivité.

Enfin, mentionnons l’étude du professeur Watts sur les conditions de survie ou de désintégration des fédérations, où les exemples abondent pour tous ceux qui veulent s’inspirer de l’expérience des autres, et la prospective du Professeur Simeon qui s’engage dans la voie irréversible du séparatisme pour y décrire ce que pourrait être le scénario de cette scission pour en arriver à la conclusion (identique à celle de l’ancien premier ministre ontarien Frost) que cette séparation est possible sans violence et sans heurts armés et qu’il est même possible d’envisager par la suite des ententes entre les deux parties qui maintiendraient leur cohésion.

Comme en témoignent l’introduction et la conclusion, qui sont toutes deux excellentes, cet ouvrage fut écrit au lendemain de l’élection provinciale de 1970 qui porta au pouvoir M. Robert Bourassa et par conséquent au coeur du règne de M. Trudeau. Or, avec l’éclairage que nous donne maintenant la dernière élection fédérale d’octobre 1972, il est possible de mieux apprécier la valeur de cet ouvrage et de constater qu’à court terme les auteurs ont assez bien jugé des situations politiques à travers le pays sauf qu’ils ont peut-être eu tendance à laisser leur propre attitude de compréhension et de tolérance déteindre sur leurs compatriotes. Il faut remarquer chez la plupart de ces auteurs cette préoccupation majeure de prévenir
l'éclatement en faisant preuve de plus de souplesse. De plus, une même crainte les anime de voir cet éclatement conduire à plus ou moins brève échéance à l'assimilation des parties par nos voisins américains. C'est sûrement là une crainte qui trouve peu d'écho au Québec mais dont l'expression au Canada peut expliquer pour une bonne part l'intérêt réel qu'ont les autres provinces à vouloir jeter du lest pour éviter l'irréparable.

Certes, depuis octobre 72, il ne faut pas déduire de la défaite libérale un rejet des aspirations du Québec. Mais dans la mesure où l'équipe de M. Trudeau voulait représenter l'aspiration des francophones et mettre en place les réformes requises, on peut se demander si la réaction de l'électorat anglophone ne conduit pas à une réponse carrément négative à tout effort sérieux de réforme. Au fond, est-ce que l'indifférence que plusieurs auteurs ont identifiée chez leurs concitoyens ne s'est pas transformée en un sentiment de rejet? Quoiqu'il en soit, voilà un ouvrage unique au Canada. Jusqu'ici on s'était retranché "ad nauseam" derrière le fameux: "Qu'est-ce que veut le Québec"? Enfin, voilà l'expression d'une réponse et quelle qu'en soit le contenu elle manifeste une attitude de dialogue dont la qualité et l'ampleur demeurent, à mon avis, sans précédent.

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Political fashions, like other kinds of fashion, are evanescent. The speed of their progress from growth to apogee to decay depends upon a rule that can be expressed as \( T^2_N \), TN being the television and newspaper coverage, divided by the square of the reality of the issue. This law has been illustrated in numerous ways in recent years. One graphic example of it has been the rise, and the decline, of the student protest movement. Not a little of this movement was manufactured; in some cases it was manufactured simply by the presence of a television camera, as if a particular event was a play instantly created on the spot for the publicity. There was some basic reality in many of the issues raised by student protest, but the real issues became magnified,
distorted, at times even obliterated by the heat and the noise created in part by the medium whose task it was simply to transmit information. Television not only reveals the present: it makes it.

Television's lineal ancestor, the newspaper, has been in existence since the 18th century and it began to become an engine of opinion in the 19th. When literacy was confined to a fairly narrow range of the population — and that usually the most sophisticated — newspaper creation of opinion was a more difficult exercise, though by no means an impossible one. In Canada literacy for a substantial part of the population came early. William Lyon Mackenzie made his reputation on the strength of his Colonial Advocate in the 1830's, as did George Brown with the Globe in the 1850's. The creation of public opinion did not have to await the pulp newspaper of the 1890's: it was already in train well before that time. Moreover, as with television, the very existence of a known and susceptible public made some issues possible. The public, one might say, learned to make their own crises. On many issues extreme papers tended to drive out the moderate ones. The Canadian reaction to the Riel affair and the Saskatchewan rebellion of 1885 is a good example.

Pulp paper in the 1890's increased the power of the press. The Canadian Boer War agitation of 1899 is an astonishing example of what had been created just the year before in the United States. A state of war was created by the new, yellow press — in the American case it was the Spanish-American War. In their turn, radio in the 1920's and television in the 1950's have created new forms of instant public opinion. It is fair to say that according to the rule $\frac{TN}{RT}$, the steepness of the rise and fall of issues has increased.

No one can deny the reality of the issue of separatism. But the measure of it, its shape and proportion, its ambience, is extremely difficult to determine, not only because of a wide spectrum of opinion about it, but because these opinions are changing. It is a curious comment on Canadian academic life that many commentators who ought to know better mistake present appearances for present realities, not only on a host of university issues, such as abolition of examinations, demands for contemporary "relevance", but also upon more difficult questions such as separatism.
That being said, this present book, on the issues posed for English-Canadians by separatism, falls properly into place as a book of the times. One senses that twenty-five years hence it will be studied as part of the intellectual phenomena of our present age. To a historian the effect of the book is to emphasise how difficult it is to place political issues of the time in any firm framework of reality, in other words, in the long perspective of history. By contrast, Fernand Ouellet's article, "Les fondements historiques de l'option séparatiste au Québec", in CHR 1962, is as relevant now as the day it was written, and really underlies the articles in this present book.

The purpose of these articles is to study in a dispassionate way the contemporary problem of Canada and of Canada's relations with Quebec within Canada. There is little doubt, in the minds of the most of the authors, of the emotional attachment of most English Canadians to a united Canada. As John Deutsch puts it in his introduction:

Among English-speaking Canadians, the attachment to a united Canada is primarily emotional; the discontents and fears are largely economic. Among French-speaking Canadians, the attachment to a united Canada is primarily economic; the discontents and fears are largely emotional.

Whether Canadians have always "willingly" paid the price for being Canadian — the abverb is W. R. Lederman’s — it is certain that Canadians have paid a price, and that most are willing to continue paying. There is however a suggestive question in the London (C.W.) Advertiser of September 6th, 1865, "... where is the Canadian who will not sell out if only he gets his price?" This is too close to present problems to be passed over lightly. Nevertheless, Professor Lederman is probably right that we are ready to pay for our independence, though we are a long way yet from knowing what the price is. And there are always the faint-hearted who will blanch when they find out.

Similarly, in facing the contemporary reality of Quebec, there have been possibilities that English Canadians have been reluctant to admit even to themselves, let alone in print. It is a virtue of this book that we are brought up sharply and squarely to confront this reality. Richard Simeon's article, "Scenarios for Separation" supposes, for the sake of discussion, that Jean Blain
is right: that Quebec is headed down a one-way street to sovereignty. What might this sovereignty mean, and how would it come about? The dilemma for English-Canadians is very difficult. What Lévesque seeks is a symbolic freedom more than a real one, whereas English Canadians would go a long way to concede real freedom in order to avoid conceding the symbolic one.

For separatists the difficulty lies not only here, but more especially in the possibility of having to abandon French-speaking minorities outside the borders of Quebec. In 1961, four and a half million people in Quebec claimed French as a mother tongue, together with about another three-quarters of a million people outside Quebec. And there are nearly three-quarters of a million inside Quebec whose mother tongue is English. These cross populations may be in fact the cement for the future, for they cannot be ignored or explained away. The Ontario and New Brunswick French-speaking populations need Quebec. They tune in, more often than not, to the CBC French network out of Montreal. This symbiosis is a modern version of the French Canadian children of the past, and it is the only basis for the expansion of French Canada. For the birth rate in Quebec is now one of the lowest in Canada; and indeed it may well be argued that it is this falling birthrate, between 1951 and 1971, that has provided the element of fear in the French Canadian position.

Of all the changes over this past twenty years, one of the most striking, (though the least talked of) is Ontario's. Ontario has reversed a position that has had an existence since the 1880's, and even before that. These changes date mainly from 1959, as do Quebec's. The appointment of John Robarts as Minister of Education in the Leslie Frost government in 1959 was in its way just as dramatic in its effects for Ontario as was the death of Duplessis in 1959 for Quebec. Ontario's quiet revolution — the title of T.H.B. Symons' essay — consisted in the development of French as a working Ontario language. It was achieved more through administrative than legislative changes. The culmination of all these developments, however, came by legislation in July, 1968. Ontario unanimously adopted French as a second official language. How would the shade of D'Alton McCarthy have reacted to that?
Quebec and its neighbours, Acadian New Brunswick, French-speaking Ontario, are in a sense the core of the Canadian identity, whether they are quite aware of the role or not. It is the ancient core of Canada, like the Shield itself, around which we have built the integument of English Canada. Quebec is not really a province like the others. It can never be so, however difficult it may be to create the political and constitutional means to deploy this reality. The old system of House of Commons representation, where Quebec had 65 seats and the rest of the provinces had their seats struck in proportion, always seemed to me symbolic of what Quebec meant to us of a confederated Canada.

