BOOK REVIEWS
LIVRES NOUVEAUX

Legal Identity: The Coming of Age of Public Law. By Joseph Vining. New Haven: Yale University Press, 1978. Pp. xiii, 214.

In law, as in other intellectual disciplines, there is often a congruence between the investigation of an active branch of a subject and the writing of the "philosophy" of that discipline. One discovers, for example, that Dicey developed his view of the English constitution about the same time that he began to articulate a distinctive positivistic philosophy of law;[1] that there was an intimate connexion between Pound's social interest theory of tort law and his program for a sociological jurisprudence;[2] and that leading exponents of legal realism shepherded the development of the Uniform Commercial Code.[3] The publication of Joseph Vining's *Legal Identity*, subtitled "the coming of age of public law", marks a further example of this congruence and perhaps evidences yet another shift in the legal subject matter which stimulates jurisprudential writing.[4]

At one level this book simply reviews recent developments in a technical aspect of administrative law, the non-constitutional law of standing.[5] But the author has a larger purpose. He observes:

---

[1] Compare Dicey, *Introduction to the Study of the Law of the Constitution* (1885) [commonly known as *The Law of the Constitution*] with Dicey, *Lectures on the Relations Between Law & Public Opinion in England During the Nineteenth Century* (1905).

[2] See Pound, *An Introduction to the Philosophy of Law* (1922) and *A Theory of Social Interests* (1921) 15 American Sociological Society: Papers and Proceedings 16.

[3] Llewellyn, *The Common Law Tradition* (1960); *Statement* (1954) 1 N.Y. Law Rev. Comm'n Rep. U.C.C. 23.

[4] One might also cite the jurisprudential work of Davis, *Discretionary Justice* (1969), and Bishin & Stone, *Law, Language And Ethics* (1972) as evidence of this trend. Both are written by teachers of public law in the United States.

[5] Vining postpones consideration of constitutional law standing cases to the book's final chapters (where he also deals with standing in private law), although he suggests at pages 9 and 10 that the issues faced are similar. In the Canadian context, compare *Nova Scotia Board of Censors* v. *McNeil* [1976] 2 S.C.R. 265, 5 N.R. 43 with *Rosenberg* v. *Grand River Conservation Auth.* (1976) 69 D.L.R. (3d) 384 (Ont. C.A.).

> The study of law is a powerful means of access to the communal mind, and we have only a few. But it must be particularized. Depart from the law's doctrinal structure, the language in which law actually speaks, and the method loses its strength .... Following the thread of standing one comes face to face with time and change, freedom and responsibility, uniqueness and unity, skepticism and belief — riddles that must be found and faced, through one means or another, if human life is to have meaning.[6]

Thus, in this challenging and difficult monograph the reader is at once treated to an erudite discussion of the threshold question of judicial jurisdiction in administrative law — *locus standi* — and a philosophical investigation of three notions which are fundamental to Western legal thought — persons, values, and equality. For Vining the concept of identity relates these two themes to each other, and lies at the nexus of theory and practice; hence it is concurrently the subject and the premise of the book.

Legal Identity commences with a preliminary analysis of the term "standing" by reference to four important cases litigated before the Supreme Court of the United States during the past decade: *Association of Data Processing Service Organizations, Inc.* v. *Camp;*[7] *Barlow* v. *Collins;*[8] *Sierra Club* v. *Morton;*[9] and *Gilmore* v. *State of Utah.*[10] From these decisions Vining develops several tentative hypotheses, the underpinnings and implications of which are then traced out in the book's remaining chapters. These hypotheses are set out by the author as follows:

(1) "What we are witnessing is nothing less than the breakdown of individualism as a basis for legal reasoning";[11]

(2) "We achieve our ends, which we cherish as individuals, and we realize ourselves precisely because individuals are not legal persons";[12]

(3) "The judge personifies himself in giving content to the doctrine of standing. Standing defines his jurisdiction, his role, who he is when he acts as a judge";[13]

(4) "A judge must have a person to hear, for the same reason that anyone — including the reader — must conceive a person to hear or to address. ... [T]he judge cannot fail to hear those

---

[6] P. 7.
[7] 397 U.S. 150 (1970).
[8] 397 U.S. 159 (1970).
[9] 405 U.S. 727 (1972).
[10] 429 U.S. 1012 (1976).
[11] P. 2.
[12] *Ibid.*
[13] *Ibid.*

whom he does understand; that he does understand them and why they are before him is justification for his entry into the flow of events";[14]

(5) "To ask who these legal persons are and what their relationship is to individual human beings, we must in the end inquire into the purpose of government, the meaning of equality before the law, and the relevance of the results of decisions to judgments of their rightness";[15]

(6) "In future histories of our era administrative law may in fact be cited as the development that eliminated finality from the principles of social order, a quality many had assumed essential to the very notion of order".[16]

At first glance these propositions are startling, for they seem to challenge several fundamental assumptions shared by both public and private lawyers. Yet the author's development of his theses is genuine, sophisticated and persuasive. Consequently, upon finishing the book, one wonders if their conscious articulation and demonstration may be a signal that public law has indeed come of age.

