Those interested in the issue of judicial appointments in Canada can only benefit from exposure to similar debates and controversies in other legal systems. In that vein, *Appointing Judges in an Age of Judicial Power: Critical Perspectives From Around the World*, a collection of essays co-edited by Kate Malleson and Peter H. Russell, is an important addition to what is sure to be a growing body of literature.

The book focuses on the judicial appointments process in three different political contexts: established democracies; international courts; and new democracies and transitional states. Some 19 jurisdictions receive attention. Most of the chapters follow a common trajectory: a brief history of judicial appointments in the state or system under discussion; an outline of the current process; and an analysis of the issues particular to that state or system.

The collection has many positive aspects. For example, the reader is presented with a large amount of historical, political and statistical information, which provides a handy comparative reference tool. The book exposes readers to numerous kinds of judicial appointments processes, including: pure executive discretion (Canada, New Zealand); recommending committees (the United Kingdom, Scotland); appointment committees (Israel); mixed executive-legislative regimes (the United States); and judicially controlled (the Netherlands).

Another positive aspect is the degree to which the collection addresses the need to diversify the judiciary. Some chapters take a fairly predictable route, examining “diversity” as a countervailing value to “merit” (the Netherlands, Canada). However, a helpful running discussion throughout the book explores why and how...
diversity is important: for example, whether its justification lies in the potential to change the actual process of judging (sometimes termed the “representative” approach) or to better reflect a society’s composition and, in turn, enhance the courts’ legitimacy (often called the “reflective” approach). Most authors in the collection prefer the reflective approach, citing the concern that too great a focus on “representation” risks turning the judiciary into an institution driven by expectation. A number of chapters also query whether a superficial focus on diversity makes it harder to appoint truly outstanding candidates over “mediocre compromise” ones (England and Wales, New Zealand, South Africa). Finally, the collection serves as a useful reminder of the different ways in which one can understand “diversity,” from a focus on race and gender (the UK), to religion (the Netherlands), regionalism (Canada), and even political orientation (Italy).

The collection offers several points of interest to a Canadian audience. For example, the variety of judicial appointments processes examined challenges the assumption that reforms to our system necessarily involve ceding more control to the legislative branch. It is also interesting to note the degree to which the judicial path in other Commonwealth legal systems is limited largely to superstar advocates. Writing about England and Wales, Malleson describes the “corrosive impact” of a judiciary that is overwhelmingly homogeneous (“elderly, white, male barristers educated at private schools and at Oxbridge”) because judges are overwhelmingly recruited from barristers’ ranks which still remain disproportionately closed to women and minority groups. She urges a more “Catholic approach” to judicial appointments which recognizes the value of different professional backgrounds.

Thus, the book is informative and timely. Nonetheless, some of its elements may draw criticism. The first element relates to the book’s organization. With respect to the main division between Parts I and III, which is best described in terms of states’ democratic pedigree, it seems that simplicity has won out at the cost of coherence. For example, the Continental and Anglo-American systems canvassed in Part I embody such distinct approaches to the judicial role that useful comparisons of approaches become difficult. Similarly, Israel and South Africa are an odd fit for the emerging democracies of Part III. If division was needed, it would have been helpful to consider other means of classification, such as the nature of the judicial role in the states and systems under discussion, the current process of judicial appointments, or even the extent to which particular states or systems adhere to the separation of powers.

4. Ibid. at 42.
5. Ibid.
The collection's coherence is also challenged by the relationship between its breadth and its overall theme. The animating presumption of the book is that judges have increased influence and power. As such, politically, the book appears to be oriented towards a more cautious judicial role (Israel's Eli Salzberger stands alone in his unequivocal embrace of an "activist" judiciary). Yet, as James Allan writes in the chapter on New Zealand, "context surely matters" and the reality is that judicial power is not on the increase in many of the countries discussed. The debate that appears to concern the editors most (safeguarding judicial independence versus mitigating increased judicial power) has actual significance in a relatively small number of countries. Generally, those countries enjoy: well-established democratic traditions; effective protection for the judiciary against political pressure; recognition of the rule of law; and some notion of fundamental rights which are beyond ordinary legislative control. Such factors do not exist in a number of the countries discussed, most notably those in Part III and some of the Continental countries covered in Part I.

One technical shortcoming is that some chapters do not explain terms that are specific to the jurisdiction under discussion. For example, the word "secret soundings" appears repeatedly in the chapters on the UK and Australia, but this term is not widely used in North America and its nuances may not be appreciated here. Finally, it would have been helpful to provide an appendix presenting important features of the individual systems, such as method of appointment and basic judicial structure. With so many different jurisdictions addressed, the reader can quickly become overwhelmed, and a concise informational summary would have been useful.

Aside from those general observations, a number of chapters warrant particular mention. Since F.L. Morton focuses on the present author's own jurisdiction, Canada, we will begin with his paper. As Morton notes, the judicial appointment process in Canada is a product of a bygone, colonial era. The federal government appoints judges to the superior courts, which are themselves subject to provincial administration and deal with cases arising under both provincial and federal laws. Though a practice of provincial consultation has developed over the years, appointments to the superior courts overwhelmingly reflect federal priorities and, occasionally, little more than political patronage. Furthermore, appointments to the Supreme Court of Canada are even more closely guarded. Pressure has been building to

7. James Allan, "Judicial Appointments in New Zealand" in Malleson & Russell, supra note 1, 103 at 108.
9. Malleson, supra note 3 at 50. The term appears to refer to committee members providing their own personal knowledge of candidates, or to solicit the same from others, but to keep that information as well as the identity of the "referees" from the candidate.
12. Ibid., s. 92(14).
reform the process. Indeed, Morton's discussion is already outdated since, in 2006, the federal government announced changes to the advisory committees. These developments, though unexpected, limit the relevance of this chapter.

Of greater concern, in my opinion, is the way Morton frames the chapter as an anti-Charter, anti-judiciary diatribe. Morton's selective account suggests that he is more concerned with the results reached in particular cases or legal areas (as stated, the Charter is a favourite target), than with process reforms per se. He is hostile to attempts to diversify the judiciary, at times making intemperate characterizations. Thus, the statutory requirement that the Supreme Court reflect Québec's distinct legal tradition becomes mere "ethnic representation;" the historic ascension of female justices to the Court is due to "feminist lobbying;" and the current focus on judicial diversity is largely owed to "identity politics advocates." Aside from these generalizations, Morton's historical analysis is misleading, such as when he characterizes R. v. Morgentaler as the product of the one female Justice on the Supreme Court (Bertha Wilson). Four other judges reached the same result through equally path-breaking opinions. Moreover, Morton makes unsubstantiated claims that recent Supreme Court appointments were motivated by a desire to influence the outcome of particular cases or to appease particular minority groups. The implication of

13. Department of Justice, online: Proposal To Reform The Supreme Court Of Canada Appointments Process <http://canada.justice.gc.ca/en/dept/pub/scc/scc.pdf>. The changes are threefold. First, committees will cease ranking applications as "highly recommended," "recommended" and "unable to recommend," replacing them with the terms "qualified" and "not qualified." Second, the government has added a fourth representative in the form of a law enforcement agent. Third, the government has given itself a working majority on the Committee by stating that the judicial member of the committee shall not vote except to break a tie. Department of Justice, online: Proposal To Reform The Supreme Court Of Canada Appointments Process <http://canada.justice.gc.ca/en/dept/pub/scc/scc.pdf>.


15. For example, he states that polls show a majority of Canadians would prefer popular elections of Supreme Court judges. This result could be interpreted as a lack of faith in our judges, but other polls have shown that Canadians approve of the Charter and express confidence in the judiciary. See e.g. Kirk Makin, "Judges garner greater trust than politicians, survey finds" The Globe and Mail (9 April 2007), online: The Globe and Mail <http://www.theglobeandmail.com/servlet/story/LAC.20070409.CHARTERPOLLSIDE09/TPStory/National>. Morton appears to endorse the idea of popular election. Though he admits that the idea is probably unachievable, he implies this is solely due to a failure of political nerve. The reality is that such processes are extremely rare. For example, of the jurisdictions covered in the book, only the United States and Japan employ any kind of (limited) elections.

16. Supra note 10 at 58.
17. Ibid., at 72.
18. Ibid., at 72.
20. See e.g. supra note 10 at 62-63 (Morton's discussion surrounding the appointment of Michel Bastarache to replace Gerard La Forest). While Bastarache's former ties to the Liberal party are fair game for criticism, the allegation that he was somehow in cahoots with an all-powerful gay rights lobby is risible. Similar comments are found with respect to the appointments of Rosalie Abella and Louise Charron, insinuating that the government wanted a particular outcome in the Reference re Same Sex Marriages, 2004 SCC 79, [2004] 3 S.C.R. 698, 246 D.L.R. (4th) 193 [re:Same Sex Marriage cited to S.C.R.]. No persuasive reasons are given for why the federal government would seek to manipulate a particular outcome in this way.
these claims is clear: the balance of power has shifted to "far-left" advocacy groups to which government and courts are cowed and subservient. These kinds of arguments distract the reader from the complicated history of the judicial appointments process in Canada, a process against which criticisms can legitimately be made.\footnote{See e.g. Peter H. Russell, "An Error of Judgment" \textit{The Globe and Mail} (27 February 2007) A21.}

James Allan’s thought-provoking chapter on New Zealand is similarly suspicious of judicial power but far more helpful than Morton’s contribution.\footnote{Supra note 7.} Discussing the recent establishment of the New Zealand Supreme Court, Allan argues against any indirect structure for judicial appointments. In the case of the Supreme Court, he explains that New Zealand’s Attorney General initially refused to nominate the four most senior judges on the Court of Appeal at the time. Many thought that this course of action was constitutionally appropriate. Ultimately, the Attorney General “backtracked and backtracked”\footnote{Ibid. at 107.} until those judges were eventually appointed. Allan frames the issue as a crisp choice between two dangers: “over-politicization”\footnote{Ibid. at 110.} on the one hand and “an insulated, self-selecting lawyerly caste”\footnote{Ibid.} out of step with the voting public on the other. He prefers the first danger, arguing that political pressure will usually act as a sufficient deterrent against abuse of the judicial appointments power.

Though Allan’s analysis is cogent, it presents difficulties nonetheless. First, he does not consider why the Attorney General might have legitimately wished to make other appointments (for example, to pick judges better suited for the needs of the new court) or explain why elevating the most senior existing judges was the only constitutional decision (surely one would want some highly experienced judges to remain on the lower courts). One wonders whether the proper result was, in fact, achieved. Second, he assumes things about appointments committees that cannot be verified. Like Malleson,\footnote{Supra note 3 at 45.} he speculates that such committees will eschew riskier candidates, but he does not acknowledge that politicians may be equally cautious. Indeed, the assertion that politicians are more likely to throw down the gauntlet with respect to judicial appointments is somewhat counterintuitive. Finally, Allan exaggerates the extent to which the existing judicial pool displays attitudes at odds with those of the general public, and he overstates the degree to which such uniformity is the norm among judges. Surely what is more important is that judges recognize the proper boundaries of their role and do not allow political views to influence their decisions. It appears that Allan’s stark legal realism has produced an alarmist scenario based on the most cynical arguments about judicial activism.

