The Legal Point of View

L. C. Green

Follow this and additional works at: https://digitalcommons.schulichlaw.dal.ca/dlj

Part of the Jurisprudence Commons

Recommended Citation

This Book Review is brought to you for free and open access by the Journals at Schulich Law Scholars. It has been accepted for inclusion in Dalhousie Law Journal by an authorized editor of Schulich Law Scholars. For more information, please contact hannah.steeves@dal.ca.
Reviews


What is Law? By what criteria do we recognize valid law? These questions have exercised the minds of distinguished jurisprudential thinkers of the past. Every solution that has been propounded, whether in terms of natural law theory, command models, norm or rule models, seems to have been defective in one way or another. The main thesis of this book is that every attempt to find some "essence of law" — whether in terms of commands, rules or whatever — is bound to fail. The reason given is that there is not one and only one "true" conception of law. There are different perspectives from which law and near-law can be usefully treated. What is a useful paradigm for lawyers dealing with a sophisticated legal system may not be useful for the anthropologist. The standpoints of the "bad man," of the counselling lawyer, of the judge, and of the legislator, all reflect different slants on legal phenomena. When we look at law from a philosophical standpoint it becomes clear, in the author's view, that our determinations as to what is law will be based on evaluative models. We may think, as Kelsen did, that legal phenomena can be the object of a value-free science, but if so we are deluded, Samek contends. "Although we can point to instances of legal systems and of individual laws in the world, we can do so only in virtue of a scheme of interpretation of a certain range of phenomena which we have defined explicitly or implicitly by means of an evaluative model" [p. 89]. Rather than attempt to find some "essence of law," then, Samek suggests that legal philosophers approach the study of law through use of explicitly evaluative models. Models should themselves be evaluated not according to whether they are "true" or not, but whether or not they are fruitful. The notion of "fruitfulness" is appealed to repeatedly throughout this work.

A large part of the book is devoted to examining and criticizing the older models. There are lengthy summaries, with critical commentary, of the views of Hobbes, Bentham, Austin, Kelsen, Hart and Fuller, as well as some treatment of Backstone, Morris, Dworkin, Pound and Summers. One problem with this format is that the author's argument tends to get submerged in expository
material. He defends his method by saying that his new organizing concept of "the legal point of view" will be "largely constructed with the building blocks of the old models" [p. xvi] and that "in meshing my own ideas with what has gone before, the idiosyncrasy of my position can at least be judged against a broader canvas and a deeper perspective than it alone could provide" [p. xvii]. But the effect of this method is to place a considerable burden upon a reader trying to get a composite view of Samek's positive contributions. The studies, particularly of Bentham, Kelsen and Hart, are meritorious in their own right, however, and will be of interest to persons engaged in studying those authors. Space would not permit both a detailed evaluation of his treatment of these authors and an examination of the foundations of his own proposals. In this review I shall confine myself mainly to the latter.

The philosophical presuppositions of this book are subjectivist, relativist and pragmatic.¹ Samek does not believe evaluative judgements express truths or falsities. That he is a verificationist I conclude from statements such as the following: "Models of points of view can only be evaluative models; they cannot be assertive models, since they are not verifiable" [p. 40]. Given his meta-ethical affinity with Kelsen, it is interesting to see how his approach differs from the latter's. In contrast to Kelsen, he is not disturbed at the idea of admitting evaluative components to the study of law. One reason is that he thinks Kelsen does not succeed in providing a value-free theory of law. The attempt breaks down at the level of the "basic norm," supposedly an objective, logical requirement, but concerning which Samek says "the logical necessity of this presupposition is by no means self-evident. Indeed, it strikes one intuitively as unnecessary" [p. 181]. Furthermore, Samek does not go along with the shift in focus whereby Kelsen, having determined that a norm system is effective, concentrates on the basic norm as the reason for the validity of a norm system. "Kelsen is at great pains to distinguish the reason for the validity of a norm system, that is, the basic norm, from the condition of its effectiveness; but since the former merely rubberstamps the fait

¹ There is perennial confusion surrounding use of the word "subjectivist." One usage that is not implied here is that according to which ethical utterances are reports of one's evaluative feelings. Clearly, if as a psychological report on how I feel. Analogous considerations apply regarding interpretation of the term "relativist." In philosophical jargon, one would label Samek a "non-cognitivist," a general term which could apply either an "emotivist" or a "prescriptivist."
accompli constituted by the latter, it is a distinction without a difference” [p. 187].

A second reason is that Samek, in keeping with other modern subjectivists, has lots of room for the use of reason in constructing, defending and recommending value judgements. Thus Samek says “although evaluative models and expressions are incurably subjective, it does not follow that no rational choice is possible between evaluative standards acceptable as appropriate to one body of informed opinion and those acceptable to another” [p. 51]. Drawing on some ideas of Richard Taylor, he maintains that value judgements can be both validated and vindicated:

Validation is a method of evaluating the rational pedigree of an evaluative standard in depth. Vindication supplements the yardstick of depth by the yardstick of breadth. Man has not just one end, but many, and if they are all to be realized they must be *practically consistent* with each other, that is, they must not get in each others’ way. Hence what a person has to show in order to vindicate his adoption of an evaluative model, or his use of an evaluative expression, is not merely that they serve a particular end which he seeks to realize; he must also show that this end fits into a consistent set of ends. As a person becomes more conscious of the rational connection between his various ends, he may be said to commit himself to a way of life [p. 51].

A third and more fundamental reason for departing from Kelsen’s quest for a “pure science” emerges when we consider Samek’s early discussion of Wittgenstein. One of the upshots of that discussion is that “it is impossible to define the essence of anything in an absolute sense” [p. 13]. Furthermore, “there is no sharp line which divides ordinary concepts from model concepts, and all concepts are open textured to some extent” [p. 14]. Now it is possible that I am misinterpreting Samek, but I take him to be implying something like this: if all concepts, scientific, ethical or otherwise, take on different meanings according to the different purposes for which they are used, and are “subservient” [p. 13] to those purposes, it would seem difficult if not impossible to be completely free of subjectivity. Even where facts appear to correspond perfectly with a scientific assertion, it can be argued that “the facts” are construed on the basis of an evaluative model. Clearly, if the goal of absolute objectivity can never be fully realized in any sphere, it seems pointless to press for such a goal regarding law.
The reason I hesitate somewhat in ascribing the above views to Samek, is that he seems perfectly confident to talk about truth and objectivity regarding scientific assertions. He does distinguish between the scientific point of view and the point of view of philosophy of science and perhaps would admit that evaluations entered in from the latter perspective. But if so, it might be asked, do such evaluations not colour the concepts adopted from the scientific point of view as well? Here a problem of consistency arises: for Samek seems prepared to allow that evaluations made at the legal-philosophical level colour contentions made from the legal point of view — in other words, that judgements made from the legal point of view are not value-free. Should he not also be prepared to make the same judgement concerning science? I do not get a clear answer concerning Samek's position. It is open to him to argue that the scientific point of view differs in that it eschews the valuations of the philosophical-scientific standpoint, whereas the legal point of view admits some of the valuations of the legal-philosophical standpoint. I simply do not know what his answer is, but whatever it is, it would be helpful for clarifying the ideas in this book.

**Points of View:** Samek stipulates that a "point of view" marks out an exclusive field of interest, and that "consequently, points of view are mutually exclusive" [p. 38]. I use the word "stipulates" advisedly, since it is not clear to me that the notion "point of view" as I understand it necessarily excludes other points of view. He objects to Richard Taylor's inclusion of only partly normative elements into the normative point of view on the ground that this undermines the distinction between normative and non-normative points of view; he also objects to Taylor's contention that some points of view, such as the moral and political points of view, may overlap. Samek thinks the latter admission erodes the distinction between points of view. His reason is that the rules of relevance which Taylor attaches to given points of view would "hardly have sufficient binding force to give them concrete shape" [p. 38]. Here Samek seems to me to need more argument and elucidation, particularly in light of the importance he attaches to the impossibility of inconsistency between different points of view.

A concept which is used from a point of view is "bent by that point of view in the direction of a field of interest marked out by it," and "similarly. . . a model is bent by the point of view of which it is constructed" [p. 38]. Samek also holds that "points of view are not
linked with, or limited to, any particular functions of discourse” [p. 38].

So far, it would appear as if the notion of “point of view” is an evaluative notion. But we must be careful to distinguish, Samek says, between models of points of view, which are evaluative, and models constructed from points of view, which may be assertive and verifiable [p. 40]. “Strictly speaking,” he says, “it is an understanding, or an evaluative model of a point of view, and not the point of view itself, that marks out a field of interest” [p. 39]. This evaluative model of a point of view he calls a second-order or meta-model.

