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Recent Publications

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Recent Publications

Authors

Paul Heng-chao Chen, Paul Hoffman, Gilbert Sharpe, Glenn Sawyer, Leon Friedman, Catharine A. MacKinnon, and Edward Dumbauld

RECENT PUBLICATIONS

CHINESE LEGAL TRADITION UNDER THE MONGOLS: THE CODE OF 1291 AS RECONSTRUCTED. By Paul Heng-chao Ch'en. Princeton, N.J.: Princeton University Press, 1979. Pp. xix, 205. \$19.50.

The growing diplomatic and economic *entente* between the United States and the People's Republic of China has generated much interest, *inter alia*, in Chinese law and legal history. *Chinese Legal Tradition Under the Mongols*, whose author is a Lecturer in Asian Law at the University of London, explores a milestone in that history—the *Chih-yuan hsin-ko* or “New Code” of 1291, under which the Mongol emperors of the Yuan dynasty (1271-1368) transformed Chinese civilization. By singling out the innovative character of the Yuan legal system, the author attempts to show that the Mongol contribution to the Chinese legal tradition was greater and far more significant than most previous scholars had believed.

The author begins by summarizing the development of imperial Chinese legal codes from the *Fa Ching* of 400 B.C. through the *T'ang Code* of 653 A.D. and the *Hsing T'ung* of 963 to the *T'ai-ho lu* of 1201. He suggests that although Mongolian customary law, as embodied in Genghis Khan's collection of rules and instructions known as the *jasay*, was an important source of law in China during the initial period of the Mongolian conquest, its role was substantially limited by the end of the thirteenth century because Chinese society proved too complicated for its successful importation.

The author concludes, however, that many Mongolian legal institutions and concepts were adopted into the Chinese codes of the Yuan dynasty and became an integral part of a new legal order that culminated in the *Chih-yuan hsin-ko*. For example, the five traditional criminal punishments of pre-Yuan law (death, life exile, penal servitude, beating with a heavy stick, and beating with a light stick) were expanded to include new types of financial and physical penalties for certain offenses, and new “conflict of laws” rules were established to govern legal disputes between people of different ethnic, professional, and religious groups.

After a thorough discussion of the Yuan dynasty's penal and judicial system, the author presents a reconstructed text and annotated translation of the *Chih-yuan hsin-ko*. The ninety-six surviving fragments of this mammoth compilation are arranged in ten sections: “public regulations” (comprising administrative law and procedure), “standard of selections” (election and civil service law), “governing of the people” (constitutional law), “management of finances,” “taxes and *corvée*,” and “taxes and levies” (which to-

gether comprise tax law and procedure), "warehouses," and "construction and manufacturing" (which both comprise commercial law), "prevention of thefts" (criminal law), and "investigation of cases" (criminal procedure).

The author's analysis of the "New Code" leads him to two conclusions: that the Yuan penal system was more lenient than its predecessors in imposing lesser punishments for minor offenses, and that the Mongol-Chinese partnership of the Yuan dynasty developed one of the most impressive and mature judicial systems that imperial China ever had for the administration of justice. He therefore argues that Chinese law in the time of Marco Polo was much less barbaric than has traditionally been thought.

COURTHOUSE. By Paul Hoffman. New York: Hawthorn Books, Inc., 1979. Pp. 184. \$12.50.

In the Part 35 courtroom of the Manhattan Criminal Courts Building in New York City there is a mural, dating from the turn of the century, which depicts Justice, not with the traditional blindfold, but with her eyes open. Paul Hoffman, a veteran investigative reporter, suggests in *Courthouse* that the mural accurately forecast the state of the criminal justice system as it is currently administered in New York. In early 1978 the author spent ninety-nine days observing the judges, lawyers, victims, defendants, and staff who people the Criminal Courts Building. *Courthouse*, a diary of Hoffman's observations, suggests that the New York City criminal justice system often fails to provide "equal and exact justice to all men of whatever state and persuasion," although the author scrupulously avoids drawing any conclusions from his raw reportage.

Inside the courthouse, which combines state and city trial courts, one of New York's most prominent judges, Harold Rothwax, encourages lawyers and defendants to act speedily in order to keep the calendar manageable. Judge Bruce Wright attacks the overload problem with tactics that have earned him the sobriquet "Turn-'em-Loose Bruce." William Kunstler tries to reopen the Malcolm X murder case. Neophyte prosecutors try to find Part 31, which is in the courtroom marked Part 44.