John Meisel's essay, one that for cogent good sense and a firm grasp of political realities is about the best in the book, is significantly titled "Cancel out and pass on". Its theme is analogous to that of Strindberg's play "The Dance of Death". In Strindberg's play, a married couple find their life with each other filled with tension and even hostility. But they cannot live without each other. In the end, having exploited their mutual dislike, even cast at each other some of their mutual hatreds, they realize their inter-dependence. They agree to cancel out past quarrels and pass on to a better future.

John Meisel's essay was written as recently as the summer of 1970, and the changes that have taken place since have already cast a patina of age over its bright relevance of two and a half years ago. But it is still worth reading. And lest historians believe they can write sub specie aeternitatis, let it be said that anachronism is inherent in most things. And the more "relevant" the writing the faster will it disappear.

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There is probably no one in Canada who has written more, or is better informed, on the scope and nature of Canadian federalism than Professor D. V. Smiley. He is perhaps one of the
few persons outside the inner circles of the top echelons of government who fully understands the intricacies of federal-provincial fiscal arrangements. We are indeed fortunate that he has now written *Canada in Question: Federalism in the Seventies*, setting down in one place a good deal of his extensive knowledge and insights about the subject of Canadian federalism. The book is indeed a treasure house of important information on Canadian federalism.

Lawyers should find the first and second chapters of particular interest, because these chapters are devoted to describing the details of the legal aspects of federalism and of the attempts to re-structure it through the long process of constitutional review. Professor Smiley tends to somewhat downplay the importance of judicial review in determining the scope of federal-provincial power. In this he is partly right, particularly since the 1930's. He refuses to indulge in the usual invective against the Judicial Committee for handing down so many decisions favourable to provincial claims; instead he emphasises the insufficiently recognised proposition that the Judicial Committee was possibly giving "... retroactive recognition to the underlying particularisms of Canadian life ...". Having, in effect, recognised that the Court was in sociological step with the current of Canadian events, he then very disappointingly reiterates the tired proposition that the Judicial Committee approached the B.N.A. Act in a "...positivistic tradition of constitutional interpretation. ...". It has long been my contention, which Smiley in effect supports in the first quotation above, that in reality the Judicial Committee's approach was more sociological than positivist, in that the law lords departed from the centralist text of the B.N.A. Act to provide Canada with a Constitution more de-centralised than envisaged by the formulators of the B.N.A. Act. Nevertheless, it is encouraging to see the fairness with which Professor Smiley deals with the Judicial Committee, despite his obvious predilection, expressed in the final chapter, for a more centralised Canadian federalism. He is also fair in his discussion of the formal constitutional structure, recognising its flexibility and adaptability to changing social needs. Of particular interest is his suggestion, in the final sentence in his chapter on the Constitution, that perhaps the Constitution has been too
flexible in the sense of being too easily manipulated by the Executive, without recourse to either the legislatures or the electorate. At least this is a refreshing change, because during the recent orgy of Constitution drafting the familiar cry was that the Constitution was too old and, thus, out of date and, by implication, too rigid. Smiley’s criticism is certainly far closer to the truth, in that the Constitution is flexible, but surely in our structure, flexibility is preferable to excessive rigidity.

The second chapter of the book summarizes steps in the process of constitutional review. It outlines all the steps leading up to the drafting of the ill-fated Victoria Charter. This is useful exercise as the whole process at the time was often hard to follow, and rather disjointed. Professor Smiley makes no attempt to explore in detail the content of the Victoria Charter, except for the provisions on amendment. In this he is entirely justified in that, except for the amendment formula, the rest of the Charter did not deal specifically with the problems of federalism. It is, however, disappointing that, though outlining the formal amendment process in the Victoria Charter, he offers no comments on the substance of this formula. It would have been of considerable interest to have Professor Smiley speculate on the potential impact of this formula, if it had been adopted, on Canadian federal functioning. Here again one senses a tendency on his part to under-emphasise legal factors as compared with social and political ones.

His chapter on Executive Federalism is highly useful in that it explains in considerable detail the extent to which federal-provincial relations and disputes are dealt with through meetings and conferences sponsored by representatives of the Executive, rather than by resort to either the courts or the legislatures. Though Dr. Smiley doesn’t explore the point, it seems quite likely that “Executive federalism” has been significant in downplaying the role of the judiciary in the resolution of disputes between levels of government.

The chapter on “The Politics of Canadian Federalism” is an interesting survey of recent works in the field of political sociology, analysing in particular the role of political parties in a federal context. The amount of writing on this subject is reasonably extensive, and much of it quite pertinent. The
synthesis of this material in one place is in itself a valuable contribution. Professor Smiley is undoubtedly right, however, in concluding that, "Political parties are thus of decreasing importance in the Canadian federal system." It is impossible, in my view, to quibble with this assessment.

The chapter on the fiscal problems of Canadian federalism is also extremely valuable, though sometimes difficult to follow. To some extent this is undoubtedly due to the fact that this is a highly complex subject, thoroughly understood by very few. Professor Smiley unfortunately tends to assume that most of his readers are perhaps more informed in this area than probably most of them will be. If one of the objectives of this book was to serve as a text for undergraduate students of the Canadian governmental system, it might have been helpful if the basic fundamentals of federal-provincial financing had been spelled out at the beginning of the chapter. Nevertheless, the reasonably informed reader in this area will find it a good summary of the problems involved. Professor Smiley documents the significant increase since 1955 in both the expenditures and share of tax revenues on the part of the provinces. One may be aware of such a trend, but to see it reflected in quantitative terms is enlightening.

The chapter on what is basically the impact on Canadian federalism by the existence of two official languages is referred to as "Cultural Duality and Canadian Federalism." It outlines and explains the emergence of a new approach to federalism by Quebec with the election of the Lesage government in 1960. Smiley points out many causes for Quebec's more aggressive policy, causes which have perhaps in the past received insufficient emphasis. The chapter (which contains an incisive summary of Prime Minister Trudeau's views on federalism) concludes with a view of the options for Quebec, ranging from biculturalism to separation. While talking of separation, Smiley makes another too seldom made point, namely that after separation an economic free trade area between Canada and Quebec is not inevitable.

In the final chapter of the book, "The Compounded Crisis in Canadian Federalism", Professor Smiley analyses the fundamental problems facing Canada as a nation. He lists these as
"... (a) the relations between Canada and the United States, (b) the relation between English and French communities, (c) the relations between the central heartland of Ontario and Quebec and those Canadian regions to the east and west of this heartland". He places particular stress on the decline in the power of the central government in comparison with that of the provinces. He appears unhappy with the increasing aggressiveness of the provincial governments. It is my view that some roll-back of power from Ottawa to the provinces has not been an altogether unhealthy trend. It is consistent with an increasing urge on the part of citizens to involve themselves with politics and to have government intervene to solve pressing social problems. Many of these problems are regional and local and citizens have turned to the appropriate arena. Furthermore, as Canada has grown in population and its problems have thus become more complex, it is unrealistic to expect the central government to dominate events as it did during and shortly after the war. Furthermore, if the Ottawa government has sometimes failed to play the full role that it should, very little of this responsibility should be attributed to the provinces, but rather to abdication of responsibility by the federal authorities. The health of the Canadian polity will be strengthened by rigorous political activity at both the central and regional levels, the activism of one level of government not necessarily excluding action by the other. Increased provincial activity allows for social experimentation and provides flexibility for meeting different needs in different ways in different parts of the country.

Professor Smiley, however, points out very effectively how the central government should seek to make the western and eastern extremes of Canada feel more a part of the national structure. He is undoubtedly correct in his assumption that the federal Cabinet, its secretariat and the civil service have come increasingly under the dominace of Canadians from Ontario and Quebec. In the event that this unhappy state of affairs is changed and the central government becomes more responsive to all of Canada, it still doesn't mean that the provinces should draw away from vigorous political action and thus leave everything to Ottawa.

There is no doubt that this book is an extremely valuable contribution towards understanding important aspects of the
Canadian political system. If writers of academic distinction continue writing about Canada, the prognosis for its survival remains good.

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_Federal-Provincial Diplomacy_. The Making of Recent Policy in Canada. By Richard Simeon, University of Toronto Press, 1972. $10.00

Consideration of the ways and means of developing a federal system that will work in the complex climate of the present day has occupied the time of many people. Even since Confederation, and particularly since 1935, we have been busy drawing up plans for the developing of some workable consensus between federal and provincial (and perhaps now municipal) governments. It has been a favourite, if so far not wholly productive, pastime in Ottawa, the provincial capitals, and sometimes even in the academic community.