Samek’s meaning here is not entirely clear to me. Certainly there is a difference between evaluatively mapping a field to be designated “legal point of view” and, having accepted that field, making assertions about occurrences within it. We might adopt, for example, an extended form of the command model and they be led to treat a father’s command to his son as a kind of “law.” Accepting the framework of the command model the contention that the father has expressed a law takes an assertive form. But is it genuinely assertive, or assertive in form only? One can verify that the father gave the command and therefore, given the evaluative framework, that he expressed a law. But the assertion “he expressed a law” still carries with it the evaluative framework of the command model, and one who rejects that framework may equally want to reject the description of the father’s command as “law.” Exactly how the models constructed from points of view can escape being to some extent also evaluative is what Samek does not make plain. In fact, it is often very difficult to know when he is talking of a model and when of a meta-model. It is not surprising that he should feel it necessary to remind us that he has been talking about “the legal point of view, or more accurately...my evaluative model of it” [p. 337].

The danger attaching to confusion of meta-models with models is that a “point of view” not identified as one or the other can be used in one guise to reject the models of others (evaluatively), and in another guise to set out its own “essence-of-law” model (the evaluative side being played down). Samek criticizes both Austin and Kelsen for trying to “have it both ways”: that is, for appealing to some factual condition for legal validity and yet denying that it is the source of the validity. I sometimes wonder whether Samek, too, may not be “trying to have it both ways” stressing now the
subjectivity of all legal models, including his own, and at other times speaking as if he had, after all, something like an "essence-of-law" model, only superior to others. To say that this or that legal point of view is more "fruitful" and therefore should be adopted, may just be trading old essences for new. What is "law" perhaps becomes essentially that which will bear the particular kind of fruit sought, or the different kinds of fruit which different people seek for their own particular purposes. Since Samek never investigates the notion of "fruitfulness" at any length, such an interpretation, or misinterpretation, is an ever-lurking possibility.

As indicated above, Samek treats "points of view" as mutually exclusive and (hence) such that they cannot contradict each other. Since he has stipulatively defined "points of view" to be mutually exclusive the question to ask is not whether he is right or wrong to say they have this property, but whether any things corresponding to his definition can be found. Are there any "points of view" in his sense? If everything which we would recognize to be a point of view fails to have the feature of never contradicting another point of view we may well conclude that there are none. Let us examine a few cases, to see how things stand. We might conceive of cases where we would want to say that someone is "from a legal point of view, guilty of murder," but "morally speaking, perfectly innocent." Here, as Samek suggests, the concept "murderer" gets "bent" according to whether we adopt the legal or moral point of view. There is no contradiction. But consider another example, suggested by Lord Gardiner's bill before the English Commons recently, the Rehabilitation of Offenders Bill. This provides that after so many years a person convicted of one among certain classes of crimes may, if he has "gone straight" during those years and "lived down" his offence (i.e. has not been convicted of another offence), deny that he was ever convicted at all. Suppose that in a typical case, precisely of the kind envisaged by the Bill, a person fitting the description avails himself of the enacted bill's provisions in a courtroom setting. Could we say, without contradiction, that "legally speaking there was no lie, but morally speaking there was a lie?" The notion of lying is tied to misuse of speech conventions, with a view to deceiving; it is not tied merely to verbal falsehoods. The law would have great weight in re-casting the conventions, so that there could be genuine doubt as to whether the person could properly be said to be "morally speaking, a liar."
Without resorting to elaborate examples, we can question also whether a murder that is paradigmatic from the legal point of view — that is, where no plea can possibly be sustained in defence, as in an out-and-out case of wanton slaughter, in full view of witnesses, the killer perfectly sane, and so forth — could be intelligibly viewed as possibly not murder “from a moral point of view”? One can conceive of cases where it would seem absurd to say “it was murder from a legal point of view but not from the moral point of view.” Yet if points of view are exclusive in the sense Samek holds, such a statement must always be non-self-contradictory.

It is interesting in this regard that Samek himself regards the legal point of view as including morality as a component, although he claims it is “bent” in the legal direction.

The Legal Point of View: Samek’s own evaluative working model purports not to give us the “essence of law” but rather to demarcate a “field of interest” [p. 87]. The field of interest is “that mode of institutional social control which it enforces through the effective application of a norm-system by courts or tribunals acting as norm-authorities of the system” [p. 87]. The content of the norms “is adapted for the purpose of that social control from a range of values drawn from different points of view, and in particular from the moral point of view which provides the foundation of values on which a legal norm-system is based” [p. 87]. A norm must be impersonal, and the norm-subject must be different from the norm-authority [p. 56]. A norm which has the character of an obligation is action-committing, and a norm which has the character of a permission is action-guiding, “and I shall distinguish between a weak and a strong permission as follows: a permission in the weak sense is action-guiding in the minimal sense that it advises the subject that there are no obligation norms which explicitly cover the act in question. . .A permission in the strong sense is action-guiding in the positive sense that it advises the subject that he has the option of doing or forbearing from doing the act in question” [p. 62].

A necessary condition for there being a legal norm-system is that it be effectively enforced. Samek considers a system effectively enforced if its “machinery is effective for most of the norm-subjects on most occasions” [p. 89]. This norm model “relates individual laws to a hierarchical system on the philosophical analogy of the relations of norms to a norm system” [p. 94]. Every genuine norm is eo ipso a valid norm, since it is by definition an atomic unit of a
norm-system, that is, of an hierarchical system of impersonal prescriptions, the issuing of the lower units of which is enjoined or permitted by the higher’’ [p. 177].

On this account, legal validity has a ‘‘double aspect,. . . .namely the aspect of conformity with a legal norm-system, and the aspect of effective enforcement of this system’’ [p. 263]. Samek goes on to assert that ‘‘. . . .the validity of a given statute is not due to its acceptance as valid by officials, and to the obedience of the people; it is due to the fact that it is a postulate of an evaluative model that statutes are valid sources of law, provided that they are effectively enforced within the framework of a legal system’’ [p. 268].

This last statement calls for comment. It seems to make a claim about what makes a statute valid. But the statement is made in the context of a general denial that there can be any purely factual criterion for legal validity. Samek claims that any seemingly factual criterion will be found to relate to an evaluative model tacitly underlying it. Hence I do not see how Samek, if he is consistent, can mean precisely what he says above. To say that validity of a given statute is derived from the fact that it is a postulate of a given evaluative model is a purely factual criterion. What he must mean to say is that the claim that a given statute is valid must be made within the context of an evaluative model. If not, he would inconsistently making an exception for his own criterion of validity, treating his alone as providing an ‘‘essence of law.’’

Samek allows for a distinction between rules and standards within his model. The former are treated as prescriptions, while the latter are assertive or evaluative in nature. ‘‘An action-committing rule is either obeyed or applied, or disobeyed or not applied; an action-guiding rule is either followed, or not followed; a standard may be more or less satisfied or met’’ [p. 284]. Standards may be open or closed. The former require ‘‘considerable judgement’’ for their application, for example, the standard of due care or reasonableness. Closed standards, on the other hand, can be applied mechanically — for example a speed limit of 30 m.p.h. ‘‘General legal norms,’’ he says, ‘‘lay down broad principles which are to be used as open standards by the norm-subjects’’ [p. 284].

From the legal point of view the decisive factor is the ‘‘enforceability of the regulation by a court or tribunal (that qualifies as a legal norm-authority) through the application of the norms of a legal norm-system’’ [p. 299]. The legal point of view is concerned with man’s social aspect as such, Samek says. The moral
point of view includes the social aspect but much more besides. Legal obligation is distinguished from moral obligation in that each is "bent" in the field of interest marked out by the relevant point of view. The moral point of view is primarily concerned with action-guiding aspirations and action-committing obligations. The legal point of view is concerned primarily with action-committing norms. "The concept of sanction is only indirectly relevant to the former, but crucial to the latter" [p. 319].

We have seen that Samek has stipulated that there can be no logical conflict between evaluative models of the legal and of the moral point of view. It is also the case, he says, that no logical conflict can exist between evaluative models constructed from the legal and from the moral point of view. "The so-called conflict between law and morality is at bottom a problem of the overall consistency of ends in adopting evaluative models of different points of view, and evaluative models constructed from different points of view" [p. 319]. Here there seems to me some problem as to whether "consistency of ends" is sufficient. A group of thugs bent on overthrowing legitimate government might, consistently with their selfish aim, adopt a succession of quite conflicting evaluative models. If consistency of ends were all that mattered, we would have to say that these different models were consistent. At the heart of the matter is Samek's subjectivism. If legal models are evaluative, then we cannot show that another's model, however out of keeping with the views of the rest of mankind, is wrong. We can only try to show how the proponent of the model is not being consistent with his own fundamental values or commitment.

