Criminal Conspiracy in Canada

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Reviews


Criminal Conspiracy in Canada “is primarily intended to provide the practitioner of criminal law in Canada with a guide through the maze of law surrounding the inchoate crime called criminal conspiracy” (p.iii). This intention has been realized. Professor Goode has presented a thorough, clear and well-documented account of the intricacies of his subject as they are likely to affect a conspiracy trial. And intricate the subject is, because the nature of the offence is difficult to define, and because the evidentiary and procedural problems which attend the conspiracy trial are easily susceptible to misunderstanding and confusion.

Following a brief overview of the history of the conspiracy offence, Professor Goode begins his examination of the physical and mental elements of the crime. He quickly identifies a central conceptual problem in asserting that “the question of evidentiary matters constantly intrudes in any discussion of the actus reus, particularly in the courts, and is largely responsible for the dearth of definition of the actus reus” (p. 9). The problem, in other words, is confusion between the evidentiary basis upon which a conspiracy can be said to exist and the nature of the conspiratorial agreement itself. The result is the absence of a basic definition of the actus reus of conspiracy. The meanings of “agreement”, and frequently proffered synonyms for agreement (such as “common design”) are assumed by the courts. When is the relationship between persons such that it can be said that there is agreement between them? In answering this question, the courts have tended to rely upon assertions in the negative about the circumstances in which an agreement may be inferred. Conspirators need not know the identity of one another, and they need not have met, or consulted with or spoken to those with whom they conspire.¹ These assertions do not resolve the problem of definition. Nor do the metaphors which

describe the different types of conspiracies according to the organization or hierarchy of the criminal enterprise: "Wheels", "chains", and "cartwheels", have all been used to describe conspiratorial organizations. It is not clear that the use of such metaphors is limited to what may be a useful illustrative purpose. It may be that a pattern of conduct or the internal hierarchy of an organization or enterprise can be likened to a "chain" or a "wheel". It does not follow, however, that once a "chain" or "wheel" type of organization is established, the preconcert of its members in relation to a single purpose is an irresistible inference.

Professor Goode does not offer a definition of agreement, but he does make some necessary distinctions:

It is clear that conspiratorial agreement is not mere acquiescence in or knowledge of the plan; it is not a formal agreement in any way; it may be tacit or express; it is less demanding than contractual agreement, and it is more than criminal negotiation (p. 16).

It may be added, however, that the courts should explicitly and in positive terms set out the characteristics of agreement. There is, after all, no magic in the word. An agreement is a decision, made by the parties to the agreement, to pursue the object of a common intention. The agreement is a conspiracy if the object is unlawful. This is the essential question which the trier of fact must answer. The circumstances from which an agreement may be inferred, and the metaphors to which an organization may be likened, are but aids in answering the essential question. They are not substitutes for the answer.

Professor Goode's discussion of the mens rea of conspiracy is mainly directed to the decision of the Supreme Court of Canada in R. v. O'Brien and that of the House of Lords in Churchill v. Walton. O'Brien raises the question whether an alleged conspirator must have "an intent to agree, as distinguished from an intent to carry out the unlawful purpose" (p. 19), and the author suggests that O'Brien is not clear on this issue. One would think it safe to assume that, minimally, an intent to agree would be required, at least in looking upon agreement in a narrow sense as mere

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signification, verbal or otherwise, of concurrence. *O'Brien* could then be relied upon in support of the proposition that the intention to agree must be sincere, that is, the parties must also intend to participate in the common purpose with a view to achieving its object.

A more difficult problem is the nature of the *mens rea* required when the object of the conspiracy is a strict liability offence. This problem has been discussed in a line of English cases and, in 1967, the House of Lords ruled that persons may be convicted of such a conspiracy only if what they agreed to do was, on the facts known to them, an unlawful act. The problem has not arisen in Canada because, as Professor Goode points out, most strict liability offences are found outside the *Code* and, until recently, it was not clear that "unlawful purpose" in section 423(2) extended to unlawful objects outside the *Code*. Hopefully, Professor Goode is correct in his prophecy that Canadian courts will follow the *Churchill* decision. Strict liability may have a rationale of its own when considered, as it is for the most part, apart from the moral implications of criminal liability. It may be true in England, as pointed out by Asquith J. in *R. v. Clayton*, that conspiracy does not in itself carry particularly wicked connotations. Such is not the case in Canada where conspiracy is defined as an indictable offence with punishment of imprisonment for up to two years. It is serious enough that our criminal law enables certain conduct to be cast in a more serious light solely because it is done by two or more persons rather than by one alone. To allow this to be done when the object is an offence of strict liability without requiring proof of knowledge would be an unfortunate extension of the conspiracy offence.

The scope of the unlawful act requirement is the most important issue raised by the law of criminal conspiracy. The objects of conspiracy are defined, in some cases, quite narrowly in that the agreement involves pursuit of a specific criminal offence. But section 423(2) proscribes conspiracies to effect unlawful purposes. It has been accepted that the scope of "unlawful purpose" extends beyond offences in the *Criminal Code* to include other criminal offences and to breaches of provincial and even municipal law. Infractions of non-criminal laws may thus be elevated to indictable

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6. (1943), 33 Cr. App. R. 113; 65 T.L.R. 329n
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conspiracies simply because two or more persons have acted in concert. The question now is whether "unlawful purpose" may encompass a wider area of unlawful conduct at common law. The second chapter of Professor Goode's volume focuses on this question.

The chapter begins with an historical study of the unlawful act requirement at common law. Conspiracies to commit public mischief and to commit torts may be charged if, in each case, a loosely defined public interest is infringed. Professor Goode casts doubt on the Knuller and Shaw cases as authority for a charge alleging a conspiracy to corrupt public morals, but this too must be seen as a possible conspiracy at common law.

Professor Goode is appropriately critical of the vagueness and uncertainty of the conspiracy offence as it has developed in England. He then considers whether the common law on conspiracy applies in Canada and concludes that it may, but that there are sound arguments to the contrary — at least with respect to the application of some common law conspiracies. The fact that the Criminal Code does cover some of the unlawful acts which might furnish the unlawful purpose at common law, and the expressed preference of the Supreme Court for well-defined limits to criminal conduct can both be cited in this regard. Notwithstanding these observations, we are still left with the language of Fauteux J. delivering the judgment of the Court in Wright v. The Queen:

"the "wide embracing import of the term 'unlawful purpose' remains unchanged" — unchanged, that is, by the 1953-54 amendments which codified common law conspiracy.

A resolution of the possible conflict between section 423(2) and section 8 would at least clarify the scope of common law conspiracy in Canada. One possible interpretation of the sections read together, suggests that, although no person can be convicted of an offence at common law, a conviction may be registered for a conspiracy to commit an unlawful act where "unlawful act" may include conduct

C.C.C. (2d) 84 (C.A.); R. v. Jean Talon Fashion Center Inc. (1975), 56 D.L.R. (3d) 296; 22 C.C.C. (2d) 223 (Que. Q.B.)
which was unlawful at common law. In the words of Professor Goode, it is possible that section 8 "prohibits only common law crimes, not common law definitions" (p. 95). Because substantive common law offences have been abolished in Canada, this interpretation means that conduct which is no longer unlawful in Canada remains unlawful solely as an object of conspiracy. This interpretation adheres to the letter, if not the spirit of section 8.

