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Books Reviewed

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BOOK REVIEWS

THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES. By Barton L. Ingraham; Foreword by Jacques Verin. New York, New York; Westport, Connecticut; London, England: Greenwood Press, 1987. Pp. xvii, 197.

INTERNATIONAL CRIMINAL LAW: CRIMES. Edited by M. Cherif Bassiouni. Dobbs Ferry, New York: Transnational Publishers, 1986. Pp. xix, 581.

INTERNATIONAL CRIMINAL LAW: PROCEDURE. Edited by M. Cherif Bassiouni. Dobbs Ferry, New York: Transnational Publishers, 1986. Pp. xvii, 552.

INTERNATIONAL CRIMINAL LAW: ENFORCEMENT. Edited by M. Cherif Bassiouni. Dobbs Ferry, New York: Transnational Publishers, 1987. Pp. xvii, 313.

INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE. Edited by Ved P. Nanda and M. Cherif Bassiouni. New York, New York: Practising Law Institute, 1987. Pp. xv, 546.

INTERNATIONAL CRIMES: DIGEST/INDEX. Edited by M. Cherif Bassiouni. New York, New York; London, England; Rome, Italy: Oceana Publications, 1986. 2 vols. Pp. lxxvii, 512; xl, 496.

Reviewed by B.J. George, Jr.*

Time was, criminal law and procedure were viewed almost exclusively as internal or domestic matters. With the possible exception of piracy,[1] legislatures defined crimes within the territorial limits of their state or nation, and courts adjudicated crimes committed within the forum using witnesses and evidence available locally. However, World War II's aftermath brought a recognition of war crimes and crimes against humanity, terrorists striking without regard to international boundaries, and international criminal organizations engaged in transnational illicit activities even more sweeping than legitimate enterprises. At least two phenomena have become visible as a result of the internationalization of criminal law. The first is a perceived need to

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1. *See* U.S. CONST. art. I, § 8, cl. 10 (Congress may "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations").

define domestic criminal law consistently with international principles, chiefly by giving it extraterritorial sweep, and to develop efficient means of international cooperation in the apprehension, return, and adjudication of persons who harm a given nation's legitimate interests outside its territorial limits. The second, generated by the fact that an increasing number of one nation's nationals are apprehended, tried, convicted, and punished in other countries, is a heightened interest in the way other criminal justice systems and judiciaries function — the stuff of comparative criminal law and procedure. As a corollary, the corpus of materials on international and comparative criminal law and procedure has expanded significantly in the last few years. The following is a discussion of several recently published books incorporating the burgeoning scholarship on international and comparative criminal law and procedure.

Professor Ingraham's book, *The Structure of Criminal Procedure*,[2] results from an effort to identify a framework for comparing and, to a degree, harmonizing the criminal procedure systems of various nations. The author has selected for this purpose France, the Soviet Union, the People's Republic of China, and the United States,[3] and has dissected criminal procedure to identify six tasks or functions common to all nations: (1) intake, (2) screening, (3) charging and protecting defendants, (4) adjudication, (5) sanctioning, and (6) appeal.[4] In sequential chapters, the author then has described the responses of each of the four selected national systems to all six functions. In his view, whatever mythology American lawyers[5] and jurists in other countries may cherish,

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2. BARTON L. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE: LAWS AND PRACTICE OF FRANCE, THE SOVIET UNION, CHINA, AND THE UNITED STATES (1987) [hereinafter THE STRUCTURE OF CRIMINAL PROCEDURE]. Ingraham is an associate professor at the Institute of Criminal Justice and Criminology of the University of Maryland, College Park. He is also the author of B. INGRAHAM, POLITICAL CRIME IN EUROPE: A COMPARATIVE STUDY OF FRANCE, GERMANY, AND ENGLAND 1770-1970 (1979).

3. *See* INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE, *supra* note 2, at 3 (the author notes that France and the United States are western democracies, one following the inquisitorial system and the other the adversarial; the Soviet Union and the People's Republic of China share the philosophy of Marxist socialism, but each has a distinct cultural tradition and perspective of law).

4. *Id.* at 22-25 (these six common tasks are summarized as follows: first, intake procedures determine registration and investigation of complaints, together with arrest and suspension of suspects; second, screening of complaints and reports of crime to determine whether prosecution is warranted; third, formal charging of defendants and defendants' procedural protections — the function in which the greatest discrepancies among the nations exist; fourth, the determination of the accused's guilt or innocence, by whom and on what basis; fifth, imposition and administration of criminal sanctions, including sentencing and the administration of prisons and jails; and sixth, appeal to higher authorities regarding the defendant's guilt or innocence and any official pretrial or post conviction decisions).

5. *See id.* at 8-9 (American mythology fails to recognize that actors in the criminal

these divergent national systems are substantially similar — although not in complete conformity — in the way they address each of the six phases.[6]

The result is a useful sketch of the criminal process, particularly in the three nations other than the United States; by shifting from chapter to chapter and focusing on a single country, one can glean a useful basic understanding about each country's criminal procedure. This reviewer, however, came away with a feeling that Professor Ingraham relied excessively on old or outdated sources. Although the "present writing" is stated to be June 1986,[7] most of the cited materials concerning the French, Soviet and United States systems date from the 1960s and 1970s. This may not be significant for an appreciation of the French and Soviet systems: both nations' law and administrative practice appear rather stable, and updated citations would be largely of cumulative impact. That is not true, however, of United States law. Accordingly, persons without a current knowledge of United States constitutional developments concerning criminal law and procedure are likely to be misled by the author's discussion of arrest,[8] search and seizure,[9] discovery,[10] and sanctioning.[11] This final area is particularly

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arena must and do respond to political pressure, even if pressure is not overtly applied).