The monograph itself is divided into three Parts: Change in the Axioms of Legal Analysis; Residues of Conceptual Change; and Legal Identity. In Part I, Vining sets the non-constitutional law of standing in its historical context: a limitation on the role of the courts in the process of government. He argues that the traditional "legal interest" test was derived from basic assumptions about property, legal remedies and the existence of a unitary common law — in short, assumptions about the "private-dispute settling" function of courts. Yet by the late 1960's the pressures on this test of standing became so intense that it collapsed, to be replaced by a test emphasizing *harm* and the fact that the *interest sought to be protected is arguably within the zone of interests regulated by the statute.*[17] In Vining's opinion, this reformulation of the criterion for standing represented an axiomatic shift in judicial self-awareness. It evidenced a realization that the legal system was indeed a system in the social scientific sense of the term. Whereas the common law had always distinguished between failures to act (omissions) and acts themselves (commissions) from a systematic perspective, a governmental failure to penalize a competitor (an omission by an

---

[14] P. 6.

[15] *Ibid.*

[16] P. 9.

[17] This is the new test for standing articulated by the U.S. Supreme Court in the *Data Processing* case, *supra,* note 7.

agency) is equally as significant as the visiting of a sanction by an agency upon an individual himself (a commission). This reformulation also afforded legal recognition to non-economic social values. Whereas the common law apparently eschewed these values (a concern with ends) and attended only to the protection of property (the means by which individuals achieved their ends), the new test involved the courts in evaluating ends for their own sake, and not just as a by-product of their concern for the protection of means. Ultimately, this reformulation leads to the acknowledgement that both public and private law must be concerned with ends and values, and that most of these values are shared, rather than private. In other words, abandoning the property-based "legal interest" test embarks courts on a journey that can only end with the recognition that the positing of an "individual" titulary of legal claims is not a starting point or threshold question of judicial jurisdiction, but rather a consequence of an analysis which commences by evaluating the public values to be protected by such positing.

The author then carefully traces how this axiomatic shift occurred, illuminating the interaction of the theoretical and the pragmatic in legal evolution. In a brilliant chapter he suggests that the role of the courts as a device for institutionalizing public values now overtly transcends (as it has always covertly transcended) its "private-dispute settling" role. This emerging view reveals that the judicial function is an integral part of the planning and value selecting role of government. Of course, this means that it is absolutely crucial to identify when and *at whose behest* the judiciary may act. Vining argues that human beings are much like institutions, such as corporations, in that they are capable of shifting through a number of distinct identities each day. Hence, the perception by a court of a person harmed depends upon its recognizing a public value that defines the class of person which an individual before it embodies and seeks to personify. On this analysis, in order to successfully perform its function the court needs to know that the proponent of a value (the object of harm) can demonstrate his personification of values already public, or on the verge of becoming public. The law of standing thus serves as the regulator of the legitimacy of non-legislated public purposes and goals; the court is transformed into the agency which accords recognition to competing values, which then compete for primacy as society evolves.

Nevertheless, all the implications of abandoning the "legal interest" test for standing are not immediately apparent, and many have not yet been acknowledged and comprehensively traced out in

the legal system. In Part II, the author discusses several incidents of the former law of standing as possible determinants of status under the new test. First, Vining argues that one cannot define either the judicial role or those entitled to invoke it by distinguishing the directly from the indirectly regulated, or in other words, by reserving judicial jurisdiction exclusively to those who can demonstrate direct agency interference with their rights. Abandon the "legal interest" test and harm can be demonstrated by both those whose property is directly affected (for example, by expropriation) and those whose property is indirectly affected (for example, by the non-expropriation of a neighbour). Moreover, many temporizing doctrines such as mootness or ripeness (the postponement of review until a *lis inter partes* develops) become redundant. Finally, determining standing questions on the basis of whether an individual is potentially exposed to sanction through direct enforcement also provides no solution; the impact of a governmental act does not depend on how it is enforced and it is a simple matter for an agency to restructure its processes so that it only effects its policy through collateral proceedings. A second traditional underpinning of judicial jurisdiction, the concept of property, also fails as a guide to when standing should be granted. In a very difficult chapter, Vining shows that the concept of property works in private law because it functions as a moral limitation on restructuring the past. The transfer of property through awards of "damages" presupposes an atomic view of causation; property and the concept of causation thus serve to guide a court in deciding how much of the past it can change by a present reallocation of economic benefit. In public law, however, one is not interested in redressing the past; judicial determinations of illegality operate prospectively, and consequently concepts of causation and property are irrelevant to determinations of whom the court may hear or help. That is,