In the previous section I have summarized the bare bones of Samek's model. To underscore the importance of each component would require going over the treatment and criticism of the authors Samek deals with. I shall limit myself to a few observations. One of the main uses to which the model is put is to find a satisfactory relationship between law and morality that will given recognition to the sound points made on both sides of the Hart-Fuller debate. He disagrees with the contention that law is morally neutral, or that a model according to which law is viewed as morally neutral is a better model. On the other hand, he recognizes, as we have seen, a distinction in point of view between law and morality. His main arguments are concentrated against the positivist side. People do not understand by "law" something morally neutral, nor should they, he suggests. "Its social utility and authority rest on the tacit
presupposition that it accords with morality, that it makes no demands which may prove morally repugnant to those to whom it applies” [p. 334]. In this section of the book Samek goes further than ever before in admitting morality as a component of the legal point of view. Having carefully stressed earlier that morality gets “‘bent’” by the legal point of view, and that it loses the character of the moral point of view, he says that “‘a judge must adopt the legal point of view, yet he must never close the door on the moral point of view — and on other points of view — or he will cease to be a judge of the law and instead become its prisoner’” [p. 320]. The problem is intriguing, in that it is not clear how far that door should be open, or whether Samek’s proposal is a legal-evaluative one or a moral-evaluative one, or perhaps both. We need to remind ourselves of the mutual exclusivity claimed earlier for legal and moral points of view. We might also ask whether a judge really needs the moral point of view as such. Moral features are already built into the law, as Samek recognized earlier. He gives few examples and illustrations in the book, but I would think the common law principle of interpretation expressed by Lord Kenyon in *Fowler v. Padget* (1798)2 is one good example of a moral component that has been grafted in the course of time onto the legal point of view. Still, there must always be a first person to state such principles, so perhaps Samek is right to ask that the door be kept open to the moral point of view.

Applying his model to Fuller’s notion of the “‘internal morality of law,’” Samek concludes that to the extent that principles of good legal craftsmanship represent moral values they do so from the moral point of view and not essentially, while to the extent that they represent legal values they do so from the legal point of view and not essentially [p. 309]. He agrees, therefore, with Hart in supposing that logically, at least, perfect “‘inner morality’” (procedural justice) is compatible with considerable external immorality. I share Samek’s view here. Fuller’s notion that iniquitous rules will be difficult to apply is not true of many examples one can think of. Procedurally, there seemed to be little difficulty in denying women the vote in the last century, however unjust the practice.

Yet the alternative of treating law as morally purely neutral also does not seem right. Perhaps one truth underlying the hostility to

---

2. 7 Term R. 509 at p. 514, 101 E.R. 1103.
moral neutrality of law — a hostility shared by Samek — is that although segments of the population may have moral objections to certain kinds of legislation (for example some welfare legislation and guaranteed annual incomes), they can accept and respect such law on the understanding that the various powers that be have given effect to those laws out of a genuine concern for the collective well-being of society. Without beliefs in the general good intentions of those in control of the legal system, the populace would be less inclined to support it, and in the extreme case a police state would be necessary to give effect to the laws. Thus I can agree with Samek when he says that "if the authority of law were recognized without regard to its moral foundations, if law were debased to a soulless machine that could be used for any purpose, it could be turned against the very morality that it aims to protect" [p. 334]. There is surely room for accepting both the view that an individual statute may have enough of the features of law to warrant being treated as valid law, even though we think it immoral, and the view that the paradigm of law has moral features built into it, so that it would be misleading to treat the connection between law and morality as purely contingent. Hume was not far off the mark when he supposed that the legitimate moral partiality we feel to friends and relatives and those for whom we have strong sympathy, would frequently lead us to view a law as contrary to our moral sentiments. It is just because of our partiality, among other things, that laws are needed to distribute goods peacefully. There is a moral justification and purpose for the laws, but also good reason for supposing conflict to arise between law and moral sentiment.

Samek goes on to say that "it is only by means of its own internal morality and not by means of an external standard of criticism, that law can be prevented from becoming an instrument of oppression" [p. 334]. His reason is that, because of the autonomous aspect of the moral point of view, "the result of separating law from morality is to banish criticism of the law to the court of conscience of the individual and of his immediate family" [p. 334]. Surely, though, there are many instances where a well-argued autonomous moral judgement has been influential in shaping the moral views of a whole community. Furthermore, one might ask Samek whether what one calls the "internal morality of law" ought not, on his own principles, to be also a matter of one's own subjective, autonomous value judgement. It is true that Samek goes on to say "according to my model of the legal point of view, the only question is whether a
legal system qualifies as a legal norm-system. If it does, it cannot be invalid on moral grounds” [p. 335]. But it must be remembered that (1) built into his model are certain features of morality and (2) he is not claiming objectivity for his model. Someone else is at liberty to put forward another model such that moral grounds could invalidate the legal norm-system, if only such a model would be fruitful for his purpose. (One may ask again here whether there is not a covert appeal to objectivity in the notion ‘‘fruitful’’ or in the stipulation that the model must be fruitful? Or whether the stipulation is merely a higher-order subjective model of how people should go about constructing models: that is, a higher-order model which itself, being evaluative, is neither true nor false.).

Samek argues that his model has the advantage of enabling us ‘‘to look at old problems and puzzles from a new vantage point close enough to keep them in sight, yet sufficiently detached to give us perspective. This not only has the therapeutic effect of dissolving many apparently insoluble problems, but permits us to reinterpret them in a positive manner’’ [p. 339]. Yet we need to know whether the new problems and puzzles raised by his own model place us in a better or worse position. Instead of a true model, we must look for a fruitful one. But fruitful for whom, for what purpose? Models of discovery, or models of persuasion? Recognition of the different viewpoints from which law may be approached, and the desire to give them all a place in the sun, so to speak, can be helpful. His meta-model does help to resolve some of the essentialist perplexities. But I would submit that he dispenses too summarily with the notion of truth. As long as those who propose new models for law are to converse with the rest of mankind, they must link up with them in some way through the body of shared beliefs. They cannot expect that the mere acceptance of ‘‘subjectivity’’ as presupposition will carry any weight towards furthering acceptance of the more concrete proposals. As an element in furthering knowledge, understanding, or acceptance of more ‘‘fruitful’’ models of law, the observation that legal models are evaluative and subjective plays, in a strict sense, an idle role; it is simply out of gear. Whether we accept subjectivity or objectivity, we will still want to make intelligent, rational appeals for acceptance of our proposals. The appeals may be directed to the intrinsic beauty, neatness, workability of a model, to its helpfulness for understanding, to social benefits resulting from general adoption of the model, or to other pragmatic considerations. In any event, claims of a true
or false nature will have to be made if the scheme is to carry weight among those to whom it is proferred. Samek would not, I am sure, deny this. But his stress on subjectivity, for all that it is liberating in one sense, is unhelpful to the extent that it tends to obscure this last consideration.

Randal R. Marlin
Department of Philosophy
Carleton University


Behaviourist approaches to the humanities and the social sciences are by no means uncommon, and we find in modern approaches to criminology and penology constant reminders that criminals are sick and that we do not pay enough attention to their mental condition, although many countries have acquiesced by accepting the concept of diminished responsibility or by making use of mental surgery as part of their treatment of criminals. Now, Professor Ehrenweig has come to the conclusion that jurisprudence and legal theory generally may be approached from a Freudian standpoint — perhaps not as surprising as one might feel in view of his Austrian background. The main thrust of Ehrenweig’s argument is to be found in Part II of the book, that “after the establishment of a common denominator, legal philosophies can be identified and distinguished only as a matter of semantic choice made on psychological grounds” (p. 27). With respect, it is submitted that his own choice of the terms ‘philopsy’ and ‘psychosophy’ for what he describes as a new type of jurisprudence is similarly somewhat of the same ilk (pp. 145-6). Is not this all that one can say of a statement “The dualism of law and justice has permeated legal philosophy through the millenia and has been at the root of such perennial political problems as civil disobedience and criminal obedience. It reoccurs in each of us with the division of Ego and Id” (pp. 37-8)?

