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## A Guide to Pathological Evidence for Lawyers and Police Officers

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# Book Reviews

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Dr. Frederick A. Jaffe, *A Guide to Pathological Evidence for Lawyers and Police Officers*, 3rd ed. (Toronto: Carswell, 1991) ISBN 0-459-35461-2 (bound). pp. 246.

The Bench, the Criminal Bar, the Civil Bar, and Law Enforcement officers will all hail the publication of the Third Edition of this outstanding work by Dr. Jaffe, whose lengthy and distinguished career as the former Medical Director of the Centre of Forensic Sciences has been marked by a desire to educate and to demystify the science of pathology.

Although the text is relatively brief, the 246 pages include 17 well structured and clearly written chapters that discuss authoritatively subjects ranging from the Medico-Legal Autopsy to the role of the Pathologist in instructing defence counsel. Of note, the topic of injury is approached from many various yet related perspectives involving the head, 'Stabs and Cuts' and 'Firearms' to name but 3 examples. Poisons are also discussed at length, and the review of the various substances that are popularly described as narcotics and drugs, from pages 82 to 95, affords the reader a fundamental understanding and many varied insights respecting this complex subject.

A quite valuable glossary of terms used in Forensic Medicine is found at pages 211 to 229 and is followed by a list of 174 references to the themes discussed. Lastly, a brief yet near exhaustive 6 page index completes the text.

The writer wishes to make plain how valuable *A Guide to Pathological Evidence for Lawyers and Police Officers* will be to the non-criminal practitioner. Indeed, counsel being instructed with respect to a civil action involving fatalities resulting out of a motor vehicle collision would be well advised to review the discussion at Chapter 5 "Traffic Fatalities—'Hit and Run Accidents'", in particular, the quite useful remarks at page 73 respecting the effect of seat belts. With respect to briefs involving allegations of negligence leading to death in the context of a course of treatment at a hospital, the discussion consigned at pages 55 to 68 is illuminating. Counsel involved in matters involving workers' compensation would be well advised to consider the quite helpful remarks at Chapters 7 and 8 respecting death by drowning or due to fire. In the writer's experience, a fundamental understanding of Dr. Jaffe's expert comments respecting the mechanism of drowning and of death by fire may be crucial in establishing the entitlement of the family of the

deceased to survivor benefits, where it is argued that a heart attack may have brought about death, prior to the fire or the immersion into water, or that the deceased committed suicide.

Unfortunately, the frequency of non-accidental injury to children and the fact that certain erroneous allegations of this nature are raised require that lawyers engaged in representation before the Family Law Courts and in Child Protection matters be thoroughly knowledgeable in regard to this subject, which is discussed at Chapter 9. If any criticism be made of Dr. Jaffe's text, it is that the discussion of non-accidental injury to children may have been too brief. In my opinion, the misunderstood mechanism of injury known commonly as the 'shaken baby syndrome' should have been reviewed at greater length. Further, reference should have been made to the seminal article, "The Shaken Baby Syndrome, A Clinical, Pathological and Bio-Mechanical Study," by Dr. C.A. Duhaime *et al.*, published in 1987 in the *Journal of Neurosurgery*, Volume 66(3), at pages 409-415.

Of course, it goes without saying that counsel who are engaged in the prosecution and defence of criminal matters will profit tremendously from this text. The discussion of sexual assaults, asphyxia, skeletal remains, *et cetera* and the quite valuable references to further publications, such as Mr. H.L. MacDonnell's authoritative article "Bloodstain pattern interpretation," noted at page 235, will guide the reader in the establishment of a working theory.

What I find to be the most surprising aspect of Dr. Jaffe's book is the repeated emphasis on the need for the pathologist to deflect the 'great pressure' that the authorities may bring to bear upon his or her task. One would have thought that, some fifteen years after the First Edition, the objective and neutral role of the pathologist as a scientist (and the need to acknowledge and defend this role) would be acknowledged by all. That it is not is to be deplored.

