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Contemporary Punishment: Views, Explanations and Justification

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Reviews

Contemporary Punishment: Views, Explanations and Justifications. Edited by Rudolph J. Gerber and Patrick D. McAnany. Notre Dame, Indiana: University of Notre Dame Press, 1972. Pp. viii, 267. \$15.00

This is an anthology of readings, mostly well-known ones by well-known contemporary authors, on the aims and justifications of criminal sanctions and limitations on their operation. One of the editors is an assistant professor of philosophy and law at the University of Notre Dame and the other is an associate professor of criminal justice at the University of Illinois. They were encouraged to make the collection by the well-known criminologist, Norval Morris, who contributes a short foreword in which he says that "It will be of use to student, scholar and all practitioners in the criminal justice system who care to lift their eyes from the routine path to the direction they wish to travel".

The anthology is divided into three parts. Part I, "The Context for Punishment", is an introductory chapter on criminal law and criminal punishment, designed to provide the reader with a context in which to view the problem of punishment; the first two out of the five readings in it are, auspiciously enough, from those two masters of articulate expression and literary charm, the late Henry Hart of Harvard and the late Herbert L. Packer of Stanford. Part II, "Four Basic Views on Punishment", consists of four chapters, each containing five readings, that correspond with the four classical distinctions among purposes for punishment with which even plumber-lawyers and the courts are familiar: retribution, deterrence, incapacitation and rehabilitation. To the understanding of the way these purposes differ from one another the editors have adopted a helpful summary in their introduction (pp. 3-4) and a two to three page prefatory note to each of the four chapters, in which they indicate, in a very general way, what problems it deals with and what is the special nuance of each of the readings in it. Part III, "Seeking a Unity for Punishment Theories", much less abstract and much more pragmatic than the selections in Part II with their, for the most part, all-or-nothing approach, is "devoted to the theme of creating a working unity among conflicting values attached to punishment and gives the best thinking of contemporary scholars on the subject" (p. 2). A "topic" or "subject" index would have been useful to the earnest

seeker after knowledge like myself who wants help in placing one not-too-familiar idea next to its opposite or parallel not-too-familiar idea, but that is, I realize, too much to expect of two young professors who did not set out to write a book of their own but only to collect what in their view was the best of what others had written.

The strength of the anthology is that, out of the mass of contemporary writing by “deep thinkers” on the justification of punishment and on what types of “treatment” are likely to be most effective and most fair for what types of offenders and what types of offences, it selects and puts under one cover those passages that two knowledgeable people think are the best; it saves one the trouble, that is, of searching the literature oneself and finding, as usual, that there are x number of articles and passages in books that really say something on the subject and $15x$ more that are, in these days of “publish or perish” and “writing for writing’s sake”, merely copying or making hair-splitting refinements on the basic ones comprised in the x . What then are its weaknesses? First, what is, for practical purposes and practical men, its narrow range. Out of the eight propositions (whether you agree with them or not) which the five hundred-page 1969 Report of the Canadian Committee on Corrections sets out in its eight-page introductory chapter on “The Basic Principles and Purposes of Criminal Justice”, as indicating the proper scope and function of the criminal and correctional processes, the whole mass of readings cover no more than one, viz No. 5 — “The criminal justice process can operate to protect society only by way of (a) the deterrent effect . . . of criminal . . . sanctions; (b) correctional measures designed to achieve the social rehabilitation of the individual; (c) control over the offender in varying degrees” — and that, packed with practical meat and practical thought, covers only one page. Second, the content and manner of many of the readings — for which it is not, of course, fair to blame the anthologists. With certain honourable exceptions — among which I include two passages from Packer and one from Andenaes — they are written at such a high level of abstraction and at a distance so remote from a real man doing a real thing that Norval Morris’ student and scholar will have a hard time following them, and his “practitioners in the criminal justice system who care to lift their eyes from the routine path to the direction they wish to travel” will just put them aside with a sour comment about “pointy-headed professors”. Another trouble with too many of them is the graceless style in which they are written; in that company the quirky rant of Karl Menninger in favour of “rehabilitation” and of C.

S. Lewis against it compel by sheer literary grace an attention they do not deserve. Yet another trouble is the special pleading and verbal trickery of some of the "straight philosophers".

Aren't you too contemptuous of these jurisprudes and philosophers, Willis? Haven't you, in your pose of practical man, forgotten that it was two abstruse and unintelligible-to-practical-men philosophers, Adam Smith and Karl Marx, who turned out to be world-changers by innovating ideas that, after due passage of time, became the "obvious common sense" of the unreflecting practical men? Perhaps so. The truth is that with one side of my face I deeply admire those, who like the thinkers in this collection, dare to probe deeply and accurately into fundamental ideas (the true function of all university teachers everywhere) but with the other side of my face I spit me of them and align myself with the practical man who looks for short term solutions for short term problems. What seems to have happened to me in reading this anthology and writing this review is that the second side of my face won out over the first. For which, if an apology is needed, I apologise.

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Studies in Criminal Law and Procedure. Agincourt Ontario: Canada Law Book Ltd., 1973. Pp vii, 195; \$14.50.

This book is a collection of papers given at the Canadian Bar Association Seminar held at Montreal in 1972. The papers discuss such disparate subjects within the criminal procedure field as corroboration, criminal discovery, arrest and bail, industrial espionage, and the role of the trial judge in the criminal process. No attempt has been made to link the papers in any way; rather each is presented as a self-contained whole, unrelated except by general affiliation to the areas of criminal procedure and evidence in criminal cases.

The evidentiary subjects examined are "Corroboration Revisited" (Mr. A. Maloney, Q.C.) and "Burden of Proof, Presumptions, and Reversals of the Burden" (Judge P. J. O'Hearn). Mr. Maloney gives an extensive treatment of all aspects of the difficult law on corroboration, but the reviewer found some confusion in the paper between corroboration required as a matter of law and corroboration required as a matter of practice. Some discussion has been

pre-empted since the paper was delivered, because the area of corroboration has been discussed in some detail by the House of Lords in *D.P.P. v. Hester* ([1972] 3 All E.R. 1056) and *D.P.P. v. Kilbourne* ([1973] 1 All E.R. 440). Judge O'Hearn's paper is also an excellent treatment of the law. In particular, his views on the relation between the burden of proof and a legal presumption are interesting. In both papers, it would have been useful to have a consideration from the Canadian point of view of the controversial Eleventh Report on evidence in criminal cases by the English Criminal Law Revision Committee, but presumably pressure of time prevented the speakers from looking at such details.

"Absolute and Conditional Discharge" (Mr. E. Greenspan) is subtitled "The Success and Failure of an Attempt to Rectify the Stigma of Criminality". Mr. Greenspan concludes that the introduction of a possible sentence of absolute or conditional discharge may not be a failure, but is certainly not an unqualified success. Much of his observation is good sense, although, regrettably, the depth of the paper indicates that its author was again limited by time. The defects indicated by Mr. Greenspan, while they do not strike at the heart of the measure, relate to the effectiveness of its operation, and it is to be hoped that Parliament will act speedily to prevent a potentially innovative sentencing technique from failing to achieve the ends for which it was designed.