As with so many other works on jurisprudence, the first part of Dr. Ehrenweig’s _Psychoanalytic Jurisprudence_ is devoted to summarizing and commenting upon the views of more traditional legal philosophers, such as Kelsen, Hart, Ross, Savigny, Jhering, Gény, Ehrlich, Pound, the naturalists — both old and new,
he regards the differences among them as comparable to Don Quixote and the windmills (pp. 82-3). He is aware that each of these philosophers and the schools they lead concern themselves with gaps in the law and the need to fill them, but he contends that to a very great extent any difference arising in this connection does not stem from differing philosophies as from differing value judgments (p. 85). He points out that at the centre of modern juristic thought is the issue of the right to resist, but he warns that in considering this problem we “must be particularly careful in disengaging ourselves from the battles of semantics and emotions” (p. 87). When considering this issue he compares the views of Aquinas, Locke and Martin Luther King, considering the message of the latter to be close to that of St. Thomas — “Jurisprudentially, King’s postulate merely asserts that a posited rule is validly derived (concretized) from the apexnorm of the Constitution only if this rule requires the lawmaker’s own obedience” (p. 90). Closely connected with the right to disobey is, the learned author maintains, the counterpart of criminal obedience or the duty to disobey and he refers in passing to the problem of the post-Nazi German courts which have applied Radbruch’s unger-rechtes Recht. The classic example of punishing such criminal obedience is, of course, Nuremberg, but of this and the German decisions he says, “far from proving the ‘existence’ of such a [‘higher’] law, they merely disguise the ‘positing’ of retroactive, legislative or judicial repeals of earlier law to the contrary, and illustrate the fact that law is continuously made by value-directed concretization” (p. 94). He suggests that if this type of approach is adopted, then “criminal obedience, like civil disobedience, ceases to be a battleground of schools of jurisprudence” (p. 95).

One of the problems which has given most delight to jurists and on which, as Austin has shown, personal predilection plays so large a role, is that of ‘what is law?’ Dr. Ehrenzweig examines this problem jointly with that of ‘lawness’, and he does so in order to suggest that some of the claimed differences between, for example, the common and civil law are not as real as sometimes suggested. He uses as his final test the approach of the ‘expert on foreign law’, maintaining that “scholars should insist...that courts, lawyers, and their brethren everywhere recognize and admit what we do when we ‘apply’ foreign rules, namely that we interpret our own laws with our own techniques in light of our own views on ‘lawness’, or as it has been put so aptly,
that we act as architects rather than photographers of the foreign rules. Thus, despite many differences in mechanics, we might be able to promote in this area a convergence between the two legal orbits similar to that...of their concepts of law itself" (p. 141).

Part II of this work is devoted to an exposition of Ehrenzweig's special approach in which he participates in what he calls the struggle to liberate legal philosophy from a stalemate of two and a half millenia (p. 146), doing so by way of psychosophy, "the study of our minds, conscious and unconscious, as 'the science of sciences'. Only if we accept such a study's limitation and its promise can we expect guidance through the mirage of justice, whether it appear as an absolute or as a relation, as a pretense of reason, or as a tool of politics. On our path through this mirage of justice, law will be our steady companion" (p. 147). The author's seeking after the psychological bases of law leads him into a variety of sideways and byways, and he is highly intrigued by Lorentz's work on ethology and the importance of 'instinct', for "legal philosophers have at times spoken of an inborn instinct of justice which in both humans and animals shares with other instincts the mission of 'preserving the life of the race'. This view is strongly supported by ethological research. Forced and voluntary submission of many animals to authority may well be the first stage to the recognition of a 'legally' accepted ranking as the origin of our sense of justice since it contains instinctive aggression as well as fear, and since it attributes to 'each man his due'" (p. 156, italics in original).

Just as he is intrigued as much by lawness as law, Professor Ehrenzweig prefers 'justnesses' to 'justice', and these justnesses cannot be measured 'by such seemingly objective standards as equality, reason or politics. We are left with the conclusion, disconcerting to many, that we 'merely praise or condemn in the light of our own feelings'" (p. 157, c. Ayer). In asking us to accept his approach, the learned author discusses a variety of issues and refers, for example, to the drift from contract to status, so that nowadays we find the workman or the insured person, for example, seeking 'protection against their 'contracts' from a status protected by the state. The standard contract law of Israel (1964) offers a first tentative solution" (p. 161). It would have been helpful if he had expanded this comment. Instead, he merely provides a footnote "See Hecht [an article in the Israel Law Review]. A pertinent provision of the Soviet Russian Civil Code has been abandoned 'as no longer required'. Hazard [The Soviet Legal System] 316-317". 
Although the ordinary reader may feel that the author’s recourse to his psychosophic methods of analysis may be somewhat confusing (see, e.g., the comments on conflict of laws at p. 164), it cannot be denied that many of the points made by Dr. Ehrenzweig are substantive. Even traditionalists will probably agree that “our judgments of justness will and must always vary. But they respond to an emotion which appears to be common to all of us, though its range and intensity may vary according to each person’s psychological, or for that matter pathological, make-up. Only in this sense can we understand those who claim that ‘law is part of man’s essence’ or a product of man’s reason” (p. 183). Casual reference to the way in which the law concerning obscenity, abortion or homosexuality has changed confirms this, in fields which are generally treated as falling within the realm of morality, although Ehrenzweig in his discussion of the sense of justice expressly abstains from distinguishing justice from morals or ethics, for “the psychological structure of these concepts is the same for our purposes” (ibid.). Non-psychosophists might also agree that “the sense of justice determines law making in the same manner as hunger determines eating and the sex drive secures procreation”. But would those of them who have lived through the conscious ‘population stimulus drives’ of post-1919 France and of Hitler, agree that “only science fiction could construct a human being who would engage in the processes of eating and mating without being induced to do so by his instinct, but who would do so because of a sheer intellectual determination to continue his own life and that of his race” (p. ibid.)? It may equally be questioned whether many will go along with Ehrenzweig in his study of the sense of justice by using “Freudian studies of the two to six-year-old and post-Freudian speculations about the suckling and the toddler” (p. 193, see also pp. 200-1, and on ‘oedipal’ and ‘post-oedipal’ crimes, pp. 211 et seqq.).

The width of the author’s reading is impressive. It is therefore surprising to find him ignoring here the views of Glanville Williams, particularly when, in looking at problems of punishment, he states that “we rarely admit, and hardly ever face, the overwhelming impact of that ‘unofficial’ motor of much of our criminal law, our retaliatory urge” (p. 208) — but then he has used Fitzgerald’s edition of Salmond. Hermann Mannheim is a writer in this field whose work, even his Criminal Justice and Social Reconstruction, does not figure in Ehrenzweig’s vade mecum.
In so far as man's law abidingness is concerned, Dr. Ehrenzweig points out that one can not generalize for the whole field of criminal law, but must examine it almost crime by crime, and this is true also from the point of view of the purpose of punishment. With regard to what he calls post-oedipal crime, e.g., compliance with traffic regulations, he maintains that by and large compliance depends almost entirely on "‘a-moral’ prescriptions and prohibitions’" (p. 213), whereas with oedipal crimes there is an irrational desire for retribution even though it may appear as deterrence, and it if frequently used "unconsciously to counteract our own unconscious temptations. . . . Much of our criminal procedure reflects our desire for forgiveness. Anybody who has ever had a part in the investigation of trial of a crime, or for that matter of any litigated issue, knows of the relief it meant to him to receive or to witness a confession in a criminal case or even an admission of a crucial fact in a civil case. Consciously, to be sure, he will attribute his relief to having fortified his conclusions. But subconsciously he has gained freedom from his guilt, both its burden and its pleasure. The victim has turned into an ally and a co-judge” (pp. 218-9). As a result, society tends to reward the cooperative prisoner — perhaps the Watergate series of ‘plea bargaining’ prosecutions constitutes the finest example of this.

Dr. Ehrenzweig comments on the growing tendency towards humanization even in connection with oedipal and some post-oedipal crimes, but he warns as have so many before him that "‘where retribution prevails. . . there looms danger. Here aggression, purportedly displaced, may return with a vengeance’" (p. 220). He appears to be concerned not so much with the risk of a return to lynch law (but see pp. 236-7), but with criticisms of the substitutions for traditional forms of punishment that the state may introduce, but, as with his reference to the Israel contract law, the list of examples that he cites tells us nothing, unless the American reader is more fully acquainted with both American and German legislation than is the non-American. The trend to humanization has of course shown itself in connection with the defence of insanity and the gradual widening of the legal concept from that of the McNaghten test to a more acceptable common-sense view, but as a result "‘for some time now, . . . lawyers and psychiatrists. . . have engaged in a rather disgraceful game of pingpong, in which each profession attempts to leave to the other the final responsibility. Indeed, the new tests, while seeking to respond to medical
knowledge and demands, have in turn betrayed the law. What the law desires to know is whether or not to punish. Whenever society purports to treat the offender's 'sanity' as decisive, it primarily seeks to rationalize what is likely to become the result of irrational reactions of aggression or guilt' (p. 232). It is because of this 'irrationalism' that there is 'a compelling justification for retaining, as society's mouthpiece and tool, the jury or other lay bodies which are neither qualified nor compelled to articulate pseudo-rational argument where there can be only irrational reaction' (ibid.), but he does not feel the same need for retention of the jury in civil cases — save perhaps for a 'reparatory law of torts which continues to resist more rational schemes of loss distribution' (p. 275) — where abolition 'will immeasurably simplify process and thus help to protect the little man' (ibid.).

