the end, not at the beginning. And the result is that the end comes as a sudden, disappointing petering-out: it is a splendid performance, but it is only a part performance. We are returned to specific performance of the objectives of the series by A. A. Fatouros' survey (pp. 194-242) of "Obstacles to Private Foreign Investment in Underdeveloped Countries": the obstacles considered are social, ideological, economic and legal.

These, then, are the contents of the first two volumes of *Current Law and Social Problems*. Some of the essays are valiant and successful attempts to realize the series' lofty objectives; others are equally valiant, but less successful; and others again are merely legal or legal-philosophical exercises of the kind long familiar in legal periodicals. The inclusion of these last is, of course, a proper contribution to the editorial objectives. Lawyers engaged in interdisciplinary communication must give as well as take, and if this series is to be a true interdisciplinary forum, it is proper that we should use it for the public examination before other specialists of our own specialized problems and our own specialized cultural heritage. But the *typical* essays remain those which examine a specific legal problem in the light of a battery of diverse extra-legal materials. As to these, the Editor is to be particularly congratulated for providing ample space in which his authors can solve the problems of the interdisciplinary approach; but for all this, on the whole, the problems remain unsolved.

Yet we should not conclude that the problems *cannot* be solved. The 1962 volume (not available at this time of writing) is to have a new Editor, and this may perhaps be regretted; for Professor Macdonald has launched the series with both vigour and vision. But whereas the first two volumes (as is only to be expected at the start of a new series) offer only random collections of essays, the third is to be a *thematic* collection, devoted to legal and social problems of organised labour in Canada; and this, perhaps, is a step in the right direction. The limitation of the theme to a *Canadian* problem need not involve a similar limitation of the usefulness of the work; indeed, Australian lawyers who have read Mr. Palmer's essay in Volume I will find themselves looking forward to Volume III. As for the original interdisciplinary objectives, far from departing from them, the idea of thematic sets of essays may be the best way to fulfil them. For, on the whole, the conclusion to be regretfully drawn from a reading of the first two volumes is that unless we can all become *homines universales*, few single essays by single minds are likely to attain sufficient detail, sufficiently diverse expertise, or sufficient mental manipulability for the reader, to make the interdisciplinary approach a fruitful one.

A. R. BLACKSHIELD*

Justice According to the English Common Lawyers, by F. E. Dowrick. London, Butterworth & Co. Ltd., 1961. ix and 251 pp. (£2/12/6 in Australia.)

It is an idea of great *prima facie* attractiveness that the meaning of "justice" as a jurisprudential problem should be dealt with not by recourse to abstract philosophical theories, but by a careful piecemeal examination of what common law judges have said about justice in their occasional invocations of the concept. The use of judicial utterances seems attractive, first, because there are fair grounds for expecting that these will furnish the "typical utterances" about justice which we should be examining according to the canons of con-

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temporary linguistic analysis; and second because, after all, the common-law judicial views are *our* views, expressions of the notion of justice that belongs to our legal heritage. I have explored elsewhere some of the limitations on the *prima facie* usefulness of this kind of inquiry; but I have also briefly explored its promise, and attempted to give a sample of the kind of information to which such an inquiry might lead us.[1]

Further exploration, however, has led to the discouraging conclusion that to carry out such an inquiry on any worthwhile scale would be a labour of Sisyphus, and that the rewards would not be equal to the labours. *Explicit* judicial invocations of the symbol "justice" are few and far between. Many of those that do occur consist of judicial exegesis of specific uses of "justice" in specific contexts, as with the reference to "just terms" in s.51(xxxi) of the Australian Constitution;[2] and *general* judicial usages of "justice" are likely to be *exceedingly* general, so that their significance for the inquirer into the meaning of "justice" will at most be that of hints which he must follow up elsewhere.

For these reasons, we approach with admiration tempered by scepticism F. E. Dowrick's pioneering attempt[3] "to present the notions of justice current in the English legal profession in the twentieth century"[4] by reference mainly to judicial utterances about justice. Significantly, Dowrick has found it necessary to supplement his judicial sources by heavy reliance on other legal and quasi-legal sources;[5] he has also found that "any suspicion that the English common lawyers unanimously hold and for centuries have held to one clearly formulated notion of justice . . . is soon dispelled".[6] He does, however, particularise seven notions of justice which, in vague and kaleidoscopic combinations, he conceives to underline the judicial utterances. These are as follows:
(a) *Justice as Judicature.* On this view, says Dowrick, "justice" is not so much "an ethical value, but . . . rather a mechanism of government directed to realising the political value of social order". It is synonymous with "judicial settlement of disputes", as "the relatively civilised alternative to leaving disorders to multiply and private wrongs to be redressed by violent self-help".[7] But his primary authority for this understanding of justice is Bracton;[8] his assessment of its modern standing is that "English lawyers who would admit to being satisfied with this elementary notion of justice *simpliciter* are indeed rare.[9] This is not to say that they have dispensed with it, but rather that they have developed more complex notions which assume the original one. But still this original notion remains in their basic vocabulary".[10]

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[1] See A. R. Blackshield, "Empiricist and Rationalist Theories of Justice" (1962) 48 *Archiv für Rechts- und Sozialphilosophie* 25, 29-33.