The logical answer to the problem of interpreting section 423(2) lies in the recognition that "agreement" is not an abstract concept. An agreement is characterized by the object agreed upon, and if the object is no longer criminal in Canada, the conspiracy should no longer be criminal. Section 423(2) undermines codification of our criminal law by providing recourse to a potentially unlimited common law area of criminal conduct. It is to be hoped that the sentiments expressed in Frey v. Fedoruk\(^\text{12}\) will lead our courts to reject common law developments in the area of conspiracy.

In chapter three, Professor Goode discusses three problems on the subject of parties to conspiracy: conspiracies involving a husband and wife alone and with others, inconsistent verdicts in conspiracy cases and companies as parties to a conspiracy. The law with respect to the first and third problems is settled and fully discussed by the author. The second problem is not as easily subject to only passing comment. From the requirement that a conspiracy as an agreement requires the concurrence of two or more persons, a difficulty sometimes arises in reconciling the verdicts reached in the case of one or more participants. Governing principles have yet to be determined in Canada and some of the recent cases reveal a continuing concern with formal consistency on the face of the record,\(^\text{13}\) perhaps at the expense of ensuring logical consistency in the actual result.

The rule which empowered the courts to quash a conviction where there was an inconsistency or repugnancy on the face of the record was not born of a logical attempt to deal with the problem of inconsistency. It was, rather, a limited basis of appellate redress at a time when the bases for appeal were far more limited than they now are.\(^\text{14}\) The justification for the rule may have rested more on public policy considerations, and the courts' insistence that justice should


\(^{14}\) The history of the rule is reviewed in the judgment of the House of Lords in
be seen to be done, than on logic. The apparent absurdity in the conviction of only one conspirator and the acquittal of one or more others who allegedly conspired with him required either that an explanation be given as to why this result was possible, or that the apparent repugnancy be removed from the record. Because the former was not possible on the limited material before the appeal court, the latter inevitably became the approach to the problem of inconsistency.\textsuperscript{15}

The problem of inconsistent verdicts is unique in conspiracy cases simply because more than one person must be involved for the offence to take place. Generally, inconsistent verdicts of joint participants is not a ground for quashing a conviction.\textsuperscript{16} But conspiracy is an offence in which the convictions of the participants may be interdependent. If one alleged conspirator is convicted and another or others are acquitted, the courts should be in a position to determine whether there is inconsistency in this result. Upon the present bases of appeal, there is ample scope for this to be done.\textsuperscript{17} Professor Goode views the recent decision of the House of Lords in \textit{DPP v. Shannon}\textsuperscript{18} as recognition of this and as a significant improvement in the law on inconsistent verdicts. \textit{Shannon} represents a rejection of the narrow approach to inconsistency on the basis of the record. At the same time, the House of Lords may have gone too far in the opposite direction in the belief that the evidence against each accused will be the determining factor, thus overlooking the logical interdependence of some conspiracy convictions.

Professor Friedland has offered a test whereby a conviction would be quashed (where the issue of inconsistent verdicts is raised) "only when the verdicts make the appeal court suspicious whether the jury properly understood the issues or the evidence".\textsuperscript{19} This would be an appropriate test in approaching the problem of inconsistency in conspiracy cases. It is sufficiently broad to take account of the imaginable circumstances in which it might be unsafe

\textsuperscript{15} See particularly the judgment of Lord Salmon in \textit{DPP v. Shannon}, id. at 770; [1974] 2 All E.R. at 1048; 59 Cr. App. R. at 274
\textsuperscript{17} \textit{Criminal Code}, s. 603
\textsuperscript{19} Friedland, supra, note 18 at 205
to allow different verdicts with respect to co-conspirators to stand, and yet is not so narrow as to require at least two alleged conspirators to be convicted in every case in which two or more are charged. One difficulty with the test is the suggestion that it would only apply “in a case where both were tried by the same jury; it would not apply to trial by different juries or when one of the accused pleaded guilty and his co-participant was later acquitted”. However, Professor Friedland goes on to say that “in all cases there would have to be sufficient evidence that the principal offence was committed . . . , or that the co-conspirator is also guilty”. Recognition is thereby given to the interdependence of participant guilt and to the fact that different verdicts in different trials may require scrutiny in order to determine whether the conspiracy offence has been committed. It is suggested that Professor Friedland’s test offers the most reliable guide to the problem of inconsistency in conspiracy cases.

Modern communications are such that conspirators can plot from many different locations to perform acts in other locations. Professor Goode’s discussion of jurisdiction over conspiracy focuses on jurisdiction over an agreement made within the territory to commit an offence outside, and the converse situation of jurisdiction over an agreement made outside the jurisdiction to pursue an illegal object within. The two most important cases bearing on this subject are the decisions of the House of Lords in Board of Trade v. Owen and DPP v. Doot. In the former, it was held that a conspiracy in England to commit a crime outside England was not indictable unless the contemplated crime is one for which an indictment would lie in England. In Doot, the House held that a conspiracy formed abroad to commit a crime in England is indictable in England.

On the few occasions when Canadian courts have had opportunities to deal with the problem of jurisdiction in conspiracy, they have not expressly adopted Owen and Doot. Professor Goode suggests that the reasoning in both cases would find favour in this country. It may be unnecessary to speculate further on the question as section 423 of the Code now includes jurisdictional rules for conspiracy cases. Section 423(3) fixes the situs of a conspiracy in

20. Id.
21. Id.
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Canada for the purpose of indicting a party who, while in Canada, conspires with anyone to effect a purpose outside Canada which is an offence under section 423 and under the laws of the foreign jurisdiction concerned. Subsection 4 deems a conspiracy formed abroad to commit an offence under section 423 in Canada to have been formed in Canada. Subsection 5 allows a section 423(3) or 423(4) conspiracy to be tried in the place in Canada where the accused is found.

In chapter five, Professor Goode analyses the procedural problems involved in situations where an accused faces a conspiracy charge and a substantive offence arising from the pursuit of the conspiracy. Several cases which illustrate the different variations of the problem are discussed. Possible limits to joinder are considered and judicial objections to the practice are reviewed. The author’s argument that Kienapple\(^{24}\) may apply to conspiracy and the substantive offence is of particular interest because of its possible dramatic effect on current joinder practice and procedure. A useful summary of conclusions to the joinder problem is found at the end of the chapter.

Professor Goode’s volume is concluded by a note on evidence in conspiracy cases. In particular, the author examines the degree of proof necessary for conviction and the effect of a peculiar conspiracy exception to the hearsay rule.

