BOOK REVIEWS

WHAT'S WRONG WITH THE LAW? Edited by Michael Zander. McGill-Queen's University Press. 1970. Pp. ix and 126. $4.00.

In recent years, there has been some evidence of a refreshing tendency on the part of the legal profession to begin to take a serious and critical look at the law and its institutions.[1] This new attitude has so far led to cautious, but significant, advances in the law's capacity to adjust to modern social conditions and has been accompanied by an increased public interest in its ability to do so. In 1969, the B.B.C. employed these two factors to produce a series of radio talks entitled "What's Wrong With The Law." The talks were given by distinguished legal contributors, including Lord Devlin, Sir Leslie Scarman, Professor Street of Manchester and Professor Watson of Michigan, and were aimed at the general audience.

The present book consists largely of edited versions of these talks, together with the transcript of a discussion between a number of the contributors, which ended the series, and an inquiry into the state of legal education compiled by William Plowden.

The themes of individual talks were only loosely interconnected by the title of the series. Beyond that each speaker was free to choose his own topic, with the result that the book contains only short discussions of extremely diverse issues, ranging from the narrow question of whether accident cases should be taken away from the courts to the very general problem of whether there is equality before the law. However two general concerns, those of efficiency and justice, did underly much of the discussion.

In relation to the efficiency of the legal system, Sir Leslie Scarman and Norman Marsh, Q.C., were concerned with the obscurity and the rigidity of the legal system respectively. The major remedy for these joint ills was seen to be in comprehensive legislation drawn up at least initially through the mechanism of the Law Commission, which could both ensure that the legal system made a rapid response to new demands and supervise the quality of new legislative. Both contributors felt that legislation should take the form of a clear statement of principle, leaving considerable room for judicial development of the law, and that the Code should become a basic weapon of English law. While it is admitted that this would considerably alleviate the two specific defects of obscurity and rigidity, it must be noted that legislation of this nature will require a considerably changed attitude on the part of the English judiciary. Not only will judges have to make decisions much more consciously on grounds of policy (and this rationally presupposes that they will be permitted to hear evidence on such matters), but they will also have to take a considerably less traditional view of precedent, in making the Code itself a starting point for each decision.

[1] The most notable examples of this tendency in England are the appointments of the Law Commission and the Ormond Commission to investigate legal education.
In Canada, the appearance of provincial Legal Research Institutes, the proposed Federal Law Reform Commission and the introduction of limited legal aid schemes testify to a similar interest.

Two other writers dealt with the same theme. Morris Finer, Q.C., adumbrated the ways in which the legal profession might contribute to the efficiency of the legal system, though his discussion is so general as to be of litle utility. Broad statements urging the profession to "reach out" to those segments of the population caught in the legal no-man's land between affluence and the level of poverty necessary to invoke legal aid are by now commonplace and require further detailed discussion of ways in which this laudable object might be attained. In an English context, it might at least be asked whether the better solution might be an enlargement of the already expensive legal aid system, or perhaps the extension of a system of Citizens Advice Bureau, staffed by state-salaried lawyers.[2]

Finally in this section Professor Harry Street expresses the growing sentiment that accident cases should be taken away from the courts. He makes an excellent case in the context of radio talk, though for both lawyers and the concerned layman, his ideas are expressed in the necessary depth elsewhere.[3]

The other contributors are concerned with the question of whether the legal system in fact produces the "justice" for which it is designed. Two contributors, Anthony Lester and Warren Evans, consider obvious aspects of inequity before the Law. Mr. Lester points out the unfairness to which inequality of bargaining power can lead in the law of contracts, and Mr. Evans discusses some of the injustices in our present system of administrative law. Both suggest wholesale statutory intervention to remedy the situation. In this context, however, it is perhaps interesting to note the extent to which the courts can act, at least as a temporary expedient. Canadian Courts, for example, have begun to evolve at least a limited doctrine of inequality of bargaining power[4] and have adopted the doctrine of fundamental breach with some enthusiam to protect the weaker party in commercial transactions.

Lord Devlin, in discussing why injustice occurs in the law, singles out the expense of enforcing an individual's rights as the single greatest factor. As a remedy, he questions the adversary system and the need for the courts to insist upon oral evidence. In this respect, it is again encouraging that a person of such legal eminence should be challenging even fundamental assumptions of the legal system, but the necessarily limited scope of his presentation prevents the alternatives from being argued in any depth at all.

Andrew Watson contributes probably the most valuable part of this book when he discusses the impact which can be made by exposing lawyers to elementary principles of psychology. The merit of this contribution is that it exposes ideas to lawyers and interested laymen alike which, certainly in England and Canada, would probably not otherwise reach them. In a most simple and practical form, he points out the value of psychological study in interviewing techniques, in assuring community acceptance and understanding of legal decisions and in questioning some of the underlying assumptions of our legal procedure. In this way. Dr.

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2 This suggestion is taken up elsewhere in the book by Anthony Lester, *What's Wrong With the Law?* at 25.

3 D. W. Elliott & H. Street, *Road Accidents*, (1968).

4 *Morrison* v. *Coast Finance Ltd.*, (1965) 54 W.W.R. 257; *Knupp* v. *Bell* (1966) 58 D.L.R. (2d) 466.

Watson perhaps best carries out the book's purpose of producing stimulating ideas for improvement in various aspects of the law.

The transcript of the discussion which ended the series is aimed at answering some of the obvious questions raised by the contributions, and in filling in a little detail to some of the proposals. In this part of the book, an interesting conflict arose between Anthony Lester and Lord Delvin as to the role of the judiciary in law reform. In the course of this conflict, Lord Devlin makes the surprising statement that "My idea of a healthy judiciary is a judiciary that is not concerned with where the laws leads to."[5]

Such an attitude is astounding from a former member of the high echelons of the English judiciary, which in the last decade has shown some tendency to mould the law actively in several new directions.[6] If the Court chooses to develop the law, or if it chooses not to when it has the opportunity, it surely must do so with an extreme concern for the effect of its decisions. One can only assume that the lack of caution of Lord Devlin's statement was due to the fact that it was part of a slightly heated discussion.

The final part of the book contains a discussion of legal education, which was conducted by William Plowden. The main defect of this section is that it is largely concerned with the maze of English legal education, which results partly from the very distinct qualifications required from each sector of a divided profession and partly from the numerous different methods by which a person can become qualified to practice law. As such, the details of the discussion can be of little interest to the majority of its Canadian readers, though for *aficionados* of the current debate as to the future of legal education in Canada, it exhibits many of the unnecessary tensions which exist between the practising profession and law teachers.

In summary, the book succeeds only to a limited extent in its object of provoking critical thought about some of the practical problems facing the law. Most of the contributions seem better suited to the medium for which they were designed than to a book such as this. In their written form, the presentations appear rather disjointed when read consecutively and, above all, their subject matter demands more detailed treatment. It is unfortunate that many essentially good ideas appear trite when discussed at such a high level of generality. The book can therefore only be regarded as a very elementary starting point for anyone, whether layman or lawyer, who wishes to study seriously some of the shortcomings of the legal system.

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5 Devlin, *What's Wrong With the Law?* at 81.

6 One might cite as the most obvious examples of judicial activism the use of the doctrine of fundamental breach to control exemption clauses and the rise of negligent misstatement as a cause of action.

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