> [c]oncerns about protection of property arise when the court is engaged, not in vacating decisions and letting the world go on, lead where it will, but in unravelling the past; not in mediating history, but in creating it.[18]

If then, the above notions cannot provide a key to when a court should recognize the standing of a litigant, might one nevertheless found a distinction for standing purposes between those who are special beneficiaries of the administrative system (that is, those individuals who the statute in issue seems designed to protect), and those who are not? Vining concludes that the search for a special beneficiary represents an atavism in the law which is tied to the

---

[18] P. 100.

"private-dispute settling" function concept. He notes that every specific modern legislative initiative is complex, and directed to achieving many distinct policies. Only if the law is seen as pre-existing and static (which public law patently is not) and if statutes exist merely to correct some predetermined "mischief" can canons of statutory interpretation pretend to isolate special beneficiaries. Moreover, the concept of a "beneficiary" displays logical difficulties when advanced as a criterion of standing. Even when definitional limitations such as *ius tertii* are involved, it is difficult to distinguish beneficiaries since these limitations ultimately do not prevent a given individual from putting his case to the court. They merely lead him to search for a personality which fits the court's preconception of whom the statute specially benefits — to disingenuously show an identity which is non-factual and artificially tied to a non-existent claim about a pretended common law right. If a "special beneficiary" test is adopted, standing becomes nothing more than a question of feigning the appropriate legal personality. If standing is refused, the reason simply will be a failure to assume the correct legal "identity". Since identity is here tied only to a generalization of objective criteria, the special beneficiary test is clearly duplicitous. Vining argues that the legal system can overcome this problem of feigned personalities only if it recognizes that identity is generated in the light of shared public values — a premise antithetical to the assumptions of our individualistic common law. He also suggests that this potential duplicity explains why motive assumes an important role in public law litigation. With the acknowledgement that public law is a process of experimentation and adjustment that is prospective and does not involve a need for finality of decision, the myth of rights deriving from a pre-existing discovered law vanishes and the underlying motivation for every legal challenge becomes a crucial issue. Standing decisions determine who may use the legal process for what public purposes; they must be made in the light of a thorough investigation of all social values, including those personified by the individual seeking standing. The problem of feigned personalities hence becomes a problem of belief — if the court concludes that a litigant genuinely believes in his asserted identity, it may then proceed to evaluate the public purposes being pursued.

Part III of the monograph reveals to their full extent the jurisprudential implications of Vining's scholarship. If the most meaningful test of standing must be articulated metaphorically as "do you believe?", then who you are and what you personify become the focus of legal thought. However, before embarking on this

theme the author considers one final possible common-law criterion — that of foreseeability and remoteness of effect. He notes that these concepts are meaningful in private law, where limitations on illegality and limitations on remedy merge, where rights are private and where each case is discrete. But the prospective nature of remedies in administrative law undermines the appeal to a notion of "I didn't realize it would affect you" as a criterion for determining who may and who may not complain. In public law, it is not important that an agency was unable to foresee that a certain person would be harmed by its act, for no retrospective sanction, such as damages, is being imposed. By the fact of complaint, the agency now sees that individual who is harmed, and is in a position to modify its illegal act for the future. With this last touchstone of the common law destroyed, the court is left to make determinations of standing only on the basis of the identity of the person appearing before it.

Vining believes that the law of standing is a microcosm of the larger question of how the law creates legal persons. He suggests that persons do not come before the court "ready-made"; rather, a court must decide in what *persona* a litigant acts, and determine which identity is being pursued. Because each individual consists of several competing identities, the author reformulates the "private-dispute settling" role of courts in psychoanalytic terms: standing decisions engage the court in resolving identity conflicts within each of us. What is more, each individual can have no primary identity, for neither occupation nor a general sense of one's full-time preoccupation nor objective characteristics such as sex, race or age provide a criterion for establishing a unitary link between an individual and his identity. In the author's view, all human beings are unique precisely because we each have no primary identity, but rather are a distinct mix of several identities. Because these identities (which represent values) are mixed within us, it follows that the process of government does not consist of catering to individuals, but rather of developing institutions for discovering, articulating, abandoning, accommodating or repressing our various identities. From this perspective, distinctions between institutional and non-institutional persons, or economic and non-economic persons, fade, as we recognize the equality of all persons; each identity and each value it embodies has an equal claim to recognition by the law. Vining concludes that "[p]ersons are indeed equal before the law, although individuals as such manifestly are not".[19]

---

[19] P. 168.