The frequent relyances upon circumstantial evidence in proof of conspiracy brings into play the operation of the rule in Hodge’s Case.\(^{25}\) The problem here arises from the Supreme Court decision in Mitchell\(^{26}\) to the effect that circumstantial evidence of intent does not have to satisfy Baron Alderson’s test in Hodge’s Case. Spence J. stated that planning and deliberation were mental processes, and that conclusions respecting them were always based on circumstantial evidence. The rule in Hodge’s Case was concerned only “with evidence as to the commission of an act”.\(^{27}\) But, as Professor Goode points out, the “act” of conspiracy involves reference to a state of mind. Does Mitchell apply where proof of the act involves reference to a state of mind? Surely it makes little sense to suggest (as in R. v. Landriault\(^{28}\)) that the test demanded by Hodge’s Case

\(^{24}\) [1975] 1 S.C.R. 729; 44 D.L.R. (3d) 351; 15 C.C.C. (2d) 524; 26 C.R.N.S. 1
\(^{25}\) [1838], 2 Lewin. 227; 168 E.R. 1136
\(^{27}\) Id. at 478; 46 D.L.R. (2d) at 393; 47 W.W.R. at 601
applies to the act of agreement but not to the intent. Where, as in *Mitchell*, the act is a demonstrable physical occurrence, it is reasonable to make the distinction. The question of intent can be readily distinguished and subjected to a different test, or a different illustration of the reasonable doubt principle, whichever *Hodge's Case* may be. This is not so when the charge is conspiracy. The formation of an agreement is an act of the intellect on the part of each party to the agreement. Although there may be verbal expressions or other manifestations of concurrence, the existence of an unlawful agreement can only be established by indirect evidence. Both Professor Goode and the authorities preserve a distinction between direct evidence and indirect evidence of agreement, but the basis of any suggestion that a conspiracy can be proved directly is questionable. Even when a conspirator appears as a witness, he can testify directly only to his own intention and demonstration of concurrence, and to manifestations of a conspiracy — to other expressions of agreement and the acts done or words spoken in pursuing the unlawful object. But no one can see or otherwise directly experience the formation of a conspiracy.

Professor Goode’s discussion of the co-conspirator’s exception to the hearsay rule is of considerable assistance to those concerned with the peculiarities of evidence in conspiracy cases. The exception is simple enough to state:

... evidence of acts and declarations made by one conspirator may be used in evidence against another conspirator if, and only if, (a) the act or declaration is one made ‘in furtherance of’ the conspiracy, and (b) the act or declaration has been accompanied by independent proof of the conspiracy and of the adherence to it by the actor and declarer (p. 245).

The agency rationale for the exception is questionable, in the author’s view, and the requirements that the hearsay must be “in furtherance of” the conspiracy is ill-defined. It is difficult to consider the erratic application of the exception apart from problems with the hearsay area in general, and the author concludes that only codification can provide the needed certainty in this area of the law.

Professor Goode’s *Criminal Conspiracy in Canada* is a significant contribution to Canadian legal literature. Until this book, the conspiracy offence has been a “hot stove” in the sense that no one showed an inclination to put his hands on this area of the law, to wrestle with its finer points and problems, and to write a substantial work on this very difficult subject. More can be said about the
offence. Indeed the rationale for the continued existence of the conspiracy offence should be critically evaluated, and the application of the crime in a historical and political context invites further research and study. But Professor Goode has made an important contribution to our understanding of the law of criminal conspiracy.

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War crimes trials of enemy soldiers seem to be a matter of vogue. They were very popular after the Second World War, and the landmark cases, particularly the two international trials at Nuremberg and Tokyo, as well as the so-called subsequent proceedings at Nuremberg, have had a tremendous impact on the evolution of the international law of armed conflict. Yet, since the late 1940s, enthusiasm for such trials has diminished to a vanishing point among lawyers and laymen alike. Only one famous trial has taken place in the intervening period, namely, that of Adolph Eichmann in Israel. But this trial related to the same war, and, in fact, was confined to genocide and crimes against humanity, as distinct from war crimes in the strict juridical meaning of the term. Other opportunities to institute legal proceedings against war criminals were missed. Not that charges of war crimes have not been made (or even traded) in the various wars of the last three decades. Korea, Vietnam and Bangladesh are illustrative instances which immediately come to mind. Still, in the final analysis, none of the accusations was put to a judicial test.

In some individual cases, certain countries admittedly brought to trial persons from amongst their own armed forces who had committed acts amounting to war crimes. Lieutenant Calley’s court martial in the United States is an obvious example. But these proceedings scarcely count inasmuch as, legally speaking, the defendants were charged with offences under national rather than international law, and, realistically speaking, no state is too anxious to punish its own soldiers for “excesses” committed against the
enemy in time of war. When a country prosecutes members of its armed forces for criminal acts directed at enemy life or property, it appears to be sitting in judgment over itself.

Why, then, are war crimes trials directed at the enemy so unpopular at the present time? Essentially, because it is equally hard to trust a belligerent party to conduct an impartial trial against the opponent’s soldiers. The tendency to exculpate the misdeeds of one’s own soldiers is complemented by the corresponding urge to condemn the enemy. This is particularly true during hostilities: as long as war is raging, the atmosphere is not exactly conducive to a fair trial of members of the armed forces of the other side (not to mention the difficulties inherent in any serious attempt to collect the evidence, examine the witnesses, etc.). Even at the termination of hostilities, trials of enemy war criminals are often suspect: many observers believe (rightly or wrongly) that the opponent’s soldiers are presumed to be guilty until proved innocent.

Thus, war crimes trials seem to present an inescapable dilemma: whether held by the home country or by the enemy state, justice, even if done, does not appear to be done. The only effective way to cope with the problem is to entrust such trials to an international penal tribunal. Precedents for the operation of international military tribunals are to be found in the Nuremberg and Tokyo proceedings. However, these trials had been held on an ad hoc basis and the tribunals concluded their specific functions. Besides, in view of the fact that they had been set up by the victors against the vanquished, the proceedings were subjected to (largely spurious) accusations of partiality. The only solution lies in the establishment of a permanent international criminal court, which will be available whenever the need arises. But, at present (as in the past), support for the idea emanates mainly from jurists and academics. Sovereignty conscious statesmen and states do not find it appealing at all. So we are back to square one. Absent the appropriate international machinery, judicial proceedings against war criminals are usually viewed with distaste.

Nevertheless, the cardinal legal issues dominating war crime trials have always fascinated lawyers. First and foremost among these issues is the defence plea of obedience to superior orders, which is raised in such trials almost as a matter of course. The importance of the plea actually transcends war crimes trials for it can be — and is — resorted to, both in national and in international proceedings, whenever a hierarchical system exists in which subordinates owe obedience to the instructions of their superiors.
This new book, by Leslie Green, University Professor at the University of Alberta in Edmonton, deals with the problem of obedience to superior orders as it has emerged in national and international law. The book grew out of a report submitted to the Canadian Department of Justice, and, probably as a result, about two thirds of the text are devoted to an examination of the national legal systems of various countries, even though the author is best known for his previous contributions to international legal studies. The report antecedents are noticeable in the format of the work as well as in the fact that there are many lengthy quotations from court decisions, some several pages long. The book is nonetheless very comprehensive and entirely up-to-date. There is even a last minute addendum on the matter of the mercenaries in Angola (pp. 95-6).