\footnote{22. \textit{Supra note 7.}}
\footnote{23. \textit{Ibid. at 107.}}
\footnote{24. \textit{Ibid. at 110.}}
\footnote{25. \textit{Ibid.}}
\footnote{26. \textit{Supra note 3 at 45.}}
In judicial appointments, as in constitutional law generally, the United States is at once an outlier, beacon, and reference point. Michael Tolley's contribution highlights how mechanisms that are perfectly balanced in theory are vulnerable to manipulation in practice. Tolley's focus is the process of Presidential appointments to the federal bench, which are made on the advice and consent of the Senate. Although the system has always been politicized, in the past it was also characterized by "institutional norms that could manage interbranch and interparty conflict." Two recent developments raise serious questions about whether the process is functioning in accordance with constitutional norms: the President's use of the recess appointment power to bypass the need for Senate consent, and Senators' use (or abuse) of filibuster rules to prevent Presidential nominations from going to a straight vote. Tolley rightly characterizes both tactics as destructive and emblematic of an increasingly polarized political class. In terms of possible solutions, a constitutional amendment is considered briefly but rejected. Yet, Tolley's preferred resolution—judicial intervention—seems unrealistic, given the degree to which the judiciary is itself viewed as partisan. One struggles to understand how intervention by that branch could resolve such a divisive issue.

If the United States represents one extreme of judicial appointments in terms of negotiation and openness, the other extreme is surely found in Australia. There, as Elizabeth Handsley notes, judicial appointments are actually described as "in the gift of" the Attorney General. Handsley surmises that controversial cases such as *Mabo v. Queensland,* and alleged situations of judicial misconduct, have spurred greater interest in judicial appointments leading in recent years to a more diversified bench (mostly in terms of gender). Her concern is that the predominantly outcome-oriented nature of the debate has focused on appointing judges who will reach the "right" decisions, leaving intact a remarkably opaque appointments system. She is pessimistic about the prospects for change. This pessimism, reflected as well in the Canadian chapter, is probably realistic. Still, it is interesting to note that in other jurisdictions such as Scotland, England and Wales, and Israel, we see that, on occasion, executive branches have voluntarily ceded power in pursuit of a more balanced process.

The chapters concerning the Netherlands, Italy, France and Germany offer a vivid counterpoint to the Anglo-American countries. As Continental systems, the four countries have a separate, professional system for appointing judges, which

29. Supra note 27 at 82.
30. Elizabeth Handsley, "The judicial whisper goes around: The Appointment of Judicial Officers in Australia" in Malleson & Russell, supra note 1, 122 at 141.
stands in stark contrast to the overlapping of the judiciary and the legal profession in common law countries. The chapters are interesting in their own right. Italy, for example, has developed an extraordinary system of absolute judicial independence combined with overt partisanship, such that one finds both unionization and party politics firmly entrenched in the judicial ranks. In France, a traditional aversion to the separation of powers and a widespread suspicion of an "elite" class in conflict with the vaunted administrative corps have produced a markedly low regard for judges. Recent attempts to standardize and broaden judicial education have begun to improve the public perception of the profession, but progress is slow. The Netherlands is presented as a highly stable and consensus-based society reflected in a judiciary that never issues dissenting opinions and, in the case of the Supreme Court, draws up its own list of appointees. In Germany, Christine Landfried writes, "even the election of the Pope is more democratic." Arguing that the coherence of the appointments process affects the legitimacy of judicial review, she decries the establishment of political "seats" on the Constitutional Court, calling instead for public hearings. Curiously, only the French chapter deals with the diversity issue in relation to racial minorities, the accommodation of whom becomes a divisive issue in much of Europe.

The sole chapter on international courts, authored by Ruth Mackenzie and Philippe Sands, provides an informative account of a complex, multilayered system. Mackenzie and Sands note that different processes govern over 30 courts and tribunals, producing bodies which function more like islands than members of an interconnected system of legal norms. Though most international bodies articulate a set of required qualifications and geographic/legal system targets, the appointments process itself remains shrouded. This is largely due to the fact that true power rests with member states effectuating the nominations through un-interrogated domestic channels. Calling for a more open system, including advisory committees, the authors present an unsettling picture: evermore powerful international law norms are enforced by judges appointed through shrouded processes.

Francois du Bois' discussion of South Africa is a highlight of the collection. South Africa, of course, is a rich source for legal analysis and debate. Perhaps more

32. Mary L. Volcansek, "Judicial Selection in Italy: A Civil Service Model with Partisan Results" in Malleson & Russell, supra note 1 at 159.
34. Leny E. de Groot-Van Leeuwen, "Merit Selection and Diversity in the Dutch Judiciary" in Malleson & Russell, supra note 1 at 145.
than any other nation, it confronts the contemporary reality of “diversifying” a judiciary which needs the “best” possible candidates to perform an exceptionally challenging role. Unsurprisingly, the country has one of the most politically conscious and transparent appointments process of any in the collection: regular calls for applications; open interviews; references admitted from a variety of sources; and even published transcripts of (some) closed deliberations are just some of the distinguishing characteristics. Candidates are routinely grilled about “their political leanings, their judgments, their failure to do community work and their attitude to transformation” (although “direct and substantive legal questions” are comparatively rare).

The process has not been without controversy and criticism, and not always from the expected sources. Agonizingly difficult choices are thrashed out, at times, in full public view. Controversies invariably involve black candidates versus non-black “shining stars” who could add to the diversity of the bench in other ways. Generally, the commissions have sided with black candidates. While the importance of racial balance is obvious and undeniable, du Bois worries that other meanings of "diversity" have yet to make meaningful inroads into the public consciousness.

Most of the other accounts in Part III provide cautionary tales of systems either currently characterized by, or struggling to overcome, an appointments process that sees the judiciary as an arm of the executive. The chapters on Namibia and Zimbabwe are compelling (and in some respects harrowing) accounts of previously colonized systems undergoing the turmoil of regime change. Colin Hawes provides a fascinating account of the enormous shift underway in China as a rapidly modernizing state (which previously did not even require of judges specialized legal knowledge) must now struggle to reform its education and professional training system to meet the increasing needs of its massive population.

One question raised by many of the chapters, particularly those in Part I, is, how it is possible that such obsolete systems have continued to survive in modern democracies? The question is particularly relevant given the low social tolerance for corruption and the deeply entrenched expectation of fairness with respect to the bestowal of public benefits (which a judicial appointment surely is). The answer is not

38. Ibid. at 295.
39. Ibid. at 296.
40. Ibid. at 290-91 (noting that the “doyen of pre-1994 anti-apartheid lawyers, Sir Sydney Kentridge QC,” has expressed concern that the new judicial selection commission “had not been rigorous enough in ensuring that legal knowledge and experience accompany the other qualities needed for transformation of the judiciary” [footnote omitted].
42. Derek Matyszak, "Creating a Compliant Judiciary in Zimbabwe, 2000-2003" in Malleson & Russell, supra note 1 at 331.
43. Colin Hawes, "Improving the Quality of the Judiciary in China: Recent Reforms to the Procedures for Appointing, Promoting, and Discharging Judges" in Malleson & Russell, supra note 1 at 395.
immediately apparent and reveals puzzling contradictions in the public debate about the judicial role. For example, in spite of the lack of a transparent, rationalized appointments process, judiciaries in stable Anglo-American democracies enjoy high levels of public support. Perhaps it is difficult to become exercised over a process which—because of its opacity—rarely produces “victims” (since most candidates are considered behind closed doors). As well, the link between judicial selection and judicial performance remains murky. Obviously, further research and comparative engagement are needed, but Malleson and Russell are to be commended for this latest contribution to an important debate.

Carissima Mathen
Associate Professor
Faculty of Law
University of New Brunswick

44. In stark contrast stands South Africa, with its explicitly political approach but where the Constitutional Court enjoys low levels of public support. Francois du Bois, “Judicial Selection in Post-Apartheid South Africa” in Malleson & Russell, supra note 1 at 301.
Le droit de choisir :
Essais sur le droit du Québec à disposer de lui-même

The Right to Choose:
Essays on Quebec’s Right of Self-Determination

par Daniel Turp

Daniel Turp est professeur titulaire à la faculté de droit de l’Université de Montréal depuis 1982 où il enseigne, entre autres disciplines, le droit international public et le droit constitutionnel. Il a été député du comté de Beauharnois-Salaberry à la Chambre des communes du Parlement du Canada de 1997 à l’an 2000 où il a agi comme porte-parole du Bloc Québécois en matière d’Affaires étrangères et d’Affaires intergouvernementales. Il représente l’électorat du comté de Mercier à l’Assemblée nationale du Québec depuis 2003 (il vient tout juste d’être réélu en mars 2007) où il intervient au nom du Parti québécois principalement dans les domaines des relations internationales et des affaires canadiennes.1

À son retour à l’Université de Montréal en 2001 et avant d’être élu à l’Assemblée nationale du Québec, il avait entrepris de regrouper plusieurs de ses écrits qui furent alors publiés la même année par les Éditions Thémis. Il s’agit donc d’un ouvrage réunissant 25 textes, plusieurs dans leur version originale et d’autres remaniés, portant sur le même thème, à savoir le droit du Québec à disposer de lui-même. C’est là un thème récurrent de la vie politique canadienne depuis plusieurs décennies. Les deux premiers textes, les plus importants au niveau du développe- ment, sont une version remaniée de mémoires complétés dans le cadre d’études de deuxième cycle. Le reste de l’ouvrage contient des articles déjà publiés dans des revues juridiques, des exposés présentés devant des commissions parlementaires, des

<http://www.danielturp.org/>.
conferences et des notes pour allocution. Les textes sont rédigés en français ou en anglais ; souvent, il s’agit d’un texte français qui est suivi de sa version anglaise ou de l’inverse. S’y ajoutent en annexes une vingtaine d’instruments juridiques internationaux et canadiens destinés à faciliter la compréhension du lecteur quant au sujet en titre.

Le premier texte court sur près de deux cents pages et est intitulé « Le droit des peuples à disposer d’eux-mêmes, le droit de sécession et son application au cas du Québec »2. Il s’agit bien évidemment d’une étude des principes du droit international public fondant l’exercice de ce droit ainsi que de son champ d’application. Le texte est une version remaniée du mémoire de maîtrise de l’auteur déposé en 1979 et publié sous forme d’article en 1982. C’est donc l’état du droit tel qu’il existait à cette époque qui y est présenté. Les sources, tant conventionnelles que la pratique des États, du droit des peuples à disposer d’eux-mêmes y sont d’abord analysées puis son corollaire, le droit de sécession et ses conditions d’exercice. La doctrine est aussi mise à contribution. Même si le cas du Québec ne rencontrait pas (à l’époque) tous les critères formels identifiés pour l’exercice du droit (d’abord réservé semblait-il aux peuples coloniaux), il constituait, selon l’auteur, une occasion privilégiée pour la communauté internationale de l’actualiser en y ajoutant en particulier le critère de la légitimité démocratique fondé sur la tenue d’une consultation populaire3. Le premier référendum sur la souveraineté du Québec avait eu lieu en 1980. Il en ressort que l’exercice de ce droit, même si son résultat affecte l’ensemble du Canada, reste entre les mains exclusives du peuple québécois.