What then is the function of jurisdictional litigation in public law and how do concerns about standing influence this function? Certainly one accepts the goal of maintaining the legality of decisions, but courts also have been always concerned with justice. In jurisdictional litigation this latter concern is reflected by the reformulated law of standing. Recognizing the independent force of public values implies recognizing the identities articulating them. Defining who may challenge official illegality (that is, what values legitimately may claim recognition) becomes the principal judicial mechanism for integrating public values and legislative mandates. Assuming jurisdiction, even where the merits of an act are unassailable, is thus the judicial device for recognizing and protecting an emergent public value. On this analysis, the failure to assume jurisdiction reflects the fact that the value by which a given harm is determined is still inchoate, for the identity it represents has not yet achieved the status of legal person in that context. Similarly, statements about causation can be seen as paraphrases of decisions respecting identity: when a court concludes that an act did not cause an alleged harm, it is in effect saying that it does not understand how that particular person could be harmed in the way asserted. The judge cannot understand the personification or identity claimed: the value it embodies is simply not recognizable. From this conception of jurisdictional litigation, in which questions of justice are subsumed in decisions about standing and identity, Vining derives his final thesis: the fundamental unity of public and private law. This is sustained not through a belief that public law is really a branch of private law, but rather through his view that private law is an aspect of public law. For example, when we make individual decisions, such as to discipline a child, we must assume a role-identity as a parent, a jurisdiction to act (as bounded by the law of torts and the criminal law), and a framework of decision by means of which relevant and irrelevant factors are evaluated. These are exactly the processes by which administrative agencies act; each of us performs as such an agency whenever we act. Even in the mundane world of common law actions, questions of standing, merits and remedy must be dissociated. The underlying issue is not "whether the plaintiff or defendant 'has' a right, but rather whether the challenged action is authorized by law".[20] What ultimately is at stake in any decision, be it that of a Labour Relations Board or that of a parent, is not the result, but rather the decisional process.

---

[20] P. 180.

Legality is measured solely by the values (identities) that the decision-maker did or did not canvass.

As the above *précis* of its major themes and theses clearly demonstrates, *Legal Identity* is a powerful work in the philosophy of law. Although focussed on the rather narrow question of the non-constitutional law of standing in the United States, and hence likely to be technically difficult for many readers, its larger themes are of universal interest. In many respects it is a profoundly disturbing book, the implications of which are devastating for much traditional learning. What we teach, what we learn, what we believe law to be, why we act, how we live, who we are: each are topics open to re-consideration in light of Vining's analysis, topics which the thoughtful reader cannot avoid investigating as he works his way through the many re-readings which this book both demands and merits. In pondering where such inquiries will lead and what conclusions they may ultimately produce, one can find no better guidance than the author's concluding thoughts:

> Law is symbol as well as system. Its development can be seen in a single word ... *locus standi* .... Law need no longer symbolize what it has in the past. ... "Person", "property", and "cause" are basic elements of the structure of legal thinking. ... As they have changed, and as the problems they present have been addressed by thousands of lawyers and judges, arguing and puzzling day after day, decade after decade, the vision and the thrust of law have changed. Litigation can now bring home as forcefully as any religious ritual that each of us is in fact involved in mankind. Public law has come of age.[21]

R. A. Macdonald*

---

[21] *Ibid.* One cannot help but notice the strongly existentialist flavour of these concluding remarks. For a close parallel, which more directly addresses many themes tangentially considered by Vining and which also finds its subject matter in public law, see Bishin & Stone, *supra,* note 4. This book can be read profitably in conjunction with *Legal Identity.*

* Of the Faculty of Law, McGill University.

Legislative Drafting: A New Approach. By Sir William Dale. London: Butterworths, 1977. Pp. xix, 341.

It is hard for an American to evaluate a book that criticizes the drafting of statutes in the United Kingdom on the basis of "the continental system" as exemplified by France, Germany, and Sweden. Being unfamiliar with the latter and only generally familiar with the former, I can only comment on the author's analysis and recommendations in the light of American experience.