6. *See id.* at 33-34, 121-23. The author begins his analysis by noting that criminal procedure systems in non-totalitarian and totalitarian regimes are substantially similar: all governments must address crime, and a regular system of justice promotes perceptions of fairness, thereby reinforcing support for the regime. *Id.* at 33-34.

7. *Id.* at 69.

8. *Id.* at 65-66. The author addresses the issue of arrest and bail in a cursory fashion without noting that the accused's protections greatly expanded in the last 25 years and have more recently been restricted. *Id.*

9. *Id.* at 69-71 (author notes that Supreme Court has fluctuated in its protection of accused's fourth amendment rights, as generally enforced by exclusionary rule).

10. *Id.* at 73-74. In this and several other procedural contexts, the author cites exclusively to ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL (1st ed. 1970), apparently unaware that the standards were thoroughly revised and significantly changed in the second edition, ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL (2d ed. 1980); the second edition was augmented by new chapters on mental health standards and the legal status of prisoners. The author failed to utilize the MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (American Law Institute 1975) and the UNIFORM RULES OF CRIMINAL PROCEDURE (National Conference of Commissioners on Uniform State Laws 1974).

11. *Id.* at 105-08 (survey of sanctions is also significantly deficient because the author failed to note the phenomena of presumptive sentencing, sentencing according to guidelines, and abolition of classical parole, all of which Congress had adopted in the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (1984) (codified primarily in scattered sections of 18 U.S.C.)); *see also* B.J. GEORGE, THE COMPREHENSIVE CRIME CONTROL ACT OF 1984 ch. 8 (1986) & ch. 8A (Supp. 1988). The author makes no reference to either the STANDARDS FOR CRIMINAL JUSTICE: LEGAL STATUS OF PRISONERS (American Bar Association 1980) or to (National Conference of Commissioners on Uniform State Laws) MODEL SENTENCING AND CORRECTIONS ACT (1978).

deficient for purposes of a comparative analysis, because there is now a wide gulf between the avowed objectives of criminal sanctioning in the United States and in systems based on Roman law, such as France, Italy, Japan, and West Germany.

The author's discussion of criminal appeals in the United States is likewise misleadingly brief[12] because it does not take into account review under the sentencing guidelines system now in force in the federal courts.[13] It is also regrettable that the author has accorded such glancing recognition to the Anglo-American concept of double jeopardy as it compares with the Roman law doctrine of *non bis in idem*.[14] The attachment of jeopardy might have provided the author with a useful illustration in support of his contention that modern procedural systems tend to attain rather similar results, whatever the apparent differences in terminology and scholarly explanation.[15] One well-chosen comparison could have shown that the early point at which jeopardy attaches under our federal constitutional provision[16] contrasts with the later point of attachment under Roman law systems;[17] however, the scope of protection under the "same offense" concept[18] in the United

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12. INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE, *supra* note 2, at 114-15 (explaining appeals procedure in United States in only two paragraphs).

13. *See* 18 U.S.C. § 3742 (Supp. IV 1986). The Sentencing Guidelines and Policy Statements issued by the United States Sentencing Commission on April 13, 1987 went into effect on November 1, 1987. Appeals by either side based on sentences falling outside the Guidelines-mandated matrices are now a signal feature of federal sentencing procedures, and are more obviously consonant with Roman-law criminal procedure systems than Ingraham acknowledges.

14. *See* INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE, *supra* note 2, at 84.

15. *See* H. LIEBESNY, FOREIGN LEGAL SYSTEMS: A COMPARATIVE ANALYSIS 51 (1981) (quoting R. DAVID, FRENCH LAW 77-82 (1972)).

16. *See* Crist v. Bretz, 437 U.S. 28, 37-38 (1978) (jeopardy attaches when jury is empaneled and sworn); *see also* Serfass v. United States, 420 U.S. 377, 388 (1975) (jeopardy does not attach in bench trials until the first witness is sworn).

17. Under Roman law, finality attaches only after the last appeal or right has been completed or forgone; on this basis, the prosecution has equivalent appeal claims to the defense. *See* G. KOSHI, JAPANESE LEGAL ADVISOR: CRIMES AND PUNISHMENTS 61 (1970); Nagashima, *The Accused and Society: The Administration of Criminal Justice*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 297, 300-01 n.16 (A. von Mehren ed. 1963); SCHMIDT, Introduction to AMERICAN SERIES OF FOREIGN PENAL CODES: GERMAN CRIMINAL PROCEDURE CODE at 1, 23 (1965); *see also* the leading judgment of the Supreme Court of Japan, 4 Saikô Saibansho Keiji Hanreishû 1805 (1950), *translated in* J. MAKI, COURT AND CONSTITUTION IN JAPAN: SELECTED SUPREME COURT DECISIONS, 1948-60, at 219 (1964). The author does not devote any attention to the matter in his text. *See* INGRAHAM, THE STRUCTURE OF CRIMINAL PROCEDURE, *supra* note 2, at 82-84.