Le troisième texte, « De l’opportunité de proclamer le droit à l’autodétermination du peuple québécois »6, est un texte inédit écrit en 1981, donc après le premier référendum et au moment de la saga des négociations fédérales-provinciales ayant entraîné le rapatriement de la Constitution canadienne. En effet, ce rapatriement a conduit au plan politique à l’exclusion du Québec. Le projet d’accord du Lac Meech tentera, mais vainement, d’y mettre fin et la problématique continue

3. Ibid. à la p. 186.
4. Ibid. à la p. 189.
5. Ibid. à la p. 291.
6. Ibid. à la p. 297.
même encore aujourd’hui de hanter le Canada. Pour l’auteur, le droit à l’autodétermination n’est pas réservé aux seuls peuples coloniaux et il presse les autorités québécoises à proclamer la qualité de peuple à la collectivité québécoise. Suivent successivement une opinion juridique préparée en 1985 pour le gouvernement québécois d’alors sur la portée de la qualification du Québec comme « société distincte » ou comme « peuple » dans la Constitution canadienne

8. Le caractère distinct et le droit à l’autodétermination du Québec » supra note 1 à la p. 325.
10. Options d’avenir politique et constitutionnel du Québec » supra note 1 à la p. 347.
11. Le processus d’accession à la souveraineté et le droit à l’autodétermination du Québec » supra note 1 à la p. 425.
14. Supra note 1 à la p. 555.

en anglais en 1996 sur l'exercice par le Québec de son droit à l'autodétermination et son impact sur le régime fédéral canadien\textsuperscript{15}, un article publié en 1993 et faisant la synthèse du droit des peuples à disposer d'eux-mêmes en rapport avec la pratique des États\textsuperscript{16}, le texte anglais d'une conférence présentée en 1993 toujours sur l'exercice du même droit tant en droit canadien qu'en droit international public\textsuperscript{17}, deux textes, d'une facture plus partisane, écrits en 1996 et l'un publié en anglais dans The Gazette\textsuperscript{18} et l'autre en français qui se trouve à être des notes pour un débat\textsuperscript{19}; l'on regrette dans ce dernier cas de ne pas connaître l'argumentation adverse.

L'avis de la Cour suprême du Canada dans le \textit{Renvoi relatif à la sécession du Québec}\textsuperscript{20} a été rendu en 1998. Même si la Cour suprême du Canada constata le silence de la Constitution canadienne sur le droit de sécession des provinces, elle n'en conclua pas moins sur l'obligation des autorités fédérales et du reste du Canada de négocier les termes d'une sécession avec le Québec suite à la tenue dans cette province d'un référendum où une question claire sur ce sujet l'emporterait avec une majorité claire. Le lecteur ne sera donc pas surpris de retrouver dans cet ouvrage les commentaires et réactions de l'auteur : « Globalizing Sovereignty—The International Implications of the Supreme Court of Canada’s Advisory Opinion on Québec Sovereignty »\textsuperscript{21}, « Les incidences internationales de l'avis consultatif de la Cour suprême du Canada sur la souveraineté du Québec »\textsuperscript{22}, « The Issue of International Recognition in the Supreme Court of Canada's Reference on Québec Sovereignty »\textsuperscript{23}, « La question de la reconnaissance international[e] dans l[e] Renvoi à la Cour suprême sur la souveraineté du Québec »\textsuperscript{24}, « International Recognition in the Supreme Court of Canada’s Québec Reference »\textsuperscript{25}, « La reconnaissance internationale dans le \textit{Renvoi relatif à la sécession du Québec} de la Cour suprême du Canada »\textsuperscript{26}. Ainsi, l'auteur fait état de l'étonnement de beaucoup face à l'émergence inattendue en droit canadien d'un droit constitutionnel de sécession alors que le droit international public reste, quant à lui, dans l'ambiguïté relativement au droit de sécession d'un État-membre d'une fédération.

\textsuperscript{15} « The Recognition of Québec’s Right of Self-determination and its Exercise within a Novel and Canadian Union » \textit{supra} note 1 à la p. 569.
\textsuperscript{16} « La décennie du droit international et le droit des peuples à disposer d’eux-mêmes » \textit{supra} note 1 à la p. 579.
\textsuperscript{17} « Self-determination From a Québec Perspective: The Quest for a New Model of Sovereignty » \textit{supra} note 1 à la p. 593.
\textsuperscript{18} « Courting Confusion : Ottawa’s Legal Challenge of Unilateral Declaration of Independence is Purely Political » \textit{supra} note 1 à la p. 615.
\textsuperscript{19} « L’indépendance du Québec : primauté du droit ou primauté de la démocratie? » \textit{supra} note 1 à la p. 619.
\textsuperscript{21} \textit{Supra} note 1 à la p. 625.
\textsuperscript{22} \textit{Ibid.} à la p. 633.
\textsuperscript{23} \textit{Ibid.} à la p. 641.
\textsuperscript{24} \textit{Ibid.} à la p. 653.
\textsuperscript{25} \textit{Ibid.} à la p. 665.
\textsuperscript{26} \textit{Ibid.} à la p. 679.

Deux référendums se sont déjà tenus au Québec sur la question de sa souveraineté et aujourd’hui, on ne peut mettre en doute son droit de disposer de lui-même, d’autant plus que dans les deux cas, le gouvernement fédéral et ceux des provinces ont pris part au processus en plaidant pour le maintien du Québec au sein de la fédération. Au niveau international, certains États, comme les États-Unis et la France, ont également cru bon d’intervenir dans le processus et de mettre de l’avant leur préférence. Si l’existence du droit ne semble pas contesté (quoique la Chambre des communes du Canada adoptât le 27 novembre 2006 une motion reconnaissant « que les Québécoises et les Québécois forment une nation au sein d’un Canada uni »33), il en va autrement en ce qui concerne la tenue elle-même du référendum (question claire et majorité claire) et ses conséquences en cas de réponse positive (partition du territoire, peuples autochtones, minorité anglophone, répartition des actifs et de la dette, instabilité politique et économique, libre circulation, monnaie,

28. Ibid.
29. L.R.Q. 2000, c. 46.
32. Supra note 1 à la p. 979.
etc.). Bref, on peut à prime abord s’interroger sur la pertinence de l’ouvrage en titre dont le thème central s’articule autour de l’existence du droit du Québec à disposer de lui-même. Mais à notre avis, il est d’une pertinence et d’une actualité certaines. En fait, la question de l’autodétermination du peuple québécois est essentiellement liée au maintien de son identité linguistique et culturelle et elle se posera tant que durera la présence francophone en Amérique du nord et que le régime fédéral canadien ne sera mieux en mesure de garantir sa pérennité.

Au plan empirique, l’ouvrage constitue une analyse exhaustive, dont le développement court sur une période d’une vingtaine d’années, des principes juridiques de droit international public et de droit constitutionnel canadien applicables de manière générale au droit des peuples à disposer d’eux-mêmes et de manière plus particulière au cas du Québec. Il permet de mieux comprendre l’évolution des règles juridiques applicables et du contexte juridico-politique entourant le débat de la question au Canada et au Québec aussi bien qu’au niveau international. Les écrits de Daniel Turp se caractérisent par leur objectivité au plan juridique même si, par ailleurs, ils peuvent quelquefois revêtir un caractère partisan au niveau de l’opinion. À ce titre, ce livre constitue à notre avis un ouvrage de référence sur la question du droit des peuples à disposer d’eux-mêmes et aussi sur le droit à l’autodétermination du Québec. Au niveau du droit constitutionnel canadien, on aurait intérêt à lire et relire ses commentaires sur l’avis de la Cour suprême sur le droit de sécession et sur la fameuse Loi de clarification adoptée par le Parlement canadien et dont toute l’ambiguïté vise à encadrer si ce n’est nier l’exercice du droit à l’autodétermination du Québec pourtant clairement mis de l’avant par le tribunal.

Il est évident que l’ouvrage tel que constitué laisse place à une redite. Des recoupements sont inévitables d’un texte à l’autre compte tenu de l’identité du thème abordé. Mais le lecteur averti appréciera les ajouts, mises à jour et nuances qui caractérisent les textes au fur et à mesure de leur chronologie. C’est à une compréhension du développement du droit auquel le lecteur est convié. Là où surgit un questionnement quant à la forme de l’ouvrage, c’est à l’utilisation des versions française et anglaise de mêmes textes. Normalement le format bilingue d’un ouvrage juridique canadien renvoie à un recueil de textes d’auteurs différents rédigés dans la langue (français ou anglais) qu’ils choisissent. Dans la mesure où les textes de l’auteur écrits en français et en anglais sont différents, on peut comprendre sa volonté de les réunir sous la même couverture. Mais plusieurs sont simplement des versions de textes identiques. Nous ne croyons pas que ce format ajoute à la pensée de l’auteur ni n’est susceptible d’augmenter le lectorat.

André Braen
Professeur titulaire
Faculté de droit, Section de droit civil
Université d’Ottawa
I. Overview

In this fascinating book, Dale Brawn provides individual biographies of the 33 men appointed to the Manitoba Court of Queen's Bench between 1870 and 1950. Aside from a whole first chapter devoted to Alexander Morris, briefly the first Chief Justice of the Manitoba Queen's Bench before becoming the Lieutenant-Governor of Manitoba and the Territories, the biographies are grouped into six chapters covering an era, with five or six biographies in each chapter following each other in the sequence of appointment dates. Of the 33 judges covered in this book, 11 of them where elevated at some stage to the Manitoba Court of Appeal which was created in 1906. Previous to that date, appeals were heard by the Court of Queen's Bench en banc. However, from 1906 to 1950 there were an additional nine lawyers appointed to the Manitoba Court of Appeal who were never trial judges at the Queen's Bench level, and thus not included in the book. If Brawn had included another nine biographies, we would have complete coverage of all superior court judges of general jurisdiction in Manitoba through 1950. The research that went into writing these biographies appears to have been formidable and the book is very substantial as it is, so Brawn can hardly be faulted for not writing about the final nine, but I do hope that he will eventually produce another volume that does so. I cannot imagine anybody else in a better position to deal with the missing nine given Brawn’s immersion in the


2. Morris probably was better educated and trained than any of the 33 judges to follow him. He had four academic degrees, was fluently bilingual, and practiced in both Upper Canada common law and Lower Canada civil law jurisdictions before arriving in Manitoba.