Legislative tradition being what it is, the title of the book gives little hint that the author is focusing on much-neglected aspects of legislative drafting, such as the allocation of drafting functions, the deployment of personnel, and the procedures that interlink them, while giving minimal attention to the materials usually found in books on "legislative drafting". Persons interested in the specifics of what a legislative draftsman should put into a statute must look elsewhere. Since almost two-thirds of the book is devoted to extended statutory quotations and much of the material in the remainder is of only marginal relevance, Sir William has little opportunity for more than sweeping generalization. However, some of his generalizations are well worth pondering. The legal profession is indebted to him for delving into an aspect of legislative drafting that is known to few and only rarely written about[1]: the organizational and procedural context in which legislative drafting takes place.

Sir William's main complaint against English statutes is that they are hard to read and understand. To provide examples, he quotes extensively from copyright laws, family laws, labour laws, limitation of actions laws, and several other kinds. Unfortunately, the typical reader, like this reviewer, is unlikely to rise to the challenge of verifying their total usefulness, because Sir William has burdened him with excessively protracted examples. (I would have preferred fuller drafting principle and more persuasive recommendations.) Even so, the reader seems justified in concluding that the persons who put together statutes in the United Kingdom and elsewhere would do well to emulate some of the practices typical of France, Germany, and Sweden.

---

[1] *E.g.*, Dickerson (ed.), *Professionalizing Legislative Drafting — The Federal Experience* (1973).

Sir William is at his best when tracking down deficiencies in English statutes, the most important of which seem to be the following:

(1) a general lack of clarity;
(2) the failure to disclose at the beginning of a statute its basic thrust;
(3) the needless introduction of qualifications and conditions before a general rule is stated;
(4) the inclusion of unnecessary words and other extraneous matter;
(5) excessively long and involved sections;
(6) too many definitions and too much reliance on them or on "interpretation" clauses;
(7) too many provisos;
(8) too many and too much reliance on schedules;
(9) unnecessary repetition;
(10) unnecessarily convoluted or otherwise bad arrangement;
(11) too much incorporation by reference; and
(12) too much cross-referencing.

In his opinion, the United Kingdom's trouble is largely attributable to "a system under which the drafting is entrusted to specialist technicians", which tends "to produce texts of growing legal technicality, complexity, and length".[2] This calls for a "change of style".[3] The continental style of codification is a good way to accomplish this, because it helps to extricate statutes from "the matrix of the common law",[4] thus making way for a more felicitous style and a more accessible arrangement.[5] "A more profound change is also desirable: a determination to seek the principle, to express it, and to follow up with such detail, illuminating and not obscuring the principle, as the circumstances require."[6]

If Sir William's evaluation of English statutes is correct (and from the evidence he has assembled I have no cause to deny it), much of what he says makes good sense. At least, it fits with what Professor Mellinkoff and others have concluded about legal gobbledygook: that most of it is an unnecessary hangover from times (1)

---

[2] P. 333.
[3] *Ibid.*
[4] P. 335.
[5] It is not clear whether Sir William advocates not only immediate adoption of the codification style but also ultimate adoption of a general codification program: see, *e. g.*, p. 335.
[6] *Ibid.*

when Old English or Middle English was being enriched to meet legal needs by words or phrases from Norman French, Old Norse, Celtic, or Latin, many of which persist today only in the language of the law while having usable plain-English counterparts,[7] (2) when draftsmen pitted their wits against unfriendly, precedent-oriented judges who viewed statutes as unseemly encroachments on the common law,[8] or (3) when the language of litigated instruments was thought to be judicially sanctified. Certainly, the emancipation of statutes from these still lingering judicial prejudices should be aggressively sought. Another cause of legislative obscurity may be serious inbreeding in an office that, having a monopoly on legislative drafting, has failed to maintain a sensitive editorial point of view.

Sir William also points out that there is more to clarity than a readable style; there is sound arrangement. It is in this respect that English statutes seem the most deficient. First, it is hard to find and understand core statements of what English statutes are requiring. Such statements, of course, belong at or near the beginning. They should also be sufficiently self-contained that the reasonably knowledgeable reader can get their gist without turning to another statute or even to another part of the same statute. Nevertheless, English statutes, being the product of highly skilled lawyers, have a high level of logical coherence.

Sir William's laudable skill at uncovering "the mischief" is not fully matched by his skill in tracing efficient causes. Of course, he is on solid ground in attributing much of bad legal style to the common law matrix within which English statutes still exist, and to a devotion to its conceptual structure and traditional terminology. These matters, he thinks, can be cured by switching to codification, or at least to its style.