[2] See esp. *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (1946) 72 C.L.R. 269, esp. *per* Latham, C.J. at 280. Cases on the parallel provision for "just compensation" in the Fifth Amendment to the U.S. Constitution tend to be less helpful, the ground covered being both broader (because of infusions from the whole problem of "due process") and narrower (because "just compensation" is only one element in "just terms") than in the Australian cases. See in *Commonwealth* v. *Huon Transport Pty. Ltd.* (1945) 70 C.L.R. 293, Rich, J. at 307-308, McTiernan, J. at 327, and Williams, J. at 337; and in the *Grace Bros. Case* Dixon, J. at 289-90.

[3] *Justice According to the English Common Lawyers* (1961) (here cited as "Dowrick, *Justice*").

[4] *Id.* v, 1.

[5] See *id.* 2-4, and *cf.* G. Wilson, Book Review (1962) 78 *Law Quarterly Review* 434 at 435: "The title of the book is misleading. It is not concerned with justice according to the English common lawyers but with statements by some English lawyers in courts, on committees, in articles and as reported in biographies."

[6] Dowrick, *Justice* 13.

[7] *Id.* 17.

[8] *Id.* 17-19; *cf.* on the oddity of his reliance on such remote historical figures Wilson, review cited *supra* n. 5 at 436.

[9] In the modern literature he finds firmest support for it in W. Markby, *Elements of Law* (1 ed. 1871, 6 ed. 1905) 30-35, 111-12.

[10] Dowrick, *Justice* 22.

(b) *Justice as Fair Trial.* In this "extension" of his first sense into "a series of canons of what constitutes a fair trial", which "have become an essential part" of the lawyer's concept of justice,[11] Dowrick bases himself essentially on Lord Denning's recent extrajudicial formulation of the principles which go to make a fair trial.[12] Chief among these are, of course, the so-called "principles of natural justice".[13] Yet, even assuming these to be precipitates from the lawyer's notion of justice, that very assumption may well imply that the work of justice has been done here.[14] These concrete extensions of "justice as judicature" may indeed, like that notion, be the indispensable substratum for the doing of justice in the wider sense; but they may also squarely conflict with justice in that wider sense.[15]

(c) *Justice as Conformity to Natural Law.*[16] The natural lawyer's understanding of justice is, of course, of mainly historical interest. No doubt it was an important force in English legal thought when Christopher St. Germain published the *Doctor and Student,*[17] on which Dowrick mainly relies;[18] but he concedes it to be "undeniable that most common lawyers in the nineteenth and twentieth centuries have rejected the doctrines of natural justice as part of their conscious legal philosophy".[19] He sees some signs of a current of opinion now running in the other direction, his main evidence being culled from the writings of Richard O'Sullivan[20] and Sir Henry Slesser,[21] as well as from the latter's judgments in the Court of Appeal.[22] But beyond this, his conclusion as to the present and even, on the whole, as to the past, is that "the influence of . . . Christian and natural law precepts, while deep and continuous, has not been direct or articulate;" but that, conceivably, "these truly fundamental principles have been the inarticulate major premises in legal thinking, and have inspired at a more articulate level" the remaining notions of justice which he detects.[23]

(d) *Moral Justice.* Under this rubric, Dowrick seeks to articulate what lawyers have in mind when they say that a course of action is "fair", "proper", "reasonable", "sound", "just and reasonable";[24] or that it accords with

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[11] *Id.* 30.

[12] *The Road to Justice* (1955) 1-44. *Cf.* Blackshield, article cited *supra* n. 1 at 31-32. And see Denning, L.J. in *Jones* v. *National Coal Board* (1957) 2 Q.B. 55 at 63-67.

[13] Dowrick, *Justice* 41-43, thinks the name is a misleading one. "The use of this exalted title for these principles is a good example of what Pound has called the ethically idealised law of the time and place." *Cf.* J. Stone, *The Province and Function of Law* (1946) (hereinafter cited as "Stone, *Province*") 673ff.

