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Canadian Perspectives on Legal Theory

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BOOK REVIEW

Canadian Perspectives on Legal Theory. (Richard F. Devlin ed.)
Toronto: Emond Montgomery Publications Limited, 1990. Pp. vi,
538.

*Reviewed by The Honorable Mr. Justice Mark R. MacGuigan**

This book¹ is the first indigenously Canadian source book on jurisprudence. Twenty five years ago there could not have been such a book because there was no Canadian jurisprudence to speak of. That such a book is possible today is convincing testimony to the maturity of Canadian law schools — the traditional well-spring, along with the judiciary, of jurisprudential thought.

I must confess to a fundamental disagreement with Professor Devlin about the subject matter. Having categorized the concepts “legal theory,” “jurisprudence” and “the philosophy of law” as synonyms, Professor Devlin states that “to me they simply mean thinking about law on a sustained level.”² I would wish to add at least the notion of thinking about law in universalist terms, across all the various fields of the law. The alternative conjures up visions of generations of English positivist texts on jurisprudence seldom rising to matters that the rest of the world would consider as jurisprudential.

Nevertheless, this radical difference in perspective does not, even in my view, mar Professor Devlin’s book, because the readings he selects do with some exceptions yield a considerable harvest of traditional jurisprudential questions — community and moral standards, the individual and the community, the coercive force of law, the legal process, to name but a few.

In fact, what is distinctive about his book, in addition to its Canadianness, is its reliance on what I might call inductive rather than deductive materials. The author does not include general philosophers of the

* Federal Court of Appeal, Canada (Ottawa).

¹ CANADIAN PERSPECTIVES ON LEGAL THEORY (R. Devlin ed. 1990).

² *Id.* at 2.

law — of whom there are perhaps none in Canada in any event. He utilizes rather legal thoughtpieces which he organizes around seven contemporary themes: liberalism, law and economics, neo-Marxism, critical legal studies, feminism, first nations, and constitutional interpretation. While these clusters by no means exhaust the possible themes of such a book — consider for example, the previous generation's jurisprudential *leitmotifs* of social change and the legal process — they are highly representative of the preoccupations of today.

Unfortunately, to my way of thinking, Professor Devlin seems to have a bias against traditional jurisprudence. "Traditionally," he writes in his Introduction, "jurisprudence has been conceived from the top down . . . drawing on the 'high theoretical' traditions of transcendentalism, universalism, and abstraction."³ Its "elitism . . . has been the cause of its marginalization."⁴ In my view, a coherent *weltanschauung* makes a greater contribution both to long-range scholarship and to pragmatic enlightenment, because the reader is exposed to the whole context and consequences of a legal thinker's thoughts rather than to a cafeteria of limited choices. What is to me ideal is a combination of deductive and inductive materials, such as was sometimes achieved in the past from a putting together of readings and cases. Nevertheless, given the dearth of Canadian legal philosophy, Professor Devlin has shown a good sense of discrimination in the materials he has assembled.

With three exceptions the articles included indeed appear to have been written for this volume so that they are in the most literal sense contributions. The writing is as simplified as jurisprudential writing is ever likely to be, and for the most part does not presuppose esoteric knowledge. Each chapter opens with a helpful introduction, and every article is followed by five questions, as well as by a bibliography, all of which will enhance the book's value as an educational tool.

Professor Devlin has put together a book that is topical in its themes, far-reaching in its inclusiveness, and challenging in its intellectual impact. All in all, this is no mean feat.

³ *Id.* at 1.

⁴ *Id.*