Enough has been said to indicate that there is much of interest and value in Ehrenzweig's Psychoanalytic Jurisprudence, while its title may serve as an additional attraction to both jurist and student alike. Its value to the potential reader, however, is likely to be lost if that person looks at the last paragraph: 'Man has reached the moon, that miniscule outpost of his own planet to which he must forever return. He has taken a glance into his unconscious mind in a miniscule flight from his conscious to which he must forever return. And brightly, and oh, so sadly, beyond Plato and Freud, a new 'Humanistic' science of 'Self-actualization' has set out to prepare us for higher insights 'transpersonal, transhuman, centered in the cosmos rather than in the human needs and interests.' It is that 'science' that as a latter-day religion is to prepare man's higher nature... for being fair and just,' — only to close a cycle that opened with Heraclitus' divine cosmos 3000 years ago. But the cycle beckons again. Faith and trust in absolute justice and truth again reveal their shallow roots in our frailty, like our ancient dreams of conquering the universe. Should another Plato seek to share with us his longing for the Sun in the shadows of his Cave, another Freud will teach us the wisdom of his resignation — in the eternal struggle between Eros and Thanatos, between man's love of life and his yearning for peace' (p. 281).

L. C. Green
Department of Political Science
University of Alberta
As Julius Stone notes in his characteristically graceful Introduction, Professor Ehrenzweig’s book itself, in the sense implied in Huizinga’s words, had to be written; for in the climate of our present age its theme struggled for articulation. It is, in fact, one of only a handful of really comprehensive, “scope” works on Legal Theory published since World War II, and in a very real sense one of the important legal studies of our era.

Professor Ehrenzweig’s book has a double purpose, and that fact, it must be admitted, in some respects adds to the difficulties in its comprehension. As the product of twenty-five years of teaching Legal Philosophy at the University of California at Berkeley, it is, of necessity perhaps for teaching purposes, a survey or compendium in which the main “schools” of Justice and Jurisprudence, from Plato to the present day, are identified and analysed; and in which the main alternative definitions of Law and the main alternative and sometimes competing theories of the “ends” or purposes of Law are classified comparatively through space and time. The author, a product of the rich Viennese cultural heritage, began his legal studies and entered the legal profession in the troubled Austria of the between-the-two-Wars era. The personal political tragedy that brought Professor Ehrenzweig’s flight to England, and ultimately to the United States, provided him with the need, and the occasion, of acquiring a second legal education, with the result that he became the master of the two main World legal systems — the Continental European Civil Law and the Anglo-Saxon Common Law. One thinks, in this regard, of the extraordinary enrichment, provided by the accidents of history, to the Anglo-Saxon Common Law legal theory in the middle and late 1930s. For our system was then in the comparative doldrums after the Americans Legal Realist impulse had begun to peter out, and the North American Sociological School of Jurisprudence’s teachings had become so largely accepted; and Man’s Inhumanity to Man and the forced emigration of so many distinctive legal thinkers from Hitler’s Germany and Hitler-threatened Central Europe provided a new and rich source of hitherto largely “alien” legal ideas.

Professor Ehrenzweig’s study, as a survey or compendium work on Jurisprudence, bears comparison to similar monumental studies — by Julius Stone (the massive trilogy: Legal Systems and Lawyers’ Reasoning (1964); Human Law and Human Justice (1965); Social Dimensions of Law and Justice (1966)); by Wolfgang Friedmann (Legal Theory, 5th ed., 1967); and by Alf
Ross, (On Law and Justice [1959]). But Professor Ehrenzweig is not as wide-ranging and thorough in his eclecticism as Julius Stone; nor as felicitous in presentation and styling as Wolfgang Friedmann. He is, indeed, rather closer, in design and the fixing of his immediate scientific objectives, to Alf Ross. For where, with both Stone and Friedmann, the author’s own personal legal philosophy is, in Cardozo’s sense, ‘‘interstitial’’, or at least secondary to the main objective of critically analysing and comparing through space and time the main legal systems, with Ehrenzweig the author’s own personalised approach to law becomes almost a contrapuntal theme to his survey outline. Where Stone and Friedmann and Ross, in this sense, are clearly committed, with varying degrees of emphasis and enthusiasm, to the sociological approach to Law — Stone more rigorously empirical and social scientific in orientation, in the North American tradition flowing from Roscoe Pound; and Friedmann and Ross seemingly a little more historically relativist in the Continental European tradition associated with Radbruch and Max Weber — Ehrenzweig commits himself to what must be described as a special value-oriented approach to law. Ehrenzweig’s approach is, indeed, an essentially intuitive, ultimately aesthetic assessment of law and its social functions and social purposes. This, the prescriptive as distinct from the purely descriptive part of Ehrenzweig’s study, will be the most challenging, and the most difficult, for the legal reader who is not himself trained also in advanced psychology. For these parts of the Ehrenzweig study borrow heavily from the works of Freud and Jung, with whom Ehrenzweig and his brother Anton, a specialist in the psycho-analytic approach to Art appreciation, were familiar from their own past associations with the cultivated intellectual milieu of the Viennese literary haut-monde of the pre-World War II era.

I cannot say that this part of Professor Ehrenzweig’s work is always clearly presented. His tendency to coin new words or phrases the better to communicate his concepts — ‘‘beautness’’, ‘‘psychosophy’’, or ‘‘psychophily’’ — may baffle and frustrate some readers. But the importance of the Ehrenzweig approach, here, is the attempt to break out of the confines of the endless jurisprudential debate over the Positivism — Natural Law dichotomy; to find some ways of escape from the seemingly ‘‘give-it-up’’ imperatives of academic legal relativism, in a crisis period in the Western World perhaps increasingly comparable to that Ehrenzweig himself experienced in Hitler’s Europe years ago.
The particular schools of Natural Law, whose postulated eternal verities may provide comfort and assurance for some, turn too easily into dogma with conformity thereto enjoined in the interests of political intolerance. On the other hand, concepts such as "Natural Law with a changing content", or Radbruch's search, in the post-World-War II atonement, for limiting principles as to what must be, in all "civilised legal systems", a statutory wrong and hence a "non-law", — tend, from the strictly jurisprudential viewpoint, to appear either purely vacuous or else hopelessly subjective. Ehrenzweig's frankly psychological, aesthetics-oriented quest for "super- eminent" legal principles common to all civilized legal systems — a sort of national law-based jus cogens, new jus gentium — is at least an interesting new attempt at devising ordering legal concepts of human dignity in an era of widespread ideological conflict and diversity and of philosophical pluralism.

Edward McWhinney
Department of Government
Simon Fraser University


Legal insanity seems to be a highly specialized subject. Many lawyers do not feel that they have — or should have — anything to do with it, just as many psychiatrists feel that they do not want to have any part of forensic psychiatry. In reality, however, the insanity defense constitutes an important problem closely related to fundamental issues of both law and science. There is a science of jurisprudence and there is a scientific core of clinical psychiatry, although this latter is often obscured by extravagant speculations and deep-sounding but actually superficial clichés and assertions. Moreover the insanity defense is a paradigm for the understanding of the relations between law, psychiatry and society.

After many centuries of search and research man found a way to cope more or less successfully with antisocial or criminal behavior. The result was the establishment of criminal law. This has as its foundation the concept of responsibility, formulated and codified in various but always juridical terms. Then the psychiatrist enters and draws conclusions about responsibility not on legal but on clinical
medical grounds. How to incorporate this is not merely a matter of an addition to the periphery of the law, but of something that touches its very foundation. Hence the importance of the insanity defense and the justification for evaluating Richard Arens’ book *Insanity Defense* not in a narrow frame but with consideration of the broader social-historical picture.

Professor G. V. V. Nicholls, in the December 1973 issue of this *Journal*, made the timely observation that all civilized systems of law have two objectives: certainty and flexibility. Flexibility, desirable and essential, as it is, can exist only if the firm foundation of certainly is untarnished. “Everyone should know in advance”, Professor Nicholls adds, “or be able to discover, how the law will affect him if he acts or fails to act in a given way.” This certainty is lacking in the United States of today to an extraordinary degree. Wide sections of the population have lost all faith in law and law enforcement. Serious crimes committed by those of high standing, such as perjury, bribery, destruction of evidence, even physical breaking-in into private or public places, have remained in a twilight of half settlement or no settlement at all. This is not flexibility; it is rigidity of privilege. And it has a far-reaching effect on our whole society.