3. The "missing nine" are Howell, Philippen, Haggart, Fullerton, Dennis-Toun, Trueman, S.E. Richards, Bergman, and Coyne.
Court records, newspapers, and archival materials of the era. Someday it would also be worthwhile to have a parallel biographical history of the approximately 30 individuals who served as Manitoba County Court judges before 1950, as this s. 96 of the *Constitution Act, 1867*, Court was also staffed with federal appointments.4

Surviving records, length of tenure, and importance of the subjects of the biographies vary, but Brawn nevertheless does an impressive job of providing information on the family background of each judge, education and legal training, associations with various law firms, political involvements, participation in various events of the era, leadership positions in the profession, writing and speaking contributions, religious affiliations and involvements in various clubs, associations with legal or political patrons, and generally the processes through which public and professional prominence was achieved for each of the subjects. While it may not be of much significance without further context, Brawn even looks up and counts each reported case that the subject lawyer was involved with before becoming a judge and gives the reader a win-loss record. Of the 33 judges, there are photographs included for 22 of them. For 11 of the judges, Brawn does not have a photo included, but in two cases he has a picture of the house the judge lived in, and in one case a picture of the father of the appointee. I am puzzled by the absence of a photo of E.K. Williams, after whom the law library at the University of Manitoba is named. His picture hangs in several locations on the walls of the university’s law building and there is also a picture of Williams in what remains the leading book on Manitoba legal history.5

While the biographies are the bulk of the book, Brawn does provide very brief historical background at the start of each chapter as to demographic changes and developments in the administration of justice in Manitoba, changing workloads of the court in terms of the number of writs filed, and shifts in the provincial political landscape, including highlighting some of the leading political controversies of the time. There is also an introduction to the book, approximately ten pages of which contains a very succinct and useful overview of the legal history of Manitoba, from the administration of law by the Hudson’s Bay Company (leaving aboriginal peoples with their own law in terms of inter-aboriginal relations); moving to the confusing legislative provisions that seemed to grant some judicial authority to Lower or Upper Canadian courts; and followed by a clear return to Hudson’s Bay Company authority in the Red River Settlement

4. The Manitoba County Courts were first staffed independently from the Queen’s Bench in 1882. The County Court has a history that runs for a hundred years until 1984 when the County Courts were amalgamated with the Queen’s Bench. In terms of federal appointments to the County Court until 1950, there were about 30 judges, only one of whom (Prendergast), as far as I can tell, was ever elevated to the Queen’s Bench and thus part of Brawn’s biography. The history of the Manitoba County Court would be quite a story, given that two of the judges were removed from office. See Dale and Lee Gibson, *Substantial Justice: Law and Lawyers in Manitoba 1670-1970* (Winnipeg: Peguis Publishers, 1972) at 240, 258-68.
and the rise of the General Quarterly Court of Assiniboia. 6 One of the frameworks that Brawn uses to organize his biographical sketches involves the distinction between, and a transition period between, an early time period when judges were usually appointed from outside the Manitoba legal profession, and a later period when judges were routinely appointed from within. I might suggest, however, that the third period should really be divided again, because even when the judges were appointed from within the legal profession in Manitoba, the vast majority of them were raised elsewhere, received their legal education outside of Manitoba, and were first called to the bar elsewhere, even if they did subsequently come to Manitoba and achieve their professional prominence. However, there were ten judges appointed before 1950 who actually were students-at-law in Manitoba and five of the ten were also born in Manitoba. The last three appointments to the bench before 1950 were both Manitoba-born and -trained which suggests a trend. 7 To this group of ten we might also add Hugh Amos Robson, bringing the number to 11, because while Robson was born in England, he came with his parents to the North West Territories and was ultimately a student-at-law in Regina and called to the bar of the North West Territories, and therefore does not fit in the category of the remaining 22 judges who all embarked on the training and study of law in Ontario, Quebec, or the Maritime provinces before coming to Manitoba.

While the focus of Brawn’s biographies is more on the pre-judicial career and process of appointment, rather than on the career of the person as a judge, nevertheless for many of the subjects Brawn does review a few famous cases that arose during the judge’s tenure and gives an assessment of the judge’s reputation, or lack of it. It should be noted, however, that this book is not intended to provide jurisprudential analysis of the legal reasoning of judges, although again there are some useful hints that other scholars might wish to build on. 8 There are some good judicial quotes in this regard. For example, Thomas Taylor is quoted as saying, “I am here to dispose of this case, according to the law. Whether that is, or is not, justice, is a question for the Legislature to determine.” 9 Prendergast, on the other hand, when asked about his judicial methodology replied that he “reviewed the evidence, determined who should win, and then applied the law in such a way as to bring about the result.” 10

6. A book containing the biographies of the four leading judges of the General Quarterly Court is Roy St. George Stubbs, Four Records of Rupert’s Land (Winnipeg: Peguis Publishers, 1967). The Court was the precursor to the present Queen’s Bench established after Rupert’s Land was transferred to the Federal Government and the province of Manitoba was created in a postage stamp size in 1870.

7. It would appear that this trend is born out by the next eight judges appointed in the decade between 1950 and 1960, namely Duval, Maybank, Freedman, Tritschler, Monnin, Miller, Bastin, and Ferguson. But for Sam Freedman who was born in Russia and transported to Winnipeg at the age of three, and Maybank who trained in Manitoba, but was born in London Ontario, all of these men were both Manitoba born and trained (although this may or may not be true of F.M. Bastin for whom I have no biographical information).

8. For example, Killam, Mathers, and Montague seem to have been creative judges, while Thomas Taylor, and E.K. Williams were formalists.


10. ibid. at 231.
In addition to the more than 50 pages of notes, there are 70 pages at the end of the book containing 33 bibliographies listing the primary and secondary sources that Brawn has used to construct each of his biographies. The research that went into this book is truly impressive.11 Because many of these judges came to Manitoba from Upper or Lower Canada or from the Maritimes, Brawn's research includes many references to archival holdings from outside Manitoba, and the text itself has numerous references to political and legal persons and controversies outside of Manitoba. This is a book which contributes to Canadian legal history generally, and is certainly not only of local interest.

There are some tables in the appendices12 which list the 33 judges and the length of their tenures, by date of appointment and then alphabetically. There is also a table addressing reasons for judges leaving the trial court by death, retirement or elevation; and a table listing the members of the Court of Appeal and the Chief Justices of the Queen's Bench and Court of Appeal for the period in question. Regretfully these appendices are not easy to use if you want to know which judges were active at the same time on the Queen's Bench. The difficulty is that the first table containing the dates of appointment also has a column that purports to be the, Date left Queen's Bench, but the problem is that for the judges who were elevated to the Court of Appeal, the dates of departure are the dates they left the Court of Appeal, not the dates they left the Queen's Bench. Thus the reader must go to a different list which contains the dates of departure from the trial court for these 11 judges and incorporate them back into the period of tenure in the first table. Even after doing that, it takes some effort to discover who the six judges were that heard cases in 1926, just to take one example. Interestingly when you go through this exercise you will discover, as explained below, that four out of the six judges in 1926 were apparently considered incompetent or significantly biased.

I warmly congratulate Dale Brawn for this major contribution to Manitoba and Canadian legal history scholarship. In the introduction and conclusion, Brawn points out various themes that can be drawn from his biographies. In this review I will only highlight a couple of them, namely the issues of competence and political patronage in the appointment process.

11. Sometimes I am puzzled by the absence of a reference. For example, no mention is made of Ken Reddig, "Judge Adamson Versus the Mennonites of Manitoba During World War II" (1989) 7 Journal of Mennonite Studies at 51.

12. Supra note 8 at 363-68.
II. Competence and Impartiality: Successes and Failures

There were some colourful characters who sat on the Manitoba bench. The three judges appointed after Morris’s brief tenure were either incompetent, incapacitated, lacked impartiality or suffered all three disabilities at once. James McKeagney apparently lied to the Prime Minister that he knew French (an obvious requirement in Manitoba in the 19th century), but of even greater consequence, “[he] was widely regarded as incompetent.” Louis Betournay, born and raised and called to the bar in Lower Canada, obviously knew French, and seems to have had a kindly disposition, but apparently did not know much of any English law and procedure and was tainted by presiding at an inquiry where he owed substantial sums to the key individual party in the inquiry. Brawn ends his sketch on Betournay by stating: “[i]n actuality he was one of a number of judges who were not competent either before or after their appointments.” The next judge, Edmund Burke Wood, a brilliant lawyer and politician, appointed as Chief Justice of Manitoba, had lost one arm in a hunting accident in his youth, but his real disability was that by the time he came to Manitoba he was incapacitated by alcoholism. Wood presided over a perjury trial involving one of the most colourful and controversial Manitobans, Dr. John Schultz. The problem was that Chief Justice Wood owed very substantial sums of money to Schultz, and Schultz was acquitted by Wood, who according to the local press acted “more as counsel for the defence than as a dispassionate judge.” While Wood acquitted Schultz of perjury, he later sued Schultz all the way to the Supreme Court of Canada which judged Chief Justice Wood as having acted in a very unbecoming manner in this lawsuit and to have been “[d]eluded, negligent, and reckless.” Apparently Wood also made political speeches and wrote political editorials while sitting on the bench, and in at least one case drafted a judgment before hearing the case. Despite writing various judgements that were often well-reasoned, his eccentric behaviour and apparent venality, led to concerted efforts to have him removed, and only his sudden death brought to an end the debate over his removal by petition in both the House of Commons and the Senate.

While the subsequent appointees to the bench during the 19th century seemed to be at least competent at the job, over the three decades between 1903 and 1932, of the 14 judges appointed, eight of them, appeared to have serious competence or impartiality issues. Daniel Alexander Macdonald, appointed in 1906, was considered a kindly, but incompetent judge. Thomas Llewellyn Metcalfe, appointed in 1909,
presided over the famous seditious conspiracy trials of the leaders of the Winnipeg General Strike. In addition to the argument that he displayed extreme bias in favour of the Crown, Brawn points out the apparently well-known fact that Justice Metcalfe had a long affair with the wife of A.J. Andrews, one of the most prominent lawyers in the history of the Manitoba legal profession. What Brawn fails to point out is that Andrews was the chief prosecutor in the strike trials, although his own conflicts of interest in that case were far greater than the judge sleeping with his wife. Metcalfe also seemed to have a hyperactive personality and thus was quite an undignified sight on the bench, constantly fidgeting, running his fingers through his hair, or throwing a leg over the arm of the bench. James Prendergast, an important Manitoba politician but one of the least accomplished lawyers to sit on the bench, was described by Hugh John Macdonald, as a man who "had a small amount of brains, and knows absolutely no law." Toward the end of his long and controversial judicial career, a local critic suggested that "Prendergast should be replaced by a particular County Court judge, thereby improving the quality of both courts!"