"Industrial Espionage and the Criminal Law" (Mr. F. Kaufman, Q.C.) deals with the adequacy of the criminal law in dealing with two areas of industrial espionage: the theft of intangibles, such as photographed copies of confidential documents, and the application of the crime of conspiracy. Mr. Kaufman appears to suggest that the concept of common law conspiracy can and may be used in the area of industrial espionage. This reviewer could not disagree more heartily. The prospect of charging "offenders" with the vague, grab-bag offence of conspiracy to commit an act not criminal if committed by an individual is not one to be regarded with equanimity. Mr. Kaufman points out, quite correctly, that the use of this offence in this area may be a power for good or evil, but it is submitted by the reviewer that more evil than good would ensue. Just because the present enacted criminal law may be inadequate to deal with the problems of modern industrial espionage is not sufficient reason for the Canadian courts to fill the gap by resurrecting an inequitable doctrine with origins in the Middle Ages. The rationale for such a crime has been bitterly attacked, and the English Law

Reform Commission has acknowledged this by recommending that the crime of conspiracy be restricted to conspiracy to commit a crime. It is interesting to note that since the writing of the paper, the Ontario Court of Appeal has been confronted with the prosecution of industrial espionage by conspiracy to commit a crime. (*R. v. Chapman and Grange* (1973), 11 C.C.C. (2d) 84).

“The Mental Element in Criminal Law” (Mr. S. Kujawa, Q.C.) is introduced with the protest that the topic is so broad and all-embracing that “I found it hard to start, harder to continue, and impossible to conclude satisfactorily.” He continues “if I am going to do anything of any potential value, I feel I must get off the beaten track.” He succeeds admirably. The perceptive and often witty discussion that follows deals with the defence of automatism, with comments on the relationship between law and psychiatry, and the focus of the concept of *mens rea*. The depth of perception shown by the speaker, particularly in the general introduction to the discussion of automatism, makes worthwhile reading. In particular, the reviewer found an often ignored, but central, point in the following passage:

“It is onto this background of uncertainty that the relatively new but very real defence of automatism must be fitted. . . . The new theory cannot be made to work unless it contains within it a unified concept of investigation, presentation, trial, and by no means least, correction. A substantive law cannot have real meaning taken out of the context of its application which includes investigation, presenting in Court, and the carrying out of the consequences which flow from it.”

The paper by Mr. Walsh, Q.C., “Discovery in the Criminal Process”, succeeds well with the practical points that it sets out to make. Among these he stresses the importance of the interviewing of accused and witnesses by defence counsel, gives helpful tips on the essential information to be gained from these interviews, discusses the need for viewing the scene of the crime, and explains the technique of cross examination and the role of defence counsel at a preliminary enquiry. Unfortunately, the obtaining of particulars and discovery of documents from the Crown, so central to criminal discovery, receives scant attention. Where the accused, particularly in a summary case, receives a cryptic complaint, it may be argued that he is entitled to further particulars which tell him which law he has broken, and, with reasonable particularity, how he is accused of breaking it.

Especially in the case of widely drafted summary offences, particulars force a specification of the range of conduct which these offences cover. This kind of argument seems quite urgent with respect to summary offences, but does it apply with as much force to offences where a preliminary hearing is necessary or possible? Will requirements for particulars or stricter disclosure by defence and prosecution at preliminary hearing have a detrimental effect in the delicate balance between Crown and accused? What effect does discovery of an alleged confession, for example, have upon the adversary system of criminal justice? (See Brennan, *The Criminal Prosecution: Sporting Event or Quest For The Truth?*' (1963) Wash. U.L. Q. 279; *Romeyko v. Samuels* (1972), 2 S.A.S.R. 529; *Lafitte v. Samuels* (1972), 3 S.A.S.R. 1).

Mr. Powell's paper on "Arrest and Judicial Interim Release" sets out in exhaustive detail the state of the law in Canada. It is surprising, in view of the controversial nature of the Bail Reform Act, that no comment is offered as to the desirability or otherwise of this legislation. Instead the paper is limited to describing the law as it is, methodically and extensively. Much of the paper is an account of the relevant statutory provisions.

The collection contains three papers dealing with the role, power, and duties of the participants in the adversary trial. (Mr. Justice J. Ducros, "The Role of the Trial Judge in the Criminal Process"; Judge T. G. Bowen-Colthurst, "Working Relationships: Crown Counsel, Defence Counsel and the Court;" and Mr. J. A. Hoolihan, Q.C. "Ethical Standards for Defence Counsel".) Both Mr. Justice Ducros and Mr. Hoolihan look, from different angles, at the problem which arises where the accused disrupts his own trial. This problem is new to Anglo-Canadian Courts. In 1973, Borrie and Lowe found that the problem had not arisen in England, (Borrie and Lowe, *The Law of Contempt* (1973) at 34), although it has in Canada. (Linsenmeyer "Voices from Chicago — Trial Disruption and the Court's Response" (1971), 19 Chitty's L.J. 154). Mr. Justice Ducros concludes that perhaps a standard reaction in extreme cases should be the removal of the accused from the courtroom to a place where he may follow the proceedings by audio and visual technology. Mr. Hoolihan stresses that defence counsel should never become involved other than to restrain his client, citing, but not commenting on, the conduct of Mr. Kunstler in the Chicago Seven Trial. However, the reason for this view seems to have little to do with the

relationship between accused and his counsel: "In this country, there are adequate legal rules to ensure the rights of the accused person."

Both are standard lawyers' responses to the problem, but more people are beginning to ask questions. Why is the accused acting in this way? Why does he refuse to believe in the rules designed to give him a "fair trial"? Why does he show contempt for the law in the courtroom? What can be done with someone who refuses to acknowledge the legitimacy of the law and the courts? The full answers to questions like these, if they can be found, will perhaps show that there is more here than can be dealt with by the deterrent sanction of contempt. "When they speak of a courthouse as the 'Hall of Injustice', when they think that justice and equality have been subordinated to mere power, when their credulity about 'the public interest' is breached, the whole basis on which the authority of the state rests is eroded. Authority is then reduced to force, and no society can long continue on that basis." (Reich, *The Greening of America* (1970) at 211). The reactions of Hoolihan and Ducros are typical, understandable lawyer's answers. Time will show whether they are sufficient.

The main emphasis of "Working Relationships: Crown Counsel, Defence Counsel and The Court" by Judge T. G. Bowen-Colthurst is upon the separation of the functions of these agents in the criminal justice process. Thus: "If you [Crown Counsel] fail to discharge your duties properly, or if you usurp some of the duties of the others, a miscarriage of justice may occur. A miscarriage of justice may, of course, also occur if the police, defence counsel, or the Courts, fail to carry out their duties properly or usurp duties other than their own." Of particular interest to the reviewer is the discussion of the relationship between police and prosecutor. Judge Bowen-Colthurst deals with several ways in which Crown Counsel may exercise *de facto* control over police investigative behaviour. From the practical point of view, this area is fascinating and remarks are quite illuminating.

The subject of plea bargaining arises in four of the papers delivered. It arises only incidentally in the Greenspan paper, where the author observes that absolute and conditional discharge may not be available in some plea bargain situations. Thus: ". . . if an accused is charged with the offence of rape but pleads guilty to a lesser and included offence, such as indecent assault, which has a maximum penalty of five years, the offender cannot benefit from an absolute or conditional discharge because the offence of rape, which is the 'proceeding commenced against him', has a maximum period

of life imprisonment.” In advocating that counsel should be candid with client, court, and opponent, Mr. Hoolihan concludes that “it may well be that the interests of the client and the administration of justice are best served if what has occurred is placed on the record in open court.” The reader may share the reviewer’s difficulty in understanding this vague and somewhat cryptic remark.