With respect to the significant contribution that the text may provide to the task of police officers, regard may be had to the recently published Twelfth Edition of *The Police Officers Manual*, by Gary P. Rodrigues, which refers to the Second Edition of Dr. Jaffe's text on 89 separate pages.

Moreover, it may be of assistance to note that the discussion at page 13, item 4, respecting 'survival time', which reads "A very long survival time, e.g., several years, may raise doubts concerning the role of the supposedly lethal injury in the causation of death." Perhaps reference should have been made to section 227 of the Criminal Code, whereby a death occurring over a year and a day after a certain event, by means of which a person caused or contributed to the cause of death, may not be the subject of a prosecution. Further, the article referenced at number 125 at

page 237 is in German with no translation as to the title to guide the reader, even though a reference to a French text at number 103 and to a further German text at number 127 were provided in English. Lastly, reference should have been made to the leading American text, *Forensic Neuropathology*, by Dr. Jan Leestma.

In conclusion, Dr. Jaffe's text must be read and understood by anyone having any involvement with a medico-legal matter involving the science of pathology.

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\* This book review does not represent the views of the Department of Justice.

Jane Gladstone, Richard Ericson and Clifford Shearing, *Criminology: A Reader's Guide*, (Toronto: Centre of Criminology, University of Toronto, 1991). ISBN 0-919584-67-5. pp. 275.

As a journeyman law teacher, sometime sociologist, enthusiastic law reformer, and an occasional dabbler in criminology and comparative law, this volume came to me like manna from heaven. It's an intelligent catalogue of almost all I ever wanted to know but most often never had time to read. Modestly called "a reader's guide", this book will serve a multitude of purposes for anyone with an interest in criminology. It is an excellent starting point for the student wishing to commence research on nearly any serious criminological topic. Criminal justice professionals who wish to step out of their narrow niche and see the system as others see it will have their eyes opened. Legal scholars who think they have a pretty good handle on criminal justice issues may be amazed to find how much useful research is being done in cognate disciplines. Last and no doubt least, bluffers who wish to pontificate on criminal justice issues without having to go through the tedious business of real research will find it simply invaluable.

This is a collection of ten essays which survey developments in key areas of what is sometimes called "criminology"—a heterogeneous field populated by scholars from a variety of disciplines who have an interest in crime, criminality, law, justice and all that that doth entail. The contributors to this volume are associated with the Centre of Criminology of the University of Toronto, and the book bears witness to the strength and collective wisdom of that organization. The salient characteristic of the book is that each of the contributors provides a synthesis of the literature in his or her field with an excellent bibliography, usually annotated copiously, of the most important research to date. Richard V. Ericson and Clifford D. Shearing, in their introduction entitled "An Institutional Approach to Criminology", call the essays "idiosyncratic guided tours of the criminological literature." This characterization, while it highlights the fact that each contributor's ideological views and discipline-based predilections come through in the discussion, may undervalue the coherent progress which seems to be occurring in the criminological literature despite heated ideological debates and methodological contradictions revealed therein.

Ericson and Shearing in their brilliant introduction present the essays as the embodiment of the approach to research taken at the Toronto Centre of Criminology as instilled by its founding director John L. J. Edwards.

“The Centre’s focus has been on the institutional dimensions of criminal justice; studied in empirical detail. Research has pursued an understanding of how crime, criminality, law and justice are constituted within major institutions, especially law, the polity, the economy, science and culture.”<sup>1</sup>

Ericson and Shearing show how almost all the essays approach the criminal justice system in the context of a broad social order which includes three “fundamental components”: morality, procedure and hierarchy. Criminological research is demonstrating the nature of institutional relationships which shape notions of crime, criminality, law and justice in the context of the three fundamental components which cross institutional categories. One of their most perceptive insights about criminology in modern, secular Canadian society is that “law is seen as replacing other institutional discourses as a cultural tool for imagining and accomplishing order.”<sup>2</sup> With this tight analytical / institutional framework as a guide, Ericson and Shearing unveil the common threads which bind together the essays in the volume. Their introduction provides an excellent overview of each contribution—far better than I can do in the space of this review. Hence I will content myself with truly idiosyncratic observations on each essay, not by way of comprehensive analysis, but of comments designed to pique the interest of the potential reader—be he or she student, jurist, scholar or bluffer (or all of the above).