The title of this book will, no doubt, appeal to those provincial leaders who sometimes tend to confuse their office with that of a 'head of state'. In the book, one of a series, Richard Simeon has addressed himself to the demanding task of sorting out how the game is really played. He has used the vehicle of three important modern cases-studies to provide the evidence for his analysis. While the analogy of diplomacy is not quite as unique as the series editor suggests (it was common in the fifties, for example, for public servants to talk of the need for federal and provincial ambassadors), Simeon has brought substance to what was merely a somewhat sardonic figure of speech.

The three cases chosen are all of first importance, although of somewhat different force and effect. The study of the Canada-Quebec pension dispute reveals only too clearly the attitudes and approaches of one province in a particular situation where the ends were not always what they seemed. But it was a case which, while illustrating the political authority of that one province, was settled nevertheless without im-
mediate damage to the national fabric, although the long-term effects may be something else again. This is by far the most interesting of the three studies, perhaps because the subject being closed, at least for now, the author seems to have had access to his best sources of information.

The second study deals with the financial negotiations since the formation of the Tax Structure Committee in 1964. Put in the rather limited time-span of the period it is less illuminating that is the case of the more self-contained pension issue. Nevertheless it clearly supports the view that 'federalism is finance' and shows us the dilemma of the federal government in trying to maintain its national role in the face of strengthening provincial pressures and ambitions.

The constitutional study is of necessity abbreviated and incomplete for, with the rejection of the Victoria Charter by Premier Bourassa, we have been left in a state of continuing inanimation. But despite its inconclusiveness, this case, perhaps better than the others, shows us how diplomacy, as contrasted to hard negotiations in specifics, does operate in the domestic field. Here, unlike the pension and financial issue, was a case where the prizes of success were less immediately identifiable and where the costs were less readily assessed. Mr. Lesage, as Simeon notes, recognized the shifty ground of open constitutional discussion and preferred more practical approaches. Mr. Johnson and his successors were perhaps more conscious of their own long-term aims and in this were abetted by the rather unusual interjection of Ontario into a field of previously acknowledged federal responsibility, with the calling of the Confederation of Tomorrow Conference.

The author uses these case-studies as the base for a thoughtful, if sometimes over-involved, analysis of the political process as it operates in the Canadian federal state. He examines in considerable detail various aspects of the federal-provincial exercise: procedures, issues, goals, resources, strategies, outcomes and consequences. All of these are related in the context of actual events and often as a reflection of the activities of those actually involved in the process.

It is clearly quite beyond the limits of any review to deal in an extensive way with a serious examination of the negotiating process as Simeon has seen it operate since 1964, but his facts and analysis of them can be wholly recommended
as essential reading for anyone interested in the future of this country. In his work we see the uneven growth of provincial authority, with Quebec increasingly dominating the bargaining process. This growth comes as a product of changing times and developing public needs and is a direct issue of the developing struggle for political power at the provincial level. I am not sure that he sees the fragmentation effect of the process in as serious a light as it seems to me he should by the very nature of his analysis. But neither do I think he overstates his final conclusion which is that much of the future of Canada will be decided as the changing system responds to the discussions between Prime Minister and Premiers at the negotiating table of federal-provincial diplomacy.

Simeon regards the federal-provincial negotiating process as more self-contained than I believe experience shows it actually is. It is in fact but the part of a complex political process where interests cross and recross in a tangled skein of often ill-defined and fluid relationships. Provinces disavow 'ganging-up' on the federal government at conferences, perhaps because they have so much upon which they disagree. But there is little doubt that accommodations have been and are sought, not only among the provinces but between federal and provincial governments; perhaps now the municipalities will be involved as well. It seems to me that this fact emphasises the need for an accepted process and machinery to bring some sort of established order into a very confused system (or lack of one).

Even in a book so full of interesting facts and excellent reporting it would be unique if a reviewer could not find some points about which to quibble. My one major regret is that the author did not give us a bit less detail and a bit more of his own valuable insight into where this has led us and where it leads us now. There is a conclusion which is really a summary, and at the end we are left (or at any rate I was) wondering just what Richard Simeon thinks about it all. He gave us in *One Country or Two* a sample of the ideas he can extract from events. I rather wish there were more of these ideas here and less of the doctoral thesis. This book deserves to be read rather than examined.

At times, perhaps due to the great detail, I found the writing difficult, as will, I suspect, the general reader. For
example, while I fully appreciate the problems of identifying sources, the habit of frequent snippets of unattributed quotations was often disconcerting. The purpose might have been better served by the author's paraphrase. But, regardless of any minor reservations, this book is a first-rate piece of work and fills a valuable place in the literature of Canadian studies.

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This book is the result of the complete rewriting of a set of course materials used for several years by Professor Verge, and more recently by Mr. Gagnon as well, at Laval University. It is a comprehensive textbook of provincial and federal labour law applicable in Quebec, and is explicitly designed as both a teaching and research tool.

The brevity of the book in relation to its enormous scope - its 441 pages come out to less than 300 when the lengthy tables and index and the many blank pages between chapters are subtracted - has inevitably been achieved at the cost of rather summary treatment of some areas. But in many other areas its brevity is due less to what has been left out than to the tight and thoughtful organization of what has been included. Although the authors, in the civilian tradition, minutely subdivide each of the sixteen chapters in a way that may at first sight appear rather staccato to a common lawyer, their evident concern for function as well as logic in the ordering of their material leads to a result that is unusually smooth-flowing for a textbook of this type. The book can be used with profit by anyone interested in the blending of North American, French and indigenous influences that has given a distinctive flavour to the Quebec labour law system. It has clear potential for furthering the understanding of that system among students of labour law outside Quebec.

The question whether labour law exists as a separate area of law or merely as a series of glosses upon the pre-existing
common law is the subject of the first chapter. Although this question is often the point of departure for treatises or courses on labour law in France, it is rarely discussed in North America, undoubtedly because it has a conceptual tone inconsistent with the professed pragmatism of most of our legal thought. Yet it touches many of the most down-to-earth problems in Canadian labour law. For example, to what extent should persons who are not "employees" at common law be covered by labour relations legislation? How ready should the courts be to review decisions of arbitrators and labour relations boards? What effect should the commission of common law torts have upon the legality of strikes and picketing?

From time to time throughout the book, the authors make some mention of parallel areas of French labour law and their possible or actual relevance to Quebec. It is unfortunate that the most unique and interesting institutions in French labour law, the *Conseils de prud’hommes*, are not discussed in chapter 1 in the context of the authors' very brief sketch of the various labour law forums existing in Quebec. Consisting of employer and employee representatives without any neutral members, the *Conseils de prud’hommes*, provides a relatively expeditious and informal procedure for the conciliation and adjudication of most of the statutory and contractual claims that an employee in his individual capacity may have against his employer. The unorganized employee has the same right as the organized employee to use the procedure. Unlike his Canadian counterpart, the unorganized French employee is not rigidly relegated to a lower status in the matter of forums and remedies merely because he does not fall within the scope of collective bargaining. The jurisdiction of Canadian labour relations boards or other labour tribunals could well be broadened along the lines of the jurisdiction of the *Conseils de prud’hommes* as a counterweight to the often excessive reliance of our labour relations system upon the principle of majority rule. The authors make it clear that this principle is followed nearly to the same extent in Quebec as elsewhere in Canada.

As is frequently the case with European labour law textbooks, the authors' chapters on the contract of employment (chapter 2) and on state regulation of employment conditions (chapter 3) come before any of their material on freedom of organization and collective bargaining. This arrange-
ment reflects not only the traditional importance of the individual contract of employment prior to the growth of collective bargaining, but also the fact that in many western European civil law jurisdictions the statutory or executive fixing of minimum employment standards retains an influence on the overall level of terms and conditions of employment comparable to that of collective bargaining. Although the balance of influence has generally tipped much more in favour of collective bargaining in North America, labour law writing and teaching in Canada have tended to underemphasize the actual and potential importance of direct government regulation as a determinant of the economic well-being of those unorganized parts of the work force which are not sufficiently comparable to any organized groups to be able to draw substantial indirect benefits from collective bargaining.