The broad practical scope of the book should not detract from the significance of the theoretical questions analyzed by the author. The final conclusions of the book (pp. 364-65) appear to be based on a total disregard of obedience to unlawful orders, except in mitigation of punishment. The author does adhere to the popular school of thought, which believes that the real test lies in the "manifest illegality" of an order or; to use the terminology which he prefers, its "obvious criminality" (p. 362). Yet, though he entertains doubts about the possibility of employing unlawful orders which are not manifestly illegal as a defence against a criminal charge (p. 357), he finally restricts the role of such orders to the sphere of mitigation of punishment (p. 365). To my mind, this approach is wrong. I believe that, whereas obedience to unlawful orders does not constitute a defence per se, it may be taken into account — together with the other factual elements of the given case — within the bounds of a defence based on lack of mens rea, namely, compulsion (duress under threat or necessity to avoid fatal results in other circumstances) or mistake (in fact and possibly even in law). In other words, obedience to unlawful orders may play a role not only in mitigation of punishment. However, the admissible defence is compulsion or mistake, whereas obedience to orders should be regarded as part of the pattern of facts substantiating the presence or absence of mens rea on the part of the accused.

The main problem relates to the issue of duress. Although the author states that he has come to the realization that "the plea of superior orders was inextricably interwoven with those of duress and necessity" (p. viii), he seems to pay no heed to duress in his concluding chapter entitled "The Way Ahead" (pp. 354-65). This
is particularly unsatisfactory in the light of the thorough examination to which the question of duress as a defence in murder trials has recently been subjected in three separate decisions of the House of Lords, the Privy Council and the Supreme Court of Canada.

The first of these cases is DPP v. Lynch,\(^1\) which is discussed by the author (pp. 20-3, 69). Lynch drove a car with three IRA gunmen who killed a police constable in Belfast. Lynch was charged with murder as a principal in the second degree. His plea was that he had been compelled by duress to drive the car. The crux of the issue was whether the defence of duress was available in principle to an aider and abettor in a murder case. The House of Lords, by a majority of three (Lord Morris, Lord Wilberforce and Lord Edmund-Davies) to two (Lord Simon and Lord Kilbrandon), held that duress could indeed afford a complete defence to anyone charged with murder as a principal in the second degree.

The second case is Abbott v. The Queen.\(^2\) Abbott was a member of a commune in Trinidad. He took an active and leading part in the incredibly brutal murder of a girl who had been the mistress of one of the inmates of the commune: she was first stabbed and then buried alive. Abbott was charged with murder as a principal in the first degree. He too submitted that his participation in the acts resulting in the girl’s death was due to duress. The Privy Council, again by a majority of three (Lord Salmon, Lord Hailsham and Lord Kilbrandon) to two (Lord Wilberforce and Lord Edmund-Davies), held that duress is not available as a defence to anyone charged with murder as a principal in the first degree.

The last case is R. v. Paquette.\(^3\) Paquette drove two other persons on their way to commit a robbery in Ottawa, in the course of which an innocent bystander was killed. Paquette was charged with non-capital murder. His contention was that he participated in the robbery (by driving) only because he was forced to do it. The Supreme Court of Canada, in a judgment delivered by Martland J., in interpreting the Criminal Code, relied on the Lynch decision and held that the defence of duress was available in such circumstances.

The incidence of three major judgments relating to duress in less than two years is quite exceptional. It is noteworthy, however, that

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duress was rejected as a matter of law in one of the three (Abbott). And, on retrial in the decisive case of Lynch, following upon the House of Lords’ ruling, the jury rejected the defence of duress on the facts and Lynch was again convicted of murder. Thus, duress is still limited in its application: it is never available to defendants charged with murder as principals in the first degree, and even aiders and abettors cannot easily benefit from it. All the same, in some instances persons who are compelled to commit offences may be acquitted: Paquette is a good example.

Evidently, the three cases serve as precedents only within the ambit of the national legal systems involved. But the Privy Council did not ignore the related problem arising in the context of international law. It was stated in the Abbott case by Lord Salmon delivering the advice of the Privy Council:

In the trials of those responsible for wartime atrocities such as mass killings of men, women or children, inhuman experiments on human beings, often resulting in death, and like crimes, it was invariably argued for the defence that these atrocities should be excused on the ground that they resulted from superior orders and duress: if the accused had refused to do these dreadful things, they would have been shot and therefore they should be acquitted and allowed to go free. This argument has always been universally rejected. Their Lordships would be sorry indeed to see it accepted by the common law of England.\footnote{5}

This passage reflects accurately existing international law. No degree of duress may justify murder, let alone genocide, of innocent people. But not all violations of the laws of war consist of wholesale, or even single acts of, murder. A war criminal may, for example, be a soldier who plunders property without endangering human life. If a soldier commits such an act in obedience to unlawful orders and under duress, there is no reason why this fact may not be taken into account for the purpose of exemption from responsibility, as distinct from mere alleviation of sentence.

Whether or not one shares the author’s conception of the interplay of duress and obedience to superior orders, one cannot fail to be impressed by the wealth of material covered in the book. The author’s erudition enables him to master the intricacies — indeed the vagaries — of numerous national legal systems which have very

\footnote{4. Abbott v. The Queen, [1976] 3 All E.R. 140 at 143; 63 Cr. App. R. 241 at 243 
5. Id. at 146; 63 Cr. App. R. at 246}
little in common with one another. The book will prove invaluable to anyone interested in war crimes trials.

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The first edition of Transnational Legal Problems, 147 pages shorter and $6.50 less expensive than the present one, appeared in 1968. Its publication coincided with that of International Legal Process\(^1\) by Abraham Chayes, Thomas Ehrlich, and Andreas Lowenfeld, a book which introduced a “problem solving” orientation to International Law teaching. The novel approach of the latter gained it somewhat more attention in the law reviews,\(^2\) but Transnational Legal Problems was innovative in its own right. While Professor Steiner and Vagt’s book found inspiration in an earlier work by Professors Katz and Brewster\(^3\) and continued to utilise a large number of edited court judgments, the authors rejected the traditional approach to their subject which concentrated on the analysis of “rules” of International Law in favour of considering “problems which transcend national frontiers in some important way — and suggesting significant relationships among the different paths towards their solution”.\(^4\) Their goals were not to develop a “concept of coherent transnational legal system”.\(^5\)

In order to achieve a conceptual unity among the book’s thirteen chapters, its scope was further narrowed by an admitted concentration on “problems which are directly relevant to the

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1. (Boston: Little, Brown & Co., 1968)
4. H. Steiner and D. Vagts, Transnational Legal Problems (Mineola, N.Y.: Foundation Press, 1968) at xii
5. Id.
private participant — individual or corporate — in transnational activities". While the book was not intended to be used in courses on international transaction technique, its contents treated the "international movement, protection and regulation of persons or trade or investment" with a stated emphasis in the new edition on domestic regulatory and constitutional problems involving foreign affairs; the defense of human rights; the expropriation and protection of foreign investments; cooperation among national judiciaries; relationships among national legal systems in fields of criminal and economic regulation with extraterritorial reach and the role and activities of multi-national enterprises and organizations (particularly the European Common Market) (p. xvi).

As a reviewer, I am in the somewhat unique position of having taken two courses which used *Transnational Legal Problems* from one of the authors, Detlev Vagts, and also having engaged in private practice with heavy involvement in transnational legal matters. I have always found the original edition an excellent source book and starting point for private transnational problems. Indeed, a number of my colleagues in the Paris firm with which I practised used it in the same way. It goes almost without saying that the book is academically sound and stimulating; and, looking back upon it from a practical perspective, I can state without hesitation that the book itself — and a course based on it — has a substantial practical value as well.