John M. Beattie’s contribution, entitled “Crime, Policing and Punishment in England: 1550-1850” is a fitting lead-off to the collection, given the obvious importance of the Canadian criminal justice system’s English roots. Beattie, currently the Director of the University of Toronto Centre of Criminology, is described by Jim Phillips in the next essay as having authored “the best book written in the field of criminal justice history”.<sup>3</sup> Beattie’s essay deals with the literature on policing, prosecution, trials, and punishment in the broadest social, economic, political and ideological contexts. Most importantly he provides students, jurists and scholars with a sense of the debate between the critical scholars, or revisionist social historians, who have challenged conventional conceptions of the English justice system’s origins over the last twenty years, and a new breed of scholars who are forcing the revisionists to revise. A key aspect of recent historical findings has been the new appreciation of the role of the English magistrate in local justice and local administration. Some bluffers will want to know that Shakespeare’s model of the English

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1. p. 4.

2. p. 8.

3. p. 88. The reference is to Beattie’s *Crime and the Courts in England, 1660-1800*, (Princeton: Princeton University Press, 1986).

watchman as incompetent buffoon is now seen by historians as over drawn.

Jim Phillips' essay entitled "The History of Canadian Criminal Justice, 1750-1920" begins with "an *apologia* and an acknowledgement of the limitations of the field." Phillips asserts that "Canadian criminal justice history remains one of the most underdeveloped areas of Canadian history, and is also very much the poor relation in the burgeoning international family of studies in the history of crime and punishment."<sup>4</sup> While it is true that there are no general texts on the topic, and while many studies have suffered from an inappropriate use of models and methodologies best fitted to the jurisdictions in which they were developed, this thirty-five page article (by far the longest in the book), with a massive bibliography, gives hope that criminal justice history is alive and well in Canada. Dealing separately with the literature on English and French Canada up to the time of Confederation, Phillips canvasses the works which now contest the received English Canadian dogma that the French settlers of Quebec welcomed the "superior" English criminal law, and were relieved to be rid of the "tyranny" and "barbarity" of the French inquisitorial process. Phillips then deals with the institutional impact of Confederation, and the sizeable body of literature describing the link between the history of the R.C.M.P. (much contested) and the opening / subjugation of the Canadian west. Phillips emphasizes the impediments to our knowledge caused by the absence of any pre-twentieth century studies of crime and crime rates of a general nature. Of particular interest is the literature on women and criminal law in this period under the heading "crime, politics and authority". Under this same heading, Phillips deals with "race and criminal law". While this latter section is very helpful, it is a shame that this is the only treatment the topic receives in the book. One of the volume's only faults is the absence of any separate treatment of the "modern" Canadian literature on this evidently important issue. However, Phillips' piece is a masterful compilation and analysis of Canadian sources, including other bibliographies, which will be invaluable to students, jurists and scholars. Bluffers may wish to restrain their use of Phillips' assessment of both authorized and unauthorized histories of the R.C.M.P. when they next encounter a member of "the Force" in awkward circumstances.

Phillip C. Stenning and Clifford D. Shearing, in their short review of literature on "Policing", are disarmingly direct in their admission that theirs is "... an introduction that gives salience to perspectives that we

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4. p. 65.

find congenial".<sup>5</sup> They eschew the possibility of "... an objective, neutral, non-constructive framework" for the study of policing, or indeed any other criminological issue. Having entered this caveat they provide the serious reader with a masterful glimpse of the "liberal" and "critical" visions of policing found in the literature, without hiding their bias toward the latter—when it is well done. Bluffers will henceforth be able to toss about a plethora of new labels: regular policing, political policing, high policing, low policing, public policing (including specialized and non-specialized policing), private policing (including contract policing and in-house policing), pro-active policing, re-active policing, under-cover policing, professional policing, community policing, preventative policing, and more. With such an arsenal of terms, the bluffer will be able to boggle the mind of all but the most discerning listener.