18. *See* Blockburger v. United States, 284 U.S. 299 (1932). Where a transaction or an act violates two distinct statutory provisions, the "same offense" concept merely asks the court to determine if "each provision requires proof of fact which the other does not." *Id.* at 304; *see also* United States v. Woodward, 469 U.S. 105 (1985) (per curiam) (court of appeals "plainly misapplied" *Blockburger* rule when it held that a false statement was a

States is much narrower than the protection in nations adhering to Roman law traditions.[19]

In sum, Professor Ingraham's conceptual framework for a comparative analysis is useful, and American readers can develop a serviceable grasp of the outlines of criminal proceedings in three of the four selected nations. However, the superficiality of much of the author's treatment of the United States system might very well mislead those practicing elsewhere who refer to it for an understanding of United States criminal procedure.[20]

Until the publication in 1986 and 1987 of the three volumes of *International Criminal Law,* edited by Professor M. Cherif Bassiouni,[21] there was relatively little available in either the United States or England on that topic. Therefore, their appearance is welcome. The first volume embraces the substantive law of international crimes.[22] After addressing the basic theory of an international criminal law[23] and its codification,[24] the various contributors treat fifteen out of twenty-two recognized international crimes.[25] Professor Bassiouni first catalogs

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lesser included offense of a misdemeanor involving currency reporting); Missouri v. Hunter, 459 U.S. 359 (1983) (because *Blockburger* is a rule of statutory construction and not a constitutional rule, it does not prohibit cumulative punishment for violations of two statutes proscribing the same conduct where the legislature has so intended); Albernaz v. United States, 450 U.S. 333 (1981) (satisfaction of *Blockburger* rule results in presumption that Congress intended cumulative punishment, unless there is a clear indication of contrary legislative intent).

19. The scope of protection under Roman law traditions is clearly broader than the "same offense" concept, as stated in *Blockburger. See supra* note 18. However, it is not as broad as the "pure transaction" test as represented in Fed. R. Crim. P. 8(a). The pertinent part of that rule states:

> Two or more offenses may be charged in the same indictment . . . if the offenses charged . . . are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

20. They might be well advised to turn, for example, to J. ISRAEL & W. LAFAVE, CRIMINAL PROCEDURE: CONSTITUTIONAL LIMITATIONS (4th ed. 1988).

21. M. Cherif Bassiouni is a professor of law at DePaul University College of Law, Chicago, Illinois, secretary-general of the International Association of Penal Law, and dean of the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy.

22. 1 INTERNATIONAL CRIMINAL LAW: CRIMES (M.C. Bassiouni ed. 1986).

23. *Id.* at 1-80. Component articles include Bassiouni, *Characteristics of Criminal Conventions, id.* at 1-13; Bassiouni, *International Criminal Law and Human Rights, id.* at 15-32; Derby, *A Framework for International Criminal Law, id.* at 33-58; and Mueller and Besharov, *Evolution and Enforcement of International Criminal Law, id.* at 59-80.

24. *Id.* at 83-129. Component articles include Jescheck, *Development and Future Prospects, id.* at 83-100; Wise, *Perspectives and Approaches, id.* at 101-07; and Williams, *The Draft Code of Offenses Against the Peace and Security of Mankind, id.* at 109-29.

25. *Id.* at xvi-xvii. The crimes included in 1 INTERNATIONAL CRIMINAL LAW, *supra* note 22, are aggression, war crimes, unlawful use of weapons, genocide, slavery, torture, un-

relevant international criminal law conventions arranged by crime,[26] and a roster of experts, including Professor Bassiouni, then discuss the antecedents and current jurisprudence covering each of the crimes addressed in the volume. Following each chapter, the editor has provided one or more appendixes with the text of relevant United Nations and other conventions, multilateral treaties and international agreements. The result is a quite useful mini-treatise with supporting documentation for each international crime.

Volume II addresses procedure.[27] There is a strong comparative law dimension in certain of the chapters, especially those discussing judicial assistance and mutual cooperation in penal matters,[28] transfer of prisoners,[29] securing evidence abroad,[30] and extradition.[31] Relevant international conventions and federal legislation are appended to each textual discussion.

Volume III, which focuses on enforcement,[32] is, of necessity, the most abstract of the three segments because it covers areas of international criminal law and practice, the development of which lies probably well in the future. Thus far, only the war crime prosecutions fol-

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lawful human experimentation, piracy, aircraft hijacking, threat of and use of force against internationally protected persons, taking of civilian hostages, drug offenses, theft or destruction of national treasures, and crimes against the environment. *Id.* Crimes against humanity are discussed in 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT (M. Cherif Bassiouni ed. 1987). The omitted crimes are international traffic in obscene publications, theft of nuclear materials, unlawful use of the mails, interference with submarine cables, falsification and counterfeiting, and bribery of foreign public officials. For a discussion of all 22 crimes in one publication, see *infra* note 47 and accompanying text.

26. Bassiouni, *International Criminal Law Conventions by Crime*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 137 (M. Cherif Bassiouni ed. 1986).

27. 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE (M. Cherif Bassiouni ed. 1986). The reviewer contributed one chapter on immunities and exceptions affecting criminal jurisdiction, *id.* at 55-91, but can appropriately review the volume because he neither devised nor edited any other part of the three volumes.

28. *Id.* at 93-196. Component articles include Muller-Rappard, *The European System, id.* at 93-132; Gardocki, *The Socialist System, id.* at 133-49; and Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters, id.* at 151-96.