For several years it has been sufficiently known that the now ex-president of the United States was guilty of legally forbidden acts and omissions of acts. Thousands of people with much less evidence against them are confined in jails. Yet again and again representative politicians, journalists and lawyers have stated that in the absence of formalized proceedings there can be no “certainty” about the presence and extent of the ex-president’s guilt. They have complained that they felt uncertain about it. I am reminded of the man who consulted a psychiatrist because he was so “uncertain” about whether his wife was faithful to him or not. Once he called the psychiatrist and told him that he had seen his wife in the evening walking with a man on the street. He followed the pair to a hotel and looked through the keyhole into the room they were in. “I could see my wife all nude’” he told the psychiatrist,” and then I saw the man all undressed, too. But then they turned off the light — and now I have that uncertainty again.” When the ex-president got a complete pardon the light was turned off. What German jurists call the *Rechtsbewusstsein*, the sense of justice of the people, was violated. The very concept of responsibility was put in doubt.
With regard to certainty of and trust in the judicial process the insanity defense is one of the most sensitive and vulnerable areas. That is understandable, but by no means necessary. Psychiatry and the law can work together perfectly well. Even for such a difficult subject as the psychological harm done by racial segregation in schools I was able, by scientific, clinical psychiatric testimony in a court in Delaware, to lay the scientific foundation for the later historical desegregation decision of the U.S. Supreme Court.¹

But in recent years the judicial-psychiatric process has been vitiated by tendencies in the law to abandon strict adherence to due process and by tendencies in psychiatry to neglect strictly scientific principles. Something close to the Watergate spirit has gradually invaded the field. A prime example is the case of Ezra Pound, a brilliant poet and critic, evidently guilty of a political offense, who was declared insane and confined in an institution on the basis of a totally unscientific psychiatric report.²

The frequent lack of equality before the law in United States justice is matched — or rather surpassed — by inequality in psychiatry, both in diagnosis and in treatment. In civil practice the rich man is apt to be treated as neurotic, whereas the poor man is labelled psychotic. But when a crime is committed the situation is reversed: the rich man is exculpated as psychotic, while the poor man is dealt with and punished as just neurotic. These differences are evident not only in the results of clinical examinations and observations, but also in the alleged more neutral results of psycho-diagnostic tests.

In recent years this situation has become enormously exacer-bated. To give concrete examples: I happen to be a pupil of Emil Kraepelin, the father of modern clinical psychiatry, who first described the mental disease dementia praecox, which Bleuler later named schizophrenia, its present designation. Having practiced psychiatry for over fifty years in clinics, hospitals, universities, institutions and private practice, I should by now know the symptoms of schizophrenia. But suppose I testify in court that a young man suffers from this disease in its most serious form. I may find myself confronted in court by two psychiatrists who testify that this young man does not have any mental disease at all; he may at

times be a little nervous, but that is all. Or assume that I testify for an old lady over eighty years of age. After the most careful examination I find her to be perfectly normal. There is some difficulty with immediate retention, as is compatible with her age, but her memory in general is intact, she is conversant with current events, takes good care of herself and handles her finances sensibly. Some relatives wish to contest her will and have her declared insane. So two psychiatrists testify that she suffers from advanced senile dementia and also from severe Parkinsonism.

Every experienced United States criminal lawyer knows that such experiences are not unusual. Apologists for the status quo will say that they are exceptional; but in my experience and to my knowledge they are typical. And the psychiatrists involved are not fly-by-night experts but are connected with leading universities and major hospitals. What happens in the courtroom is of course merely a symptom of more widespread, underlying frailties of the judicial-psychiatric system.

Current publications of forensic psychiatry do not reflect adequately this state of affairs and therefore they are not helpful in bringing about the much needed reforms in this crime- and violence-ridden period. What is lacking most is the study of facts, procedures and well-observed cases with prolonged follow-up. From psychiatric-legal publications on an exalted level of abstraction and generalization one can hardly guess what happens in actual life in and outside the courtroom and in and outside psychiatric institutions. In this general situation Richard Arens’ book *Insanity Defense* is important. It tells us what actually does happen in the courts, in the hospitals, in the press, in the political wings.

The book is an account of an interesting research project financed by public and private funds. An in-depth study was made of individual cases with an insanity aspect after the introduction of Judge Bazelon’s *Durham* rule by the Court of Appeals in Washington, D.C. (The *Durham* rule specifies that an accused is not legally responsible if his criminal act was the product of mental disease or defect.) The investigation covers the years from 1959 to 1963. The author is Professor of Law at Temple University in Philadelphia. A leading scholar in legal-psychiatric studies, he has a real understanding of the politico-social aspects of forensic psychiatry, as shown for example by his critical discussion of the book *The Crime Of Punishment* by Dr. K. Menninger in the
University of Toronto Law Review in 1971. He was trial counsel in most of the cases that are discussed, some in great detail, in this book.

St. Elizabeth Hospital, where many of the insanity determinations in these cases were made, is one of the best-known psychiatric hospitals in the United States. The U.S. Court of Appeals in Washington is one of the highest courts. That increases the importance of this study. But it is even more significant inasmuch as it reflects what generally happens in the rest of the country in applied forensic psychiatry. The book has an even wider appeal than this. As Harold Lasswell, professor of law and political science at Yale University, points out in his introductory essay, what is at stake is nothing less than the "denial of human rights". And indeed the book demonstrates that psychiatrists are given—or have taken—a great deal of unchecked power and that the psychiatric determinations of competence to stand trial and of responsibility are often not based on psychiatry but rest on other extraneous considerations. This is true not only of the public psychiatric hospital but also of private psychiatrists as well. These determinations affect a person's whole life. Needless to say, the poor and racially discriminated against are especially exposed.

There are lessons in the fact that the injustices and questionable practices, professional and organizational, documented in this book have been and still are accepted. An interesting part of the research is made up of interviews by project staff members of public and private psychiatrists active in criminal cases. It emerged that they had a strong tendency to allot to themselves in criminal cases the right to extra-diagnostic judgements. Some of the psychiatric and court decisions made in the wake of the Durham rule are noteworthy in this respect. For example, drug addicts, disturbed epileptics, serious sex offenders and persons with delusional and hallucinatory experiences were declared "without mental disease or defect" or even as "mentally healthy". Surely this justifies Professor Lasswell's judgement about "human rights". These arbitrary decisions interfere with both the rights of the individual and the protection of society. The attitude about irrational violence is typical. Confronted in court with the evidence that a defendant had attempted to throw his little baby into a burning fire and was prevented only by physical force from doing so, a psychiatrist testified: "I don't think it amounts to mental illness" and went on to hold forth on people "displacing their hostility".
The *Durham* rule has now been superseded by the *Brawner* doctrine which Arens discusses in the epilogue to the book. Durham, although it had some defects, embodied "essential democratic aspirations". The *Brawner* rule, from a progressive and humanitarian as well as scientific point of view, represents a definite regression. It is based on the American Law Institute’s Model Penal Code. Of it it can be truly said with Horace: *Parturiunt montes nascetur ridiculus mus*. It is not, as is claimed, an improvement over the M’Naghten rule. For instance, it substitutes "substantial capacity" for "capacity", or "to appreciate", for "to know", as if that would clarify anything. It is based on no concrete case studies, much less clinical ones. It has, as Professor Arens points out, "turned the clock back". This is a serious matter, for all but one of the federal appeals courts have now adopted the basic features of the American Law Institute rule. Devised by academic bureaucrats, the *Brawner* rule opens the door to a kind of Watergate psychiatry, where responsibility is arbitrarily assigned.

Arens disposes of the old idea that there is a communication breakdown between psychiatrists and attorneys. As Heine said long ago, when they do the wrong thing they understand each other only too well. *Insanity Defense* represents a blending of strictly judicial thinking, progressive social orientation, and respect for clinical science. It is a landmark in forensic psychiatry and humanistic jurisprudence.

Fredric Wertham
Kempton
Pennsylvania

---

3. The president of the American Academy of Psychiatry and Law told a Subcommittee of the U.S. Senate Committee on the Judiciary that the addition of the term "substantial" facilitates the presentation of psychiatric data. This is confusion twice confounded.
This volume was published as a "Green Paper" by The Honourable Allan J. MacEachen, President of the Privy Council, in July of 1973. Its author is presumably an anonymous public servant. In view of the widespread interest arising out of the well publicized Watergate Story the subject of conflict of interest as it applies to elected members is of considerable interest. The book discusses the present state of the Canadian law and contains guidelines and proposals for changes and a draft of the "Independence of Parliament Act". It also includes an appendix of proposed Standing Orders of Parliament to deal with the subject, and another appendix setting out existing Canadian legislation on the subject.