In an appendix to their chapter on freedom of organization (chapter 5), the authors outline the provisions of the Quebec Construction Industry Labour Relations Act that purport to give special protection to the freedom of association of construction workers. These provisions are strongly worded. Not only do they prohibit discrimination by employers but also by employee associations or by the two sides acting in concert. Several sections, some of them added or amended since the book was written, explicitly affirm an employee’s right to belong to any association of his choice or to none at all. As well as lifting the burden of proof from the employee's shoulders, the statute creates special machinery for the enforcement of those rights by a single arbitrator, who may reinstate the employee in his job or in his union and order him indemnified by the employer or union for any monetary loss. The authors offer no insights into the actual operation of these provisions. The Quebec construction industry has for years been severely plagued by strife between the "international" craft unions of the Quebec Federation of Labour and the more nationalistic and less craft-oriented syndicates of the Confederation of National Trade Unions. In the fall of 1972, during the statutory forty-day "raiding period" preceding the expiry of the Construction Industry Decree of 1970, sweeping public allegations of gangsterism and intimidation were made by officers of one federation against named officers of the other, occasioning a huge libel action in reply and further advancing
the paralysis of the Construction Industry Commission that is responsible for much of the administration of the Act. The interest as well as the pedagogical effectiveness of the authors' material would be enhanced by some explanation of the background against which the protective provisions of the Construction Industry Labour Relations Act were conceived and by some information on how well those provisions are working. Such material gives life to the bare bones of the law.

The general intent of the Construction Industry Labour Relations Act, passed in 1968, is to introduce a unique scheme of bargaining by "representative associations". This scheme is dealt with in the chapter on sectorial bargaining (chapter 14), it being the only example of such bargaining in the private sector in Quebec. It attempts to impose upon the construction industry a bargaining pattern common in western Europe, under which a number of unions coexist on a more or less competitive basis in the same industry or even in the same workplace while bargaining together for a national agreement that will set standards for the entire industry. The Act goes well beyond the construction industry provisions of other provinces in that it substantially rejects the notion of certified or accredited bargaining agents in favour of the concept of "representative associations", which are either listed by name in the Act or subsequently designated as "representative" by the Minister of Labour. The QFL and the CNTU, mentioned above, are the only two employee associations listed in the Act as being representative. No other employee association has managed to jump the enormous hurdle which the Act places in the path of recognition by the Minister — the requirement that such an association have as members at least 20% of all construction workers in the province (the scale of bargaining in the industry being province-wide, at least in appearance). Since only those associations recognized as representative have the right to sit at the bargaining table and since each construction worker may belong to only one association, other unions find it very difficult to recruit members. Effective freedom of association is therefore limited. In addition, the forty-day raiding period provides a statutory invitation to a province-wide battle royal — an invitation which was taken up by both federations in 1972 during the QFL's drive to end the CNTU's representative status by reducing its membership to less than 20% of the total
number of construction employees in the province. It now seems clear that a legislative scheme requiring a live-and-let-live attitude on the part of competing unions is ill suited to the traditionally violence-ridden North American construction industry. In Quebec the problem is aggravated by the not inconsiderable ideological gap between the two major union federations.

The authors' brief discussion, also in chapter 14, of the two schemes of sectorial bargaining in the Quebec public sector — one for the public service, the other for public schools and hospitals — takes on particular interest in the light of the lengthy public sector strikes in 1972 during "common front" negotiations for teachers and civil servants. The apparent strengthening of the bargaining position of public sector employees through their use of a common front has induced the Quebec government to propose complex new legislation (Bill 89 of 1972) to restrict the right to strike in essential services in both the public and private sectors. This bill, to be debated early in 1973, provides for a form of compulsory arbitration in which the arbitration tribunal would not be allowed to write an award of its own but would be required merely to make a choice between the entire final offer of the employer side and the entire final offer of the employee side. This appears to be the first serious government proposal to introduce final-offer-choice arbitration in Canada.

Parts of chapters 6 and 7, on the legal status and classification of unions and the status of the certified association under the Labour Code, show the authors at their best. The European-inspired Professional Syndicates Act of Quebec, which dates from 1934, is succinctly discussed in chapter 6 and is described (p. 121) as a "witness of an earlier era" because it reflects a concept of unionism that does not distinguish between non-managerial and lower-level managerial employees. In this respect, the Professional Syndicates Act could be a link with the future as well as the past. Also of interest in chapter 6 is the peculiar thrust of the "confidential capacity" exclusion from bargaining units under the Quebec Labour Code (p. 130). Although this exclusion does not exist at all in the private sector under that Code, s. 1 (m) (3) makes it

1. This translation and all other translations from the authors' text are mine.
into a curious appendage to the malignant doctrine of Crown privilege by enacting the following exception to the definition of “employee”:

“1(m) “employee” — a person who works for an employer and for remuneration, but the word does not include: . . . (3) a functionary of the government whose position is of a confidential nature in the opinion of the Labour Court or under the terms of an agreement binding the government and the associations certified in accordance with Division XV of the Civil Service Act which are parties to a collective agreement which otherwise would apply to such functionary; such is the position of a conciliation officer of the Department of Labour and Manpower, an investigator or investigation commissioner contemplated by this act, an employee of the Executive Council, of the Treasury Board, of the Civil Service Commission, of the Department of the Civil Service, or in the office of a minister or of a personnel manager. . . .”

With respect to the status of the certified union, the authors offer a particularly interesting treatment (pp. 143-47) of the “successor rights” problem — the problem of whether existing bargaining rights and collective agreements can survive changes in the legal identity of the employer. In this context, under the title “Attachment of certification (and the collective agreement) to the enterprise”, the authors follow French labour law writers into a discussion of two competing theories of the nature of the enterprise (l'entreprise, perhaps unfortunately translated as “undertaking” in the Quebec Labour Code). The relative weight of French and North American influences on Quebec labour law at the theoretical level is well indicated by the fact that although the question of the nature of the enterprise is still treated by French labour law writers as being of major significance, the authors raise it only in connection with the more or less marginal matter of successor rights.

The first of the two theories of the enterprise discussed by the authors, the occupational or contractual theory, sees no legally recognizable link between employer and employee other than the contract of employment. Although the enterprise may
be "a collective reality on the sociological plane", it has no separate existence on the legal plane, where it breaks down "into an assortment of individual contractual relations".\(^2\) In contrast, what the authors call the organic theory but what is perhaps more precisely termed the institutional theory holds that "the enterprise is a community of effort; managers and workers are linked by an organic solidarity; this solidarity, the existence of interests common to all members of the enterprise, is the basis of the prerogatives of management..."\(^3\) In the Canadian labour law context, the occupational or contractual theory, according to the authors (pp. 144-45), would find support in the fact that collective bargaining de-emphasizes the individuality of each employee and emphasizes the importance of job categories. The continuance of substantially the same job categories under a new employer would apparently be the chief indicator of the survival of the enterprise. As for the organic theory, it would look for the continuance of more concrete factors — the human element (the same employees), the physical element (the same place of work), and the intellectual element (the same ends for the enterprise). The successor rights provision of the Quebec Labour Code, s. 36, may be worded vaguely enough to call for this type of theoretical concern, which is not unlike that recently shown by the United States Supreme Court in *National Labor Relations Board v. Burns International Security Services, Inc.*\(^4\) The much longer provisions in the statutes of other provinces, such as s. 55 of the Ontario Labour Relations Act and s. 29 of the Nova Scotia Trade Union Act, seem designed to short-circuit such concerns in favour of a frank legislative commitment to the carrying over of collective bargaining obligations and collective agreements in any situation where it would not bring about grotesque results. However, the growing complexity of such statutory provisions and the large residue of discretion that they explicitly leave in the hands of labour relations boards to facilitate effective response to new types of employer transformation are evidence of the friction involved in the unhappy meeting between labour


\(^4\) (1972) 92 S. Ct. 1571.
law and the law of business organizations in this context. As to whether the theories that they discuss might be helpful in drawing together two areas of law so painfully different in purpose and concept, the authors wisely avoid any optimism.