Mr. Justice Ducros and Judge Bowen-Colthurst show definite distaste for the practice of plea bargaining. The former maintains that “judges should take no part in the practice of plea bargaining, since it is contrary to the principles enunciated in the first part of this address, the right of an accused, any accused in our system of criminal law, to a trial, a fair and public hearing before an impartial judge.” Judge Bowen-Colthurst, from the point of view of prosecutor, is equally emphatic: “If you and defence counsel reach an agreement as a result of which the charge is reduced to manslaughter and the accused pleads guilty, you are usurping the limits of your proper function.”

The fact that this issue recurs throughout these papers shows that it is gradually eating away the shield which has concealed it from public gaze for some years. The problem with any discussion of plea bargaining is that its merits or demerits, problems and solutions, will depend largely upon the social context within which it works. Thus, it has been correctly concluded that no comparison at all exists between the English and American plea bargaining experience. (Davis, *Sentences For Sale: A New Look at Plea Bargaining in England and America* (1971) Crim. L. R. 150, 218). The central question in the societal context is whether the plea bargaining process, conducted behind a veil, as in England and Canada, or out in the open before the judge, or with subsequent sanction by the judge as recommended by the Model Code of Pre-Arrest Procedure (section 350 3(5)), has a deleterious effect on the objectives of the criminal justice system. Whether that is true or not in Canada has yet to be discovered. Most writing is American and English, and must be treated with caution in Canada. Two judges, in this book, regard the practice of plea bargaining as suspect at best. It will be interesting to see how the subject develops.

The book under review has its limitations. Firstly, these are not papers written for publication, but written to be spoken. Secondly, they are all written by busy professionals, who have not the time for research available to academic. Thirdly, the time allowed for delivery of the paper was undoubtedly a limiting factor. Within these limits, the book is a thought-provoking collection of papers of wide

general interest to the criminal lawyer. As in any collection of this kind, the standard and style of treatment varies, but in this case all are lively and interesting. The publication of papers delivered at high-standard, well-informed seminars of this kind is to be welcomed, and it is to be hoped that the Canadian Bar Association will continue to provide both services.

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The Meaning of Criminal Insanity. By Herbert Fingarette. University of California Press, 1972. Pp. 265. \$10.00

“Of making many books there is no end and much study is a weariness of the flesh.” One might add in this connection that much studying within the cloistered confines of sterile doctrine is an equal weariness of the mind and spirit.

Herbert Fingarette, a distinguished philosopher with peripheral interests in legal doctrine, has undertaken to add to the rapidly mounting volume of disquisitions on the insanity defence. The book is a timely one. President Nixon himself termed the insanity defence a monstrosity which should not be tolerated by his version of the “law and order” society, a society not overly concerned with a My-Lai type massacre or a Christmas bombing of Hanoi. Herbert Fingarette does not appear to share the President’s bias, although he fails to discuss these latter-day forms of international crimes under his subject-headings. Here at least, if we refer to the My-Lai type atrocity, is one area in which this reviewer might find an insanity defence a monstrous perversion of justice. But the author does not concern himself with that.

Dr. Fingarette develops an impressive argument for the retention of the insanity defence, at least in its traditional common law context. To be sure, it is an insanity defence purged of the impurities of battling lawyers who have not had the benefit of the enlightenment furnished by Professor Fingarette in his seminar.

This is a brilliant and at times an exciting book on the verbal use and abuse of the whole host of insanity formulations dotting the lugubrious process of the criminal law through the centuries. Its focus, however, is on the *verbal* content of the insanity defence. And while Dr. Faustus declared “it is magic, magic that has ravished

me'', Dr. Fingarette might well say, with equal fervour, that he is propelled into his intellectually ecstatic state by words, words, words. Nothing in the description of Dr. Fingarette's experiences provided by his publisher, nor anything appearing in his book, even remotely suggests a familiarity with the courtroom process. Quite the contrary is the case. Upon citing a courtroom experience, laboriously extracted at second or third hand from another book drawn from a dusty shelf, it is plain that Dr. Fingarette lacks the astuteness, based upon elementary courtroom exposure available to the youngster one year out of law school, to engage in a meaningful and reality-laden interpretation of what he sees. One example should suffice, expressive of the preoccupation with the superficiality of the written word. Dr. Fingarette quotes:

''One hospital received a patient, pre-trial, for about a three-month observation period. It was our consultant's opinion (a psychiatrist of thirty years' experience), concurred in by a staff physician and myself, that the patient had 'no mental disorder'. For some reason, the court also appointed two local private psychiatrists to examine the man, one of whom found him to be a schizophrenic, paranoid type, and the other called him a paranoid state. At the trial, two psychiatrists from the hospital testified as to the fact we found no mental disease, and the two court-appointed psychiatrists, of course, testified as to their findings of mental disorder. Then, the prosecution put on the stand a fifth psychiatrist who had examined all the reports of the four experts and had listened to their testimony, and he expressed the opinion that on the basis of all the 'facts' presented he could find no basis for the finding of a mental disorder which would diminish the defendant's responsibility. The jury thereupon found the man 'not guilty by reason of insanity' and 'still insane' and committed him to the hospital which had just testified it had found him without mental disorder. . . . The patient, within two months, petitioned for a writ of habeas corpus. The hospital took the position that it was the jury's responsibility to determine insanity, and that this took precedence over the hospital's previous findings of no mental disease. 'We further stated that, in view of the conflicting evidence as to the patient's mental condition, we needed further time for observation and study. As time has gone on, we have reversed ourselves, and it is now the hospital's finding that this patient is suffering from a type of paranoid psychosis and requires further hospitalization.'''

The author attributes these strange events to the ''relative youthfulness of psychiatry as a medical science''. The interpretation of any lawyer conversant with the insanity defence would be vastly different. The facts outlined clearly demonstrated the iron determination of the state prosecutor to defeat the insanity defence when used as a

shield by the accused. In this context, it is clear that the hospital psychiatrists referred to in Dr. Fingarette's text would, if they had operated in anything like a typical North American medical setting, have been pressured by the prosecution to make their diagnostic findings conform to the hypothesis of guilt and the desired end of maximal punishment. Neither is it surprising to any lawyer conversant with these practices that the very hospital which, notwithstanding some professional dissents, had propounded its institutional judgment of no mental illness in the accused would — following an insanity acquittal — seek to reverse this diagnosis and to reach a result of serious mental illness, consistent with indefinite and, in all likelihood, permanent confinement. To the lawyer with even moderate experience in the field, the psychiatric sleight of hand, as thus described, represents a development in the fine art of perjury rarely equalled, let alone excelled, in courtroom situations not dependent on the alienist.

Dr. Fingarette is not even in a position to deny this conclusion, which almost all knowledgeable lawyers will take for granted, because, it appears, he has never sullied his professional "objectivity" by dealing with the judicial ordeal of live men and women. This good philosopher bears not the scars of battle, but the dust of library volumes. His handling of such volumes is magnificent. He is keen, perceptive, lucidly analytic, and, at times, resourceful, in a form of logic-chopping which would make a stellar representative of medieval scholasticism swell with pride. The beauty of his exegesis has all that the scholastic heart could hope for but, alas, to the more young of heart, his writing appears singularly detached from the social and political framework from which formulae of exculpatory mental illnesses take on meaning. He has yet to learn that no rule is self-administering and that a study of the insanity defence not founded upon courtroom observation and indeed courtroom participation as integral parts of the scientific study of the subject, is a sad waste of printer's ink. In a word, Dr. Fingarette has little to say about the living reality of contemporary criminal justice.