The Green Paper has been referred to the House of Commons Committee on Privileges and Elections together with the question of conflicts of interest as applied to the Members of the Federal Cabinet. This latter subject seems to be one of more immediate and paramount urgency. Members of Parliament do, themselves, have some influence on public affairs but they do not, as such, have executive powers, they do not make contracts for the Crown and they do not administer public funds. The occasions of conflict are minimal in their case as compared to the possibilities of conflict that arise out of holding a position in the Government itself. The booklet calls attention to the different attitudes that have been taken in the United Kingdom and the United States. The British have tended to rely on a minimum of written rules and on parliamentary tradition. The American Congress, on the other hand, has opted for a more codified approach to conflicts of interest. Typically the Canadian Green Paper's recommendations seem to lie between the two. I would recommend the British approach.

The difficulty of detailed codes is that the possibilities of conflicts of interest in the changing economic patterns are so varied and innumerable that there is no codification that can possibly be devised to cover all eventualities adequately. This is something like the old problem of whether courses in legal ethics are really of any assistance in upholding standards of the legal profession. One wonders, for example, how many of the lawyers involved in Watergate took at their law school's courses in legal ethics. It might be better just to adopt or adapt some of the excellent definitions of conflict of interest set out in the rules of equity developed in the
British courts. What could be neater than the following: "A trustee must not in any way make use of trust property or his position as trustee for his own interest or private advantage." And again, "A trustee must not intentionally place himself in a position in which his interest may conflict with his duty. He must not, therefore, enter into engagements in which he has or can have a personal interest which conflicts or may conflict with the interests of those whom he is bound to protect". (Halsbury Laws of England vol. 14, 3rd ed. and vol. 38, 3rd ed. 956; Aberdeen Rly. Co. v. Blackie Brothers (1854), 1 MacQ. 461, per Lord Cranworth. Regal v. Gulliver [1940]. 1 All E.R. 378, per Lord Sankey). Another problem that arises is how are the rules to be enforced; through the courts or by Parliamentary action? It has been stated that Members of Parliament cannot be relied on to check the misdeeds of their own colleagues. On the other hand, it may be that Parliamentarians under our adversary system could be trusted to deal intelligently, fairly, and with a great deal of insight with these matters. Reliance on Parliament itself to enforce the rules as to conflicts of interest seems to have worked well in Britain. Of course, where the matters are clearly criminal in nature, the courts are the appropriate tribunals.

I hope that lawyers and students will study this volume and give the benefit of their views on these matters to the committee which will be responsible for recommending necessary changes in the law. The fact remains that the trust of the people in their elected members is essential to a sound democracy. The pressure on Members of Parliament from varied special interests is undoubtedly a real one. In any proposed changes of the law there should be full disclosure of any potential conflicts of interest and full revelation of all financial interests of Members. Those elected to Parliament should not complain that their right to privacy is invaded if they have to disclose details of their financial position and interests. This should be part of the price of seeking to represent the people of Canada.

Andrew Brewin
House of Commons

Milan Bartos of the University of Belgrade, together with his colleague Milos Radojkovic, was probably the first academic international lawyer who put forward the contention that friendly coexistence constituted a fundamental principle of international law, and as a result friendly relations appeared on the agenda of the 47th Conference of the International Law Association held in Dubrovnik in 1956 (p. 11, n. 4). Since then there has been a widening recognition of the legal character of this concept culminating in the adoption of the Declaration of the Principles of International Law Concerning Friendly Relations and Cooperation Among States, by the 25th commemorative session of the General Assembly of the United Nations in 1970. In view of this historic background it is perhaps not surprising that the present volume of essays on the Principles of International Law Concerning Friendly Relations and Cooperation should have been produced by a group of Yugoslav scholars working under the auspices of the Belgrade Institute of International Politics and Economics.

Broadly speaking, these legal principles are nothing but the Panch Shila of the old days of the Sino-Indian honeymoon spelled out in legal terminology, or the principles of the United Nations Charter expressed in a more traditional view of sovereign rights slightly adapted to bring it up to date. Apart from the general editor's own contribution on codification of the principles in question, the papers are devoted to prohibition of the threat or use of force, pacific settlement of international disputes, sovereign equality, non-intervention in internal affairs, the duty to cooperate in accordance with the Charter, equal rights and self-determination of peoples, and the duty to carry out the obligations flowing from the Charter in good faith. In view of the recent debate at the Caracas Conference on the Law of the Sea where it became apparent that voting would only emphasize differences, it is interesting to note that the General Assembly's Special Committee charged with codification of these Principles, aware of the conflict between the older western democracies and the underdeveloped states and the Soviet group, agreed to vote in accordance with existing rules of procedure only when 'consensus' could not be reached (p. 11). According to Dr. Sahović, in the drafting it soon appeared that the
real conflicts were not between the ideologically opposed members of the United Nations, but between the small and the large countries, with states appearing "to be more sensitive to the preservation of their independence than to political considerations, so that in the course of the elaboration of the legal principles of coexistence the specific manifestations of bloc disintegration took place", with the Declaration formulated as a compromise (p. 12), and receiving universal acceptance.

Perhaps the most controversial principle established by the Declaration — for the principle to cooperate with one another in accordance with the terms of the Charter is but one aspect of the principle to fulfill in good faith the obligations assumed under the Charter — is that of equal rights and self-determination of peoples which is the subject of Dr. Olga Sukovic's paper. As she points out, this principle was not approved until the final meeting of the Special Committee, for "there was no agreement among members... on the legal nature, subjects and concepts of the principle of equal rights and self-determination of peoples. Difficulties also arose over defining the scope of this principle as distinct from that of the other principles..." (p. 323). The final formulation of the principle was clearly a compromise, and despite the unanimity with which the Declaration, with this as one of its parts, was accepted by the General Assembly there is still controversy as to the extent to which it has become a recognised principle of international law. All Dr. Sukovic says is that "the compromise formulation represents a step in the direction of affirming this principle as a rule of contemporary international law" (p. 324). The learned author acknowledges the controversy that still exists as to the legal content of this so-called principle of law, even pointing out that some Yugoslav writers regard it as a politico-moral postulate, but she herself takes the line that the Declaration on Granting Independence to Colonial Countries and Peoples is a clear assertion of its legal nature. She dismisses the views of those who question the legal validity of General Assembly declarations and sides with those, particularly the socialist and non-aligned countries, who define self-determination "as equal rights of all peoples" (p. 329).

Nevertheless it is interesting to see that, unlike so many of those who proclaim that the right of self-determination is one of the basic principles of the Charter, Dr. Sukovic admits that "it is not possible to draw unconditional and unequivocal conclusion on this principle's binding nature from where the Charter refers to the
principle of equal rights and self-determination of peoples’’ (p. 336).

Enough has been said of this one paper to indicate the interesting and reasonably balanced way in which its arguments have been presented. The same is true of all the contributions. In addition to the assessments of each principle put forward by the individual contributor, the volume provides an excellent survey of the work of the United Nations committees that were involved in this problem and the way in which the Principles of International Law Concerning Friendly Relations and Cooperation were evolved and ultimately formulated.

L. C. Green
Department of Political Science
University of Alberta

---


Despite its title, this work by Chief Justice Elias deals entirely with the Vienna Convention on the Law of Treaties. He has called it The Modern Law of Treaties because he believes the Vienna Convention "represents the new law of treaties" (Preface p. 7). To the extent that the Convention, though not yet in force, constitutes most of the corpus of contemporary law about treaties, his emphasis is appropriate but his title is misleading. The reader should beware not to expect a treatise on the whole of the law of treaties. As an exposition of the Convention, the author claims "this is the first systematic and the most detailed study of the subject by an 'insider'" and he hopes it will become a vademecum and a work of reference (Preface p. 8). In making this claim, he furnishes criteria for its review.

As an insider, the author is amply qualified to undertake such a study. He was elected to the U.N. International Law Commission soon after that body began work on the law of treaties and later became its General Rapporteur at two important drafting sessions. When the international conference was convened in Vienna, the author was elected Chairman of the Committee of the Whole Conference for both sessions and also served as chairman of the Afro-Asian Group of representatives.
The author's claim that his study is systematic is certainly true of his approach to the Convention. The substance of the Convention is organized into fifteen chapters, covering conclusion of treaties, observance and application of treaties inter partes and towards third states, interpretation, amendment and modification of treaties, grounds for and consequences of termination, suspension and invalidity of treaties, jus cogens, settlement of treaty disputes and the functions of depositing, correcting and registering treaties. His coverage of the Convention is complete even to the extent of pointing out what matters were omitted from it, such as application of treaties to individuals, state succession to treaties, the effect of hostilities on treaties and most-favoured-nation clauses (p. 17). But his claim to provide a useful work of reference would be substantiated more convincingly if his study covered the entire range of problems.