Alexander Galt, appointed in 1912, appears to have had such a combination of arrogance, intransigence and incompetence that when he was appointed to the bench his law partners celebrated, not because of some glory that came to the firm for producing a judge, but rather because of the relief that they were now rid of him. During his 20 years on the bench, Galt appears to have continued to display the same defects, compounded by his own deafness. John Curran, also appointed in 1912, was another alcoholic lawyer with a very undistinguished record, who would be plagued by controversy, incompetence, and accusations of bias as a judge. Appointed in 1922, John Evans Adamson, who would apparently redeem his reputation when elevated to the Court of Appeal, was nevertheless as a trial judge perceived as an "exceptionally weak judge" and his nickname was "blackjack" because of an extreme pro-prosecution bias. Interestingly, a number of Winnipeg lawyers petitioned against his appointment to the bench, and Adamson apparently never forgot who these lawyers were when they appeared in front of him. The decisions of James Kilgour, appointed in 1927, were routinely criticized by the Manitoba Court of Appeal as judgments without foundation in the evidence. Finally, Brawn does not


21. Ibid. at 218.
22. Ibid. at 224.
23. Ibid. at 231.
24. Ibid. at 252.
25. Ibid. at 259-65.
26. Ibid. at 283.
27. Ibid. at 282.
28. Ibid. at 289.
clearly say that William Donovan, appointed in 1928, was considered incompetent or biased, but it would appear from Brawn’s list of Court of Appeal cases criticizing Donovan’s judgments that this judge also might be on the negative list.  

During approximately the last two decades of appointments covered in this book, Brawn is less likely to say much, if anything, about the reputation of the eight appointees. William Major, who had spent decades as Manitoba’s Attorney General, went from cabinet to bench in 1941 and Brawn suggests that his pro-prosecution attitude made him less than fair in his work as a judge. Brawn states, “Major had a volatile temper and possessed what a contemporary referred to as one of the smallest, meanest minds in the judicial world.” The most extensive biography in this last stage of the book is that of E.K. Williams, a towering figure in the history of the Manitoba legal profession and bench. No matter how controversial and intimidating to the lawyers who appeared in front of him, Williams was certainly not incompetent. However, Brawn does point out the role that Williams apparently played in the trampling of civil liberties as counsel to the federal espionage commission of 1946, just before Williams was appointed to the bench.

When I was reading this book and discovered that three out of the first four judges appointed to the bench in Manitoba were “failures” as judges, I started to make a list of those who Brawn portrayed as competent-impartial and those who were judged to be incompetent or perceived to be seriously biased. I ended up with three lists. There were 12 judges on my negative list, 14 on my positive list, and seven judges for whom I thought Brawn did not provide sufficient commentary, if any, one way or the other as to their reputation as judges. Other readers may come to different conclusions.

On the positive list of 14 are judges who achieved a level of respect from the profession and public for their competence and fairness. In terms of those who were appointed in the 19th century, Alexander Morris, Joseph Dubuc, Lewis Wallbridge, Thomas Taylor, Robert Smith, and John Bain appear on this list, but there is also one judge who was particularly notable. Appointed to the trial bench in 1885, Albert Clements Killam, was ultimately appointed to the Supreme Court of Canada in 1903. Brawn suggests Killam had a wide knowledge of law, was a creative and activist judge, and was especially well-respected for his judicial temperament and kind character.

In terms of judges appointed in the first half of the 20th century, William Perdue, Thomas Mathers, Percival John Montague and E.K. Williams appear to have achieved various degrees of respect. However, there are at least three additional judges who achieved a special distinction as outstanding, ironically in the same period where

29. Ibid. at 293-95.
30. Ibid. at 319.
31. Ibid. at 336-38.
32. Ibid. at 166.
more than half the appointees were seriously deficient in judicial qualities. John Donald Cameron, a very scholarly bachelor, appointed to the bench in 1908 and elevated to the Manitoba Court of Appeal in 1909, achieved star status for his learning and convivial personality. Andrew Dysart, appointed in 1921 and serving as an ad hoc judge of the Supreme Court of Canada in 1935 and elevated to the Manitoba Court of Appeal in 1947, was the one of the best-educated judges in Manitoba history. He was a graduate of Harvard Law School and also studied law at Oxford. Dysart achieved a special respect for his scholarly, literate and humane approach to judging. If I were forced to choose the one individual who had the greatest impact in the various fields of the profession, politics, and judicial affairs, it would be Hugh Amos Robson. Appointed to the bench in 1910 after a distinguished career, he resigned in 1912 and had an even more distinguished career as a civil servant, politician, in-house counsel, legal educator and leader of the profession. Robson was then reappointed to the bench, going to the Court of Appeal in 1930 and then back to the trial bench as Chief Justice in 1944. The special place of Robson in the history of the Manitoba legal profession is reflected in the fact that the faculty of law at the University of Manitoba is housed in Robson Hall.

III. POLITICAL PATRONAGE AND THE APPOINTMENT OF JUDGES

At least seven of the judges that Brawn deals with in this book were appointed directly to the bench from an elected position in the federal or provincial legislature (sometimes less as a reward for services to the party in power, and rather more to get rid of the person from their political position), and at least another 12 of the judges had previously been elected, campaigned for office, or were actively involved with the advancement of a particular political party. Another half-dozen or so were appointed because they had family members or law partners or other patrons who were powerful enough to successfully champion the appointment of a friend, partner or relative as part of a political debt owed to them by the Prime Minister or other members of the political party in power. Brawn concludes that “two thirds of Manitoba’s first judges had an association with someone politically connected” and these connections were “as important as winning a seat in a legislature.” As Brawn notes from a 1933 editorial in the Fortnightly Law Journal, “in most judicial appointments the appointee owed his selection to the extent of seventy-five per cent to political considerations; fifteen per cent to religious affiliations, while ability and fitness measured up but ten

33. Ibid. at 207-15.
34. Ibid. at 268-76.
35. Ibid. at 232-46.
36. Ibid. at 353.
per cent.” While the best judges and the worst judges were equally appointed in this process of giving priority to political partisanship and fulfilling debts owed for political service, a logical conclusion that arises out of reading this book is that the political patronage appointment process of judges is directly linked to some of the failures of judges to be either competent or able to set aside their previous partisan commitments for a more impartial stance on the bench.

Political patronage relative to competence considerations may have a different weight today compared to the period covered in Brawn’s book, but it obviously has not been eliminated. Up to this point the “independent” Judicial Appointment Advisory Committees for the federally appointed judiciary merely purport to screen candidates for the bench into three categories: unable to recommend, recommended, and highly recommended. Assuming for the sake of argument that the criteria for the categories and the application of the criteria to candidates is fair (and not just a movement from party politics to bar politics), as long as the party in power undertakes not to appoint anybody from the “unable to recommend” list, the process does serve to eliminate from the bench some individuals who might otherwise be appointed through political patronage. It is noteworthy that slightly more than half of the candidates who apply are given an “unable to recommend” moniker. The point is, however, that the party in power may still appoint people to the bench based on political patronage out of the pool of the many candidates who are recommended or highly recommended, and the government does not have to confine itself to the highly recommended list. It would be naïve to suggest that appointment to the bench today no longer requires partisan political affiliation, service, or patrons, and that appointments are all based solely on merit.

At the point where I am writing this review, the process has been changed in a direction which is even more retrograde in terms of upholding the potential for political patronage considerations. Now we are going to have only two categories of “unable to recommend” or “recommended.” The membership of the committees has also been expanded from seven to eight, with a member of the screening committee now coming from the law enforcement community. Furthermore, it is clear that the Minister of Justice may ask the committee for a reassessment of a candidate who has been given an “unable to recommend” grade. These changes may well cause concern, but the debate is just a tempest in a teapot so long as these committees are advisory screening committees instead of true judicial nominating commissions.

37. Ibid. at 267.
The remedy seems obvious. Creating independent appointment commissions (rather than screening commissions) with power to choose a very small number of people who are highly recommended for specific vacancies and then having the executive appoint only from this small list would not require any constitutional amendments to implement. The person chosen for a judicial position, irrespective of whether patronage played a role in making the final selection from the small list, could rightly claim that such patronage should not cast the shadow of a doubt on their merits for the position. The Provincial Judges of Manitoba are chosen through a process of having a nominating commission that produces a list of three to six names from which the executive appoints. The sky has not fallen.

When reading this book I was reminded of how, at one time, the practice of law and the practice of politics often went hand-in-hand. While the motivations for political involvement may have easily been debased into personal career advancement, the other side of the coin was an expectation that lawyers played a central role in the political leadership of the community. Ideally the role of lawyer was not simply confined to the advancement of individual client interests, but ran to the overall structuring of society in terms of advocacy for a social architecture of ordered liberty and justice. In a democracy, lawyers should have no special monopoly on political power, but arguably the legal profession today has lost this sense of having a special calling for the ministry of public justice, and instead we have accepted the more limited role of simply selling a service in the marketplace to whatever interests pay the most. Politicians probably have an even worse public image than lawyers do, and it is perhaps not surprising that we have a deficit in both talent and effort in the legislatures of all levels. Judicial appointments should not be based on rewards for partisan political service, but there is another side to the equation, namely that lawyers should not be punished for such service either. If the territory for partisan political considerations is substantially reduced or removed completely, lawyers should be able to participate in politics without having that participation cast a cloud over their subsequent appointment to the bench. If anything, independent judicial nominating committees may find that political involvements might be positive evidence of competence in lawmaking and a confirmation of a candidate's interest in issues of public justice.

Alvin Esau
Professor of Law
Faculty of Law
University of Manitoba

Les humeurs du droit pénal au sujet de l’humour et du rire

par Pierre Rainville


Vice-doyen aux études supérieures et à la recherche à la Faculté de droit de l’Université Laval et coauteur de l’excellent *Traité de droit pénal canadien* et du livre *Les infractions contre la propriété*, Pierre Rainville est, depuis quelques années, une figure dominante du paysage juridique canadien. Son plus récent ouvrage sur *Les humeurs du droit pénal au sujet de l’humour et du rire*, nous confirme, une fois de plus, l’immense talent de l’auteur. Dans un style d’une clarté et d’une précision remarquables, le professeur Rainville nous livre l’une des contributions les plus originales et les plus rigoureuses jamais écrites au Québec sur les limites du droit pénal et de son action répressive. Il ne faut pas se tromper car il s’agit bien ici de « s’interroger sur le seuil de tolérance du droit criminel », de réfléchir sur « les raisons qui président à la caractérisation d’un comportement en tant qu’acte criminel ». Pour tracer la ligne de partage entre le comportement dérogatoire et le comportement criminel, l’auteur a recours à une approche méthodologique à la fois ambitieuse et inédite : *l’humour vexatoire et les mauvaises plaisanteries*.

Loin de se limiter à la description du droit, l’auteur pénètre dans les profondeurs de la littérature, de la psychologie, de la médecine et de la philosophie pour enrichir son analyse d’éléments extrajuridiques. En débordant les frontières traditionnelles de l’activité judiciaire, l’auteur subvertit les limites du droit positif et livre une œuvre qui, à notre avis, marque un point tournant dans la littérature...