In the mere four pages of his contribution on "Penology", Richard V. Ericson does a remarkable job on the literature in the annotated bibliography dealing with a subject which extends from sentencing to sentence administration and the running of carceral institutions. The literature in his view ranges from "technocratic, bureaucratic and administrative" to that which sees "penal institutions as part of a broader inter-institutional network in society which is in turn shaped by political economy and culture".<sup>6</sup> Ericson notes that "penology is a vibrant field [with] no settled orthodoxy" composed of contributions from a variety of different disciplines and which "promises to make significant contributions to knowledge and public policy deliberations in the years to come".<sup>7</sup> Students, jurists, and scholars may wish to note that while the bibliography contains reference to most important classics in the field, it tends to ignore recent literature which purports to rehabilitate the potential of rehabilitation. Bluffers may find the approach very abstract, but should be able to get good mileage out of Ericson's important insight that "... penal reforms are perpetually in need of reform, and that the reform process is as much a part of the penal system as are the penal mechanisms and penal agents themselves".

The ideological diversity of the book appears clearly in the chapter entitled "Politics and Crime: A Survey" by Peter H. Solomon, Jr., a political scientist. Solomon's most helpful contribution is his survey of the literature which "distinguishes" between "political crime" and "ordinary crime", and which examines the phenomenon of the "political trial" in this context. However, the sections on criminal justice policy develop-

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5. p. 125.

6. p. 142.

7. p. 142.



ment and political intervention in the administration of justice are instructive. Solomon emphasizes the main message of David Rothman's book *Conscience and Convenience* which warns:

“... that when criminal justice officials support a change for reasons of their own (convenience) that differs from those of reformers (conscience), the officials may distort the reforms in the course of implementation. In short, beware of easy and strange alliances.”<sup>8</sup>

One gets the clear impression that Solomon is more comfortable with and supportive of the “liberal democratic” literature than are Stenning, Shearing or Ericson. By contrast, Beattie and Phillips are more circumspect about displaying their ideological preferences. What is interesting in all this, however, is that the bibliographies of the contributors overlap, with certain works being emphasized as important regardless of the ideological position of the contributor. This might be thought evidence of both coherence and progress in criminology as a discipline—there are certain things that one clearly must read (or have read) in order to make claims to understand the discipline. Bluffers will want to be particularly aware of this phenomenon, although it may be that the dictum exhorting one to beware of “easy and strange alliances” should be brought into play.

Chester N. Mitchell's piece entitled “Narcotics: A Case Study in Criminal Law Creation” is both a literature review and a sustained crusade against Canada's drug legislation and the present enforcement policies in the area of narcotic drug control. Mitchell's thesis is that the four central assumptions underlying the approach to control of drug use dominant in North America for almost a century are false. That is: (1) The classification of some drugs as extremely dangerous and criminogenic because of inherent chemical properties (cannabis, cocaine, heroin) and others as benign (alcohol, tobacco, coffee) is false and irrational; (2) The primary motivation behind the introduction of drug legislation was not the control of dangerous substances, but rather the commercial control of their exploitation, and the racist political control of ethnic minorities such as Chinese and Mexicans who used different drugs than those preferred by the white majority; (3) The combination of prohibition, and granting drug control to law enforcement agencies and the medical profession, merely publicizes obscure drugs, shifts users to more potent ones, creates black markets, corrupts the police, unnecessarily enhances the power of doctors, and just plain doesn't work; and (4) While the general public may now be convinced by governments and law enforcement officials of the “necessity” of current drug legislation, there was no public need perceived by other than moral entrepreneurs at the time of the introduc-

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8. p. 141.

tion of this legislation at the beginning of the century. Mitchell's polemic is well documented, though he does not flush out the practical problems of transition to a more rational system. Mitchell also makes an extraordinarily important general point about the legislative process. He notes that criminal law and procedure provide elaborate rules to ensure that only relevant and trustworthy evidence is admitted when trying individual offenders, and that as the Marshall or Milgaard cases demonstrate, one can dramatically mobilize public opinion in the face of individual injustice. However, Mitchell argues that in creating crimes such as those in drug legislation, legislators can penalize vast numbers of people without having to meet a burden of proof that the law is necessary or that the factual assumptions underlying the legislative process are valid. There is much in Mitchell's chapter to give the sober reader serious cause for reflection. For the playful, iconoclastic bluffer, there is a wealth of anecdotal material which will allow one to scandalize the pompous or the prudish in almost any proper social gathering.