Before proceeding to an analysis of the changes in the second edition, it might be well to say something about the book's utility in the Canadian context. From a Canadian law teacher's standpoint, the book's most serious drawback is its concentration on American cases and statutes. Most of the material dealing with transnational problems within national legal systems, the interpenetration of national and International Law, the role of national judiciaries in building a transnational legal system, and the transnational reach of national legal systems utilises American law as its primary focus, although it would be unfair to neglect mentioning the excellent

6. *Id.* at xiii
7. *Id.*
8. Most topic areas, for example, contain precise references to selected books and articles. Only really pertinent material is cited — there is no "fireworks" display of vague references to general treatises or articles. Other authors could profit from this example.
comparative law footnotes and comments, including some to Canadian problems.  

Nevertheless, the book has been used successfully in Canadian courses in which American legal content is relevant; for example, the Business School at Dalhousie uses it for its course on legal aspects of international business. It would have equal utility in a law course which concentrated on Canadian-American relationships from the private viewpoint, since it gives such an excellent synopsis of many American institutions, such as antitrust laws, securities regulation, and the constitutional system. 

Finally, even if the book could not be directly utilised in Canadian law schools — and I think it can and should be — one hopes that it might be an inspiration for a similar work from the Canadian viewpoint. That, of course, will not happen until there is a market for such a book, which can only happen if Canadian International Law teachers recognize the undoubted need for teaching their subject from other than the public law perspective. It is somewhat ironic that, while certain Canadian legal educators decry the overemphasis on private law subjects in the law schools, the International Law area is the almost exclusive domain of public international lawyers. The result is even more ironic in the context of Canada's undoubted need to generate expertise in the legal side of her international business relations. Canada's lawyers are being trained to view international problems as involving peace-keeping forces rather than trade and investment. This is not to say that lawyers should not study international legal problems from the view-point of the Minister for External Affairs. They should. But commercial economics in the international sphere are also of vital concern to the nation. A study of Professor Steiner and Vagts' work provides an excellent starting point for the kind of book Canada needs. 

Turning to the particulars of the second edition, the authors themselves note that it "holds to the basic structure of the first. Many of its changes simply reflect developments between 1967 and 1975" (p. xvii). The work is divided into six parts and thirteen chapters as follows:

I. Transnational Problems within National Legal Systems

Chapter one covers responses of a national legal system to aliens

9. E.g., when discussing the interrelationship between international agreements
and their activities. This chapter deals with immigration and nationality and particularly matters involving the protection of aliens under national law and alien access to economic activities. In the American context, this means dealing with constitutional issues, such as state control over aliens when in conflict with federal power and the equal protection clause of the Fourteenth Amendment, and the federal power to deport and exclude aliens and restrict access by aliens and naturalized citizens to federal jobs in the face of the First and Fifth Amendments. The potential provincial/federal conflict over regulation of alien activities was raised obliquely in Canada in Morgan v. Attorney General for Prince Edward Island, and it is likely that the Canadian Supreme Court will need to face the issue whether the provinces should continue to be able to bar entry to the professions and other areas of employment on the grounds of alienage. While the United States Supreme Court did so under Equal Protection and Due Process, it might well have proceeded also under the Supremacy Clause, holding that Congress intended to occupy the field and exclude state enactments. In the Canadian context, our Supreme Court would have to find the regulation of entry into various fields of employment by aliens as concerning "Naturalization and Aliens" rather than a section 92 power, analogous to the route which the United States Supreme Court did not choose to take.

and national law, the authors compare the American constitutional doctrine, under which federal treaty power authorizes the central government to implement the treaty with legislation over subject matter not normally open to it domestically, with the Canadian situation, where the federal government may not legislate to enforce treaty provisions trenching on provincial domain. Compare Missouri v. Holland (1920), 252 U.S. 416; 40 S. Ct. 382, with R. v Stuart, [1925] 1 D.L.R. 12; [1924] 3 W.W.R. 648 (Man. C.A.) and Labour Conventions Case (Attorney-General (Canada) v. Attorney-General (Ontario)), [1937] A.C. 326; [1937] 1 D.L.R. 673 (P.C.) (Can.)

10. E.g., Sugarman v. Dougall (1973), 413 U.S. 634; 93 S. Ct. 2842
13. Hampton v. Wong (1976), 96 S. Ct. 1895; 48 L. Ed. 2d 495
15. Cf. In re Griffiths (1973), 413 U.S. 717; 93 S. Ct. 2851 (state could not bar alien from practice of law solely on ground of citizenship)
Chapter two concerns the distribution of national powers for dealing with transnational problems, first, within the federal government (new material deals with the controversy over the power of the executive in light of the Vietnam War) and, second, in the federal structure, between the states and the central government (e.g., the question whether state “Iron Curtain” statutes, regulating distribution of local estates to residents in Communist countries, tend to undermine the federal power over foreign affairs).

II. International Law and its Relationship to National Legal Systems

Chapters three and four cover ground familiar to most International Law casebooks. Chapter three, “Distinctive Characteristics of the International Legal Process”, adds material not contained in the first edition on “jurisprudential issues about the nature of law and its relationship to the economic and political order” (p. xviii). The chapter discusses international tribunals, state protection of their nationals (e.g., persons, corporations, and the local exhaustion principle, the processes through which local law develops (custom, treaties, and international organization influences), and the conflict between local and International Law). Chapter four illustrates the international legal process through an analysis of an international minimum standard involving protection of the person, expropriation of alien-owned property, concession agreement problems, and the Calvo Clause. Chapter five looks at the interpenetration of national and International Law, again with particular emphasis on the American position with respect to customary International Law and international agreements before the American courts. The latter area covers the constitutional status of a treaty in the United States, types of treaties, and treaty interpretation.

III. The Role of National Judiciaries in Building a Transnational Legal System

Both because this is an American casebook and because it focuses

20. E.g., Interhandel Case (Switzerland v. United States of America), [1959] I.C.J. Rep. 6
21. The authors added some fifteen new pages on the Chilean copper expropriations.
on private commercial affairs, there is a strong emphasis on the role of courts in the transnational legal process. Chapter six, which discusses litigational immunity of foreign sovereigns and the American "Act of State" doctrine, has been reduced dramatically in length on the sovereign immunity question in view of pending statutory proposals.\footnote{Only recently enacted. Foreign Sovereign Immunities Act of 1976, Publ. L. 94-583; 90 Stat. 2891} Included under the "Act of State" section is the European reaction to the Chilean copper expropriations, as well as a tracing of the doctrine in American courts through and beyond \textit{Sabbatino}.\footnote{\textit{Banco Nacional de Cuba} v. \textit{Sabbatino} (1964), 376 U.S. 398; 84 S. Ct. 923. See also \textit{First National City Bank} v. \textit{Banco Nacional de Cuba} (1972), 406 U.S. 759; 92 S. Ct. 1808 and \textit{Alfred Dunhill of London, Inc.} v. \textit{Republic of Cuba} (1976), 96 S. Ct. 1854; 48 L. Ed. 2d 301}

Chapter seven, "Civil Actions in a Transnational Setting", may be considered by many more suited to a book on the Conflict of Laws. The chapter compares jurisdiction to adjudicate and recognition of foreign judgments in the United States and in a number of European countries. It also looks at choice of forum clauses, international commercial arbitration, and the obtaining of foreign evidence for domestic civil use. Because the chapter takes such a comparative law approach, it is not a repetition of the Conflict of Laws course. Indeed, with students in many law schools not electing to take Conflicts, inclusion of such a chapter is indispensable in a course which lays such emphasis on private international transactions.