29. *Id.* at 239-74. Component articles include Bassiouni, *Transfer Between the United States, Mexico and Canada, id.* at 239-52; and Epp, *The European Convention, id.* at 253-74.

30. *Id.* at 351-89. Component articles include Spinellis, *A European Perspective, id.* at 351-77; and Zagaris & Rosenthal, *Securing Documents Overseas by the United States, id.* at 373-89.

31. *Id.* at 405-503. Component articles include Bassiouni, *The United States Model, id.* at 405-25; and Poncet & Gully-Hart, *The European Model, id.* at 461-503. Separate chapters include Oehler, *European System of the Recognition of Foreign Penal Judgments, id.* at 199-217; and Schutte, *The European System of the Transfer of Criminal Proceedings, id.* at 319-35. The latter topics have yet truly to emerge in American law. *Id.* at 218.

32. 3 INTERNATIONAL CRIMINAL LAW: ENFORCEMENT (M.C. Bassiouni ed. 1987).

lowing World War II offer concrete illustrations of international tribunals adjudicating guilt of crimes against humanity.[33] The volume usefully discusses the problems inherent in establishing international mechanisms to prosecute international crimes,[34] and offers a compendium of the League of Nations[35] and United Nations[36] instruments on which a system of international penal law enforcement might be established. The latter effort is one in which Professor Bassiouni has been very active,[37] so that the documentation is obviously "state of the art."

In sum, these three volumes provide an indispensable ready reference for anyone who wishes to grasp the contemporary dimensions of international criminal law and procedure.

International Criminal Law: A Guide to U.S. Practice and Procedure, edited by Ved P. Nanda and M. Cherif Bassiouni,[38] represents an adaptation, for the benefit of practitioners, of several of the papers in the first two volumes of *International Criminal Law,* emphasizing offshore enforcement of antitrust, securities and tax law, legislation against terrorism,[39] international judicial assistance and extraterritorial use of subpoenas to obtain evidence, extradition, and prisoner transfers. This reviewer has only one reservation about the contents: Professor Jordan J. Paust, in his chapter on constitutional limitations on extraterritorial federal power involving persons, property, due process and the seizure of evidence abroad,[40] endeavors to create an impression

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33. *Id.* at 25-178. Component articles include Bassiouni, *Historical Development of Prosecuting Crimes Against Peace, id.* at 25-27; Bierzaneck, *War Crimes: History and Definition, id.* at 29-50; Bassiouni, *Crimes Against Humanity, id.* at 51-71; Paust, *The Defense of "Superior Orders," id.* at 73-88 (including a discussion of the United States courts-martial following the My Lai killings); van den Wijngaeirt, *War Crimes, Crimes Against Humanity and Statutory Limitations, id.* at 89-96; Trifflerer, *Prosecution of States for Crimes of States, id.* at 99-107; and D'Amator, *National Prosecution for International Crimes, id.* at 168-78. An extensive array of appendices contains the international documents on which the doctrinal discussions rest. *Id.* at 109-69.

34. Problems include the diversity of international crimes and their various levels of receptivity in the countries of the world, the role of an international criminal tribunal in direct enforcement, and the lack of and difficulties associated with constructing an operative international criminal code. *Id.* at 3-22.

35. *Id.* at 189-202.

36. *Id.* at 203-302. This section includes a helpful procedural flow chart for an international criminal court. *Id.* at 303.

37. *See* M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) (proposed international criminal code with suggested applications).

38. INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (V.P. Nanda & M.C. Bassiouni eds. 1987) [hereinafter U.S. PRACTICE].

39. The reviewer contributed chapters on federal anti-terrorist legislation, *id.* at 15-20, and diplomatic and consular immunity, *id.* at 395-495, but has appropriately reviewed the volume because he neither devised nor edited any other part of it.

40. Paust, *Constitutional Limitations on Extraterritorial Federal Power: Persons, Property, Due Process, and the Seizure of Evidence Abroad,* in U.S. PRACTICE, *supra* note 38, at 449.

that a clear body of precedent supports extraterritorial application of the Federal Constitution whenever American officials participate in or American courts benefit from investigations or criminal litigation abroad. He criticizes the position adopted by the American Law Institute in *Restatement of the Foreign Relations Law of the United States* (Revised)[41] as "unnecessarily cautious."[42] In the reviewer's sense of the cases, only one federal court[43] has ruled directly that the United States Constitution applies externally; several other federal and state cases have rejected the idea outright.[44] Despite the current atti-

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41. 2 RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (Revised) § 721 (1987).

42. Paust, *supra* note 40, at 462.

43. See United States v. Verdugo-Urquidez, 42 Crim. L. Rep. 2417 (BNA) (9th Cir. Aug. 29, 1988).

44. There are several decisions in the search and seizure area. *See, e.g.*, United States v. Busic, 592 F.2d 13 (2d Cir. 1978) (fourth amendment exclusionary rule does not apply to evidence obtained during an unconstitutional search and seizure by foreign officials in their own country); Stonehill v. United States, 405 F.2d 738 (9th Cir. 1968) (exclusionary rule not applicable to search and seizure by Philippine officers in Philippines), *cert. denied*, 395 U.S. 960 (1969); People v. Helfend, 1 Cal. App. 3d 873, 82 Cal. Rptr. 295 (1969) (exclusionary rule does not apply to seizure of U.S. citizens in Mexico by Mexican officials), *cert. denied*, 398 U.S. 967 (1970). At least two cases deal with wiretapping. *See* United States v. Peterson, 812 F.2d 486, 492 (9th Cir. 1987) (telephone tap used in joint Philippines-United States investigation violated Philippine law and also the fourth amendment, but DEA agents could rely in good faith on the assurances given them by the Philippine officials that the tap was lawful); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (federal statute prohibiting unconstitutional wiretapping does not apply outside United States).