What can one say in response to such a learned man? "Oh knowledge, ill-inhabited, worse than Jove in a thatched house".

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Libel and Slander. By Peter F. Carter-Ruck. London: Faber & Faber, 1972. Pp. 448. English price £10

The technical difficulties of the law of defamation are notorious. Thus Russell L. J. has said: "To the comparative newcomer, the law of libel seems to have characteristics of such complication and subtlety that I wonder whether a jury on retiring can readily distinguish their heads from their heels" (*Broadway Approvals Ltd. v. Odhams Press Ltd. (No. 2)* [1965] 1 W.L.R. 805 (C.A.), 825). In similar vein Diplock L. J. has remarked: "Lawyers should be ashamed that they have allowed the law of defamation to have become bogged down in such a mass of technicalities . . ." (*Boston v. W. Bagshaw & Sons* [1966] 1 W.L.R. 1126 (C.A.), 1135). Perhaps technicality is inevitable when one remembers that the law of defamation is concerned to keep a finely-adjusted balance between protection of reputation ("good name in man or woman" being "the immediate jewel of their souls") and freedom of speech. In some countries this may raise great constitutional issues, as is demonstrated by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. It is only incidentally, however, that defamation has provided the battleground in recent years for constitutional struggles of a different sort: to throw off the fetters of judicial subordination to the House of Lords. For the former British colonies the attempt was crowned with success in *Australian Consolidated Press Ltd. v. Uren* [1969] 1 A.C. 590 (J.C.); for the English Court of Appeal the uprising was crushed in *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027 (H.L.). (A powerful Canadian shot in this battle, again fired in the context of a defamation suit, is to be found in *McElroy v. Cowper-Smith* (1967) 62 D.L.R. (2d) 65, 71-2.)

Little of all this is apparent from the book under review. "[D]esigned primarily to provide a comprehensive work on libel and slander, sufficient to meet the needs of all whose livelihood depends on the printed word" (Preface, p. 15), it smoothes the path of the traveller through the thickets of legal technicality, avoids the pitfalls of competing values and ignores the bullets of the judicial antagonists which may pass overhead. It is, therefore, a useful book but hardly an important one. While one may not doubt the usefulness, for those "whose livelihood depends on the printed word", of the clear and accurate exposition, in some 20 chapters, of the law of defamation in England, some scepticism may be expressed as to the value, even for an international publisher, of the outline — on average in little more

than a page each — of the law of defamation in nearly 60 countries, from Argentina to Zambia. Each of the Canadian Provinces and the Australian States is dealt with separately, though no reason is given as to why in the case of Australia the Northern Territory is deemed worthy of inclusion, but not Tasmania or the Australian Capital Territory. The section on the United States carries a warning that the law “varies considerably between State and State”, but does not attempt to catalogue the differences. The usefulness of the book is extended, however, by chapters on injurious falsehood (including slander of title and of goods), obscene publications, and contempt of court. Illustrations of the amounts of damages awarded in cases from 1951 to 1970, which are set out in Appendix IV, are, on the other hand, only likely to confuse the reader because of the brevity of the report of the circumstances of the publication and the fact that defamation actions are probably too infrequent for any pattern of awards to develop from which a scale of damages may be constructed, as has been done by the English courts in cases of personal injury.

There is not much in Mr. Carter-Ruck’s statement of the law with which one can quarrel. *Bognor Regis U.D.C. v. Champion* [1972] 2 Q.B. 169 was probably decided too late for the author to introduce the qualification which that case requires to the paragraph on page 86 concerning the right of a municipal corporation to sue. On page 113 the effect of *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247 (C.A.) on the onus of proving a criminal offence in civil proceedings is misstated. Although three of the seven members of the House of Lords in *Broome v. Cassell & Co. Ltd.*, *supra*, dissented on whether the trial judge’s direction was adequate, it is not true to say, as Mr. Carter-Ruck does at page 172, that “it was held, by a majority of only four to three, that the law as to the categories of case in which exemplary damages might be awarded had been correctly stated by Lord Devlin in *Rookes v. Barnard*” [1964] A.C. 1129 (H.L.). Only Viscount Dilhorne dissented on this point, though others of their Lordships did indicate that if Lord Devlin had not spoken they themselves would have chosen wider or narrower categories. On the previous page (p. 171), after a discussion of special damages, it is stated that it is for the jury to assess general damages: this may mislead a reader into believing that the assessment of special damages is not a function of the jury.

It is surprising that *Egger v. Viscount Chelmsford* [1965] 1 Q.B. 248 (C.A.) is not cited on page 216 as authority for the proposition

that malice of one joint publisher does not destroy the qualified privilege of another. It is still more surprising that *Machado v. Fontes* [1897] 2 Q.B. 231 (C.A.) is cited on page 234 without any warning that its authority may have been impaired by subsequent developments of the law of conflict of laws in tort: at least a reference to *Boys v. Chaplin* [1971] A.C. 356 (H.L.) is called for. It is no doubt too much to expect that a question mark be put against *Mangena v. Wright* [1909] 2 K.B. 958 on page 120 in the light of Dixon J.'s view in *Bailey v. Truth & Sportsman Ltd.* (1938) 60 C.L.R. 700, 721-4, that a privileged report of untrue facts will not support a defence of fair comment on the facts, as opposed to fair comment on the report. It is questionable whether "most writers of legal text books are agreed that general damages are not recoverable" in a case of slander not actionable *per se* where special damage is proved (p. 180). While this may be true of works specifically on defamation, general writers on Torts are of the contrary opinion: see the current editions of *Salmond, Fleming and Street*, and the editions of *Clerk & Lindsell* before the last two (and for American authority, *Prosser*). *McGregor on Damages* says the matter is undecided, citing a dictum either way. However, the dictum so cited as being *in favour of* recovery of general damages was relied on by the majority in *Albrecht v. Patterson* (1886) 12 V.L.R. 821 (F.C.), who *denied* recovery beyond the special damages proved. In any event, the matter is best regarded as open.

On page 32 reference is made to the South African case of *International Tobacco Co. (S.A.) Ltd. v. United Tobacco Co. (South) Ltd.*, the correct citation of which is 1955 (2) S.A. 1 (W). The award of damages is said to have been £580,000 in respect of "an imputation that [the plaintiff's] cigarettes caused cancer". Presumably the same case is referred to when on page 218, n.9, there is mention of "the astronomical award of over £250,000 damages". This action was really one for a campaign of injurious falsehood that the cigarettes caused tuberculosis, not cancer, and the special damage was fully proved. The award was actually £574,241 (see 1955 (2) S.A. at p.32) and, if memory serves aright, the solution adopted by the defendant was to take over the plaintiff rather than pay the damages.

The *Tobacco* case, instead of being cited as above, is cited as "(1955) S.A. Law Reports April 1955". This is typical of the carelessness with which overseas authorities are cited. The citations to the Australian cases on pages 254, 255 and 260 are not only

unconventional, but misleading: thus *Livingstone-Thomas v. Associated Newspapers Ltd.* “(1969), Pt. 1 N.S.W. Reports 223” should be referred to as either (1969) 90 W.N. (Pt. 1) (N.S.W.) 223 (C.A.) or [1969] 1 N.S.W.R. 771 (C.A.); while without the date *Dawes v. News* “S.A.S.R. 312 at 319 320” is virtually meaningless. The problem is avoided in respect of Canadian reports, since no Canadian cases are cited. But even with English reports conventions are thrown to the winds. Square brackets apparently do not exist for this publisher and consistency of punctuation is not seen to be a virtue. The *All England Reports* are generally favoured over the official *Law Reports*, but every now and then an “official” citation is given as well. Why cite *Jayson v. Midland Bank Ltd.* as “(1967) S.J. 15th September, 1967, p. 719” instead of its affirmation in [1968] 1 Lloyd’s Rep. 409 (C.A.)? Why on page 68 must two such diverse methods be used in notes 4 and 5a for citations to reports in *The Times*? Why is “*ibid.*” sometimes used to refer back not to the previous note, but an earlier one (pp. 173 and 222)? And one could go on.