The Convention throughout avoids dealing with the consequences of the breach of one of its rules or of another treaty subject to its rules. This omission was deliberately made as a result of the conventional distinction between the law of treaties and the law of state responsibility. It would be a severe deficiency in the Convention if the International Law Commission had not already taken the whole subject of state responsibility under separate study. This justification is also adequate for the author's similar omission from his study of the modern law of treaties. But the same excuse cannot be made for his failure to discuss the relationship between treaty law, both under the Vienna Convention and the Convention itself qua treaty, and customary law, for instance with respect to non-signatories and other third parties.

The author's claim to be systematic is less true of his exposition of the Convention. It may be questioned whether the "most detailed study" is detailed enough. The historical context of the Convention's articles is quite sufficiently developed from the travaux préparatoires. The textual analysis of the Convention is well done. There is some useful elucidation of its likely implications in certain areas: for instance, the interpretation of treaties (Chap. V), the doctrine of clausula rebus sic stantibus (Chap. VIII), and, in particular, the invalidity of treaties and its consequences, to which more than one quarter of the book is devoted. Some suggestions are also ventured about its likely effects, especially where the International Court of Justice has already passed comment, as in the Namibia Case (pp. 117-118) and the Fisheries Jurisdiction Case.
But a deeper and thus more detailed explication of the consequences of the Convention for future treaty parties could have been made. Given the author's inside experience, much more of his "own personal views and assessment of the rules and principles as finally adopted" (Preface p. 8) would have been of special value.

Furthermore, to be a work of reference much more extensive referencing, whether as footnotes or appendices, is necessary. The travaux préparatoires of the Convention are just as valuable a resource for aiding its future interpretation and application as for elucidating its history. Indeed the author favourably considers the utility of travaux préparatoires for interpretative purposes in discussing the Convention's own rules regarding interpretation in his study (pp. 79-84). Many more footnote references to this material for this purpose could most usefully have been made. The author has appended the text of the Convention and provided a handy bibliography on treaty law in the English language. The inclusion, however, of just five non-English language references amongst the English ones is an inadequate representation of such sources. There is also a table of fifty selected cases involving treaty law, most of which appear to be discussed in the text, but to which no page references are given.

This book reads best as an expression of the common understanding about the Convention shared by the insiders. Such a commentary much assists the reader's comprehension of the Convention. Regretably, the distinguished author had the opportunity to provide, and led the reader to expect, rather more.

Hugh M. Kindred
Dalhousie Law School


Dr. Moskowitz opens his analysis of International Concern with Human Rights by pointing out that what is needed today is not repeated hortatory declarations affirming belief in and acceptance of human rights, but effective action on concrete issues especially before the United Nations, and he calls for the transformation of
international concern with human rights. . .from an arresting metaphor into a systematic theory” (p.v.), for he is convinced that “the present concept of international concern with human rights cannot become an advocacy that seizes the minds of men” (p.vi).

The author opens with a survey of what the United Nations has done so far and, using the example of the Soviet Union and Czechoslovakia, points out that ideological differences as to the dignity of man and the significance and sanctity of sovereignty prevent progress on the subject of human rights: “It is very difficult to delimit the area of operation in which the power of the state may be exercised to safeguard the peace and security of the realm; it is infinitely more difficult to force governments into molds of appropriate behaviour and to prescribe how nations may act out their internal conflicts, their collective will and purpose. Ideas that are the product of one civilization will not always galvanize another society unless they are reinterpreted in terms of that society’s own traditions and impulses” (p. 62 also p. 117). The fundamental problem is, therefore, to reconcile “different scales of values and to do it without bypassing the answers for a sweeping message of faith” (p. 63). His analysis of the United Nations in operation illustrates the difficulty and frustration inherent in a situation when the international organization, which after all is only the mouthpiece of the majority of its members, operates both as referee and partisan. As an instance he cites the facility with which the majority in that body have condemned Israel for war crimes and offences against humanity, completing ignoring the fact that these are technical terms which require judicial determination (pp. 82-4). Moreover, much of the apparent concern with human rights, at least since 1960, has been as an offshoot of the struggle against colonialism which tends to ensure that only those matters disliked by the Soviet bloc and the majority of the newly independent states will really get an airing, and any criticism of action by those states is likely to be met with the argument that it is an unwarranted intervention in domestic affairs and thus outside the competence of the Organization (v. ch. VII).

While Dr. Moskowitz is of opinion that “the cause of international human rights is not necessarily well served by the multiplication of unrelated procedures and the creation of new agencies and institutions”, he maintains that “there is no question that if international protection of human rights is to respond concretely to the imperatives of the age, it must be institutionalized
[for] in a world of organized power even virtue must be structured” (p. 107), and he sees the International Covenants together with the Optional Protocol as providing “the constitutional framework within which the necessary pressures can be brought to bear on the policies and actions of governments and within which procedures can be evolved to deal with violations of human rights” (p. 108), even though by themselves they are “a precariously scaffold to support the hope of the future” (p. 110). He also draws attention to the fundamental difficulty involved in assessing whether a state’s actions which abrogate or limit human rights are really demanded by the needs of national emergency or security, for “there is no way in which the international community can intervene, except by invitation of the legally-constituted authorities, to arbitrate between patriotism and treason. The old adage that treason is a capital crime unless it succeeds, in which case it becomes an act of heroic patriotism, is very much to the point” (p. 120). Moreover, as was clear from the attitude of the Council of Europe to the Papadopolous regime in Greece, intervention in these circumstances is often nothing but a demand that the established authority liquidate itself (pp. 124-8).

Much has been made in recent years of the need to establish a proper balance between the haves and the have-nots with efforts to achieve common standards of economic enjoyment, of which perhaps some of the discussions relating to the high seas as the natural heritage of mankind are exemplary. To some extent the Covenant on Economic, Social and Cultural Rights and the Economic Charter would appear to achieve this, but it must be borne in mind that “never in the history of the United Nations has a government of a State Member been criticized, let alone censured, for failure to provide an adequate standard of living, or the desired social services, for its people, neither in developed nor developing countries” (p. 132), and there is nothing to suggest that this is likely to change.

As to the future, the learned author points out how important it is to note that unrestricted enjoyment of all man’s rights may well lead to destruction of man’s very existence in view of prospects of over-population, pollution and ecological disaster, but he also reminds us how easy it is for the developing nations to suggest “that the developed countries were contriving a cunning and devastating scheme to use the issue of environment as a means of imposing controls on the population growth of the underdeveloped nations”
Because of this 'crisis in civilization', "an organizing principle and a source of positive values must be restored to the public realm and the world given a unified vision of human development capable of containing the irrational forces rampant throughout creation and linking the hope for social change with the values of freedom" (p. 147).

It is probable that no one will contradict the author's statement that it is not the Charter that has failed the international community, but, as U Thant stated, the international community that has failed to live up to its obligations under the Charter (p. 161), and this is as true of human rights as in any other field. On the other hand, while approving the idealism which underlies it, one may be tempted to question his statement: "There is no doubt that if a model of the world could be constructed which would demonstrate the precise cause and effect relationship between all the factors that enter into the human condition, establish the exact point at which they intersect, balance and evaluate the consequences of any shift in that balance and otherwise assess the probable effects of any given action, international concern with human rights would emerge as the one approach to the problem of man which not only moves nearest towards a predictable conclusion, but also brings harmony between proximate goals and ultimate ends and maps the road towards their attainment. There is no other approach that provides the motivation, the discipline, the tolerance and the compassion needed to deal with those problems than one which addresses itself directly to the elemental cares and burdens of man everywhere and which transcend all national boundaries and ideological divisions that block the road to true cooperation for the common good. If it be true that there is no 'scientific' solution to social problems, only a system of values whose end is man can successfully bridge the gap between his power to act and his power to foresee the consequences of his actions. There is no other dimension of international relations than concern with human rights that at once conveys the sense of interrelatedness of all the vital issues of the times and steers the world toward an international order capable of shouldering the herculean tasks confronting mankind" (p. 158).

While Dr. Moskowitz may not have put forward any really practical solution to make real the International Concern with Human Rights, his book provides a useful account of the inherent problems which militate against expectations of success from the United Nations. On the other hand, it serves to emphasize that what
is really needed for human rights to become realities is a fundamental change in the nature of man and in the ideologies of the states which both protect and endanger him.

L. C. Green
Department of Political Science
University of Alberta