Sir William finds the English lawmaking process defective in that "there is no examination or revision by a central body of experts, and there is no scrutiny by working committees of Parliament";[9] that is, the process lacks the "revising stage" provided in France, Germany, and Sweden. He prefers the continental system, in which the initial drafting is done by persons who are fully knowledgeable in substantive policy without necessarily having the

---

[7] Mellinkoff, *The Language of the Law* (1963), chs. 2 and 3.

[8] Conard, *New Ways to Write Laws* (1947) 56 Yale L.J. 458. See also Dickerson, *The Fundamentals of Legal Drafting* (1965), 32.

[9] P. 335.

expertise peculiar to legislative drafting. This tends to avoid "legalese" and produce clarity. How the latter is achieved he does not explain. Presumably, the general run of lawyer or policy expert in those continental countries is highly literate and, if untainted by legislative drafting expertise, tends to write clearly. The approach has certainly not worked in the United States, where writing inadequacies lurk even in high places and where the traditional approach of lawyers (and laymen trying to write as lawyers) is to emulate the most turgid products of the past.

Sir William accordingly recommends a three-phase system: (1) initial drafting by persons other than drafting specialists; (2) revision by an Advisory Law Council, independent of government, consisting of judges, practitioners, a professor of law, professors of literature, members of consumer councils, representatives of local bodies or authorities, and a *rapporteur*, in consultation with ministers and civil servants, followed by revision by parliamentary committees; and (3) debate and passage by Parliament.

At this point, I lose touch. The critical step for Sir William is the second (revisionary) phase, during which the ideal of clear drafting, launched during the first phase, would be consummated. Somehow during this second phase, the special legislative drafting skills needed for adequate legislation but withheld during the first phase would be supplied. How? "The Law Council should possess sufficient expertise, and authority, and be sufficiently catholic in its composition, to command attention, respect and confidence."[10]

Here, Sir William begs the question by taking for granted the existence, ready availability, and particular contributions of persons whose technical expertise is needed for adequate legislation. What is this expertise, who has it, and when and how is it to be introduced? General clarity is introduced in the first phase by persons freed of the common law tradition. But is this all? Beyond it, I find only a vacuum.

On the one hand, Sir William concedes that legislative "experts of ... high but specialised skills [that is, trained draftsmen]" can produce "a general consistency of method and style",[11] and that they have *"unique command of the needed skills"*.[12] In other words, these legislative experts, who are to be omitted during the first phase, can do something that is needed for adequate legislation, and

[10] P. 336.
[11] P. 337.
[12] P. 338 [emphasis added].

only they can do it. I fail to see how a Law Council constituted as Sir William would constitute it would or could provide the necessary ingredient. Of course, it is possible that I have underestimated the rank and file of English judges, practitioners, professors, and representatives. In the United States, such groups have amply exhibited their drafting inadequacies.

On the other hand, Sir William says that maybe the English do not need specialized draftsmen after all. They can return the responsibility for legislative drafting to the ministries "so long as there is a Law Council to maintain consistency and the required standards".[13] What specific standards are these?

But if drafting "experts of this kind, of high but specialised skills, scientists in their field, tend like most scientists to develop an esoteric language and method, understood by the initiated, but obscure to the many",[14] what assurance is there that drafting in the ministries will not fall into the hands of non-legislative scientific specialists who will inject their own brands of technical jargon? What Sir William calls a "new" approach has been common practice in Washington for many years and, in its American environment, it has been a dismal failure. Perhaps he should rest his case on his initial explanation, because the obfuscation process is more closely linked to unwholesome aspects of the common law matrix (or possible administrative inbreeding) than to dangers inherent in specialization.

I remain skeptical of the efficacy of the proposed Law Council for achieving the desired clarity. Although important legislation in Washington is normally reviewed in a series of rigorous examinations made from many points of view, these examinations remain almost wholly substantive. Indeed, there is nothing in the present Congressional system to guarantee that an important piece of legislation is drafted, reviewed, or even seen by a person with drafting expertise.

For me, Sir William's complaints come down to this: despite his professed admiration for its personnel and contributions to logical coherence, he does not like the way the Parliamentary Counsel's office has been drafting statutes. Even assuming that his dissatisfaction is well founded, I see nothing relating to clarity in the English system (which has much to commend it) that could not be as fully cured by reforming the office's editorial attitude with

---

[13] *Ibid.*
[14] Pp. 337-38.

particular regard to arrangement, cross-referencing, referential amendment, and some matters of style, without undertaking a comprehensive codification program or transferring basic lawmaking functions to other agencies.