Many cases involve interrogations which would have been unconstitutional if conducted within the United States. *See, e.g.*, United States v. Martindale, 790 F.2d 1129, 1131-32 (4th Cir.) (exclusionary rule does not apply to interrogation without *Miranda* warnings by British officers in Great Britain), *cert. denied*, 107 S. Ct. 193 (1986); United States v. Schmidt, 573 F.2d 1057, 1062 (9th Cir.) (stating in dictum that earlier abusive interrogation by Peruvian officials did not render defendant's later confession in United States invalid), *cert. denied*, 439 U.S. 881 (1978); United States v. Trenary, 473 F.2d 680, 681-82 (9th Cir. 1973) (confession made to Mexican officials admissible); United States v. Nadelberg, 434 F.2d 585, 587 (2d Cir. 1970) (*Miranda* rule inapplicable to arrest and interrogation conducted by Canadian officers), *cert. denied*, 401 U.S. 939 (1971); Clark v. United States, 400 F.2d 83, 84-85 (9th Cir. 1968) (statements to Canadian constable admissible despite lack of *Miranda* warnings), *cert. denied*, 393 U.S. 1036 (1969); Commonwealth v. Wallace, 356 Mass. 92, 94, 248 N.E.2d 246, 247-48 (1969) (fourth amendment protections do not apply to Canadian police who arrested defendant without probable cause); Johnson v. State, 448 P.2d 266 (Okla. Crim. App. 1968) (statements to Mexican officer admissible), *cert. denied*, 397 U.S. 941 (1970); State v. Vickers, 24 Wash. App. 843, 844, 604 P.2d 997, 998 (1979) (statements to Canadian officials admissible).

Participation by American officers has not changed the result, since they have no duty under foreign law to comply with *Miranda* dictates such as prompt provision of counsel. *See, e.g.*, United States v. Mundt, 508 F.2d 904, 906-07 (10th Cir. 1974) (written statement given to Peruvian officials admissible even though United States officer played substantial part in events leading to defendant's arrest), *cert. denied*, 421 U.S. 949

tude of the United States Supreme Court toward the exclusionary rule — particularly as embodied in the good-faith exception rulings[45] — this reviewer doubts that a majority of the Court would ratify the various dicta relied upon by Professor Paust to support his doctrinal conclusions. If the chapter were clearly designated as a form of defendant-petitioner's brief on the matter, one could not object to its contents, but as an exposition of confirmed doctrine it has a potential to mislead.

International Crimes: Digest/Index, which was also prepared by Professor Bassiouni, is a highly useful research tool for those who wish to explore the texts of international instruments relating to international or transnational crimes, including those discussed in *International Criminal Law.* Although the two volumes of the *Digest/Index* do not reproduce the texts of the international instruments,[46] they facilitate targeted access to all instruments bearing on twenty-two inter-

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(1975); *Trenary,* 473 F.2d at 680 (statements to Mexican officials in presence of a United States official admissible since United States officer did not identify himself as such and was not acting in official capacity); United States v. Dopf, 434 F.2d 205, 207 (5th Cir. 1970) (statements to Mexican officials held admissible since United States officer who was present had no power to provide counsel but did advise defendants of rights).

The so-called Mansfield Amendment, 22 U.S.C. § 2291(c) (1982), not mentioned by the author is also relevant. Under that provision in its original form, no officer or employee of the United States could be present at or participate in an arrest or interrogation by authorities in another country. The Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 included amendments to the provision that allow the Secretary of State, in consultation with the Attorney General, to permit United States officers or employees to participate in arrests related to the control of narcotics, if adherence to the general prohibition would be "harmful to the national interests of the United States." 22 U.S.C.A. § 2291(c)(2) (Supp. 1988). The original provision does not cover a federal officer or employee who takes direct action to protect life or safety under exigent circumstances that were not anticipated "and which pose an immediate threat to United States officers or employees, officers or employees of a foreign government, or members of the public." *Id.* § 2291(c)(3). Nor does the basic prohibition govern in the course of maritime law enforcement operations in the territorial waters of another country if that country agrees. *Id.* § 2291(c)(4). The original Mansfield Amendment prohibition remains in place against the conduct of or participation in interrogation in foreign locales unless the person undergoing interrogation consents in writing. *Id.* § 2291(c)(5).

45. Exceptions to the exclusionary rule have been granted where enforcement officials have relied in good faith on statutes or warrants which were subsequently found to be unconstitutional or invalid, respectively. *See* Illinois v. Krull, 480 U.S. 340 (1987) (exclusionary rule does not apply to evidence obtained by police who reasonably relied upon statute authorizing warrantless searches even though the statute was subsequently found to violate fourth amendment); United States v. Leon, 468 U.S. 897 (1984) (exclusionary rule does not apply to evidence obtained by officers acting in good faith reliance upon a search warrant which was ultimately found to lack probable cause, and therefore was invalid); Massachusetts v. Sheppard, 468 U.S. 981 (1984) (exclusionary rule does not apply to evidence obtained under technically defective warrant which police believed to be valid).