In fact, in a book intended for those “whose livelihood depends on the printed word”, the publisher ought to be ashamed of the presentation. There is an average of at least one misprint in every ten pages; in some sections many more. Even the Table of Contents does not refer accurately to the beginning of every chapter. The tables generally have an ugly format. It is a pity, because Mr. Carter-Ruck’s material deserved better.

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Les Droits de l’Homme et les Libertés Publiques par les Textes. By Maurice Torrelli and Renée Baudouin. Montréal: Les Presses de l’Université du Québec, 1972. Pp. xxv, 387.

Recent events throughout the world have provoked a widening interest in the promotion and protection of human rights: allegations of genocide in South America (e.g. Brazil) and Africa (e.g. Burundi) the expulsion of Asians from Uganda; accusations against British authorities in Ireland; repression against intellectuals and dissidents in the Soviet Union; as well as an increasing number of bills of rights

in national legislation. In some instances, this interest has been sufficient to lead to the introduction of university courses concerning human rights. Too often, however, the raw material for study, particularly on the comparative level, has been so dispersed as to make effective use extremely difficult, although the publication of Brownlie's *Basic Documents on Human Rights* has made matters a little easier, as have the two volumes on *International Protection of Human Rights* edited by Sohn and Buergethal.

The lacuna has been further reduced by the publication of *Les Droits de l'Homme et les Libertés Publiques par les Textes*, a collection of legal texts, both municipal and international, prepared by Drs. Torrelli and Baudouin. Their main source is the documentation found in the *Yearbooks on Human Rights*, published by the Human Rights Division of the United Nations. There could be a drawback in this since this material has been supplied by the countries concerned and readers may wonder how particular items came to be included as manifestoes directed to promoting human rights. This is particularly clear when considering reports from such members of the United Nations as South Africa. Because of the eclecticism of the editors, however, readers will have little difficulty in finding material in this collection which may reasonably be considered as legislation for the protection of human rights.

This collection is devoted to both municipal and international legislation. Since countries regardless of their political ideology nowadays tend to pay at least lip service to human rights, Drs. Torrelli and Baudouin provide a fairly wide representation of countries. The documents from Nazi Germany and Fascist Italy may well serve to remind us how easily documents on fundamental rights can become propaganda façades. It is interesting to note that under the heading 'Les régimes dictatoriaux' they also include the 26 Points of the Spanish Falange (1934), the Charter of the Spanish People (1945), and the Basic Law proclaiming the Principles of the National Movement (1958).

In addition, there are the relevant articles from the Portuguese Constitution of 1933, which are about as realistic from the point of view of the individual's right to freedom as the chapter reproduced from the 1936 Soviet Constitution. From a historical point of view it is interesting to compare these extracts, particularly chapter X of the latter, with the 1918 Declaration of the Rights of Labouring and Exploited Classes. The other 'dictatorial régimes' whose constitutions are reproduced are the Democratic Republic of Germany, and

the People's Republic of Poland and Yugoslavia. It is perhaps a little unfortunate that the learned editors have seen fit to list all three of these together with the Soviet Union under the rubric 'U.R.S.S. et Pays Satellites', particularly as no attempt is made to apply such ideological or political subjectivism in any other case, whether in Latin America or the Far East.

The European 'régimes libéraux' listed are Belgium — although one would never know from this collection that there is any conflict between the Flemings and the Walloons or that there is, as in Canada, a fundamental conflict in respect of the national language(s); France — beginning with the 1789 Declaration of Rights of Man and of the Citizen and ending with the 1958 Constitution, taking in Pétain's draft of 1940; the Federal Republic of Germany — while Germany recognizes that persons suffering political persecution are entitled to asylum, the same article of the Constitution protects citizens from extradition, presumably including those wanted for hijacking (Art. 16); Great Britain — Magna Carta, the Petition of Right, the abolition of the Star Chamber, *habeas corpus*, the Bill of Rights and the Act of Establishment, but omitting any reference to, for example, the Public Order Act or the Race Relations Act; Italy; Luxembourg; the Netherlands; and Switzerland — their version of the 1874 Constitution gives no indication that, although Art. 43 provides "1. Tout citoyen d'un canton est citoyen suisse. 2. Il peut, à ce titre, prendre part, au lieu de son domicile, à toutes les élections et votations en matière fédérale, après avoir dûment justifié de sa qualité d'électeur", women in Switzerland have still not received the right to vote. It is perhaps unfortunate that no document from any of the Scandinavian countries is included, even though Denmark, Norway and Sweden all guarantee a variety of human rights in their constitutions: Denmark (1953), Arts. 66-85; Norway (1814), as amended, Arts. 92-109; and Sweden (1809), Arts. 16, 85 and 114.

The first of the 'American' countries to be considered by the editors is Canada, which is represented by the Canadian Bill of Rights, the Saskatchewan Bill of Rights and the 1966 'Projet de Prologue' of the Quebec Civil Code. In view of the fact that this collection has been published by the Quebec University Press and is the only one of its kind in Canada, in either French or English, one might have hoped that Drs. Torrelli and Baudouin would have included the human rights legislation of some of the other Canadian provinces, such as Ontario or British Columbia or even the 1966 Anti-Discrimination Ordinance of the North West Territories. For the

United States there are the Declaration of Independence and selected paragraphs from the Constitution, together with Amendments 1-19, 21 and 24. Latin America is represented by Argentina — almost with prescience of the return of Peron, the editors have given the constitution of 1949; Brazil; Chile — the Constitution of 1925; Cuba and Mexico. In view of the extent to which the 1946 Constitution of Panama, as amended in 1956 is taken up with human rights, one might have expected this document in preference to one of those included.

Africa and the Middle East are represented by Algeria; Guinea; Iran; Israel — the Declaration of Independence; Kenya — the Constitution and the 1964 Law for the Protection of Foreign Investments; Liberia — the similarities between the Constitution of 1847 and that of the United States are, not surprisingly, somewhat close; Malagasy; Morocco; Senegal; Togo; and the United Arab Republic. Finally, in the section devoted to municipal legislation there is material from the following Far Eastern countries: India; Japan — by including the terms of surrender from the Potsdam Declaration and the 1945 Directive of the Supreme Commander on human rights, the background of the Constitution becomes crystal clear; Laos — the Constitution and the 1957 Law on Public Rights and Liberties; Mongolia — surprisingly this People's Republic is not described as a Soviet satellite; Pakistan; the Philippines; and the Republic of Vietnam — apparently regarded by the editors as independent when its constitution was promulgated in 1967. Neither the Republic of China (Taiwan) nor the People's Republic of China is included in this collection.