IV. The Transnational Reach of National Legal Systems

This part is divided into three chapters. Chapter eight looks at the transnational reach of criminal legislation, chapter nine at economic regulation, and chapter ten at income taxation. Chapter eight has been expanded with emphasis on the development of the International Law of crimes from Nuremberg through the Vietnam War. Chapters nine and ten are vital to any Canadian lawyer engaged in a practice involving the United States. The material first notes the connection between modern American choice of law methodology and statutory interpretation in many of the American economic regulation cases. It then proceeds to analyse particular statutory schemes and cases arising under them, such as maritime regulations, anti-trust laws, and securities statutes. Chapter ten
gives a quick sketch of American questions of taxability of foreign persons and laws controlling taxation of investments outside the United States, an area of obvious concern to the Canadian lawyer.

V. Trade and Investment in the World Community: Legal Structures, Policy Context and Case Studies; VI. The Developing Processes of International Organizations

Chapter eleven discusses GATT and the IMF in a much more shortened form than the first edition of the book, in favour of new material on the multinational enterprise and international business transactions in chapter twelve and the Common Market in chapter thirteen, the latter taking in all Part VI. From a practising lawyer's viewpoint, this was probably a wise decision. While the GATT and IMF arrangements have undoubted impact upon transnational commercial transactions, that impact is usually indirect; the private lawyer rarely needs to consider those organizations in the manner that he must examine, for instance, EEC Commission policy when dealing with the Common Market. Relegation of the GATT/IMF to background status is more consistent with the thrust of the rest of the book.

Parts V and VI are specialised areas and need not necessarily be included in a basic course on transnational legal problems. In fact, Professor Vagts ended his consideration of the book in his basic course with the transnational reach of national legal systems, omitting the tax materials, and then used the more specialized materials as background for a seminar on international business transactions. The inclusion in the second edition of materials studying typical distributorship and licensing agreements and the international joint venture are undoubtedly outgrowths of materials used in his advanced seminar.

The book is a long one, and the authors quite candidly suggest pruning for use even in a course running as long as sixty hours. Their approach tends to be problem-oriented, and they have included challenging problems for the student (and teacher) with which to wrestle during the class period. The problem approach can be used effectively as the text covers a great deal of background material, and the need for imparting information by lecture is generally obviated.

Transnational Legal Problems is unique, in that it serves well in teaching and has continued usefulness as a general reference work.
When I was first introduced to the book, many of my fellow students were of the opinion that it was among the best that they had had during their law school careers. I think that they were right, and, taking a look at the second edition, what they said then still holds true.

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*International Law Chiefly as Interpreted and Applied in Canada.*

A third edition of any title, let alone a Canadian legal volume, is an achievement. It shows staying power and thus, presumably, utility. Professor Castel's *International Law Chiefly as Interpreted and Applied in Canada* has stayed the course now for eleven years. This fact may cause some surprise, for his casebook has not apparently been employed particularly widely by teachers in common law schools. The third edition merits greater popularity.

Its strengths are easy to recount. First, it is up to date. In such a fast moving field as international affairs, the latest teaching book will automatically have an edge over its competitors simply by collating the latest legal events and developments. Professor Castel achieved the inclusion of materials through the second half of 1975. Thus he has collected and edited, for example, important documents on the Charter of Economic Rights and Duties of States (p. 73 ff.) and the Informal Single Negotiating Text of UNCLOS III (p. 241 ff.).

Secondly, the volume contains a great wealth of Canadian experience and example. The importance of this material cannot be overemphasized. International Law is truly an international subject and knows no jurisdictional boundaries. Comparative national and regional approaches to it should therefore be part of any university course. It may seem paradoxical and parochial, then, to praise such high Canadian content in Professor Castel's casebook. It is not so, for two strong reasons.

As a practical matter, note must be taken that Canadian, not international, students are the principal readers. Most of their
experience and certainly all of their other legal education will have been national, if not narrower. It will have been limited to a Canadian or provincial jurisdiction. Against such background, examples of Canadian involvement in world affairs are frequently the best, if not the only, means to expand students’ horizons and understanding of the international legal system.

Moreover, for Canadians, knowledge of Canada’s actions and stances on International Law is of primary importance. Foreign approaches and conflicting opinions must certainly be introduced for a thoroughly international education. Indeed, the international legal process cannot be understood without a knowledge of the opposing viewpoints to be expected in the daily interactions of state and diplomatic intercourse that constitute it. But the doctrinal character of the subject, founded and still maintained on the basis of sovereign national authority, continues to demand, perhaps regrettably, that a national perspective be foremost.

The richness of Canadian material in Professor Castel’s new edition is therefore to be praised. It is, indeed, the only commercially available collection of Canadian governmental statements and court decisions on international matters. The convenience of this compilation should not be underestimated. Although the Department of External Affairs freely makes many documents available, they are not prepared for convenient classroom use. Nor can teachers and students all troop to Ottawa in search of other materials. Professor Castel has made such an effort and has edited a remarkably varied and insightful selection of Canadian reports and documents.

But the third edition regrettably maintains old faults. It is far too long. The thirteen hundred pages are crushing by their sheer weight, let alone price. No standard length university course can employ all this material. Moreover, so many pages have so much small print that, as well as being hard to read, the volume would, if reset, be easily half as long again.

Part of the problem of length continues to be attributable to unnecessary repetition. Too often, too many illustrations of the same point are given, as if a complete catalogue were necessary. The error occurs as much over strings of cases on the same point, such as the host of decisions on the implementation of treaties in Canada (p. 973 ff.), as with repetitious examples of government actions, for instance, the recognition of foreign states by Canada (p. 86 ff.).
Another and particularly irritating source of repetition is the duplication of the same materials. A case, such as *Le Gouvernement de la République Democratique du Congo v. Venne*,\(^1\) may be first summarized and digested in some detail, often with judicial extracts (p. 652 ff.), and then immediately repeated in a full reproduction of the actual report (p. 654 ff.). Alternatively, when the same item, such as *Re Arrow River and Tributaries Slide and Boom Co. Ltd.*\(^2\) (p. 33 ff.), is relevant in a subsequent context, much of the material is reworked rather than cross-referenced (p. 974 ff.). Once is enough, and it is the editor’s responsibility, not his readers’, to decide which version will best serve the purpose of his book.

Repetition is also one of the contributing factors to a continual sense of textual uneveness. Many of Professor Castel’s commentaries on the law are very suitable and incisive, but in some places primary sources would be the better pedagogical choice. In other places editorial comment is sorely lacking. The beginnings of chapters may be cited. Professor Castel has a diffusing habit of first listing all the other works that could be read on the particular subject matter of a new chapter, while frequently failing to introduce it himself at all before a welter of primary materials. The bibliographies of references are invaluable but surely should be placed at the ends of chapters. Introductory remarks to each chapter, explaining its content and relation to previous ones, are essential to provide continuity and direction for the reader. Lacking them, the theme of the volume is hard to determine.