46. Many of the international instruments, or their relevant portions, are reproduced as appendices in 1, 2 & 3 INTERNATIONAL CRIMINAL LAW, *supra* notes 22, 25 and 27.

national crimes[47] as well as the creation of an international criminal court.[48] Each international instrument or document is assigned a decimal document number. The supporting data include: citations to sources in which the full text may be found; place and date of signature; date of entry into force; the official language or languages; lists of state signatories and parties; countries entering reservations upon signature, ratification or accession; supplementary or replacement documents; United States participation or not, with dates of action if any; other international crimes to which the treaty applies; the penal characteristics (if any) of the instrument in question, including references to the relevant articles of the instrument; and editor's notes. At the end of the digests for each international crime, Professor Bassiouni has attached a summary of the penal characteristics of the concept in question, listing the relevant documents by their index numbers and including the pertinent article numbers, as well as other international documents that apply to the category in question, with dates of adoption or promulgation. The second volume contains one appendix with a chronological index to all the instruments digested or referred to in the main body of the work, with an index document number for each; a second appendix indexing the instruments by geographical region, again with index document numbers; and a third appendix containing a common name list with index document numbers.

Like any index or digest, the volumes are not formulated to be read from cover to cover; they are designed to facilitate ready access to international instruments bearing on given topics which are not otherwise gathered sequentially in collections of such instruments. Professor Bassiouni's work is an indispensable aid to research on international crimes, and should be on the shelves of every reference library.

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47. 1 M.C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS (1986) (includes basic materials on all 22 categories of crimes). For a list of the categories of international crimes and other publications with more information on them, see *supra* note 25.

48. 2 M.C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985, at 443-55 (1986) (discussing the ten relevant documents from 1899 to 1981 that created today's International Criminal Court).

BOOK REVIEW

LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE. By Steven R. Smith and Robert G. Meyer. New York University Press, New York, New York: 1987. Pp. xvi, 772.

Reviewed by Laura LeWinn*

The law has evolved dramatically in recent decades as a forceful mechanism of social and political change. The hallmark of this evolution has been the increasingly common interconnection between the legal system and the many other systems incorporated within our society. One would be hard-pressed to identify any significant aspect of daily life which has not felt, to *some* degree, the impact of the legal system.

This phenomenon has been particularly apparent in the symbiosis between the legal and mental health systems. Practitioners and providers of mental health services, such as psychiatrists, psychologists, and counselors of every kind, as well as their agencies or institutions, are increasingly scrutinized by lawyers, judges, and legislators on such issues as quality of services,[1] malpractice,[2] licensing,[3] and human experimentation. Conversely, the law and its practitioners have developed a reliance upon mental health professionals for assistance in determining the standards for such matters as competency,[4] criminal responsibility,[5] civil commitment,[6] and child custody.[7]

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1. *See, e.g.*, Pennhurst State School v. Halderman, 451 U.S. 1 (1981) (persons with disabilities have right to appropriate treatment and services, and these services should be designed to maximize a person's potential and to treat that person in a setting that is minimally restrictive to liberty).

2. *See, e.g.*, Davis v. Virginia Ry. Co., 361 U.S. 354 (1960) (establishing that malpractice requires evidence that doctor negligently departed from the recognized standard of medical care).

3. *See, e.g.*, Barsky v. Board of Regents, 347 U.S. 442 (1954) (practice of medicine is privilege granted by state under its power to fix terms of admission to practice).

4. *See, e.g.*, Drope v. Missouri, 420 U.S. 162 (1975) (person is incompetent if he is unable to understand nature and object of proceedings in which he is involved).

5. *See, e.g.*, United States v. Albright, 388 F.2d 719 (4th Cir. 1968) (use of expert testimony should be encouraged where sanity is an issue at a criminal trial).

6. *See, e.g.*, Addington v. Texas, 441 U.S. 418 (1979) (because standards for civil commitment vary from state to state, each state is free to develop its own procedures so long as they satisfy constitutional standards).

As with many interdependent relationships, the nexus between law and mental health has proved to be both synergistic and antagonistic—dynamics which, in turn, have spawned literature on most every facet of the subject. In *Law, Behavior, and Mental Health: Policy and Practice,*[8] attorney Steven R. Smith[9] and psychologist Robert G. Meyer[10] have collaborated on a work which dramatically evinces this literary outpouring. Their book is a well-documented[11] compendium of information and thought-provoking questions directed to a growing interdisciplinary audience. The authors acknowledge at the outset that "there are important differences between [the authors' respective] professions, [yet] there are even more important common interests and common problems"; therefore, the authors' goal is to "address (in a common language, [they] hope) a wide range of the topics which involve [the] law and the mental health professions."[12]

Smith and Meyer—the latter, for some reason referring to himself as "the junior author of this book"[13]—catalogue almost every area in which the two professions/disciplines are likely to interact. The book is organized into three broad categories plus a conclusion; each chapter is divided into several topics which form eighteen chapters of the book.[14] Chapter 19 is the conclusion.

The book's structure is an indication of the authors' thoroughness and organization. The chapters are mini-treatises, bearing headings such as "Legal Issues in Testing,"[15] "Eyewitness Testimony,"[16] "Crimi-

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7. *See, e.g.,* Stanley v. Illinois, 405 U.S. 645 (1972) (all parents are constitutionally entitled to a hearing to determine their fitness before a child can be removed from their custody).