Hoffman follows several trials that made headlines, including those of accused murderer Joseph Cortale, the kidnapers of fashion designer Calvin Klein's daughter, and Marty Evans, the professional con artist and seducer who was acquitted of "assault with a friendly weapon" on the grounds that the "abominable snow job," while perhaps morally reprehensible, is not rape. With reportorial

impartiality, Hoffman also chronicles the less glamorous trials of heroin addicts, prostitutes, and the teenage murderer of an elderly couple.

Hoffman observes not only the human drama of the courtrooms, but the backdrop as well. Statistics are offered, but only to illustrate the narrative. Descriptions of dingy rooms, rodent infested chambers, court stenographers with no paper, the Tombs (a city jail facility adjoining the Criminal Courts Building where suspects were detained pending trial until its court-ordered closing in 1974), the "bullpens" where prisoners await hearings, and the elderly male "groupies" who attend criminal trials looking for Perry Mason "fireworks" to help them pass the time, are generously interspersed between the courtroom episodes.

Courthouse presents the reality of the criminal justice system in New York City. The resulting portrait, like the mural in Part 35, is one of Justice with her eyes open to political pressures, bureaucratic expediency, and the constraints of time, money, and human capital.

DOCTORS AND THE LAW. By Gilbert Sharpe and Glenn Sawyer. Toronto and London: Butterworths & Co., Ltd., 1978. Pp. viii, 448. \$25.25.

The specter of medical malpractice suits requires that physicians be sensitive to the legal implications of their work. *Doctors and the Law*, authored by two Canadians with combined legal and medical experience, is designed to introduce doctors to the law as it affects the practice of medicine. While the emphasis is on Canadian precedent, there are frequent references to American case law. The apposite provisions of the Quebec Revised Statutes, which are patterned after the French civil code, are collected in an appendix.

Doctors and the Law begins by broadly defining relevant legal terms, such as "reasonable person" and "negligence," in laymen's language. The authors then outline the objective standard of care that physicians must meet. The problems inherent in obtaining consent to medical care (including mental capacity), the minor patient, informed consent, experimentation, sterilization, and the limits of consent forms are treated in detail.

A comparative analysis of "Good Samaritan" laws in Canada, Europe, Australia, and the United States outlines the liability of doctors who render gratuitous services in emergency situations. The authors then focus on the tension between a doctor's obligation to protect the privacy of his patients and legal pressures to divulge

confidential information, including a practical discussion of what physicians may be required to collect in their medical records. The authors also discuss the physician as witness, evidentiary methods of establishing the standard of care, licensing problems, statutes of limitations, and the special problems of law and psychiatry. Attention is also given to troublesome areas such as medical experimentation, transplants, and the definition of death.

A concise manual of law for the practicing physician, *Doctors and the Law* collects and compares the varying approaches of different jurisdictions to medical malpractice. The final chapter, which discusses alternative mechanisms for the resolution of malpractice claims, is especially noteworthy. The authors conclude by offering the reader a rich set of appendices ranging from the biomedical research provisions of the 1975 Helsinki Declaration to the results of a detailed questionnaire reporting the medical practices and attitudes of nearly 2,000 physicians.

THE JUSTICES OF THE UNITED STATES SUPREME COURT: THEIR LIVES AND MAJOR OPINIONS. VOLUME V: THE BURGER COURT 1969-1978. Edited by Leon Friedman. New York: Chelsea House Publishers, 1978. Pp. 510. \$45.00

In 1969 Chelsea House Publishers, in association with R.R. Bowker Company, published the first four volumes of a project entitled *The Justices of the United States Supreme Court: Their Lives and Major Opinions*. Those four volumes, covering the years 1789 to 1969, later received the 1970 Scribes Award for an outstanding book on a legal subject. Now Chelsea House has brought the project up to date with the publication of *Volume V: The Burger Court 1969-1978*, edited by Leon Friedman, Professor of Law at Hofstra University Law School. Justice Burger began his tenure on the Court in 1969, and in the ensuing years four Justices have been appointed, while three have died or retired. This fifth volume analyzes each of the twelve Justices who have served on the Burger Court.