In so far as international instruments are concerned, the editors print only a selection of relevant European documents, while those from the Organization of American States carry the story only as far as 1954, and the material on the third world is even more rudimentary. While there is a section on enforcement with selections from a variety of documents, it is perhaps a little surprising to find the Statute of the World Court in this section, for its potential for the protection of human rights is somewhat minimal. One's surprise is intensified by the absence of such United Nations documents as the Universal Declaration of Human Rights or the two international Covenants. It is also somewhat disconcerting to find the material on the European Commission and Court, together with Protocols 3 and 2, respectively, printed separately from the European Convention itself. As to international criminal law, the editors have reprinted the

draft for an international criminal court annexed to the *draft* of the Genocide Convention — perhaps the Report of the 1953 Committee on International Criminal Jurisdiction to be found in the General Assembly records might have been more relevant; the punitive articles (227-230) in the Treaty of Versailles; and what is described as the instrument establishing the International Military Tribunal at Nuremberg — the editors refer to the text as that of Law No. 10 of December 1945 (which is what they in fact print), whereas the Nuremberg Charter was signed in August. In fact, it might have been more useful had they used the Resolution of the General Assembly affirming the Nuremberg Principles.

So far as it goes, this is a useful collection. It should be brought up to date periodically, with perhaps a little more judicious selection — there might be more use of Canadian materials and the definition of human rights might be so widely interpreted as to include such legislation as the Alberta Individual Rights' Protection Act. From the point of view of the student it is a useful adjunct to the works mentioned earlier, while for the francophone in Canada it fills a void. Perhaps one might express the hope that the publishers will see fit to use its documents, suitably amended, as the basis for a similar paperback publication in English — this would help to avoid the delays inherent in ordering materials from England or the United States.

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Amnesty International Report on Torture. London: Duckworth, 1973. Pp. 224. \$1.50, paperback.

As part of the 'celebrations' of Human Rights Day 1972 Amnesty International, which has done so much on behalf of 'prisoners of conscience', decided to launch an international campaign against the governmental use of torture, and this *Report* is the result of their survey into the position across the world.

Amnesty International is aware of the emotive character of the word 'torture' and of the concomitant desire of those who use it to find some pseudonym, although one might question the

implication that 'interrogation in depth' necessarily amounts to the same thing (p. 30). The nearest the *Report* gets to providing a legal definition of torture is to reproduce the comment of the European Commission of Human Rights in relation to the Greek issue: "The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. The notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation is unjustifiable" (p. 31). The Report rightly points out that the use of the concept of justifiability is most dangerous and readily open to abuse, and indicates the necessity of bearing in mind that cultural differences may result in what is regarded as 'torture' in one society proving acceptable in another. Kissing of the crucifix is cited as an example. Amnesty also draws attention to the dangers inherent in the demand of a government to be entitled to use a 'sliding scale' of intensity in interrogation when it considers its security to be at stake.

The most the Report can say is that "although there may be grey areas in defining those acts that constitute torture, there can be no misunderstanding about its unlawfulness. Under every relevant international legal document torture is prohibited" (pp. 33-4). For those who are interested in defining the 'black' area the discussion on medical and psychological aspects, together with the personal accounts with which the Report is replete, may serve as a guide. It must be remembered, however, that victims and their friends are often also the willing 'victims' of hallucination and exaggeration. Equally, care must be exercised when looking at matters allegedly connected with medical experimentation. It is perhaps surprising that while the Report condemns the United States for indulging in 'degrading anal searches' for drugs both before and after these were declared unconstitutional (p. 180), there is no reference to the use of medical experiments within the American prison system.

The Report deals with the use of torture in 61 countries, and while it includes such 'advanced' states as Belgium, the Soviet Union and the United States — surprisingly the prison systems of France and Italy are ignored — it is pleasant to find that there is no criticism of Canada. It is equally surprising to find that while there are case studies of the position in Greece and Ulster, these are

included in the chapter on 'Legal Remedies' and completely ignored in the 'World Survey of Torture'.

The Report concludes that "at present there exist few effective ways of stopping torture. We have seen that only in the case of Greece was proof of torture authoritatively established by an intergovernmental judicial enquiry. The Compton and the Amnesty International investigations in Northern Ireland coincided in their description of facts though they differed in the conclusions they reached. South Africa and Brazil have received much international attention, but their governments have instituted no special internal enquiry to examine the use of torture, and sharply opposed any suggestion of an enquiry from the outside. Amnesty International has also investigated complaints from Aden and Israel. In none of these cases, apart from Greece, did the international enquiries receive cooperation from the local authorities" (p. 218). It would be interesting to know why Amnesty International found it necessary, of all the middle Eastern belligerents or ex-belligerents, to pick out Israel for special comment in this way. This reader would have thought that the comments the Report makes on pages 211-214 show a governmental willingness to listen which is absent from the reports concerning the Arab states, against which similar or even more grave accusations of torture have been made.

In any compilation of this kind there is the fear of political bias and subjectivity. Nevertheless, it cannot be denied that any person interested in the defence of human rights or the maintenance of the rule of law will find the *Amnesty International Report on Torture* one of the more reliable sources of ammunition for his cause.

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International Legal Aspects of Federalism. By Ivan Bernier. London: Longman, 1973. Pp. xii, 308 \$4.95

Professor Bernier of Université Laval has written a masterly, though tedious, appreciation of the classical and contemporary international legal aspects of federalism. Given recent tendencies toward international integration, itself a federalizing process, Bernier's task was not

only to reconsider the international status of federations and their sub-units, but also to explore the relevance of that body of international law associated with federalism to such integrative efforts as the European Communities. Either objective would have been sufficient in itself; combining both in one book courted some potential risks. Happily, the author has succeeded in melding the two themes in one unified study. His scholarship is thorough in his command of both the publicists and the cases. The book is certainly timely for Canadian readers in view of the continuing controversy over the international role of the provinces.

Part One deals with such traditional international problems faced by federal states as personality, responsibility and immunity; while Part Two considers federalism and evolving international law and their mutual impact. Part One deals with the experiences of Germany, Switzerland, the United States, the Soviet Union and Canada in so far as their federal organization is internationally significant. Part Two, necessarily more speculative, is confined mostly to the evolving European Communities.

Bernier's discussion of the traditional international legal aspects of federalism gives disproportionate prominence to the disputations of nineteenth century European publicists and insufficient attention to more recent developments, particularly the Vienna Conference on the Law of Treaties held in 1968-69 and the Convention it produced. The Conference is, of course, considered, but its significance is blurred. However, inasmuch as the Conference ultimately settled nothing as far as the international legal aspects of federalism are concerned, Bernier's conclusions are clearly stated and as realistic as can be expected.

As to whether the sub-units of federations enjoy international status, the author rejects sovereignty-based theories and concludes that whatever international rights and duties these entities possess depends ultimately upon express constitutional delegation and international recognition. In reaching this conclusion, however, he relies extensively on nineteenth-century Swiss and German experience. Yet his own examination of cantonal and Länder 'treaties', upon which our understanding of the law is based, indicates that their subject matter differs little from those that American states and Canadian provinces habitually conclude with each other. Few Canadian or American writers, however, regard these minor administrative arrangements as "treaties"; nor, for that matter, do the individuals who conclude them. Another difficulty is that the instances of

cantonal and Länder transnational accords have declined dramatically over the years in contrast to the province-state agreements which have mushroomed in this century, particularly in the 1960's (16 Can. Pub. Admin. 481). Yet the North American practices contribute little that is new to international law, though they have served to reopen controversies thought to have been interred in the nineteenth century. Indeed, Canadian authorities have been reluctant to innovate in this field of law despite a greater need to do so than is the case in any other contemporary federation.