4. Ibid. à la p. 2.
5. Ibid. à la p. 2.
6. Ibid. à la p. 6.
juridique en droit pénal canadien. Naissance d'un nouveau style ou version améliorée d'une approche encore naissante au Canada, le petit livre du professeur Rainville est un modèle d'efficacité et de réussite tant du point de vue de son intérêt que de son analyse.

INTERÊT DE L'OUVRAGE

Depuis longtemps, le rire intrigue et interpelle les chercheurs. Ses manifestations extérieures — qu'il s'agisse de mauvaises plaisanteries, de propos futilles ou d'actions irréfléchies — marquent la présence d'une volonté, d'une intention dont les traces matérielles déjouent très souvent les premières impressions. De là son importance en droit pénal. Or, fait intéressant : « [l]e droit en général — et le droit criminel en particulier — accuse un grave retard dans l'étude des phénomènes du rire et de l'humour »]. C'est pourquoi, il importe de rendre compte correctement de l'état du droit canadien sur la question et de proposer une théorie proprement juridique du rire. Cet exercice est d'autant plus important que le corpus jurisprudentiel est abondant et les décisions contradictoires sur la question. En ce qui concerne la doctrine, en plus d'être rare, il semblerait que les opinions émises ne reflètent pas toujours l'état actuel de la jurisprudence. Ces « généralisations erronées [poursuit le professeur Rainville] font voir le peu d'attention qu'accordent les auteurs à départager le comportement dérogatoire ou déplacé d'une part et le comportement criminel d'autre part »]. C'est donc un territoire fertile, mais encore relativement inexploré, que le professeur Rainville entend défricher. Cette entreprise, qui n'est pas facile, exige l'adoption d'un cadre méthodologique dont la solidité théorique permettra de tracer les sillons d'une nouvelle doctrine juridique du rire et de l'intervention de la justice criminelle au Canada.

ANALYSE DU SUJET

Fidèle à l'objet de son propos, l'auteur commence son ouvrage en abordant l'évaluation du seuil de dangerosité de l'humour. Les questions suivantes sont posées :

- Jusqu'où le droit criminel doit-il se faire l'arbitre du bon goût ?
- La répression de l'impertinence est-elle de son ressort ?
- Suffit-il que l'humour soit « malavisé » pour que le droit criminel entre en scène ?

Pour répondre à ces questions, l'auteur s'interroge, tout d'abord, sur l'humour qui dégénère, sur la plaisanterie qui, dans son action ou sa dérive, emporte des conséquences que le droit ne peut ignorer. Discutant de l'exemple du jeune garçon qui

7. Ibid. à la p. 7.
8. Ibid. à la p. 11.
9. Ibid. aux pp. 15-16.
s'amuse à pointer une arme à feu en direction de son ami pour lui faire peur et qui appuie sur la gâchette en croyant que l'arme n'est pas chargée, l'auteur rappelle la gravité des conséquences qui s'ensuivent et sa prise en charge par le droit criminel. « Le jeu, qui se veut une forme d'évasion, une fuite vis-à-vis du réel, est rattrapé par ce dernier. L'humour qui se voulait passager vient [...] de créer une situation aux conséquences durables. [...] Interpellé par l'ampleur des conséquences de l'humour, le droit criminel ne peut plus s'en désintéresser ».

De l'humour qui dégénère, l'auteur passe ensuite à l'humour qui mystifie. Avec élégance, le professeur Rainville aborde certaines infractions, dont celle se rapportant à l'imitation de billets de banque. Cette infraction, précise l'auteur:

interdit d'imprimer quelque chose ayant « l'apparence d'un billet de banque courant ».

Par contre, le législateur prévoit une exemption, si la reproduction en question est une fois et demie plus grande qu'un billet de banque ordinaire et si elle est en noir et blanc ou si l'on n'a imité le billet que d'un seul côté. Le législateur s'assure de tracer les pour-tours de la plaisanterie et surtout de la rendre décelable.

Autrement dit, la plaisanterie échappe à toute sanction si elle ne comporte aucun risque.

La plaisanterie facilement décelable reste impunie, tandis que celle qui a toutes les apparences de la réalité est interdite.

Loin d'être limité au simulacre, l'humour peut offenser une valeur protégée par le Code criminel. Qu'il s'agisse de la moralité, de la propriété, de la sécurité publique, de l'intégrité physique ou d'une autre valeur reconnue par le législateur, l'humour qui offense n'est pas à l'abri de la justice. De là, la condamnation de l'entarteur qui s'attaque à une personnalité publique afin de l'humilier devant les caméras. Cette situation, précise l'auteur, doit être distinguée de celle où « la personne se fait jeter dans la piscine le jour de sa fête et s'en irrite au point de porter plainte pour voies de fait », ou encore de celle de l'individu « qui se fait entarter lors d'une soirée entre amis ou [...] sur qui l'on déverse, dans le même contexte, le contenu d'une bière sur la tête. Le farceur est innocent s'il croit que la victime de la plaisanterie acceptera elle-même d'en plaisanter. Il est innocent s'il pense qu'à l'étonnement initial de la victime succédera sa volonté d'en rire ».

L'actus reus est présent, mais l'absence de mens rea empêche la constatation du crime.

La dernière partie de l'ouvrage est consacrée, pour sa part, à l'évaluation du seuil de dangerosité de l'esprit du farceur, partie subdivisée, encore une fois, en trois...
thèmes principaux: l’absence d’anticipation de la conséquence interdite, l’absence de finalité du comportement reproché et l’absence de dessein proprement criminel. L’absence d’anticipation de la conséquence interdite renvoie au comportement de celui qui, en raison de la légèreté de son comportement, de son manque de sérieux ou de son état d’esprit, n’est pas conscient des conséquences de son geste. L’exemple du passager en état d’ivresse qui déclare sottement à un agent de bord qu’il a dissimulé une bombe dans l’avion illustre bien cette situation. Compte tenu de son état d’ebriété et de la légèreté de ses propos, le prévenu n’a peut-être pas constaté qu’il serait pris au sérieux. Rien n’indique hors de tout doute raisonnable qu’il ait “volontairement” cherché à entraver l’usage de l’aéronef. Aussi, dans la mesure où l’adverbe « volontairement » présume la connaissance de l’accusé que son acte causera probablement la production de l’événement en cause, l’absence de prévisibilité subjective quant à cet événement s’oppose à la constatation de l’insouciance ou de l’intention requise aux termes de l’infraction.

L’absence de finalité du comportement reproché est le théâtre de beaux développements sur la tentative simulée, le complot facétieux et la fausse instigation. Mais les opinions qui ont su attirer particulièrement notre attention sont celles consacrées à la complicité ricaneuse. Sur ce point, l’auteur est sans détour :

[plour intéresser le droit pénal, le rire doit [...] vouloir concourir moralement à la réalisation de l’infraction. Ainsi donc, l’examen de la finalité du rire est incontournable. La jurisprudence canadienne appelée à interpréter l’article 21(1)c) du C. cr. est catégorique : la complicité passe par l’intention spécifique d’encourager la perpétration de l’infraction. Autrement dit, l’effet du comportement de l’accusé n’est jamais concluant en soi. L’intention spécifique d’appuyer l’infraction est obligatoire encore que le législateur ne l’ait pas exprimée en toutes lettres.]

Ce renvoi à l’intention spécifique opère une transition agréable vers la dernière section du livre : l’absence de dessein proprement criminel. Après avoir rappelé les nombreuses critiques dirigées à l’encontre de ce concept, l’auteur souligne l’importance de l’intention spécifique au moment de distinguer les actes simplement répréhensibles des comportements proprement criminels. « Le concept de l’intention spécifique revêt [en effet] un intérêt insoupçonné ». L’auteur précise en disant que

[très souvent, le dessein répréhensible du farceur n’atteint pas la gravité d’un dessein proprement criminel. Partant, il ne possèdera pas l’intention spécifique que requièrent de nombreux crimes. L’intention frauduleuse, l’intention d’extorquer, l’intention de se procurer les services sexuels d’un prostitué : voilà autant de dessein proprement criminels dont la présence risque d’être remise en cause de par la volonté de l’inculpé de plaisanter. L’objectif recherché par le blagueur risque fort de différer de celui exigé par le droit criminel.]

15. Ibid. à la p. 56 [notes omises].
16. Ibid. aux pp. 75-76 [notes omises].
17. Ibid. à la p. 80.
18. Ibid. [notes omises].
En plus d'être extrêmement intéressante, cette rubrique offre au lecteur de beaux commentaires sur les infractions relatives aux armes à feu, sur les menaces de mort, de lésions corporelles ou de vandalisme et sur la sollicitation dans les lieux publics.

En ce qui concerne finalement la rubrique sur le vol, il s'agit, à notre avis, de la partie la plus intéressante du livre. En toute logique, l'auteur n'hésite pas à critiquer l'approche restrictive entretenue par certains tribunaux et certains auteurs depuis quelques années. Pour le professeur Rainville :

[La seule intention de s'emparer ou de retenir le bien sans le consentement d'autrui et sans apparence de droit est [...] nettement insuffisante. Celui qui prend ou retient délibérément le bien d'autrui en se sachant dépourvu de tout droit d'agir ainsi et en ayant l'intention d'en priver temporairement le propriétaire ou le détenteur, n'a pas forcé conscience de risquer de nuire d'une manière quelconque au patrimoine de cette personne. Exiger la conscience de risquer de nuire, en agissant de la sorte, aux intérêts patrimoniaux de la victime revient à [...] s'évir que contre ceux qui font preuve de turpitude morale19.

Le propos est juste et les arguments convaincants ! « L'état d'esprit du voleur devient blâmable dans la mesure où ce dernier sait qu'il porte vraisemblablement atteinte aux droits patrimoniaux de la victime »20. Bien que nous soyons d'accord avec la position suggérée par le professeur Rainville, nous croyons qu'il est erroné cependant de limiter l'interprétation de l'adverbe « frauduleusement » à la présence d'une intention frauduleuse. Comme l'indique la Cour suprême du Canada dans l'arrêt R. c. Théroux21, rien ne paraît s'opposer à ce que l'insouciance quant aux conséquences éventuelles d'une action entraîne également la responsabilité criminelle. Or l'insouciance, comme nous le savons, n'est pas une forme d'intention, mais un élément de faute à part entière. Il serait donc plus juste de parler ici d'un élément frauduleux ou de la conscience du risque de nuire au patrimoine de la personne.

Avant de terminer ce bref commentaire sur l'ouvrage du professeur Rainville, il importe de souligner l'utilisation extrêmement originale qu'il fait des principes d'interprétation judiciaire en droit criminel (qualité que j'avais également relevée lors de la lecture de son Traité de droit pénal canadien). L'application des principes d'interprétation judiciaire étant malheureusement trop souvent mise de côté par les tribunaux, il est intéressant de constater ce retour aux fondements du droit pénal. Cette observation est d'autant plus pertinente qu'elle permet, à l'auteur, de remettre en question le bien-fondé de certaines décisions importantes en droit pénal canadien, dont l'arrêt Archer22.