As a teaching vehicle, the materials are also flat. Contentious comments are few, and questions and problems non-existent. The teacher must provide all of these in class, which is no objection by itself, but the student is given no line of enquiry or guide as to the objective of his study preparatory to class. The materials settle too stolidly to encourage his interest and inquiry.

No remarks are offered about Professor Castel’s particular choice of illustrative examples, other than Canadian, except to observe that the leading authorities and documentation as traditionally accepted, as well as some important new ones, are all included. Yet enough critical comments have been made to suggest that further editing would be rewarding. In sum, the third edition of Professor Castel’s casebook is a goldmine of contemporary International Law for

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Canadians but demands too much hard digging by both teacher and student alike.

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The Canadian student of International Law appears to a large extent to be the poor parent in the family of common law lawyers. Thus, he is often looked at with contempt by his brother and sister lawyers. These ones fed on the Austinian tradition, believe that International Law is not "hard" law and does not deserve, as such, an importance equal to that of other subjects in the legal field of study. Besides, and unlike the situation in other fields, there is very little cooperation among Canadian international lawyers to undertake a comprehensive study of the Canadian position in International Law and relations and develop a Canadian perspective or jurisprudence in this respect. As a consequence, the Canadian student of International Law can only resent the absence of Canadian materials to be used in relation to an introductory or advanced course in his field of study. He must, therefore, rely to a great extent on British, American or French materials and "convert" their approach to the Canadian context. In this respect, it should be noted that although transnational by definition, International Law principles are developed and received by sovereign states and that the interests of these states as well as their jurisprudential background influence their participation in the development of an international legal system. Canada in this matter still has a great deal to do.

The above developments explain that the Canadian student of International Law, in his loneliness comparable to that of a long distance runner, endlessly awaits the publication of new materials in his area of study with great expectancy.

Professor Castel’s third edition of International Law, Cases and Materials Chiefly as Interpreted in Canada purports to fulfill this expectancy and remedy the lack of International Law materials in Canada.
As its title indicates, Professor Castel has followed the practice developed in the United States by Professor C. Hyde as early as 1922. Hence, his new casebook puts an emphasis on "the problems which most frequently arise in the Canadian practice of International Law and conduct of International Relations" (see Preface). The reader will thus find in this work an abundance of Canadian cases and documents as well as a great deal of other relevant materials from various origins.

The organization of Professor Castel's book is rather classical in scope: It includes chapters dealing respectively with: Definitions, nature and sources of International Law (ch. 1); Authority and application of International Law (ch. 2); The domain of International Law (ch. 3); Subjects of International Law (ch. 4); Forms of state jurisdiction (ch. 5); Territory of states (ch. 6); Nationality and individuals in International Law (ch. 7); Extent of State jurisdiction (ch. 8); The law of treaties (ch. 11); State responsibility (ch. 12); Peaceful settlement of international disputes (ch. 13). However, the author also explores some relatively new areas of International Law, such as the international protection of the environment (ch. 9); as well as the conservation of the living resources of the sea and air (ch. 10).

The thirteen chapters of the book (1251 pages altogether) are preceded by a table of cases and followed by a short selected Canadian bibliography which is designed to complete the reading list found in relation to each individual chapter of the book. Finally, comes an index which, although insufficiently detailed, is still helpful for the reader to find his way through the jungle of materials with which he is confronted.

Seen as a whole, Professor Castel's work is thus an invaluable addition to Canadian literature in International Law and his efforts deserve to be praised in this respect.

However, a number of weaknesses must be emphasized in relation to this monumental piece of work: Thus, from an organizational viewpoint, Professor Castel's work presents some elements of confusion which force the reader to constantly shift back and forth from chapter to chapter in order to acquire a precise picture of the given area. This problem arises especially with respect to chapters 2 and 11 as well as to chapters 6 and 8. In these

divisions the breakdown of topics is somewhat controversial. It seems, for instance, that the question of the relationship between treaties and municipal law should logically be covered in chapter 2, if only for the purpose of maintaining a certain balance between the proportions of these respective chapters (12 pages for chapter 2 vs. 158 for chapter 11). Also, Professor Castel covers the questions of the right of innocent passage through straits under existing principles of International Law as well as the new concept of transit right through straits under the R.S.N.T. (pp. 255-261) before dealing with the notion of innocent passage itself (pp. 558-579 and 585-591). Along the same lines, the concept of patrimonial sea (pp. 269-278) is developed before the notions of high seas (pp. 617-645) and contiguous zone (pp. 591-617). In more than one instance, repetitions and even contradictions result from the deficient organization of the materials presented. This is notably so with respect to the question of the legal status of Arctic waters. In this particular case, however, the confusion noted can be partially explained on the basis of a lack of consistency in the Canadian position on this question.

In this respect, one must deplore the scarcity of personal notes which could tie the various parts of the book together and provide a useful thread for the reader to follow.

Furthermore and although a certain subjectivity is inevitable in complications such as the one under review, a certain unbalance in the scope of the constituent chapters of the book is to be noted. Thus, if essential topics such as those covered in chapters 1, 2, 3 total only 46 pages, others such as those dealing with environmental protection (chapters 10 and 11) amount to some 200 pages. This disproportion seems hardly in accordance with the express goal of the author to provide for a book "which is designed for use by Canadian law students in an introductory course in International Law". (see Preface) One cannot help to think here that the author has been forced for quantitative reasons to neglect fundamental areas of International Law to give in to the temptation of covering current topics. The problem with this approach is that students may not realize the necessity of exploring the substance of the introductory chapters in which the core principles of International Law are laid out. On the contrary, they may concentrate on questions which are less legal than political and whose intensity fluctuates with the state of international relations. In this respect, it is noteworthy that only a few pages have been devoted to
international terrorism (pp. 194-199 and 201-203).

Again, it is submitted with respect to sources of International Law, that the choice of cases presented to illustrate the conditions necessary to the crystalization of a custom is a controversial one. Indeed, the excerpts from cases reported here are all negative examples of the existence of such conditions and in each case the establishment of a general or regional custom is rejected. It appears here that the inclusion of a case such as the "right of passage" case would have offered simultaneously an example where the I.C.J. recognized the existence of a custom which had developed from the practice of states and the non-existence of another. In this respect, it must be emphasized that if customs do not play anymore a primary role in the International Law making process "(w)hat gives international custom its special value and its superiority over conventional institutions . . . . . . . is the fact that, developing by spontaneous practice, it reflects a deeply felt community of law." 4

Moreover, a number of errors of a more or less serious nature can be spotted throughout the book. For instance, the reference on p. 252 is not in relation to regulations adopted pursuant to the *Fisheries Act* and covering Hudson Bay as alleged, but relates to regulations concerning the pilotage district of Montreal. 5 Also, a careful examination of the table of cases will show that excerpts from the *Scott* case, on the reciprocal enforcement of maintenance orders, can be found on p. 924. In fact, the said excerpts are located on p. 928 when a mere mention of the *Scott* case is to be found on p. 924. Besides, the reference on p. 924 indicates that this case was decided in 1952 where the judgement of the Supreme Court was rendered in 1955 and reported in 1956. In the same vein, a glimpse at the index under the heading of "Terrorism" refers to p. 1074 of the book in which the reader will find no mention of this question.