[14] See H. H. Marshall, *Natural Justice* (1959) 184-86, suggesting that precisely by being reduced to formulae of positive law the "principles of natural justice" have been greatly abrogated, modified and aridified.

[15] See *Southport Corporation* v. *Esso Petroleum Co. Ltd.* (1956) A.C. 218, esp. *per* Lord Radcliffe at 241.

[16] Dowrick here uses the term "natural justice", as indicating at once, what "natural law" does not, that what is referred to is an *ethical* and not a *legal* doctrine. See Dowrick, *Justice* 46n. As to "natural law", we agree; yet surely the ambiguity of "natural justice" is far more forbidding than that which he complains of in "natural law".

[17] *Two Dialogues between a Doctor of Divinity and a Student in the Laws of England* (1st Dialogue *circa* 1523; 2nd Dialogue 1530; combined revised ed. 1532).

[18] *Justice* 49-53.

[19] *Id.* 69.

[20] See Stone, *Province* 230, 247, 260.

[21] *The Judicial Office and Other Matters* (1943); *Order and Disorder: A Study of Mediaeval Principles* (1945); *The Administration of the Law* (1949). And see now *id., The Art of Judgment* (1962).

[22] Esp. in *Re Carroll (No. 2)* (1931) 1 K.B. 317, 348-364, esp. 354; and *cf. Fender* v. *Mildmay* (1936) 1 K.B. 111, 121-27 (C.A.).

[23] Dowrick, *Justice* 69.

[24] As to which as a specialised term *cf.*, in England: *Simons* v. *Great Western Railway* (1856) 18 C.B. 805; *Beal* v. *South Devon Railway* (1860) 5 H. & N. 875; *Harrison* v. *London, Brighton and South Coast Railway* (1860) 2 B. & S. 122; *Peek* v. *North Staffordshire Railway* (1863) 10 H.L. Cas. 473; *Lewis* v. *Great Western Railway* (1877) 3 Q.B.D. 195; *Ashendon* v. *London, Brighton and South Coast Railway* (1880) 5 Ex. D. 190; *Dickson*

"common sense", "good sense", "decency", or "humanity".[25] From the present viewpoint this is the heart of the matter; but it is significant that what he finds underlying these usages is emphatically not any clear or absolute notion of justice, but "a less exalted and more variable ethical version of justice, in which the essential standards are those of current moral opinion in the country".[26] And when he takes as his primary articulation of this version Sir Frederick Pollock's reliance on "the moral sense",[27] the final result for a reader seeking empirical *data* for inquiry into "justice" is simply to refer us quite away from judicial utterances, to an investigation of "the common sense of justice".[28]

(e) *Benthamite Utilitarianism.* Whether or not Dowrick is correct in believing that the individualist version of utilitarianism was the substance of "Bentham's articulate theory of utility", and not merely a nineteenth century myth,[29] it is undoubtedly in this version that Bentham has had his main influence on lawyers. It is interesting to note that this influence was not immediate;[30] but we all know that it was great.[31] Yet the only explicit articulate statement of this theory of justice which Dowrick can adduce is Bentham's own;[32] and Bentham himself usually chose to avoid the term "justice".[33]

(f) *Social Justice.* Though English lawyers rarely speak of "social justice" in those terms, "social justice" as expounded by Roscoe Pound[34] seems to Dowrick to be what they frequently have in mind when they speak of "expediency", "social convenience", "social utility", "public policy" or "the public interest".[35] He suggests that though Pound's thought has been somewhat widely disseminated in England, through the lectures of Benjamin Cardozo and the Australian texts of Julius Stone and Sir G. W. Paton, its main significance is not that it has itself shaped judicial concepts of justice, but that it "rationalises and refines one of the traditional methods of adjudication used by English judges".[36] As expounded by Dowrick, however, Pound's concept tends

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v. *Great Northern Railway* (1886) L.R. 18 Q.B.D. 176; *Great Western Railway* v. *McCarthy* (1887) 12 App. Cas. 218; and *Sutcliffe* v. *Great Western Railway* (1910) 1 K.B. 478 (judgment of Kennedy, L.J.). In the U.S.: *Reagan* v. *Farmers' Loan and Trust Co.* (1894) 154 U.S. 362; *San Diego Land and Town Co.* v. *National City* (1899) 174 U.S. 739; and *Atchison, Topeka and Santa Fe Railway* v. *Oklahoma* (1918) 176 Pac. 393.

[25] Dowrick, *Justice* 73.