8. S. SMITH & R. MEYER, LAW, BEHAVIOR, AND MENTAL HEALTH: POLICY AND PRACTICE (1987).

9. Steven Smith is a Professor of Law at the University of Louisville School of Law and an Associate in Community Health at the University of Louisville School of Medicine.

10. Robert G. Meyer is a Professor of Psychology at the University of Louisville. He was the former editor of the Bulletin of the American Academy of Forensic Psychology. His previous books include: R. MEYER, CLINICIAN'S HANDBOOK (1983); R. MEYER & P. SALMON, ABNORMAL PSYCHOLOGY (1983); and R. MEYER & Y. OSBORNE, CASE STUDIES OF ABNORMAL BEHAVIOR (1982).

11. S. SMITH & R. MEYER, *supra* note 8. There are 157 pages containing 1745 footnotes and citations in a text of 680 pages. Footnotes are listed separately at the end of each chapter. There is also a voluminous 74-page index reference at the end of the book.

12. *Id.* at ix.

13. *Id.* at 291.

14. *Id.* at vii-viii (table of contents). The three broad categories are: Part I, "The Law and Mental Health Practice"; Part II, "Human Behavior and the Courtroom"; Part III, "Behavioral Science and Social-Legal Policy."

15. *Id.* at 173-88 (chapter 5).

16. *Id.* at 330-60 (chapter 9).

nal Responsibility and the Insanity Defense,"[17] "Involuntary Civil Commitment and Predictions of Dangerousness,"[18] and "Decision Making and Responsibility."[19] The text of each chapter discusses the subject thus identified through a series of short subtopics. Every chapter concludes with notes and citations as well as a "summary" which effectively highlights the critical data, thoughts, and questions raised by the text. This structure and style, while perhaps creating a somewhat desultory overall effect, benefit the book by rendering it accessible as a quick-reference guide. Thus, the reader need not dig indiscriminately nor flip through pages randomly in order to get at the substance of the material presented; information is readily and easily attainable to even the most casual researcher.

Substantively, the book presents a wide-ranging, almost encyclopedic, array of issues likely to concern legal and mental health practitioners. The authors commingle their expertise in an attempt to address followers of each other's discipline, as well as their own. This effort succeeds at times, and at other times fails.

For instance, the integration of the authors' respective disciplines is effective in chapter 10, "The Mental Health Professional in the Legal System."[20] In discussing the professional's possible role as therapist, expert witness, or consultant for jury selection or presentation of evidence, the authors directly relate these roles to the realities of the legal process. The authors offer guidelines for "expert and ethical" case preparation[21] and courtroom presentation,[22] with particular attention to preparing for cross-examination.[23] In addition to the mental health professional's role in judicial proceedings, the growing role of such professionals in administrative hearings and in private dispute-resolution mechanisms (*e.g.*, arbitration) is explored.[24]

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17. *Id.* at 383-417 (chapter 11).

18. *Id.* at 587-623 (chapter 17).

19. *Id.* at 657-80 (chapter 19).

20. *Id.* at 361-80. Short subtopics include: "Expert, Consultant, Advocate, or Court-Ordered Therapist," *id.* at 361-63; "The Expert Witness," at *id.* 363-75; "Other Roles in the Legal System," *id.* at 375-77.

21. *Id.* at 366-68 (including five general suggestions for expert and ethical presentation of a case, such as "Avoid taking any case in which you do not have a reasonable degree of expertise," and eight other suggestions that are important to follow if a mental health or forensic professional becomes involved in the legal process, such as, "To the degree possible, know what questions to expect when you enter the courtroom.").

22. *Id.* at 368-70 (including 11 suggestions for better presentation of testimony in the courtroom, for example, "Do not be afraid to admit limitations in your expertise or in the data that you have available.").

23. *Id.* at 370-72 (including a list of seven ways in which the cross-examining attorney will challenge the testimony of the expert witness, such as attacking the procedures that are used by the expert witness).

24. *Id.* at 375-77 (briefly examining the role of the mental health professional not

Chapters on issues of competency—such as chapter 16, "Competency: Capacity to Stand Trial, Ability to Make a Will, and Guardianship,"[25] and chapter 19, "Decision Making and Responsibility"[26]—likewise represent a well-integrated presentation of the two disciplines. Consequences of incompetency status are discussed both for their influence on legal procedures[27] and in the context of the pertinent mental health assessments and treatments for those individuals relegated to such status.[28]

Competency considerations are a major theme of the book, as those considerations are factored into other tangentially related matters. For example, the authors' discussions of the right to refuse medication,[29] informed consent to treatment,[30] and criminal responsibility[31]

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only in administrative and other hearings, but also in evaluation reports, in treatment subject to court order, and in the legislative process).

25. *Id.* at 544-86. Short subtopics include: "Standing Trial," *id.* at 545-58; "Capacity to Make a Will," *id.* at 558-65; "Guardianship," *id.* at 565-74; and "Defining Incompetency," *id.* at 574-76.

26. *Id.* at 657-80. Short subtopics include: "The Importance of Decision-Making Authority," *id.* at 658; "Standards for Determining Decision-Making Capability," *id.* at 658-63; "Level of Competency Required," *id.* at 663-64; "Incompetency and Other State Intervention," *id.* at 664-65; "Determining Incompetency," *id.* at 665-66; "Decision Making for Incompetents," *id.* at 667-71; "Responsibility," *id.* at 671-73; "Autonomy," *id.* at 673-74; and "A Final Word About Research in Law and the Behavioral Sciences," *id.* at 674-75.