The book features biographical essays of each Justice, written by legal scholars and practicing attorneys, and appends to each biography several of the Justice's major opinions, apparently unedited. The essays on the Nixon and Ford appointees discuss the judges' backgrounds, their appointments to the Supreme Court, and their work on the Court. Essays on the Warren Court judges who continued to occupy the Supreme Court bench from 1969 to 1978 emphasize their legal philosophies and contributions to constitu-

tional development. Brief bibliographies appear at the end of each Justice's section.

In his preface, Professor Friedman stresses the importance of judicial biography as an element in the history of our highest Court. Without such biography, he argues, legal scholars may neglect to study the Court in terms of the thinking and work of each individual member, preferring instead to view it as an anonymous and monolithic institution. For example, Friedman points out that a slight change in the viewpoint of even one Justice can change constitutional history, and an understanding of that change can explain seemingly inconsistent opinions on the same subject. Thus, by examining each member, the book provides an examination of the Burger Court as a whole which seeks to explain that Court's dramatic change in direction over the past decade.

SEXUAL HARASSMENT OF WORKING WOMEN. By Catharine A. MacKinnon. New Haven and London: Yale University Press, 1979. Pp. xiv, 312. \$22.50 cloth, \$5.95 paper.

In *Sexual Harassment of Working Women*, Catharine MacKinnon, a practicing attorney who teaches women's studies at Yale University, examines sexual harassment in employment as a violation of both Title VII of the Civil Rights Act of 1964 and the equal protection clause of the fourteenth amendment to the United States Constitution. Defining sexual harassment as the unwanted imposition of sexual demands by one person upon a business associate of the opposite sex who occupies a job position inferior to his own, MacKinnon focuses on how such harassment reinforces and perpetuates the sexual and economic inequality of women in the business world.

MacKinnon, who argues throughout that sexual harassment is a form of illegal sex discrimination, identifies two distinct concepts of discrimination. The "differences" approach envisions the sexes as socially and biologically different and holds impermissible only those distinctions that are preconceived or inaccurate, while the "inequalities" approach holds that discrimination consists in the systematic imposition of disadvantages upon social groups. Applying both of these approaches, MacKinnon finds that sexual harassment, by singling out a gender defined group for special treatment, adversely affects and burdens their status as employees, and creates two employment standards—one for women that includes sexual requirements, one for men that does not.

Supporting her position equating harassment with discrimination, MacKinnon explains that sexual harassment of women occurs largely because women occupy inferior job positions. In the author's view, moreover, harassment works to keep women in such positions. Drawing upon statistical data and articles in popular journals recounting harassment experiences, MacKinnon finds the working female's world to be characterized by horizontal segregation, vertical stratification, income inequality and sex-defined work. She then explores the imposition of sexual requirements as a *quid pro quo* for employment or advancement, as a condition of the work environment, and in its psychological impact upon women.

MacKinnon summarizes the case law of sexual harassment, and identifies the four most common grounds for dismissing such cases: that harassment is "personal" rather than employment related, that such behavior is "natural/biological," that harassment is not a discriminatory "policy" under Title VII, and that imposing liability for harassment would open the door to enormous numbers of suits (the author calls this last rationale "administrative rejection"). Analyzing these cases, MacKinnon explains that courts have often been hesitant, inconsistent, and ill-informed, even when they have ruled in plaintiff's favor. She finds that courts often reject harassment claims on the basis of ideological constructs about the nature of female sexuality and its role in determining social status, rather than upon the issue whether harassment is conduct "based on sex" in the legal sense.

MacKinnon provides two appendices to her work. Appendix A applies to sex discrimination doctrine the "inequalities" and "differences" approaches developed in MacKinnon's text. Appendix B is designed to assist the plaintiff's attorney in briefing a response to a motion to dismiss for legal insufficiency, which is the usual challenge to a sexual harassment complaint. Thus, while MacKinnon's text is addressed primarily to the layman, her Appendices are addressed directly to the practicing attorney in this fast-growing field.

THOMAS JEFFERSON AND THE LAW. By Edward Dumbauld. Norman, Okla.: University of Oklahoma Press, 1978. Pp. xv, 293. \$25.00.