The most interesting feature of the Quebec procedure for bargaining agent certification, the subject of chapter 8, is the unique machinery quite recently set up to administer it. The Quebec Labour Relations Board was abolished in 1969 and was replaced by a quasi-hierarchical system of investigators, investigation commissioners and a chief investigation commissioner, topped off by a Labour Court consisting entirely of provincially appointed impartial judges and possessing appellate jurisdiction over the rest of the hierarchy. Certification applications are made to the chief investigation commissioner, who despatches an investigator to the scene to check the representative character of the applicant union. The Labour Code imposes an important restriction on the investigator: if he ascertains that the employer and the union agree on the makeup of the bargaining unit, he is required by s. 24a to certify the union. On the other hand, s. 1 (e) of the Code makes it clear that only a certified union can make a binding collective agreement. In the result, although the latter provision tries to do away with "sweetheart agreements" negotiated by employers with acquiescent unions voluntarily recognized by them, s. 24a requires the investigator to give official sanction to what might well be an equally unchaste arrangement that has been given the preliminary guise of a mere agreement on the "appropriate unit". One writer has pointed out that the previous system, still in effect outside Quebec, under which a union could acquire bargaining rights through voluntary recognition as well as through certification, at least had the advantage that a company union "was often content with recognition and did not seek the cloak of virginity provided by official certification". 5

An investigation commissioner is called into the certification proceeding only if the investigator is doubtful whether the union is representative of the employees involved or if no

agreement has been reached on the bargaining unit. The investigation commissioner decides these matters, subject to the possibility of an appeal to the Labour Court. All the levels of the new system are quite clearly designed to replace the old Labour Relations Board, which was felt to be too slow and too legalistic and whose tripartite composition caused discontent. The outlines of the new system emerge clearly from what the authors say about it, but what does not emerge at all is whether it really works. In a pungent critique, written when he was Chief Investigation Commissioner (and cited by the authors), Robert Auclair has pointed out a number of shortcomings in the system, including the inadequate powers and status of the investigators and investigation commissioners and (the old story again) the excessive activism of the Labour Court. “I can see”, he says, “that it is a group of lawmen, the Labour Court, which will set the tone of the new system; the investigation commissioners will at most add some local colour”. The authors might well consider adding a bit of “local colour” to this chapter to give it more life.

As good a short statement on the meaning of good faith bargaining as can be found in Canadian labour law writing appears in chapter 9 on the collective bargaining process (pp. 185-87), but no adequate impression is given of the grave difficulty of applying the good faith standard in actual bargaining situations. Chapters 10 and 11 on strikes and picketing succeed in conveying the messages that illegal strikes are somewhat more narrowly defined in Quebec than elsewhere in Canada, that the legality of primary picketing is less closely tied to the existence of a legal strike, and that the legally permissible consequences for an employee of his participation in an illegal strike are somewhat less severe. Chapter 13 on grievance arbitration has a good short discussion of the permissible extent of union grievances as contrasted with individual grievances, a problem which is given a rather distinctive focus in Quebec by s. 57 of the Labour Code, which provides that “a certified association may exercise all the recourse which a collective agreement grants to each employee whom it represents without being required to prove that the

7. Ibid., at p. 103 (my translation).
interested party has assigned his claim”. The authors set out the case for very broad union rights in this area but do not illuminate it with any consideration of the contrary arguments. However unconvincing such arguments may be, they deserve mention in light of the prevailing view, shared by the authors, that the parties can validly contract out of s. 57.

The legal effects of the collective agreement in its ordinary and extended forms are well handled in chapters 12 and 15 respectively. Quebec law on the ordinary collective agreement is found in the Labour Code and has few unique features. More interesting is the separate statute — the Collective Agreement Decrees Act, first passed in 1934 — which provides for the extension of collective agreements by government action. The decree of extension is a device by which the Minister of Labour can order unorganized employers to comply with the terms of any collective agreement which has “acquired a preponderant significance and importance for the establishing of conditions of labour” in the relevant industry and region (Collective Agreement Decrees Act, s. 6). There are now about 65 decrees in force, a good proportion of them concentrated in trades where employers tend to be small and numerous, such as hairdressing, food retailing and car servicing. The idea of extension was applied to the construction industry in a somewhat different way by the Construction Industry Labour Relations Act, other parts of which are discussed above.

An interesting final chapter, perhaps inspired by equivalent chapters in French labour law texts, is entitled “The Right to Work”. The first part deals with government placement services, retraining programs, unemployment insurance and the like. The second part covers union security and other limitations on job access. The third part, entitled “Job Preservation and Supplementary Measures”, succeeds in demonstrating the virtual absence of protection for the unorganized employee against an employer decision to eliminate his job, especially if (as is usually the case with unorganized employees) he is not part of a group large enough to fall within the notice-of-layoff provisions of provincial or federal statutes.

To anyone who has read this far, it will be obvious that the authors cover a vast range in a mere 300 pages. In this lies the book’s main defect — it is so brief that in places it gives little more than a bare outline of the black letter law. Yet in other
places it offers remarkably full and incisive analysis in a very brief compass. Few English Canadian law teachers would likely find it a satisfactory main sourcebook for an introductory labour law course. The tightness of the authors' rule-oriented reasoning is not the same tightness sought by the more fact-oriented reasoning of the American-inspired case method. Although I am hesitant to criticize the pedagogical effectiveness of a teaching tool designed for use in a system of legal education with which I am basically unfamiliar, I do feel that a considerable fleshing out of this book in its next edition would substantially enhance its instructive qualities without impairing its usefulness as a reference work. As it stands, however, the book can provide an English Canadian reader with a valuable introduction to the unique features of the Quebec labour law system. It is comprehensive, accurate and often very interesting, and it is written in a straightforward enough style that no one with a moderate reading knowledge of French need be afraid to approach it. But it would be even more valuable if it told more about the actual performance of the system it deals with.

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These volumes, costly though they are, must be welcomed as an outstanding contribution to the literature, not only of Canadian family law, but of Commonwealth family law. Although in his preface Professor da Costa emphasizes that this collection of essays is a co-operative effort in which each contributor has approached his topic, in general, as he wished, there is an underlying unity in the enlightened approach to the subject and the clarity of expression and depth of scholarship which reflects a considerable editorial achievement. Professor da Costa also modestly states that the work covers "a reasonably broad selection from those branches of the law which relate to the family." Naturally a selection of essays cannot be as comprehensive as a text-book might hope to be, but a comparison of
the contents of these volumes with those of a standard text book shows that no important topic is omitted and indeed some areas, which are unduly neglected in textbooks, are at last given the space they deserve. (See especially the chapters on 'Children in Need of Protection' and 'The Family and Welfare Assistance Legislation in Canada'). The work could, therefore, serve the purpose of a standard university textbook in addition to being a valuable source of information for researchers.

In a rapidly developing area of law, which family law is, there is always the danger that new authority will weaken the impact of legal exegesis and analysis. The references to the English law of adoption were made without the benefit of the decision of the House of Lords in re W. The impression is also given that the significant House of Lords decision in Gissing v Gissing appeared too late for a full discussion in the text, and references to it are confined to footnotes. These problems are understandable. But less easy to understand is the lack of reference to J. v C., where the House of Lords made a thorough re-appraisal of the operation of the welfare principle in custody disputes between parents and strangers. The criticism of the prima facie presumption in favour of parents in such situations (p. 606) would have been better supported by reference to that decision than to the dictum cited from Selby J. in the Supreme Court of New South Wales. But J. v C. has been curiously neglected in Commonwealth law. Similarly, the trenchant criticism (pp. 720 et seq.) of the 'Wilkins-Woodland' rule setting up an estoppel per rem judicatam might have been modified in the light of the evidence produced by Tolstoy that decrees of judicial separation and of restitution of conjugal rights may properly be regarded as operating in rem, so that the status so fixed is res judicata in any subsequent proceedings between any parties.

The treatment of the various topics is invariably stimulating and informative and special attention is paid to what may be

4. Supra.
called the "social" dimension to the legal rules. Only in the chapter on illegitimate children, a subject where the interaction between legal rules and social behaviour and policy is particularly sensitive, does one of the contributors appear to set himself the worthwhile, but more limited, aim of cataloguing legal provisions. Hence Judge Allard ("Family Courts in Canada") raises important questions about the roles of legal personnel, court staff and judges in family matters and concludes with observations on the failure, as he sees it, of current legal response to keep in touch with changing cultural values about family life. Family courts are very much an issue of the moment in the Commonwealth, England included, and it would have been interesting to have had a sharper picture of Judge Allard's views about the proper relationship between the family courts (and their personnel) and other agencies, such as the social services and the police.

Professor da Costa prefaces his own detailed examination of the new divorce law with statistical data about its first few years of operation. The exposition which follows is penetrating and enlightening. Some minor matters might be questioned. For example, he appears to accept that the criteria of Blunt v Blunt7 may provide relevant guidelines as to when a court should grant a decree on the ground of 'public interest' despite condonation.8 But it is submitted that the objection, if objection it be, to granting a decree despite condonation is the apparent toleration of a party's volte-face, which has nothing to do with the balancing of the 'sanctity of marriage' against the fact of breakdown relevant to the discretion statement cases. The decision in Bonin v Bonin is accepted without criticism.9 Yet the case is potentially destructive of the reconciliation provisions and is based upon widely criticised English decisions which were themselves dependent on a literal interpretation of the then current English legislation, which was differently worded from the Canadian. The most depressing commentary on the new divorce law, however, is contained in the ninety-eight pages which are devoted to the grounds of divorce. It is surely deplorable that a remedial statute should have

8. Divorce Act 1968, s. 9(1) (c).
spawned such a fertile breed of matrimonial decisions and it is scarcely surprising that Professor da Costa should conclude that the reform has failed to reduce the complexity, cost or embarrassment of divorce proceedings. (p. 533). Professor da Costa most valuably emphasizes that the success of “divorce counselling” is not necessarily to be measured by the number of marriages “saved”. It may be achieved by lessening the distress and hostility of the separation. (p. 382). In this reviewer’s opinion, much would be gained if ‘reconciliation’ procedures were to be seen as primarily directed to the second objective because they are more likely to achieve a realistic and limited goal than the idealistic one of restoring cohabitation. However, so long as the law itself provides the parties with the grotesque refinements of the matrimonial offence, a weapon calculated to wound the relationship beyond any repair, any such process is doomed to frustration.