27. Issues discussed in connection with a defendant's competency to stand trial include the standards for incompetency, *id.* at 545; the basis for incompetency, *id.* at 545-47; the consequences of incompetency, *id.* at 547; a clarification of the distinctions between incompetency, insanity, civil commitment, and psychosis, *id.* at 548; and the applicable procedure, *id.* at 548-49.

Similarly, capacity to make a will is discussed in terms of the applicable legal standards of competency, *id.* at 559-60; evidence of capacity and mental health experts, *id.* at 560-62; capacity to make a will in practice, *id.* at 562; proposals for reform, *id.* at 562-64.

The subject of guardianship encompasses the standards for determining incompetency, *id.* at 566-67; hearings and process, *id.* at 567-68; incompetency without a hearing, *id.* at 568; restoration of competence and limited guardianship, *id.* at 569; special decisions concerning incompetents pertaining to sterilization and lifesaving treatment, *id.* at 570.

The discussion of decision-making and responsibility addresses such key issues as the standards for determining decision-making capabilities, *id.* at 658-63; the level of competency required, *id.* at 663-64; and determining incompetency, *id.* at 665-66.

28. *Id.* at 549-53. The authors consider the reliability of a variety of tests employed in the assessment of a defendant's competency to stand trial, *id.* at 549-51, as well as the disposition of those found incompetent to stand trial, *id.* at 551-53.

29. *Id.* at 624, 627-28 (short subtopic entitled "The Right to Refuse Treatment").

30. *Id.* at 627 (concept requires that diagnosis and treatment procedures be performed on competent adults only with their consent).

31. *Id.* at 384-85 (the concept of free or responsible choice is the traditional foundation of criminal law, but a mentally incompetent individual may not be capable of exercising free will); *see also id.* at 383-417 (chapter 11, entitled "Criminal Responsibility and the Insanity Defense").

include references to mental competency as an integral element of each topic. Moreover, in their chapter on involuntary commitment,[32] they describe as "unnecessarily harsh" the debate over abolition of civil commitment,[33] which, they assert, results from "failing to properly identify fundamental issues, *e.g.*, recognizing nondangerous commitment as a question of competency."[34] This latter observation arguably overstates the significance of competency *per se* as a factor in such issues.

The substance of this book suffers from one particularly noticeable shortcoming—the lack of coverage for legal issues related to the institutional delivery of mental health services,[35] primarily in those facilities (such as publicly funded mental hospitals) which accept and receive involuntarily committed patients for treatment.[36] The authors acknowledge that "involuntary incarceration and involuntary treatment involve interference with fundamental forms of liberty."[37] Yet, the significant and dramatic implications of this premise are not fully explored. Even the chapter on involuntary civil commitment[38] limits its discussion to standards governing the commitment process itself,[39] rather than focusing on the ostensible goals and purposes served by that process.[40]

The authors' documentation of the literature dealing with institutional issues is extensive, yet the substantive discussion of these issues is limited. Thus, this book presents an anomaly: it recognizes that the legal system has invaded, and will continue to invade, the province of

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32. *Id.* at 587-623 (chapter 17, entitled "Involuntary Civil Commitment and Predictions of Dangerousness").

33. *Id.* at 606.

34. *Id.* at 607. Another reason suggested for this debate being unnecessarily harsh is "because of the failure to recognize that the disagreements reflect good faith differences in values concerning the nature of freedom, autonomy, paternalism, and mental illness." *Id.* at 606.

35. *See, e.g.*, Gutheil, Appelbaum & Wexler, *The Inappropriateness of Least Restrictive Alternative Analysis for Involuntary Procedures with the Institutionalized Mentally Ill*, 11 J. PSYCHIATRY & L. 7 (1983) (discussing one perspective on applying the doctrine of "the least restrictive alternative" to the selection of methods for treating involuntary mental patients in an institutional setting).

36. For a discussion of some of the issues confronting state psychiatric facilities after a patient is involuntarily committed, see Brown, *State Mental Hospital Staff Attitudes Towards Patient's Rights*, 8 INT'L J.L. & PSYCHIATRY 423 (1986); Way, *The Use of Restraint and Seclusion in New York State Psychiatric Centers*, 8 INT'L J.L. & PSYCHIATRY 383 (1986).

37. S. SMITH & R. MEYER, *supra* note 8, at 647.

38. *See supra* note 18 and accompanying text.

39. S. SMITH & R. MEYER, *supra* note 8, at 592-94, 603-04.

40. For a general discussion of goals in the treatment of the mentally ill, see Daly, *The Diverse Goals Involved in Treatment of the Mentally Ill*, 8 J. LEGAL MED. 49 (1987).

mental health practitioners, thereby requiring a continual process of accommodation and adjustment between the disciplines, yet mental health institutions— one of the key areas in which this "invasion" has occurred, and where accommodations have been made— are neglected. Material which receives the authors' attention is a valuable source of information and reference for legal and mental health professionals; however, the benefit of this material will likely be gained by private practitioners facing legal proceedings on behalf of individual clients.

Smith and Meyer achieve two purposes with this book. They instruct members of both disciplines how to conduct specific proceedings and practices, and they furnish a current and comprehensive bibliography of the professional literature. The first purpose is limited as noted above, but the second is an impressive effort and provides invaluable material for continuing the dialogue between the professions.