[26] *Ibid. Cf. id.* 79 quoting Farwell, L.J. in *Barker* v. *Herbert* (1911) 2 K.B. 633 at 644: "The common law is, or ought to be, the common sense of the community, crystallised and formulated by our forefathers." And see *id.* 87-93 as to Lords Atkin and Denning.

[27] See his *Essays in Jurisprudence and Ethics* (1882) cc. x, xi, esp. at 288ff.

[28] *Cf.* E. N. Cahn, *The Sense of Injustice* (1949) 13-28; and my own somewhat more complex position, article cited *supra* n. 1, 88-91.

[29] See J. B. Brebner, "*Laissez Faire* and State Intervention in Nineteenth Century England", in *Tasks of Economic History* (1948), published as Supplement VIII to the *Journal of Economic History;* J. Viner, "Bentham and J. S. Mill: the Utilitarian Background" (1949) 39 *American Economic Review* 360.

[30] See Dowrick's discussion at 115 of *R.* v. *Lambert and ors.* (1793) 22 State Tr. 953, at 1017-18, where Lord Kenyon, C.J. strongly directed the jury that a newspaper advertisement maintaining "that all true government is instituted for the general good . . . and all its actions are, or ought to be, directed for the general happiness and prosperity of all honest citizens" was a "wicked, malicious . . . gross and seditious libel". Perhaps, however, Dowrick is not sufficiently advertent to the question of whether the charge was really directed to the particular passage quoted; nor to the full effects on public opinion of what he almost euphemistically calls "the revolutionary context of 1793".

[31] See Stone, *Province* 292-95. Dowrick, *Justice* 128-29, seems faintly disposed to query the *caveat* there expressed against over-indulgence in the argument of *post hoc ergo propter hoc*; but his own final assessment of Benthamism as "undoubtedly a potent factor" in reform seems to be exactly that reached by Stone.

[32] *Id.* 106-113.

[33] "Justice," he said, "in the only sense in which it has a meaning, is an imaginary personage, feigned for the convenience of discourse, whose dictates are the dictates of utility, applied to certain particular cases." *Principles of Morals and Legislation,* c. x, §.40, note.

[34] See Dowrick, *Justice* 135-143, and *cf.* Stone, *Province* 355-368.

[35] Dowrick, *Justice* 135.

[36] *Id.* 143—notably, he thinks, by Lord Wright, as to whom see *id.* 150-59.

to blur into an uneasy blend of (d) and (e) above.

(g) *Legal Justice.* "A notion which common lawyers in England have cherished for centuries is that the principal criteria of justice for them in their professional roles are . . . simply the established laws of the land."[37] Dowrick finds the fullest expression of this notion in the *Lectures* of John Austin;[38] but he notes that Austin "was but expressing a motif" which was almost as old as the profession.[39] To express this motif is, indeed, merely to restate the former limb of the familiar judicial ambivalence between certainty and creativity. It is, of course, important to stress that the supposition that law must be certain is itself a notion of justice; but it is also important to stress that, as with the notion of "a fair trial", it is one which may squarely conflict with "justice" in the wider sense.[40]

No doubt Dowrick is right to think that a blending and interdependence of these seven notions of justice underlies judicial thought about it, and judicial references to it. But it will be noted that in each case his primary articulation of the notion is found in an extra-judicial source, to which judicial exemplifications or evocations are then added as little more than embroidery. "All we get is a stray thought captured in print";[41] and read as an attempt to construe the judicial thought from the judicial utterances, Dowrick's labours only confirm our own conclusions in this area. These are that the uses of "justice" in legal contexts are likely either to refer merely to "justice-according-to-law",[42] which at least should not be *assumed* to be identical with "justice"; or to have no *specific* reference at all, but only an indeterminate reference.[43]

Dowrick's book is a likeable and useful collection of strains of thought in our legal-cultural heritage. Even from this point of view it suffers from some superficiality and consequent imprecision in the author's grasp of the material he expounds: his version of Pound is not exactly Pound, and his version of "moral justice" is so vague as to be not exactly anything. The vagueness, no doubt, is due in part to his decision to devote a separate chapter to each of his seven notions, regardless of the fact that some of them are so trivial, or conceptually unformed, as to make this attention quite extravagant. But all these defects, though present, are present only to a small and quite inoffensive degree. In the book as a whole there is more clarity than unclarity, and

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[37] *Id.* 176.

[38] See esp. 1 *Lectures* (5 ed. 1885) 218: "In truth, law (the positive law of the land) is itself the standard of justice". At 177 Dowrick notes, but does not attempt to resolve, the conflict between this and the alternative version of justice which Austin earnestly advanced in lectures 2-4—a kind of religious utilitarianism which at key points approximates to classical doctrines of natural law.