In his survey of literature on "The Charter and the Criminal Process", Kent Roach notes that, to date, the field has been almost entirely monopolized by lawyers writing in doctrinal terms about what the courts are doing or should do. More broadly focused, interdisciplinary scholarship is only just starting to place the Charter in a social, economic and cultural context. Preliminary research discloses, however, that 85 to 90% of Charter litigation involves the "legal rights" provisions of the Charter with lesser emphasis on other sections, including fundamental freedoms. Moreover, two-thirds of the cases to date appear to deal with the conduct of law enforcement officials. Roach gives an excellent synopsis of "lawyer's law" in relation to the Charter, but more importantly suggests there are three broad policy orientations in the literature on the Charter. The first sees the Charter as "progressive continuity" building on the traditions of our legal system. The second sees the Charter's place in the cycle of political conflict and change where there are alternating emphases on notions of "due process" and "crime control" models of justice. The third, which seems to receive preponderant emphasis in Roach's account, sees the Charter as a "legitimizing distraction" drawing attention away from "the larger and fundamentally unjust legal, political, economic and social order".<sup>9</sup> Students, jurists and scholars must be particularly cognizant of this last stream of analysis which, while true in many respects, has the potential to significantly undermine public and professional confidence in the positive potential of the Charter to empower weaker segments of society by providing them with access to a hitherto

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9. p. 200-202.

inaccessible judicial forum.<sup>10</sup> Bluffers should beware that Roach appears to be a Charter sceptic, and may underestimate the importance of the Charter to the healthy maintenance of a democratic state in Canada.

C. D. Webster brings to “Mental Disorder in the Criminal Justice System” the perspective of the psychiatrist/psychologist. He rightly points out that while the “defence” of insanity is not hard to defend in principle (it seems intuitively wrong to punish those who acted out of illness and need treatment):

“... it gives rise to intricate philosophical issues around free will ... to legal complexities, and to some very practical problems regarding the disposition of persons found to be ‘insane’.”<sup>11</sup>

One of the key practical problems in the eyes of Webster is that “[t]here is a wide mismatch between the pertinent legal and medical concepts and languages”.<sup>12</sup> Staking out his turf in the struggle between the legal and medical professionals, Webster highlights literature which deals with the “nullification” of medical testimony in the adversarial process. The insanity defence serves a symbolic justice function in separating the “bad” from the “mad”. However, as Webster points out, medical health involvement, i.e. treatment, may be required whether the person involved in the problematic conduct is found not guilty by reason of insanity, guilty, or is simply diverted from the criminal process for treatment at the prosecution stage. Most importantly, Webster canvasses fully the literature on the “prediction of dangerousness issue”. Everyone in the criminal justice system who has a decision-making or other function in relation to someone who has apparently committed a crime but may be mentally ill, usually poses the following question to the mental health professionals: “Is he/she dangerous?” The conclusion in the literature is, as Webster delicately puts it:

“... the prediction of dangerousness, so central to legal/medical matters, rests on an uncertain scientific base.”

Most bluffers will already know that this means that, statistically speaking, most predictions of dangerousness are wrong, but that most players in the system ignore that fact. Such predictions are still regularly sought, given and acted upon. Serious students, jurists and scholars must wrestle with the problem disclosed by the literature cited by Webster, that most clinical predictors err on the side of caution—people found unfit to stand

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10. See for example David Beatty, *Talking Heads and the Supremes: The Canadian Production of Constitutional Review*, (Agincourt: Carswell, 1990) (Not included in Roach’s bibliography).