In the modern world, legislative drafting specialists are indispensable. Indeed, I surmise that a more thorough investigation would show that even the "continentals", in addition to being untainted by the common law, either have attained a higher degree of literacy or have somehow tucked away in the various ministries specialists in the drafting of legal instruments who have not been officially recognized as such. On the other hand, Sweden's statutes, in their perpetuation of the false imperative, undesignated paragraphing, inconsistencies of expression, and unnecessary words, suggest that there is room for an even higher level of professionalism. In any event, continental statutes such as these should be evaluated also on the basis of other considerations than readability.

For one with an American background, it is hard to believe that any significant number of effective reviewers could be judges. Again, I may be underestimating the quality of legal talent on the continent or in the United Kingdom. Even so, it would be risky to import an apparently successful foreign program without ascertaining whether the quality of personnel needed for success can be assumed to exist in the new environment. It certainly does not exist in the United States.

The legal professions of both countries would benefit greatly from a heavy dose of formal instruction in legal drafting. The gap is not filled by Sir William's bland assumption that all it takes to make a good draftsman is the general ability to write clearly and knowledge of "the facts and the law on the subject".[15] That such a person "can pick up legislative drafting without difficulty"[16] is contradicted at least by American experience, which supports a minimum training period of several years. What Sir William seems to overlook is that many legislative drafting problems transcend style and readability and even knowledge of the substantive law and the facts.

It is also possible that sending bills to parliamentary committees before (instead of after) initial consideration by the House of Commons would make possible fuller review before the bills legislatively congeal.

---

[15] P. 339.
[16] *Ibid.*

Sir William is careful not to identify the "continental system" with the avoidance of legislative detail, inasmuch as detail is common in at least the German brand of code. Accordingly, he does not recommend that the English necessarily eschew it. On the other hand, some critics of English legislation have viewed this as a feasible alternative, lured by the undeniable fact that a complicated statute is harder to read than a less complicated one. When testifying before the Renton Committee, I was asked if I favored the "continental" system of sticking to generalities. I said that the matter is normally beyond the control of the draftsman and that, in the United States at least, the outcome is determined in each case, not by broad political theory, but by how far the legislature is willing in the particular circumstances to trust the judgment and good faith of the administrator or the courts. Unfortunately, in the United States this trust is highly tentative. Even acts that begin their lives as broad mandates tend to become deeply scarred or heavily cluttered with detailed amendments. The main road to clearer statutes probably lies elsewhere.

Sir William's comments on statutory interpretation seem to overstate the legislative draftsman's appropriate concern with that area, much of which deals with the pathology of badly drafted statutes and is therefore irrelevant to drafting principles whose application obviates the need for curative interpretation. Also, I doubt that a "change in the style of statutory drafting is likely to require an overhaul of accepted rules of interpretation",[17] even assuming that "style" includes the avoidance of detail. His assertion seems valid only so far as "statutory interpretation" is stretched beyond the courts' cognitive function to include delegated legislation by them. But supplementation is hardly explication; even though avoidance of legislative detail normally entails judicial (or administrative) supplementation, Sir William's statement remains misleading. So far as interpretative principles relate to cognition, the draftsman's interest is confined largely to areas in which the courts have been unfriendly under the doctrine of "strict construction".[18]

His analysis also suggests that the only effective escape from English judges' alleged literalism in the interpretation of statutes is to adopt, in each case, " 'a construction which would promote the

---

[17] P. 292.

[18] See Dickerson, *The Interpretation and Application of Statutes* (1975), 8 and 205-12.

general legislative purpose' ",[19] coupled with compliance with Lord Scarman's recent plea that the "judge must be given a much wider discretion than he has now in the choice of evidence from which to infer the intention of Parliament",[20] which in Sir William's view includes resort to "Parliamentary material". Such a choice overlooks a third alternative: taking account of the tempering that language normally receives at the hands of external context.[21] Ironically, resort to parliamentary material, which hardly qualifies as context,[22] tends to undermine the draftsman's incentive to better drafting. Why strain for perfection in a legal instrument that the court will subordinate to the largely uncontrolled material of legislative history?

Despite these reservations, Sir William has performed a valuable service in drawing attention to the fact that we need to know not only what a good statute should look like but what organizational devices and procedures are best fitted for producing it. May his book inspire further investigations in this neglected area.

Reed Dickerson*

---

[19] P. 339. Dale is apparently quoting from the U.K. Law Commission, *The Interpretation of Statutes* (1969), but he gives no page reference.

[20] P. 340.

[21] *Supra*, note 18, ch. 9.

[22] *Ibid.*, 138-62.