Thomas Jefferson was a lawyer by profession, yet this aspect of his life has been overshadowed by his political career and intellectual endeavors. Edward Dumbauld, a United States District Judge, attempts to correct this imbalance by showing, in *Thomas Jefferson and the Law*, that Jefferson was an active and successful private

practitioner, legislator, legal draftsman, law teacher, law reporter, and legal archivist-librarian. The text, which fills slightly more than half the volume, is addressed primarily to legal historians, but the copious notes and extensive bibliography that follow are designed to assist Jeffersonian scholars of all disciplines.

Dumbauld, whose previous books include *The Declaration of Independence and What It Means Today*, *The Bill of Rights and What It Means Today*, and *Thomas Jefferson, American Tourist*, begins his thoroughly-researched portrait by summarizing Jefferson's early education, focusing upon the methodical order in which the young law student arranged his daily readings. The author points out, *inter alia*, that Jefferson was an ardent advocate of the case method and moot courts. Dumbauld then analyzes Jefferson's unofficial legal writings, which include a treatise on prerevolutionary constitutional law and a manual of parliamentary practice for the fledgling United States Senate.

The author emphasizes Jefferson's legal scholarship, and explores at great length his subject's role, either as lawyer or participant, in several cases involving public officials, slavery, contested wills, and separation of church and state. Foremost among these is the "batture" controversy, in which Jefferson as President authorized the use of force to eject Edward Livingston from the alluvion or "beach" ("batture" in French) at New Orleans, then part of the newly-acquired Louisiana Purchase. The author similarly details Jefferson's analysis of several major cases in which he did not take part, including his response to the opinion delivered by Chief Justice John Marshall in the Aaron Burr treason trial.

Dumbauld also chronicles Jefferson's contributions as a case reporter (his *Reports of Cases Determined in the General Court of Virginia. From 1730, to 1740; and from 1768, to 1772* was published posthumously), law librarian (his personal collection of Virginia statutes was a prime source for William Hening's early nineteenth century compilation of Virginia laws), law teacher (Jefferson advised many law students at his home in Monticello, drew up courses of reading for them, made his library available to them, and while Governor of Virginia established the first law professorship in America, at the College of William and Mary), and legislative reformer (as part of a committee of lawyers who undertook to revise Virginia's prerevolutionary laws and conform them to republican principles, Jefferson analyzed the English law of descent and criminal law down to the establishment of the Virginia legislature in the fourth year of the reign of James I).

When he became active in public life, Jefferson turned his at-

tention away from the law and never returned to private practice, largely because he had no time to keep abreast of legal developments. Although Dumbauld does not draw conclusions from his research, *Thomas Jefferson and the Law* suggests that many of Jefferson's contributions in fields other than the law can be better understood by reference to the way in which he learned and analyzed the law. Consequently, this book provides the raw material for much further research into Jefferson's legal career and attitudes.

WINNING AT ZONING. By Dudley S. Hinds, Neil G. Carn, and Nicholas Ordway. New York: McGraw-Hill Book Co., 1979. Pp. viii, 247. \$12.95.

The authors, an associate professor and two assistant professors of the College of Business Administration of Georgia State University, contend that *Winning at Zoning* is the first book on zoning for the homeowner or entrepreneur who is directly affected by the zoning process. Consequently, this book is fundamentally different from textbooks and casebooks on land use controls, which are aimed primarily at practitioners and students of law, business, or urban planning. After describing briefly the zoning process and its historical development, the authors treat zoning as a variety of game, providing tips on how to utilize the zoning process to one's advantage much as books on bridge, chess, or poker give advice on how to win. By combining descriptive materials with fictional illustrative situations, the authors identify an assortment of procedures and tactics by which the individual can utilize the zoning process to his own advantage.

The book initially explains the local zoning ordinance and its relationship to the zoning map. The concept of the comprehensive plan is introduced and the problem of setting boundaries is explored. The authors then delve into particular problem areas in the application of development standards, touching on such issues as the placement and size of buildings and the location of open space and buffers. The remainder of the book is procedural in orientation. The zoning process, including inspection, administrative review, recommendations by planning professionals, and hearings by boards of adjustment and local legislative bodies, is covered in considerable detail, the authors consistently recommending the course of action with the greatest probability of success. The authors next explain the procedures and devices by which the traditional zoning process can be circumvented or overcome, such as flexible zoning tools, public hearings, and appeals to the courts. A chapter is de-

voted to the materials that a person or group should gather to give the strongest support to a zoning request. The book concludes with a summary of the game theory involved in zoning and a synopsis of current issues and emerging concepts in the field.