There are a small number of minor factual errors in the discussion of province-state agreements. The 1962 Minnesota-Manitoba highway accord (pp. 50-51, n. 198) is practically void, as the Manitoba authorities, at least, are loath to implement it. Also, contrary to the assertion on p. 59, n. 244, the Quebec Order-in-Council authorizing that province's participation in the North Eastern Forest Fire Protection Compact is No. 2497, not 2496. Moreover, the date of the agreement's entry into force is disputable.

Bernier's interesting discussion of federalism and international responsibility does not seem to be as clear as that in Hendry's *Treaties and Federal Constitutions* (1955). More seriously, he fails to mention the Convention on the Settlement of Investment Disputes Between States and Nationals of other States (UNTS, Vol. 575, 1966, No. 8359) according to which the federation of Nigeria, for example, could permit one of its constituent territories to be a party to an international dispute. In addition, he appears to shift ground concerning the importance of federal constitutions for determining the international rights and duties of federal sub-units. In particular, his discussion of responsibility in excess of competence lacks realism as far as some Canadian provinces are concerned. Ottawa might refuse to validate a provincial transnational agreement and yet lack the will or the power or both to prevent the execution of the accord. In this case, a province could deliberately attempt to exceed its competence in a bid for enhanced international recognition. Finally, the conclusion of the chapter is somewhat overstated given the welter of views and practices examined.

The chapter on federalism and international immunity is much more satisfying. However, it could have been improved by a more extended discussion of Canadian practices, particularly the status of provincial offices and agents in London, Paris, New York, and elsewhere.

As a prelude to consideration of the new international federations-in-process, Bernier reviews the well-known difficulties faced by federal states in accepting international obligations. Refreshingly, he devotes even greater attention to such existing remedies as federal state clauses, plural representation at international conferences and internal cooperation. The discussion, however, is sometimes confused. While Bernier correlates each remedy with a given state of socio-cultural integration, he fails to place them on the continuum that his correlation logically suggests. Moreover, his analysis of plural representation neglects the rich Canadian experience in United Nations, Commonwealth and francophone international bodies.

Bernier's transition to the international legal problems posed by contemporary movements of supranational integration is effected smoothly by his characterising federalism as a process rather than as a static legal formula. Viewed thus, federalism is akin to functionalism which is sometimes counterposed to the federal model for the purpose of international integration. Although I fail to see the purpose of his lengthy tracing of the federal idea, his account of the ways in which the contemporary supranational "federations" deal with the traditional problems of personality, responsibility and immunity is clear in the light of his discussion of classical federalism and international law.

Finally, he ponders the nature of the law required to adjudicate disputes between members of supranational organizations which are not quite federal unions, but which are more integrated than international public organizations. If traditional international law is inadequate for the purpose, then perhaps the experience acquired by federations in resolving the legal disputes of their territorial units is more useful. While Bernier carefully avoids premature claims, he does note a small though inconclusive amount of evidence that the federal experience has been taken somewhat into account in solving interstate disputes between members of supranational organizations.

Bernier's general conclusion is a masterfully precise summary of the main points of the book. His association of federal law and international law with different levels of societal integration is particularly noteworthy. In essence, he suggests that the more cohesive international society becomes, states could more likely find themselves borrowing from the practices of federalism in resolving legal problems that were hitherto international. However, he might have

coined a more appropriate metaphor than "love-hate" for describing the relationship between the two types of law.

In sum, Professor Bernier has contributed a very significant work that should inspire clearer thinking on international legal problems that are not always well-understood. As a synthesis of previous scholarship on the existing state of knowledge of the international legal aspects of federalism, the book is indispensable. In the light of this achievement, however, he might have been somewhat less modest in airing his own views because no new ground is broken in the book. Moreover, a good deal of repetition could have been avoided. Nevertheless, my criticisms of Bernier's volume are relatively minor and I commend it highly.

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The Brandon Packers Strike. By G. F. MacDowell. Toronto: McClelland and Stewart Ltd., 1971 \$12.50.

The Brandon packers' strike of 1960 was, as Professor MacDowell suggests, "a minor affair, involving only one hundred and ten employees"¹ and lasting six months, but it is the basis for a most interesting case study. A wondrous selection of "classic" factors and some "specials" were involved. A modest, one-man company was sold to "financiers" and, a young ambitious manager was appointed, ready and willing to break the established pattern of collective bargaining on the ground that the company could not afford to pay the union demands. There was tension within the union local between the "old guard" and the "new guard". There were allegations that union officials had misled the membership about the company's last offer, and there was an attempt by the company to negotiate directly with the employees, by-passing the union. The strike was legal but the strikers were dismissed and, finally, the strike was marked by violence which resulted in minor criminal convictions.

Mr. Justice Tritschler of the Manitoba Court of Appeal was appointed by the Provincial government to conduct a Commission of Inquiry, which resulted not only in the condemnation of the union

1. *The Brandon Packers Strike*, p. ix.

leadership but also revealed financial manipulations by the “financier” owners of the company which led to their conviction on charges of conspiracy to defraud in the making of a false prospectus.

The purposes of Professor MacDowell’s study, he says, “are to examine the events of the labour dispute; to analyze the issues in the light of the legislation and law; and to illustrate the sources of problems and conflicts by presenting diverse views of the issues.”² The strike at Brandon Packers does provide an excellent vehicle for all of this, but the aims are pursued in a rather disjointed fashion.

Professor MacDowell has fully familiarized himself with the law governing the various institutions of the labour relations system which were involved in the Brandon packers’ strike, as he demonstrates in Part I of his study. I found his essay on the functions of the conciliation board particularly good. He has, however, an unfortunate tendency to stray into fascinating corners of the law, like judicial review of arbitrators’ decisions, that were not involved in any way in the Brandon Packers’ dispute. This exacerbates the main shortcoming of the book: a lack of coherent readability.

The structure of the work makes it hard going. Chapters are elaborated by appendices and there are appendices to the book as a whole. One chapter has an addendum and most of them end with “summaries” which are not summaries at all but which elaborate and complete the narrative. There is, it appears, a reason for this. In the preface the author acknowledges his typist’s “cheerfulness and optimistic belief that the study would be completed . . . when I was frustrated and confused by the conflicting reports of publisher’s readers.”³ If Professor MacDowell had simply ignored the publisher’s readers the study might have given up something in balance and the effervescent value of being up to the minute, but would have made a much more readable book.

These criticisms duly recorded, I must hasten to say that I found it a highly stimulating exercise to work through *The Brandon Packers Strike*. It can be hard going, but for the student of labour relations law this careful examination of one particular dispute in its total context is an informative exercise and for any lawyer the reading of this study may well be an occasion for some fruitful introspection. This is, perhaps, a rather personal judgment and may be dependent on the fact that when the book came to hand I had just finished reading an article

2. *Ibid.*, p. x.

3. *Ibid.*, p. v.

entitled "The Quest for Professional Competence"⁴ by Dr. Andrew Watson, a psychiatrist who has been involved for years in the process of legal education. Against the backdrop of Watson's perceptive criticism of the methods and results of legal education, Professor MacDowell's study took on some special significance for me as a law teacher.

At one level I realized that very good use could be made of *The Brandon Packers Strike* and other studies like it in attacking one of the problems in legal education noted by Watson; that of "fact-consciousness". Legal realists, from Jerome Frank⁵ to today's exponents of a clinical law school,⁶ have impressed upon us that the continual reading of appeal court judgments and, for that matter, legal articles and texts, does not prepare the law student for realities of law practice where he will be faced with unclassified slices of life rather than "findings of fact". Exposure to the array of facts in Professor MacDowell's study, not raw facts but facts assembled by an economist rather than selected by a lawyer, could be very useful in developing in students the professionally necessary sense of relevance.