Finally, the prohibitive price of the book under review ($40) may in itself discourage students from electing an optional course which is often considered to have little practical relevance for the common law lawyer.

3. Right of Passage over Indian Territory (Portugal v. India) [1960] I.C.J. 6
In the final analysis, it is submitted that although a major contribution in the publication of Canadian materials in International Law, Professor Castel’s new casebook lacks the qualities required to become a classic in its field.

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_Whose Law? What Order? A conflict approach to criminology._

Anthologies of previously published articles are appearing with ever greater frequency, particularly in the field of criminal justice. Although they take many forms these anthologies tend either to be general, in the sense that they attempt to reflect a wide variety of perspectives, or specific, in that they focus upon the presentation of one particular perspective. _Whose Law? What Order? A conflict approach to criminology_ is an example of the latter. Designed for use in sociology and criminology courses as a supplement to the basic texts and anthologies it seeks to outline the general approach of the "conflict" or "radical" criminologists to criminal justice issues. Given the audience which it contemplates the book is, I think, successful in meeting its objective.

Before I comment more specifically on the book I might usefully give a brief outline of the debate currently taking place in criminology; for it is from this debate that this collection of articles springs. The point in dispute is straightforward enough — does consensus or conflict more accurately characterize social organization in modern western democratic societies? The consensus view suggests that within such societies there is widespread agreement on fundamental cultural, structural and organizational values. The content of the criminal law, for example, reflects that fundamental agreement. When conflicts of interest do arise the state is seen as having the capacity to act as a neutral arbiter, assessing the conflict in the light of the public interest and proposing some solution which best gives effect to that interest. Within the pluralistic society, then, there is equality (in the sense that any interest may be represented) or at least the potential for equality. The conflict view, on the other
Whose Law? What Order?

hand, suggests that society is characterized not by agreement but by discord, not by reconciliation but by dominance and subjugation. Those who have access to power are concerned to maintain their position and use the law as one means of achieving this. The criminal law, then, simply reflects the concerns of the powerful.

This debate is not, of course, a new one; nor is it confined to criminology. Yet it has had a profound effect upon the subject. Criminologists have traditionally been consensus theorists — not explicitly so, perhaps, but their work is consistent with no other theoretical view. In the past most criminologists have concentrated their energies upon those convicted of crime, studying them in an effort to identify the factors giving rise to their criminality. Once these factors were identified, they thought, effective techniques for dealing with the criminal behaviour of individual offenders, and with crime in general, could be devised. Criminologists have found the "causes" of criminal behaviour in many places — in the criminal's physical structure, his psyche, his personality, his immediate environment and occasionally in the wider social environment. In attempting this "technical" analysis criminologists left largely unchallenged the values enshrined in the criminal law. In refusing to examine these values critically and in applying themselves to the task of making offenders adjust to the prevailing value system criminologists effectively committed themselves to the existing social structure. It is this commitment that the conflict criminologists challenge.

Now to the book. It begins with a general introductory essay by one of the editors, Chambliss, (who, incidentally, wrote three of the ten articles which follow). In this introduction he outlines the essential differences between the consensus theorists ("represented" by Emile Durkheim) and the conflict theorists ("represented" by Karl Marx) and seeks to demonstrate through the use of historical "evidence" that the conflict theory is the more accurate. In this latter aspect of his essay he anticipates, unnecessarily in my view, some of the later articles. Following this introduction the book is divided into three parts. To each part there is an introduction, written by the co-editor, Mankoff.

Part One, containing three articles, focuses upon the way in which the criminal law is formulated. As I have already mentioned, the consensus theorist views the criminal law as protecting those values which are agreed upon by a majority in the society to be fundamental whereas the conflict theorist sees it as protecting the
interests of the powerful to the detriment of the powerless. The articles attempt to supply data supporting the conflict view. The first article analyses the factors leading to the development of the criminal law in western society, the second examines the formulation of particular criminal laws in their historical context, namely laws dealing with vagrancy, and the third discusses a more recent example of law formulation, namely federal legislation in the United States dealing with drugs.

Part Two deals with law enforcement. Several case studies are used to identify the ways in which the criminal law is differentially enforced. The articles seek to demonstrate how law enforcement agencies protect the powerful by focusing their efforts upon the powerless. The consensus theorist would, of course, see law enforcement agencies as essentially impartial administrators of the law and would argue that more people in lower socio-economic groups are dealt with by criminal justice agencies because people from these groups commit the majority of serious crimes.

The final part of the book deals with specific examples of criminal behaviour in American society and seeks to establish that they are the inevitable products of the overall political, social and economic structure in the United States. For example, street crime is seen as "a natural outgrowth of capitalist society". (p. 191)

I will not examine each of the articles in the book in detail nor will I discuss the strengths and weaknesses of the theoretical perspective which they advance. Rather I confine myself to three general comments.

First, the articles (all American) come from a variety of sources (from, for example, the Wisconsin Law Review, Society, Catalyst, the New York Times Review of Books and Ramparts) and so differ greatly in approach and style. Some are extensively footnoted, others contain no footnotes. Their quality is uneven. In accordance with the editors' intentions, these are not the "classic" articles in the field. Nevertheless, taken as a group, they are provocative and do present the conflict perspective in an interesting and stimulating fashion. I should emphasize here that the articles provide a critical analysis of the current system — they do not propose alternatives or give any detailed indication of what flows from acceptance of the conflict perspective.

Second, the editors intrude but a little, as editors, into the presentation of the arguments by the authors of the articles. They reproduce the articles in full with little or no editorial change.
Mankoff's introductions to Part One and Two are simply brief summaries of what appears in the articles and are of little value. His introduction to Part Three is more extensive and more helpful. Further, when in his introductory essay Chambliss outlines the consensus theory he simply reproduces a page or so from an article which he published in the Wisconsin Law Review in 1971. This same article is reproduced in Part One of the book. Thus the consensus theory is outlined at two different points in identical terms — an unnecessary and annoying piece of repetition. All this may suggest that the editors did not apply themselves with any great vigor to their editorial tasks.

Third, while the book will undoubtedly give the reader a feel for the debate, as well as some understanding of the conflict perspective, it is unlikely, I think, to persuade anyone to one view or the other. The analysis of historical and modern material is, in many ways, fascinating but it is at most suggestive. This "evidence" could be quite adequately explained by an adherent of the consensus view in a way that is quite consistent with that view. Furthermore, the consensus theorist could point to other events which might suggest that the conflict view is not an adequate explanation of social organization. He might, for example, argue that the ultimate resolution of the Watergate matter indicates the potential strength of representative government in a modern state and does not lend itself to ready explanation in terms of the conflict theory. The point is that, while it is true that "facts kick", at least occasionally, most of us view the world through a lens of ideological beliefs and assumptions. The way in which we react to this book, then, will depend upon the nature of the lens through which we view it.

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