[39] See Dowrick, *Justice* 179-183.

[40] See *London Street Tramways* v. *L.C.C.* (1898) A.C. 375, esp. *per* Lord Halsbury L.C. at 380. And *cf.* generally, I. Tammelo, "Justice and Doubt" (1959) 9 *Osterr. Zeitschrift für öffentliches Recht* 308 at 394.

[41] Wilson, review cited *supra* n. 5 at 435. Of course, as Wilson adds at 437, "it is not his fault that the gleanings are thin".

[42] *Cf.* Dowrick's conclusion, *Justice* 215, that "the stock notions in the working philosophy of the typical English judge in the modern era" are those of "justice as judicature", "justice as fair trial", and "legal justice". Wilson, review cited *supra* n. 5, at 434, comments that "English common lawyers in fact emerge as rather simple, reticent people, singularly unaware of any changes that may have occurred since the days of Bracton, and very uninspiring". But for a spirited defence of the ideal of "justice-according-to-law" see the letter by H. R. S. Ryan in (1960-61) 3 *Criminal Law Quarterly* 194-197. Wilson's comment is, of course, valid, and is no criticism of Dowrick, inasmuch as most common lawyers and judges are undoubtedly somewhat distrustful of abstract thought about justice. See I. Tammelo, article cited *supra* n. 40 at 318; and *id.*, "*La Relatività della Giustizia ed il Principio della 'Sollecitudine'*" (1958) 35 *Rivista Internazionale di Filosofia del Diritto* 350 at 351, repeated in *id.*, "Ideas of Justice and *Caritas Sapientis*" (1962) 2 *Jaipur Law Journal* 51 at 51-52.

[43] See Tammelo, articles cited *supra* n. 42 ("Justice and Doubt" 318, "*La Relatività* . . ." 358, "Ideas of Justice . . ." 58).

throughout there is a smooth readability that counts for much in this kind of book.

The point of the present criticism is only that "this kind of book" — a student's handbook of some elements in the English cultural stream as relevant to law — is not the kind of book that Dowrick seems to have set out to write. And to this we add the rider that in our reluctant view, the kind of book he set out to write simply cannot be written.

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An Analytical Guide to Contract and Sale of Goods, by R. A. Samek, Sydney. Law Book Co. of Australasia Pty. Ltd., 1963. xiv and 198 pp. with Index. (£3/0/0 in Australia.)

This is a book containing case and statutory materials, problems and questions designed to test the student's grasp of the elements of the law of contract and of the related fields of sale of goods, hire purchase and negotiable instruments. Approximately half the text is devoted to the general law of contract and the remainder sets out the more important provisions of the Goods Act, 1958 (Vic.), the Hire-Purchase Act, 1959 (Vic.) and the Bills of Exchange Act, 1909-58 (C'wlth.) with explanatory footnotes and questions for discussion. In the section dealing with the Goods Act there are, in addition, some case materials similar to those found in the first half of the book.

The author's aims, as set out in the preface, have been to provide a body of materials suitable for an introductory course in commercial law, to train students in applying the materials to new fact situations, and to stimulate the student's critical faculty. In this, he has largely succeeded, although some criticism can be levelled at his selection of cases and the treatment of the various topics. As Mr. Samek points out, the book is not intended to be self-contained and should be used in conjunction with text books, and many of the questions presuppose a more than passing acquaintance with the principles of contract law. The questions themselves (many of them based on leading decisions) are of varying degrees of difficulty ranging from elementary matters to quite difficult and thought-provoking problems.

This is a book intended to be used in an introductory course in commercial law and it may be prudent, therefore, to explain the meaning of bailment (p. 33), or infant (p. 66), or *per curiam* (p. 10), or even to indicate that C.L.R. means a High Court decision and A.C. a decision of the House of Lords (but will the student realize the significance of the absence of the letters "H.L." in the citation to *Grant* v. *Australian Knitting Mills Ltd.*[1] (p. 124)?). It may be doubted whether it is appropriate in such a work to include a technical explanation of the mistaken identity cases (p. 41) or to suggest that a distinction can be drawn between the "essence" test and "the main object" test as a criterion for marking off a contract for work done and materials supplied from one for sale of goods (p. 105).

While any attempt to compress materials on the law of contract and commercial law into 198 pages must inevitably mean a drastic pruning both of the cases to be used and of the scope of the work, there are decisions which this reviewer would have liked to have seen included, and there are topics which could have had fuller treatment. Thus, the difficult topic of mistake is dealt with too concisely (and why link mistake as to identity with the doctrine of

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[1] (1936) A.C. 85.