There is, however, another level of significance in *The Brandon Packers Strike*. A highly developed sense of relevance is a most important tool in legal problem solving, but, as Dr. Watson suggests, it does lead to a tendency to mentally mold the facts to a recognizable pattern so that the problem solver can get on with the job of dealing with "the legal issues". The very strong, usually unconscious, tendency is, Watson suggests, to suppress "life facts" which might make the legal solution unsatisfying.⁷ *The Brandon Packers Strike* provides an excellent corrective to this tendency.

Professor MacDowell's main source of material for his study was the report of Mr. Justice Tritschler's Commission of Inquiry and the transcript of proceedings before the Commission. MacDowell puts before the reader passages from the transcript which the Commissioner regarded as irrelevant and in the chapter entitled "Setting the Background" he paints a quite complete picture of the City of Brandon, the firm, and the union, including many facts to which the reaction of any lawyer will be that they are irrelevant. With Dr.

4. (1968), 37 Cincinnati Law Review 91.

5. *A Plea for Lawyer-Schools* (1947), 56 Yale L.J. 1305.

6. *A Plea for Clinical Law* (1972), 50 Can. Bar Rev. 183.

7. Watson, *supra*, footnote 4, pp. 101, 131 and especially 133-4.

Watson freshly in mind, I found myself realizing that in a labour dispute, where the central factors are human and economic, concentration on whether the preconditions specified for a given legal result are satisfied or not leads to a very limited perception of what has happened. For instance, the fact that the new owners of Brandon Packers had fraudulently removed thousands of dollars from the company's account had nothing to do with the legality of the strike, but would anyone other than a lawyer ignore that fact in assessing the rights and wrongs of the union proceeding to a strike in the face of management's protestations of inability to pay. Neither the employees, the union nor the manager knew of the fraud but in an *ex post facto* and legally irrelevant way it did vindicate the employees and their union leaders in feeling that, in breaking away from the pattern of bargaining in previous years, the manager was denying the employees "their fair share".

Exposure to 'life facts' such as this would not only present a law student with the kind of chaff of fact which he must learn to separate from the wheat, it might also cause any member of the profession to reflect profitably on the limitations of the lawyer's sense of relevance.

Throughout *The Brandon Packers Strike*, and particularly in chapter 5, entitled "The Conduct of the Inquiry", the author draws upon the transcript of the inquiry to document charges of what he calls misplaced "legalism". There are several illustrations which might be thought to support, at the same time, a somewhat more sophisticated charge levelled against lawyers by Dr. Watson, when he says,

The possession of impressive intellectual capacities often causes excessive use of the defense of *intellectualization*. This is a psychological maneuver whereby persons relate to each other and themselves primarily through ideas, even when emotional matters may be more pertinent. While this device is useful for neutralizing anxiety, it is my impression that lawyers use it to an extensive and inappropriate degree. It causes them to place too much emphasis on the verbal aspects of communication and not enough on the feeling-content and connotations which are present. To make it worse, lawyers have a multitude of technical tools, such as the rules of evidence, which reinforce that tendency. Their proclivity for playing semantic games is enough to drive off many less hearty souls⁸

A couple of examples must suffice. As is reported by Professor MacDowell, the Commission of Inquiry into the Brandon packers'

8. *Ibid.*, p. 113.

strike did not commence its hearings until after the parties had reached a settlement so neither was anxious to co-operate. The Commissioner was concerned about the usefulness of the inquiry, and so, to quote from the study:

In the course of the hearings witnesses were encouraged to express approval of the Commission, particularly from union members who, indeed, were in no position to give informed answers, since they could not know what evidence would be adduced, what interpretation would be made of it, what recommendations would be made, and what legislation would result. For example after the sensible reply, 'Oh, I don't know the outcome of the deal yet', Mr. Justice Tritschler interjected, 'Never mind the outcome of the deal. You have heard what has developed so far, do you think it was advisable that information be brought to light or would it have been better if it had been kept hidden?' The obviously forced reply, 'Yes, I think it was a good idea' was included in the report as proof of approval.⁹

One of the recommendations of the Commission was that there should be legislation making unions sueable entities. The following passage from the transcript resulted, ostensibly, from an attempt to ascertain the opinion of the witness, Mr. Olver, on this matter. Mr. Olver was the President of the Brandon local of the United Packing House Workers of America, having been just elected the year of the strike.

Mr. Arpin (Counsel to the Commission): There were statements made at one time by one of the Union Officers, I believe it was Teichrow, to the effect that the stuff that was coming out of Brandon Packers was just rotten. Do you remember hearing about that?

Mr. Arpin: And if it wasn't true it would be a most unfair thing to say, right? Now you know yourself that if you are going to spread out rumors or public statements, publish statements to the effect that the products of the Company are rotten, well some people are going to believe it and they're going to stop buying and as a result of it the Companys (sic) going to suffer damages, so it should be able, it should have the right and the means of being compensated for the damages it suffered as a result of the false statement. Right?

Mr. Olver: Yes.

Mr. Arpin: You think that is just unfair, that if anybody suffers damages as a result of a wrong made by somebody else, he should be given the right and the means of finding compensation for it. Right?

Mr. Olver: I think they have. I think the law does cover that.

Mr. Arpin: You think so, eh? Now if it does not — suppose somebody did that as a Union member for the purposes of the

9. *The Brandon Packers Strike*, p. 80, citing "evidence", p. 1148-9 and "Report", p. 55.

Union on strike, do you think the laws are adequate now to permit the Company to get damages?

Mr. Olver: Oh, I think so, yes.

Mr. Arpin: Well, please tell us how you go about it.

Mr. Olver: I don't know, I'm not a lawyer, but I imagine they are.

Mr. Tritschler: To cut it short you would have no objection to the law, being, that a union should be responsible for matters of this kind.

Mr. Olver: I don't think a Union should be responsible for all its members. If I had five children and one of them went out and broke a window, I couldn't hold the whole five of them responsible and I don't see that a Union should be held responsible. A man can go out and, on his own and have nothing to do with the Union at all.

Mr. Tritschler: If a local Union publishes false statements, in official Union pamphlets, do you think the Union should be responsible for those statements.

Mr. Olver: Oh yes.¹⁰

Professor MacDowell comments that "this intrusion of legalism was so insistent that the reader of the evidence (some 2,200 pages) becomes prepared to agree with Dick's proposal, 'let's kill all the lawyers'."¹¹ The passages quoted may not be convincing on this score, although they do seem to illustrate Dr. Watson's point about "intellectualization" and semantics.

Earlier in his book, in a more kindly frame of mind, Professor MacDowell suggests merely that "labour relations are much too serious to be left to lawyers".¹² He is not alone in thinking this, but I, for one, am not at all persuaded that labour relations would be better if lawyers were not involved. The laws regulating labour relations are complex, not because lawyers want them to be but because a complex human relationship cannot be effectively regulated by simplistic laws. The complexity of the law calls for advice and problem solving by legally trained people. The answer is not to get lawyers out of labour relations, but to attempt to ensure that the lawyers who are in labour relations are sensitive to the human and economic implications of their work, to the usefulness of other forms of experience and training and to the limitations of that mode of thought which is peculiarly "legal".

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10. *Ibid.*, p. 255.

11. *Ibid.*, p. 254.

12. *Ibid.*, p. 11.