Donald J. Macdougall’s chapter on Alimony and Maintenance shows an admirable appreciation of the difference between considerations which are relevant to dissolution of the marital tie and those which properly pertain to financial settlement. “The reason why a marriage failed is irrelevant to the courts and the question whether a marriage has in fact failed is essentially a question for the parties rather than for any outside tribunal. Once these ‘false issues’ are eliminated it may be possible for the legislatures and the courts to develop more effective processes for dealing with the real social problems created by the disintegration of the family unit.” (p. 285). He discusses the problem of the relevance of misconduct in the determination of financial provision and concludes (it is thought correctly) that society is not prepared to ignore conduct when these determinations are made. He supports the view that financial matters should be disposed of once and for all on divorce as far as this is possible, but subsequently cites, with apparent approval, a dictum of Kitto J. remarking on the uncertainties of life. (pp. 318, 322). The ambiguity is left unresolved. There is no full discussion about the difficulties of enforcing maintenance obligations (see the comments by Judge Allard on this on p. 22), but these matters are probably more

10. See the approach taken by the English Court of Appeal in Wachtel v Wachtel, [1973] 1 All E.R. 829.
properly considered in the context of the relationship between family law and social welfare law. Here again this work includes the appropriate material. S. Fodden's chapter on 'The Family and Welfare Assistance Legislation in Canada' is a particularly valuable and thoughtful contribution, because this murky area of law and administrative discretion is becoming increasingly important. Fodden's general criticism that what is saved by a cheese-paring and secretive attitude is only marginal for a department compared to its importance for the recipient is one which should be constantly before the minds of everyone concerned with these problems.

The chapter by M. C. Cullity on 'Property Rights during the Subsistence of Marriage' is amply enriched by reference to English and Commonwealth case-law. Issues relating to the occupation of the matrimonial home are given extended treatment. In view of the extensive citation of English authority, it is a little surprising that there is no reference to the important statement of principle by Lord Denning in Gurasz v Gurasz that the courts may protect a wife's right to occupation by ordering the husband to leave the home even, in extreme cases, if it is owned by him. It is relevant to his criticism of Duggan v Duggan (p. 210). As to the acquisition of beneficial interests in the home, the restricting effect on the development of Canadian law of the Supreme Court decision in Thompson v Thompson stands out very clearly. The results of this restriction are described as "utterly indefensible" because it makes a spouse's acquisition of a beneficial interest depend on "the precise allocation of the income of each spouse". (p. 203). But it may be that Canadian courts are starting to take a more liberal approach. Thompson v Thompson has been distinguished on its facts in Alberta and in British Columbia, so it may be that the statement that "recent Canadian cases disclose no judicial inclination" to allow the acquisition of beneficial interests by indirect contributions

will be overtaken by events. Cullity’s chapter contains a useful discussion on problems related to the contents of the matrimonial home, a matter to which too little attention is usually paid, and his discussion of the law relating the joint bank accounts is the best the reviewer has seen. Cullity is sceptical about the introduction of a legal regime of community of surplus as proposed by the Ontario Family Law Project. He favours a discretion in the court with a strong but rebuttable presumption in favour of common sharing. (p. 279). The discussion, however, is in the context of termination of the marriage, where the division of property should be seen in the wider context of maintenance law generally. Here indeed there must be a discretion so long as conduct is to remain a relevant factor, even if only in extreme cases. There are greater difficulties when the question arises outside a divorce context, as for example, if the husband is heading for bankruptcy. In these situations the plea for ‘fixed rights’ for wives becomes more serious, though it is unlikely to be thought that the courts should be prevented from departing from them in clear cases of injustice.

Although there are a couple of chapters which have primarily Canadian interest (Husband and Wife in Quebec and Reciprocal Enforcement of Maintenance Orders), these volumes deserve to be studied by family lawyers throughout the common law jurisdictions.

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"After more than a century of persistent failure the reformist prescription is bankrupt." This is the premise of the men and woman of the Working Party who prepared Struggle for Justice,

a report that is presented through the eyes of the prisoner. In fact several members of the Working Party served prison terms — one spent two years on death row. The result is a stimulating analysis of the failures and the oppressive side-effects of criminal law and punishment in controlling crime. As pressures on police and courts increase, the criminal justice system is speeded up with consequent reliance on practices that deny equal protection under law.

At the outset the members of the Working Party acknowledge that the quality of justice in any society is necessarily affected by inequities in social and economic institutions: “To the extent, then, that equal justice is correlated with equality of status, influence, and economic power, the construction of a just system of criminal justice in an unjust society is a contradiction in terms”. While recognizing the need for change in the broader context of social justice, the authors, nonetheless, address themselves to the problem of checking abuses within the existing system.

The major abuse is the manipulation of the criminal justice system by those in power to achieve their own interests. In the economic sphere, the criminal law has been used to persecute and harass labor unions; the dominant class has used the criminal law to oppress blacks, Indians, Mexican Americans, women, and other minorities to the extent that their subordinate position within the system of criminal justice remains practically unchallenged even today. For example, women have enjoyed the special “protection” of a system of criminal justice that exercises greater control over the sexual and reproductive activities of women than men. Under the guise of rehabilitation, women, more so than men, have been thought to be in need of moral uplift and education. As a result, indeterminate sentencing laws with longer terms under pretences of rehabilitation have fallen especially heavily on women. The youth with their different life styles and values also find that the criminal law powers of arrest, police interrogation and even the court processes are worked to their disadvantage. The gross manipulation of the system to harass and suppress political dissent in the United States has achieved international attention through such well known cases as the trials of the Chicago Seven, the prosecution of H. Rapp Brown, and the
police execution of Mark Clark and Fred Hampton, to select but a few examples.

Repression to achieve economic and social superiority, of course, is not the stated aim of American criminal justice. Publicly the system proclaims general deterrence, preventive detention, and rehabilitation. While acknowledging that retribution remains the dominant purpose of punishment, particularly among common people, the authors remark at length upon the individualized treatment model. Treatment, not retribution, is the official policy at every level. And at every level, the authors note that “the concept of individualization has been used to justify secret procedures, unreviewable decision-making ... a steady expansion of the scope of the criminal justice system and a consolidation of the state’s absolute power over the lives of those caught in the net”. This conclusion will be shared by many lawyers familiar with correctional law, and the indictment applies equally to Canada as the United States.

The virtually unchecked growth of state power over prisoners’ lives stems from the questionable assumptions that crime is the product of individual pathology, and that we know enough about individual causes of crime to design treatment programs and execute them with success. The assumptions, as the authors point out, are untenable. There is no sound evidence that crime is a product of individual sickness; indeed, crime is so pervasive, particularly unreported crime, even among the middle class, as to suggest that crime is a normal outgrowth of any society, particularly an urban industrial society. Most criminals are quite normal; it is degrading and insulting to assume that they are sick and to subject them to “treatment”.

Indeed, since the claims of treatment cannot be substantiated, the delegation of large discretionary powers to judges, prison officials, and parole officers in order to strive for individualized treatment is grossly unreasonable. Wide discretionary power exercised in the absence of common principles or express criteria invites the risk of abuse through ignorance, irascibility, or prejudice. In the administration of criminal justice, sentencing and corrections constitute the last frontier where untrammeled discretion remains untamed by law.

To check the repressive nature of criminal justice premised on the rehabilitative ideal the authors of the Working Paper recommend that wide and arbitrary discretion in the administra-
tion of justice be eliminated and that restraint be exercised in using law to solve social problems. Among other things this would include a deletion from the criminal law of offences relating primarily to morals or drugs. It would mean a re-drafting of definitions of offences in order to make them precise and to reduce "over-charging" by police; it would mean a prohibition of plea bargaining under which determinations of guilt and sentence are effectively removed from open court to be settled in the secrecy of the prosecutor's office.

As a further necessary step to exercise restraint in the use of discretion, the authors recommend that the punishment fit the crime. To this only two exceptions are allowed: more intense punishments should be permitted in cases of repeated convictions for the same offence or class of offences; secondly, some small reductions in punishment should be allowed in recognition of good behaviour in prison.