Des commentaires qui précèdent, on peut dire que le livre du professeur Rainville est un ouvrage fondamental sur les modes d'intervention du droit pénal.
Il s’agit, en somme, d’un véritable tour de force qui témoigne de la maturité intellectuelle et de l’ouverture d’esprit de l’auteur face aux dimensions littéraires, psychologiques et philosophiques de l’humour et du droit au Canada. Avec cet ouvrage, Pierre Rainville confirme qu’il est l’auteur le plus influent (et malheureusement le plus « sérieux ») en droit pénal canadien.

_Hugues Parent_

Professeur agrégé
Faculté de droit
Université de Montréal
Norms and the Law

by John N. Drobak, ed.


It will come as little surprise that norms differ in kind, scope, source and force. Social norms include: moral norms of rightness and fairness; economic norms of efficiency and choice; religious norms of well-being and duty; political norms of transparency and accountability; and legal norms of contract and required conduct. What is less well-known, and certainly less understood, is the fact that norms of these various kinds overlap, conflict and, in further ways, fail to add up to a seamless system of social order. Norms and the Law is a valuable contribution to understanding this complex interaction among our social norms. This collection, ably edited by John Drobak, represents a diverse source of approaches to investigating precisely how norms govern areas of social life, and in particular how social norms interact with law. The essays contained in Norms and the Law are too rich to each be given full appreciation here. It is likely more useful to identify some key questions and promising answers explored by this volume's contributors.

Much of the discussion begins at the level of what might be usefully regarded as "root causes," asking what sort of fundamental reasons motivate people in their social interactions? The relevance of the question is plain: in one currently prevailing view of law's authority, law claims to operate in society by creating reasons for action for its subjects. Effective law taps into or reflects reasons that subjects recognize or respect. Classical economic theory offers one explanation of what this recognition amounts to, advising us to assume that people always behave as "perfectly rational and perfectly selfish creatures." As Lynn Stout observes, however, recent literature shows it is far from true that people always behave and choose with perfect rationality, free

3. Lynn A. Stout, "Social Norms and Other-Regarding Preferences" in Drobak, supra note 1 at 13.
from deficiencies of various kinds. If the exceptions are too numerous, as they surely are, then we ought to give up, as descriptively inaccurate, the picture offered by classical economics. Yet what is surprising, Stout claims, is that little empirical investigation has been carried out to test the second supposed feature of human behaviour, our perfect selfishness. Her contribution “Social Norms and Other-Regarding Preferences” seeks to remedy that imbalance. She draws evidence for the existence of other-regarding preferences from three different types of experimental games: social dilemma games (such as prisoners’ dilemmas), ultimatum games and dictator games.5

There is much to learn from experimental games and Stout’s discussion of them, but many readers will stop short of accepting the conclusions of Stout’s analysis, given its peculiar conceptual use of “other-regarding preference.” She explains her use saying that:

in adopting this phrase, I am employing the word “preferences” in its most narrow and technical economic sense. In other words, I am describing behavior rather than motivation. I make no attempt to determine what might subjectively inspire one person to look out for another’s interests. Pride, guilt, love, or religious piety may be responsible, or something else entirely. The point is that people sometimes do behave as if they care about costs and benefits to others.6

So, other-regarding preferences exist when there are displays of concern for other’s interests, well-being, etc. This use is, however, not just “narrow” and “technical,” but quite counter-intuitive. Someone could naturally respond that an other-regarding preference is one of taking others’ interests and well-being into account precisely because others’ interests and well-being matter. In other words, there seems to be a conceptual connection between action and motivation which constitutes other-regarding preferences. Yet there is more than just conceptual disagreement here, since the conceptual disagreement infects Stout’s analysis of experimental games. Consider the conclusion she draws from social scientific evidence that reports, on average, a 50% rate of cooperation in social dilemma games:

what does this finding tell us? Most obviously, that other-regarding preferences exist and indeed are common. The subject in a social dilemma game who chooses to cooperate is choosing an option that quite plainly serves the group’s interest more than her own. There are several lay terms available to describe this type of other-regarding preference, including kindness, consideration, generosity, sympathy, and (more generally) altruism.7

There are philosophical problems in inferring that someone is kind, considerate, generous, etc., from their outward behaviour. Kind people, for example, are not just those whose actions benefit others, but are those who act on the motivation that

4. Ibid.
5. Ibid. at 17-22.
6. Ibid. at 14.
7. Ibid. at 18-19.
another's well-being matters. But there is a further problem here. In social dilemma games where parties choose to cooperate, they may do so not out of concern for others' interests, but rather from selfishness coupled with defects in rationality. A gambler, for example, is often someone who is less than perfectly rational, yet still quite possibly purely selfish. In social dilemma games, a gambler might aim at the bigger payoff to be had through cooperation by failing to recognize the risks if the other parties defect. So, we might conclude not that 50% of people are altruistic, but rather that 50% of people are gamblers, whose selfishness combined with sub-optimal rationality yields what only appears as other-regarding preferences. This alternative, plausible interpretation, however, is excluded by definition on Stout's account.

Still, we can ask, as Stout does, what are the variables which explain when people cooperate? The 50% rate of cooperation is, after all, an average. Stout identifies two social variables: (i) instructions from authority (i.e., in experimental games, the experimenters); and (ii) whether subjects believe the others are likely to cooperate. The second variable is easy enough to understand: if a subject believes the others are likely to cooperate, they are more likely to take the risk and cooperate for the larger payoff. The first variable is more interesting, since it has important connections to law. Stout notes that where experimenters instruct subjects to cooperate, cooperation rates are higher. She observes that “[t]his behavior is puzzling from a rational choice perspective, because the experimenters' instructions do not alter the objective payoffs in the game.”

Perhaps, but perhaps not: if subjects trust the experimenter as an authority regarding how to achieve the greatest payoff for all, they may follow the experimenter’s instructions even if the objective payoff remains the same. The connection to law is important to investigate: do people obey law out of a belief that legal institutions are experts about how to achieve optimal collective and individual payoffs? Stout does not offer an answer to this question in her article, but points to work where she and others have addressed it.

In some other contexts, groups of people occupy a more detached perspective, such that their decisions are not so much other-regarding but other-concerning. Juries are an example of such groups. A second key question is raised in Cass Sunstein’s article “Damages, Norms, and Punishment.” Sunstein asks: according to what norms and how well do people converge in their other-concerning decisions regarding appropriate punishment? Sunstein presents five principal findings from a series of experimental studies of citizen judgments in personal injury cases:

(i) people’s moral judgments about personal injury cases are both predictable and widely shared;

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8. Ibid. at 22-24 (she also identifies economic variables such as the size of the payoff at 24-25.)
9. Ibid. at 23.
10. Ibid. at 27-28, 33.
(ii) yet people's judgments of punitive awards for personal injury cases are highly erratic;
(iii) the effect of group deliberation is, on the one hand, polarization of people's moral judgments, either towards leniency or severity, depending on their pre-deliberative judgments, and on the other hand, universal increase of dollar awards;
(iv) when it comes to philosophical grounds for punishment, people are intuitive retributivists and care little for optimal deterrence;
(v) people's judgments, if taken one at a time, are systematically different from their judgments of cases (especially across categories) taken together.12

Sunstein offers rich explanations for each of these findings; but more importantly he identifies their significance for law. They are crucial to evaluation of a practice which makes frequent use of group decision-making and also aspires to coherence. If a legal system is to respect fairness in its distribution of benefits and burdens, it will need to find ways to address the previously unrecognized and unaccounted-for effects of isolated decision-making and group deliberation.

The apparent comprehensiveness of Sunstein's article, is, however, just that. Sunstein crucially omits the question of justice. A legal system must not only achieve fairness in making sure similar cases are treated similarly, it must also attempt to get the moral judgments and punitive damages right. Tracking objective truths about these questions of course raises deep philosophical worries, but presupposing the availability of at least some approximation of truth in moral judgments and punitive damages is inescapable. Given Sunstein's findings about the disparities between (a) individuals' pre-deliberative judgments of moral wrongness and dollar awards and (b) judgments of moral wrongness and dollar awards after group deliberation, a legal system must still ask which judgments best track justice. Are we to trust that group decisions are better, or should the effect of group deliberation sometimes be seen as a distorting effect on individual judgments which are best aggregated in some other way? This is a difficult question of institutional design, but one which follows in the wake of Sunstein's important findings and explanations.

Sunstein's discussion of the operations of justice in the public sphere introduces the third key question of the book: inquiring into justice in access to and use of various kinds of commons—contexts where public goods are shared yet liable to inefficient use and exploitation. Commons are of interest in thinking about interactions between kinds of norms for a variety of reasons, including the fact that a range of norms are available to be chosen for use in governance of various commons. Contributors to Norms and the Law address three different types of commons: households, cyberspace and natural resources. Each contribution is full of insight into the

12. Ibid. at 35-36.
norms which govern commons. Lawrence Lessig's account in "commons" of the possibility that the internet as a communications system will remain a free and open public good is fascinating; it is an essential read for anyone interested in ways in which one of the most innovative and advanced technological advances might be restricted.13 Likewise, Juan-Camilo Cárdenas and Elinor Ostrom offer a sophisticated and foundational framework for the prediction of sustainable and productive use of "common-pool resources."14 Their "How Norms Help Reduce the Tragedy of the Commons: A Multi-Layer Framework for Analyzing Field Experiments" and Lessig's article are both valuable. Here, however, I shall focus only on Robert Ellickson's "Norms of the Household."15

As Ellickson notes, there are at least two reasons for regarding the institution of the household as a particularly important source of experience, needing explanation in a comprehensive understanding of social norms. First, it is in households where most children first learn how to identify and solve social problems. Many of our most deep-seated concepts of dispute resolution and coordinated activity thus have their roots in the household. Second, we spend much of our time in households in many ways: producing economic goods, enjoying leisure, and interacting with family and other members in intimate ways. In this sense, everyone has a stake in well-functioning households as valuable institutions. Part of that value is what Ellickson calls "household surplus": by living together, members of a household enjoy a greater level of utility than if they were to live alone. This surplus, however, creates opportunities for free-riding and abuse. What keeps households together, then, and prevents members from routinely taking more than their fair share? One possibility is legal norms. Yet while everyone is subject to legal norms which set basic minimum standards of required conduct, households tend to function quite effectively without comprehensive legal regulation on many matters. Washing dishes in turn, keeping out of each other's room, not drinking a housemate's beer without permission and so on, are standards often met without the need for formal, legal contracts. So what governs the relations in households? Ellickson points to many non-legal kinds of norms, including loyalty to kin, trust, norms of gift exchange, intimacy, assumption of ownership and informal household customs.