11. p. 225.

12. *ibid.*

trial or not guilty by reason of insanity stand a relatively high chance of being declared dangerous when they are not. Given the public sensitivities, particularly in high profile cases of wrong prediction, the problematic tendency to play it safe is at least understandable. Solutions are not immediately evident, but Webster remains optimistic about progress in mental health diagnosis and treatment on the medical side. One would like to be confident that this is no bluff.

By far the most challenging essay/literature review in the volume is that entitled "Feminist Perspectives on Criminology" by Mariana Valverde. She concentrates on the broad theoretical literature rather than feminist studies on particular issues or those of a technical, legal nature. Her claim is that the flood of excellent articles and books on criminological topics has been largely marginalized, despite feminist concerns with questions which are important and central to the discipline:

"Feminist political, social and legal thought seeks not so much to find a theory that will fit female offenders—whose situation cannot in any case be understood solely in terms of gender—but to challenge the organization of the basic social categories: family, civil society, the state, normality and deviance."<sup>13</sup>

In pursuit of this broad agenda, feminist literature argues, *inter alia*, that social contract theory, positivist social science of the nineteenth century, Marxism, and neo-Marxism all exhibit distortions caused by their inherently male theoretical orientations. Valverde shows how feminists take issue with the distinction between public and private realms, evident in much criminological literature, on the grounds that "many injustices to women take place in the domestic realm which is generally exempt from surveillance."<sup>14</sup> Given the stark facts that women's crime rates are extraordinarily low, that courts and prisons are largely filled with men who have committed violent or anti-social behaviour, and that war continues to be a predominantly male occupation, these feminist efforts to construct an alternate social reality should not be lightly dismissed by serious students, jurists and scholars. In light of the rapid expansion of the feminist movement and its widespread cultural impact, one wonders whether the modern world is about to witness a "paradigm shift" in the social construction of reality based in part, at least, on feminist approaches. Bluffers should handle this socially explosive material with extreme caution. Failure to employ adequate intellectual safety precautions can lead to the detonation of social consequences of a far reaching professional, social and even personal nature.

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13. p. 241.

14. p. 241.

The last, but by no means the least, contribution to the collection is on "Juvenile Delinquency and Juvenile Justice in Canada" by W. Gordon West. He dissects the now extensive literature on delinquency in Canada with a calm and sceptical wisdom. West warns that the definition of "delinquent" often rests on the shifting sands of popular culture, and that adults have an irrepressible tendency to censure behaviour in young people in which they might have engaged in only a slightly different cultural mode during their own youth. West points to the literature which identifies the creation of "moral panics", often based on youth crime statistics, by various pressure groups and bureaucracies:

"'Moral panics' are those regularly recurring occasions generated in liberal democracies when popularly irritating concerns achieve front-page status as political issues regarding the definition of the boundary line between right and wrong."<sup>15</sup>

West contends that "errant juvenile behaviour continues as a mainstay" in this domain of irrational hype, leading often to campaigns of legal repression of a racist or discriminatory nature. But he concludes:

"... we must also recognize that some children really have been more obstreperous, revolting or downright nasty and threatening to others' property and lives."

He then reviews the literature proposing theoretical explanations for juvenile "delinquency". He concludes that none are perfect, and that intervention based on some of these theories has been counter-productive. While West affirms that some progress has been made in the social response to problems of delinquency, he concludes that "perhaps humbly and humanely recognizing our ignorance is the most important message which a century of delinquency research should give us."<sup>16</sup> Sage advice to serious readers which, unfortunately, may be anathema to bluffers.

It is perhaps superfluous to state in conclusion that this collection of essays and bibliographies will become a classical starting point for any serious criminological research in Canada for the wide array of topics addressed in it. Those regularly concerned with crime, criminality, law and justice will want their own copy for quick reference. The reserve and bibliography sections of law and social science libraries will do well to keep several copies on reserve. Bluffers will no doubt be cadging copies from their colleagues.

Bruce P. Archibald

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15. p. 264.

16. p. 266.

# **The Dalhousie Law Journal**

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