Hand in hand with these recommended changes in the legal structure the authors endorse a program of action based on the concept of empowerment. They recommend courses of action to place power in the hands of those who are most frequently the victims of abuses within the criminal process. The authors favour such developments as prisoners' unions, community police groups, civilian review boards, community based legal aid, and court room monitoring services.

Consistent with their policy of favouring restraint in the use of criminal law power, the Working Paper recommends that community groups take over the adjudication or settlement of non-criminal problems, now handled by police, such as housing emergencies, search for lost children, location of stolen cars, and the settlement of family disputes. Indeed, in some cities in the United States and Canada there are various models of community based groups settling minor disputes, policing neighborhoods, and extending and sustaining a "web of community services controlled by those who need and use them".

Thus, Struggle for Justice poses a major challenge to the inhumanity, arbitrariness, and oppressive elements of criminal justice in America. It clearly is predicated upon a need to decriminalize significant areas of human conduct. With a fervour that would delight Dicey, it insists on a sparing use of discretion. It advocates a return to a humanitarian retribution
that will disconcert many social scientists and reformers convinced of the paramount need for individualized treatment in sentencing and corrections.

There is a great deal in this book that is applicable to the Canadian scene and elsewhere. In the United States Judge Frankel's recent attack on the rehabilitative ideal echoes its sceptical tone as does Rupert Cross in England in The Hamlyn Lectures, 1971.

Rupert Cross's Hamlyn Lectures, while also concerned with penal reform differ considerably in style and viewpoint from Struggle for Justice. Cross sets out to give his assessment of penal reform in twentieth-century England. His is not the outraged cry of oppression, but the leisurely review of the armchair penologist. From the Gladstone Report of the Royal Commission on the Penal System, Cross sketches the principal persons, statutes, and institutions making up the background of penal reform during the last one hundred years.

By penal reform Cross means "any change aimed at the rehabilitation of the offender". He would extend the meaning of the term to include any measure "the primary aim of which is humanitarian, i.e. the provision of whatever control of crime the penal system can achieve with the minimum of suffering to the offender and those connected with him". On this basis he is able to report a rather substantial list of reforms, and one or two measures that failed. The successes are listed as follows: abolition of capital punishment for murder; abolition of corporal punishment; amelioration of prison conditions; introduction of parole; probation; suspended sentence; the prospective abolition of judicial punishment of children under fourteen; and the introduction of hospital orders for mentally abnormal offenders. The attempt to deal with persistent offenders through extra long sentences of preventive detention and corrective training is listed as a failure, along with sentences to Borstal institutions. In so far as the aims of the latter types of sentences were rehabilitative, they failed miserably, but in so far as Borstals were designed to improve forms of imprisonment for the seventeen to twenty-one year old group, Cross agrees they might be classed as a successful reform.

This very readable book is on common ground with Struggle for Justice in sharing a scepticism as to the value of rehabilitative programs. Both books would confine rehabilita-
tion to well-planned programs within the confines of a sentence determined on the basis of a humanitarian retribution or deterrence. Somewhat surprisingly, Cross is able to support parole as a "milestone on the road to progress" not, as it turns out, because of its reformative tendencies, but because it will, in his view, tend to get people out of prison sooner. This latter effect, however, has not always been the happy consequence of parole programs, particularly in the United States.

Cross's uncritical optimism respecting parole is reflected in his ignoring the tyranny of parole or prison decisions made without a hearing or any of the safeguards associated with fundamental fairness. Professor Cross does not refer to the great ferment in the United States culminating in the Supreme Court ruling that parole decisions must be made in accordance with due process. His assessment of penal reform in twentieth century England is unruffled by a suggestion that rules of fairness should apply to correctional law. In England at least, the concern in penal reform has not focused on the struggle for justice, but on an humanitarian approach, an approach that itself can result in injustice.

While admitting the likelihood that parole will probably be no more effective in reducing recidivism than release on termination of sentence, Professor Cross is willing to support a parole program, and thereby increase an unchecked state power over the lives of the prisoners. This increase in power is justifiable in his view if a few more prisoners are released earlier than they would have been otherwise. The inevitable disparities and inequalities that are bound to arise in attempting the impossible, that is, predicting who is ready for release and who is not, do not appear to trouble Professor Cross.

Nor is Professor Cross particularly concerned about sentencing disparities that result from placing wide discretion in the hands of judges. Professor Hogarth has shown that sentencing is very much the product of the individual judge's personal values and attitudes. The authors of Struggle for Justice along with Hogarth, Judge Frankel, and others believe that the structuring and channelling of wide judicial and administrative discretion in sentencing is a key issue, but Professor Cross does not identify it as a key problem in England. Indeed, his incidental suggestions for future reform,
while aimed in part in reducing the lengths of sentences except for persistent or violent offenders, contain suggestions for increasing state power over prisoners. Complacency with the essential soundness of English correctional law may be expected from the armchair observer, but it strikes a sharp contrast with the anguished cry in *Struggle for Justice* coming from the men and women who personally experienced arbitrary correctional powers in America.

Meanwhile, in Canada, recent reports on correctional services in Manitoba and Saskatchewan, for example, take the currently popular view that individualized treatment is the necessary foundation of a modern sentencing and corrections policy: the emphasis is not on justice, or humanity so much as it is on the need for treatment. Before building more institutions and implementing costly programs designed to offer treatment, Canadians should examine carefully Professor Cross’ erudite scepticism respecting the claims of treatment. All Canadians, too, will want to re-examine our criminal justice system, its abuses and exploitations, and think through the challenge to action posed in *Struggle for Justice*.

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This collection of essays is a reprint, with a few minor additions, of essays appearing in 1969 in *Daedalus*, the journal of the American Academy of Arts and Sciences. A collection of essays does not often make a readable book, specially when it lacks, as this one does, an overall plan. Many of the essays here are repetitive; others seem irrelevant to the central themes; an argument carefully made in one essay will be totally ignored in another.

However, the subject matter of the book is important, and so to the extent that it encourages thoughtful consideration of the difficult questions, it is to be welcomed. As a society we set a high value on the advance of medical knowledge, but, as Hans Jonas’s essay indicates, it is not an end to be pursued at all
costs. Speaking generally, there are two limits set to medical experimentation with human subjects. The first is a scientific one. The experiment must be properly designed, it must bear a reasonable relationship with other work in the field, and the object sought must be sufficiently important to justify the foreseeable risks. Very little has been written on this aspect of the matter, chiefly, no doubt, because individual instances cannot be usefully discussed without detailed scientific knowledge.

The second requirement for experimentation is one on which a great deal has been written, and that is the need for consent by the subject. There are three arguments that continually reappear in connection with the requirement of consent. All have been answered by various writers, but since they continue to appear, they continue to be dangerous misleading. The first argument is that the doctor, in treating any patient, is always experimenting, because each patient differs from any other, and the effect of treatment is therefore unpredictable. The implication of this conclusion is that if we are to approve any treatment without the fully informed consent of the patient, we must similarly approve all experimentation without consent. It is disconcerting to see this argument appearing in the foreword, among the first words addressed to the reader, as though it were an unanswerable truth. In fact, the argument is effectively answered in several of the essays, and answered particularly well by Herrman L. Blumgart, who points out that there is a clear distinction between a procedure, untried though it may be, designed to assist the patient, and a procedure designed to gather knowledge, of which the subject may or may not be a beneficiary.

The second misleading (in my opinion) argument runs as follows. Consent, it is said, is such a complex matter that we can never be sure who consents to what. We are all victims of our circumstances, and of our physiological and psychological make-up, and so we can never be sure that apparent consent to anything is real. Consequently, the implication of this argument continues, we might as well abandon any attempt to secure free consent. When the argument is put like that, the answer seems clear. The fact that consent is a difficult concept is no excuse
for failing to attempt to obtain it if it is clear that it ought to be secured if possible.

A third argument that occurs with surprising frequency is that individuals are often compelled to perform duties against their will for the benefit of society as a whole. Examples given are the payment of taxes and the performance of military service. The implication is that experiments should similarly be performed on individuals without their consent for the good of society as a whole. The point generally overlooked in this argument is that conscription and taxes are always imposed by the legislature. It is one thing to say that Parliament could conscript for medical experimentation; it is quite another to say that an individual doctor, or team of doctors, may do so. All these arguments appear in the course of the book, more or less elaborated. It should not, of course, be assumed that all the contributors would adopt them. Many have no doubt as to the importance of consent to experimentation. Dr. Blumgart, for example, says: "To use a person for an experiment without his consent is untenable: the advance of science may be retarded but more important values are at stake" (p. 47).