There is much to learn from Ellickson's paper, which in many ways builds upon ideas from his widely known work Order Without Law: How Neighbors Settle Disputes.16 Two general lessons are worth mentioning in particular. First, Ellickson provides a useful reminder to legal theorists who observe that one of law's unique

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13. Lawrence Lessig, "commons" in Drobak, supra note 1 at 89.
features is its claim to regulate all areas and aspects of life in some way, either by requiring, prohibiting, or permitting conduct. While this might be a unique feature of law, Ellickson demonstrates that often legal norms do not figure in explanations of how cooperation and desirable order emerge. Second, even in social contexts where legal norms figure centrally, such as legal rules of contract in business relations, often the rules and penalties for breach do not explain why the rules are followed. Social norms of trust, reputation and reciprocity often figure as more important considerations in keeping rules than the rules themselves. Ellickson’s point is that there are many ways in which order comes about and appeal to formal law is only one of them. Knowing these ways is vital to understanding the conditions under which legal regulation is necessary, helpful, viable or bound to fail.

By far the richest exchange of ideas in Norms and the Law is to be found in part three on judicial norms. The organizing question of this part can be framed as follows: within the practice of law itself, in what ways and to what extent are judges influenced by wider social norms, which often surround and underlie popular and political perceptions of the judiciary?

In “Judging the Judges: Some Remarks on the Way Judges Think and the Way Judges Act,” legal historian Lawrence Friedman distinguishes and evaluates three interrelated claims. First, judges are supposed to be impartial; they must be neutral or free from bias. Second, as the rule of law requires, the judiciary must be independent, and therefore free from governmental interference. Third, judges are often thought and expected to be relatively immune from social pressures; this is their autonomy. After detailed, historically sensitive consideration of each claim, Friedman concludes that, in Western liberal democracies such as the United States, while judges are relatively independent, they are not impartial, and certainly not autonomous. Friedman argues, for example, that there is no way to explain the radical differences in judicial decisions across time on issues such as race, abortion, pornography and gay rights, unless we give up as hopelessly naïve the idea that judges are immune from wider shifts in social views.

In “Judicial Independence in a Democracy: Institutionalizing Judicial Restraint,” John Ferejohn and Larry Kramer construct an extensive view about a remarkable feature of the judiciary in the United States: while courts are severely
dependent upon other branches of government in several significant ways—in the availability of various resources, execution of decisions, protection of office, etc.—over the course of two centuries they have secured for themselves crucial roles in the operation of law. Ferejohn and Kramer argue that:

institutional dependence requires that the judiciary is a self-regulator: it has created a system of self-imposed institutional and doctrinal constraints that keep judges within the bounds required by institutional vulnerability. The resulting equilibrium usually works well enough that the political branches seldom need to exercise their power or even to threaten doing so.23

There are several mechanisms and principles by which the judiciary regulates itself and so avoids political confrontation with other branches of government. For example, the practice of appellate review ensures that in controversial cases no single judge can have all the say, possibly creating mistaken or politically volatile results; before a controversial issue is resolved, it will have been authoritatively considered by several judges across time. To the same end, legislation exists which provides for the removal of judges who overstep or abuse their power, or demonstrate incapacity to perform their duties.24 While such legislation is rarely invoked, it has been noted to have an informal effect on the judiciary in keeping discipline.25 Other types of self-regulation amount to what Ferejohn and Kramer call “doctrinal limitations.” These are the various administrative tools or principles which courts use to limit their power and scope, and include: principles of justiciability, such as mootness, standing, ripeness and the political question doctrine; principles of federalism which limit the number and types of cases which federal courts hear; and rules of constitutional interpretation which illuminate the extent to which parts of the United States Constitution remain unenforced.

The interest, however, in mechanisms or principles of self-regulation lies not in their identification; they are readily known to anyone at all familiar with adjudication. Rather, the interest lies in the extent to which they lack explicit, determinate sources in law. For example, after citing several cases where the political question doctrine was invoked, Ferejohn and Kramer identify the doctrine’s “essential flavour”: “the erratic and inconsistent renunciation of jurisdiction in cases where the Court feels it has little to offer and something to lose.”26 Indeed, the theme running throughout their article is that judicial self-regulation is literally self-regulation, whose force can, to be sure, be traced back to the judiciary’s institutional dependence, but beyond which is constructed and practiced by customary judicial norms (of varying consistency), not formal sources of law.

23. Ibid. at 163.
24. Ibid. at 181-82.
25. Ibid. at 182-83.
26. Ibid. at 192-93.
While Ferejohn and Kramer focus on the judiciary, it is important to note a more general insight underlying the account of judicial norms which are in a way non-reducible to formal, legislative sources of law. Institutions of law, even core ones such as courts, may be less regulated and explainable in terms of formal, source-based law than is often thought. Other institutions which might develop and practice customary norms of their own device to smooth institutional dependence, yet at the same time function effectively, include police, airport customs, state prosecution offices, prisons and hospitals, to name a few. While there are formal legal rules which govern the practices of these institutions, it is debatable whether such rules explain without remainder their normative commitments. I believe the historical, detached approach adopted by Ferejohn and Kramer would serve very well in investigation of these other significant legal institutions.

A further issue about the nature of courts is the extent to which a particular judge’s personal characteristics, beliefs, values, etc. influence his or her decisions. The issue is naturally raised given that very few would even imagine that judges are so unlike everyone else in not being subject to social, political, and economic influences, or not having personal beliefs and values. The difficulty, however, lies in establishing particular patterns. In “Black Judges and Ascriptive Group Identification,” Kathryn Abrams takes up this task with particular attention to narrative accounts of African-American judges in the United States. While her sample is quite small, and so not safely taken as representative, her findings match those of other studies of group identification in the judiciary: there are no consistent patterns, and few salient differences, in decision-making. However, while there is little evidence of systematic differences in judicial decisions, what is more interesting are other judicial norms which emerge from attention to group identification. Abrams notes that recognition that judges are not immune to cultural, racial and gender differences has forced many to abandon the traditional norm of “objectivity,” understood as the judicial duty to achieve “abstraction or emotional distance from the life circumstances of litigants . . . ” In place of this kind of objectivity, Abrams observes that many judges believe that their social and racial backgrounds equip them to better understand the particular contexts of those before them who come from similar or recognizable circumstances. In other words, acknowledging group identification has given rise to a new judicial norm of sensitivity, which utilizes concrete understanding and emotional closeness—the very opposite of traditional objectivity. A second judicial norm which emerges from acknowledging group identification is responsibility to one’s group. This norm does not mean, as it might suggest, misplaced loyalty or special leniency to those members of one’s group appearing in court. Rather, the judicial norm is owed to one’s community at large, and is practiced in various ways, from hosting African-American children on tours of the courts, to serving on racial

28. Ibid. at 211.
equity commissions, to making oneself generally visible as part of the legal system. As Abrams notes, most, if not all, African-American judges recognize these activities as duties they are required to perform given their group membership and special leadership status.

Part three concludes with a short article29 by Harry Edwards, Circuit Judge and Chief Judge Emeritus, United States Court of Appeals for the District of Columbia Circuit. Edwards offers an insider's assessment of the various claims and observations made by Friedman, Ferejohn and Kramer, and Abrams. In particular, he articulates a judicial norm not fully noticed by the others, a social norm of collegiality within the judiciary. Edwards argues that respect for each other's views, coupled with a commitment to a shared value of doing justice through law, explains much of how and why judges do what they do.

Almost all the contributions in Norms and the Law focus on how social norms influence law. An exception is the last article, "Normative Evaluation and Legal Analogues,"30 by Amartya Sen. The fifth and final key question, raised in Sen's article, is: what are the effects of law on the understanding and development of social norms? His essay is thus an exploration of the reverse of what is often the presumed cycle—that social norms influence and give rise to law.

Sen explores how legal concepts and reasoning can impoverish moral and political thinking. He uses two examples. First, the notion of a legal right, which is institutionally created and specifies correlative obligations, has damaged thinking about moral or human rights. Often human rights are not explicitly recognized in legal systems, nor do they come equipped with specified correlative obligations. Using the notion of a legal right to understand and evaluate human rights tends, Sen argues, to lead to disvaluing these rights, since they do not always admit of determinate content or scope. The general result is a loss of normative appeal.31 The second example is the adoption, by social contract theorists from Kant to Rawls, of the legal notion of contract to ground claims of justice. The central flaw with using the legal notion of a contract to make sense of duties owed to others as a matter of justice is that "contract" imports fundamental scope restrictions into its application; only those who are parties to a contract have a basis on which to claim. Rawls' theory of justice as fairness, originally designed to identify the principles of justice to govern the basic structure of a nation state, illustrates Sen's claim: Rawls' theory cuts out of consideration people outside the state, and so fails to establish any reasons for global justice. This was a problem Rawls took up in later years, but unsuccessfully in Sen's view; the original commitment to the idea of contract was crippling.

Whether or not one agrees with Sen's particular examples, the phenomenon he explores is certainly worth investigation. However, it is important to note the lim-

ited scope of Sen’s claims. His stated focus is to explain the influence of legal concepts and reasoning on social norms, yet he largely limits his account to the influence of legal concepts and reasoning on the moral and political theories of philosophers. Philosophers such as Bentham, Kant and Rawls have overlooked the degree to which their moral and political theories were weakened by overuse of legal notions of rights and contract. This is not meant to be an objection. What I suggest is that it still leaves under investigated the extent to which knowledge of law and legal reasoning influences how citizens (among which philosophers are only a tiny subset) understand themselves and their interactions with each other and with government. For example, does greater knowledge or presence of law increase a society’s litigiousness? What effect has popular “real” courtroom television had on how people view their standing with respect to each other? Are people in fact less inclined to rally behind claims made on the basis of global justice or moral rights than if similar claims were made on the basis of legal rights and obligations? If yes, why is this? These and others are demanding empirical questions, but if Sen’s general thesis is correct, they are well worth asking in a culture which values self-awareness about its normative practices.

I have not been able to do justice to *Norms and the Law* in two ways. First, I have not been able to discuss in detail all of the rich articles it includes. For example, I have said nothing about Douglas North’s “Cognitive Science and the Study of the ‘Rules of the Game’ in a World of Uncertainty,” in which he investigates the role of law, economics and cognitive science in making sense of a social world characterized by its uncertain unity. Second, I have not been able to pursue some of the interesting connections and disagreements between different views. For example, while Stout rejects classical economics’ view of people as rational self-interested maximizers, Ellickson adopts precisely such a view in analyzing households as commons. The view of Cárdenas and Ostrom falls somewhere in between. What I hope I have done is identify the central themes in *Norms and the Law*. It contains high-quality articles written by prominent scholars from diverse disciplines, and is certainly a rich collection intelligently designed to throw much light on the interaction between law and social norms.

*Michael Giudice*
Assistant Professor
Department of Philosophy
York University

31. *Ibid.* at 253 (Sen observes that this view can be traced back to Jeremy Bentham’s view of natural rights as “nonsense on stilts”).