* Professor of Law, Indiana University (Bloomington).

Criminal Procedure in Practice: A Manual For The Defence Of Cases In Provincial Court. By P.G. Barton & N.A. Peel. Toronto: Butterworths, 1979. Pp. xxvii, 324.

Peter Barton, a University of Western Ontario law professor, and Norman Peel, a London, Ontario practitioner, have joined to produce a useful little book about criminal practice at the provincial court level. Experienced criminal practitioners and legal academics are unlikely to find the book of much interest for the simple reason that it is not written for them. It is instead addressed to novices in the practice of criminal law, and to those "dabblers" who sporadically but in increasing numbers grace our criminal courts. The authors clearly spell out the goals and limits of the work. It is defence-oriented, blatantly and unapologetically practical, and deals exclusively with practice at the provincial court level. Nonetheless, it should have a wide readership due to the increasing number of young practitioners who are relying on legal aid certificates in criminal matters to pay the rent. This manual was in part written for them and it must be evaluated in light of their needs.

The manual begins with a distillation of much of the accepted wisdom as to how to deal with a client charged with a criminal offence. The authors discuss the ever-present ethical problems and make some suggestions on how to handle them. Further chapters deal with the required preparation and planning for the case and in particular, preparation for trial. There is a very practical final chapter which outlines a typical office system for a criminal practice and which is supplemented by a good collection of forms in the first appendix.

The remaining two chapters of this manual attempt, rather successfully, to compress the law of criminal procedure into approximately one hundred and seventy pages.

The manual does have a few shortcomings which should not be overlooked. A minor one is the inconsistency of style between some of the chapters. Some inconsistency is no doubt unavoidable in any work which has been co-authored; however, the contrast in the treatment of certain topics is perhaps greater than the topics themselves would warrant.

More serious is the lack of any bibliography. Such a bibliography, whether found in an appendix or, better yet, at the end of each topic, would have been extremely valuable for the busy practitioner with

little time to leisurely thumb through issues of periodicals, special lectures or texts looking for a more extensive discussion of points touched upon in the manual. Such a bibliography would as well have avoided the very real danger that attends all manuals of this sort, namely, that they come to be regarded as the definitive work, rather than as a practical but minimal distillation of a much wider body of information.

All in all, the manual is a welcome addition to the ever growing literature in the area of Canadian criminal law. Given its stated objectives and its intended audience, the manual is quite successful. Although it does not address either provincial court judges or crown attorneys, it should nevertheless be read by both for it establishes what a minimal level of knowledge and competence is for those lawyers intending to set foot in a criminal court. What Barton and Peel have done with their manual is to ensure that a "dabbler" in criminal practice no longer need be a bumbler as well.

Vincent M. Del Buono*

---

* Assistant Professor, Faculty of Law, McGill University.

McGILL LAW JOURNAL
REVUE DE DROIT DE McGILL
Montreal
Volume 25 1980 *No. 3*

SPECIAL ISSUE ON THE KRAVITZ DECISION / NUMÉRO SPÉCIAL SUR L'ARRÊT KRAVITZ

Preface

The decision of the Supreme Court of Canada in *General Motors* v. *Kravitz* is truly a *cause célèbre*, and the Editorial Board of the *McGill Law Journal* hopes that this Special Issue will enhance the discussion of this important case.

With the exceptions of Ms. Connell-Thouez's article and Me LaPierre's comment, all of the papers in this issue were originally presented to the Colloque de l'Association québécoise pour l'étude comparative de droit, which convened in September, 1979 to discuss the *Kravitz* decision.

The Editorial Board wishes to express its sincere thanks to Professor Pierre-Gabriel Jobin for his patient and valuable assistance in the preparation of this issue.

Préface

Le jugement rendu par la Cour suprême du Canada dans l'affaire *General Motors* v. *Kravitz* constitue, à n'en pas douter, un arrêt marquant de la jurisprudence des dernières années. Aussi, le comité de rédaction de la *Revue de droit de McGill* ne peut-il qu'espérer que la publication de cette édition spéciale contribuera à entretenir le débat suscité par cette décision d'importance.

A l'exception de l'article de Mme Connell-Thouez et du commentaire de Me LaPierre, les écrits contenus dans le présent numéro furent, à l'origine, présentés par leurs auteurs respectifs lors du Colloque de l'Association québécoise pour l'étude comparative du droit qui s'est tenu en septembre 1979.

Le comité de rédaction tient à exprimer ses sincères remerciements au Professeur Pierre-Gabriel Jobin, lequel a patiemment et efficacement contribué à la préparation de cette publication.