To follow the argument so far is not, however, to answer any of the really difficult questions about consent. Consent means free consent, and free consent means fully informed consent. But who is free? What do we say of prisoners, or hospital patients, or patients asked to submit to an experiment by their own physician? And what is full information? What about children, or mentally ill persons, and what where the design of the experiment itself demands that the subject not know what drug he is receiving? All these problems have been discussed elsewhere; all appear in these essays, but no essay gives them the detailed consideration they deserve, and, in my view, there is no new light shed on these matters.

Two interesting suggestions do appear, however, in the essays of Paul A. Freund and Guido Calabresi. Both writers suggest some kind of compensation scheme for subjects injured in the course of medical experiments. The compensation could be achieved by insurance, or by setting up a compensation fund, but the important characteristic would be that the subject would be compensated without proof of fault on the part of the persons conducting the experiment. This is a proposal that seems to me worthy of further consideration. If we, as a
society, can afford to pay the costs of experimentation, we
ought to assume as part of those costs the compensation of
persons injured in the process. The provision of such
compensation would be to allocate to the research enterprise its
true costs.

The other proposal that seems to be worth further thought
is Professor Calabresi's suggestion of publishing the written
reasons of the committees that are set up at many institutions
to approve research projects involving human experimentation.
At present such committees try to decide every case from first
principles. Previous experience of their own or of other
committees is useless, because it is not published. Just as the
Courts find helpful the reported decisions of decided cases, so
experimentation committees could well use reports, not, of
course, to adopt a rigid system of binding precedent, but so as
to develop rational and consistent principles for deciding
difficult cases. Such a proposal involves a certain amount of
time and expense but, if it is seen to be useful, ought not the expense to
be borne as part of the cost of research?

There is much work to be done. There is a place for a
collection of reference materials, containing, say, the Nuremburg
Code, the Helsinki Declaration, and some of the more
important decided cases. There is a place, too, for a book by a
single author with a detailed analysis of the problems and with a
unified plan throughout. Unfortunately this collection of essays
fulfils neither need, and in consequence I fear that it falls
between two stools.

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*Protection of Foreign Investment.* By Zouhair A. Kronfol.

There is a growing realization in international circles that
economic stability and advancement, particularly in under-
developed and developing areas, cannot depend solely upon
government-to-government relations. It has become increasingly
clear that there is still a major role for private investment, but in
view of the ideological and socio-economic programmes being pursued, particularly in some of the new countries, private investors have been somewhat hesitant. They have been concerned about the security of their investments and the prospect of real compensation in the event of nationalization. In many instances it would appear that insufficient care has been taken to ensure such security, while a number of the new countries, as well as those in the socialist bloc, have tended to regard the classical rules of international law on expropriation as out of date and irrelevant. Any study, therefore, that explains the present-day prospects of security for foreign investors is to be welcomed, and Dr. Kronfol's monograph on *Protection of Foreign Investment* seeks to explain the extent to which international law now offers protection to the alien investor. It is perhaps unfortunate that the book lacks an index, while readers may be hard put to find the significance of the Helbert Wagg case, which is listed under 'R' as *Re Helbert Wagg and Company Ltd., Case* with a simple citation of 'All England Law Reports, Vol. 1 (1956)', for there is no indication as to the page in the text that this is discussed, and is it enough when referring to the *Sabbatino* decisions to cite only those of 1962 and 1964?

Although the author is seeking to explain the legal environment concerning the protection of foreign investment, he points out that politics, ideology, and social and economic pressures are all important in practice. However, these conditions change so rapidly that what may be true at the time of writing (summer 1970) may well be a matter of history by the time of reading. Thus, in the light of African policies towards Asians it barely seems true any longer to state that "hardly any states, though entitled to assert the right to exclude aliens, actually exercise this right in its full vigor" (p. 13), and there is perhaps little of practical value in saying that "the state of nationality of an alien expelled may assert its right to inquire into the reason for his expulsion, and the sufficiency of proof of the charges on which the expulsion is grounded" (p. 14). It hardly seems relevant that in 1903 the Italian-Venezuelan Commission awarded damages for expulsion without sufficient cause — the list of cases refers to the Buffalo case, the text to Baffalo, while the arbitration award concerned the claim of Boffolo. Similarly, modern states would hardly agree that
"when the right of expulsion of an alien is exercised, it should not be carried out with hardship or violence or unnecessary harm to the alien. He should be given a reasonable time to settle his personal affairs before leaving the country, and be allowed to choose the country to which he may apply for admission" (p. 14). While this may be the ideal, or even a postulate of a desirable legal situation, it is hardly an exposition of any existing legal obligation. Even though it may correctly describe what western European states insisted upon in the nineteenth century, to pretend that this is still good law only lends grist to the mill of those who assert that international law is so concerned with ex cathedra assertions as to be oblivious of those situations which require legal regulation.

Dr. Kronfol expressly discounts the nationalization programmes of Communist countries "because [they] involve basic economic, political and philosophic principles concerning the use of property. Hence, it is usually authorized by constitutional provisions or organic laws formulated in broad terms rather than by mere executive decisions. ...At the other extreme we find the limited or ad hoc nationalizations effected in France or Great Britain [also by 'organic laws' surely]. They are distinguished by a respect for private enterprise and private property, and do not seek to limit them in a general way. They are not the results of a socialist economy [-would the British Labour Party agree?—] but represent an effort to improve the liberal economy." (p. 21) He goes on to say that non-Communist nationalizations create "problems of a serious and controversial character in international law", but any study of the history of expropriation and nationalization should indicate that this is at least as true of similar measures taken in the name of socialism or communism.

Foreign investors may be protected by multilateral or bilateral conventions, investment codes, individual agreements, or by guarantees by the receiving country, and occasionally by the country of which the investor is himself a national. "In order to provide for the treatment of foreign investors, the legal guarantees have to determine certain legal standards by reference to which the lawfulness of a particular state measure is to be judged" (p. 45), and the standards which are most frequently resorted to are those of most-favoured-nation and national treatment. Some agreements still refer to the standard
of international law, but in view of the conflicting views as to the international law in this field, such a standard is today less real than it was before 1939. In so far as guarantees are concerned, the potential investor will find chapter 2 of Protection of Foreign Investment of interest, for here Dr. Kronfol has outlined the contents of some of the leading conventions, as well as the provisions of the law in some of the capital importing countries, while in chapter 3 he reminds us that guarantees by the capital exporting countries are only of municipal significance, lacking any weight in international law. Even with investment treaties, however, it must be remembered that the extent to which the investor is protected will in fact depend on whether his country is prepared to regard an expropriation as a breach of treaty which it is prepared to pursue, and, even if it does, whether it is obliged by its own system of law to pay to the investor any damages received in respect of the breach. After surveying a number of instances and looking at doctrine as well as practice, the author concludes that “it seems reasonably clear that in order for a breach to constitute a violation of international law, it might constitute an exercise of governmental power that adversely affects the rights of the alien in a pronounced and manifestly unfair way, taking into account all relevant circumstances” (p. 93). In so far as the assessment of compensation is concerned, the author points out that perhaps the only way to arrive at a proper standard is by comparing a number of municipal systems (p. 100), but it is submitted that he has a tendency to pay undue attention to the position in the United States and Great Britian.

As with so many issues of international law, be they the protection of minorities, the status of international waters, or the like, Dr. Kronfol points out that the protection of foreign investment is not one “subject to a single comprehensive solution” (p. 151). Thus, he demonstrates that, while a multilateral investment code is superficially attractive, the difficulties in persuading capital exporting countries to give up their veto right or the importing countries to accept a weighted voting system to protect the former, together with the concomitant limitation upon the sovereignty of all participants are well nigh insuperable (pp. 152-154). Similar problems, though to a less extent, arise with bilateral treaties. Never-
theless, they “are perhaps the most effective, emphasizing mutuality and respect for the legitimate interests of the states that are parties to them . . . [and] the cause of international law will best be served by efforts directed at increasing the number of bilateral investment treaties in the developing countries. Such treaties provide a convenient machinery for filling in the missing links in the chain of the international law rules of foreign investment” (p. 157). Instead of an out-of-date concept of full and prompt compensation, he believes this “should be approximate to the fair value of the nationalized property at the time of nationalization, that it should take into consideration the lapse of time between that date and the date of payment, and that it should be in a form which can be effectively utilized by the alien recipient” (p. 158), while settlement of the inevitable disputes should increasingly be left to arbitration centres (pp. 159-161).

Dr. Kronfol’s study is an interesting contribution to the analysis of the law concerning protection of foreign investment. It is regrettable that it has been spoiled by a plethora of misprints, particularly in so far as the names of writers and of cases are concerned, and it is unfortunate that he has so frequently used secondary sources when originals are readily available — even Grotius is quoted by way of a page reference in an unnamed decision to be found in the United Nations series of Reports of International Arbitral Awards, while Lauterpacht is quoted by way of Nwogugu’s Legal Problems of Investment in Developing Countries.

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