CANADIAN STATE TRIALS VOL. I: LAW, POLITICS, AND SECURITY MEASURES, 1608-1837, F. Murray Greenwood & Barry Wright, eds. (Toronto: Osgoode Society for Canadian Legal History, 1996).

Canadians do not often think of themselves as having a long tradition of concern for civil and political liberties. We traditionally think of ourselves as the heirs to the epic British struggles of the seventeenth and eighteenth centuries; importing the principles of the rule of law, an independent judiciary and responsible government more or less painlessly from the source. As the essays in this collection make clear, that was not the way it happened at all. We do not learn easily from the example of others even when it is a case of trying to recreate the same institutions. The circumstances in the British North American colonies were sufficiently different from those in Britain that the same principles had to be fought for; sometimes long after the metropolitan struggles were over, sometimes in parallel. There were a good many issues unique to the Canadas and the other British territories that eventually joined them. Greenwood and Wright have set themselves the rather daunting task of resurrecting this unknown part of our legal and constitutional history.[1] This is the first of several projected volumes modelled rather loosely on the massive English *State Trials* series of the eighteenth and nineteenth centuries[2] and on the more modest *American State Trials* of the early twentieth century.[3]

The English and American series consisted mainly of law reports accompanied by extensive commentary from the editors. This volume takes a different form. Seventeen articles by historians and legal scholars make up the bulk of the volume. There are two brief but very useful articles by archivist Patricia Kennedy on the sources available for the study of the early legal history of Canada.[4] Finally there are 200 pages of appendices containing documents relating to the matters discussed in the articles; indictments, statutes, judgments, opinions and correspondence. The format is at least in part dictated by Greenwood and Wright's desire to examine a broader range of security measures than their predecessors. While court cases remain at the centre, much attention is paid to legislative and administrative actions such as the suspension of *habeas corpus*. In addition to explaining the philosophy of the series, the introductory essay by Greenwood and Wright has one of the clearest and most concise expositions of the reception dates for English law that I have encountered. It also does a good job of explaining the law of treason and sedition as it existed in the late eighteenth and

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1 F.M. Greenwood & B. Wright, eds., *Canadian State Trials Vol. 1: Law, Politics, and Security Measures, 1608-1837* (Toronto: Osgoode Society for Canadian Legal History, 1996).

2 For trials up to 1820, see T.B. Howell & T.J. Howell, eds., *State Trials*, vols. 1-34 (London: Longman, 1809-1828). From 1820 to 1853, see State Trials Committee, *Reports of State Trials: New Series*, vols. 1-8, ed. by J. MacDonell (London: Her Majesty's Stationery Office, 1888-1898).

3 J.D. Lawson, ed., *American State Trials*, vols. 1-17 (St. Louis: F.H. Thomas Law Book, 1914-1936).

4 P. Kennedy, "Approaching an Iceberg: Some Guidelines for Understanding Archival Sources Relating to State Trials" in Greenwood & Wright, *supra* note 1, 577 and "Note on Sources," *ibid.*, 586.

early nineteenth centuries and of the circumstances under which governments in England and the colonies could suspend *habeas corpus*.[5]

As in all collections of articles by different authors, some are better than others, although the overall quality is high. The editors have obviously worked hard to make sure that all the contributors discuss the same set of issues. Happily this does not mean that all the authors come to the same conclusions. One of the central themes, for example, that emerges in a number of the essays is Greenwood's notion of a "garrison mentality" as one of the principal explanations for repressive behaviour on the part of governments. Greenwood developed this idea at length in a 1993 Osgoode Society volume, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution*.[6] It is a straightforward and commonsensical assertion that governments facing the threats of war and invasion will exaggerate the seriousness of the peril and frequently find internal enemies where none exist. They respond by using all the powers at their disposal, and often stretch constitutional limits to the breaking point to find new ones, to punish the perceived subversives.

There is absolutely no doubt that this sequence of events occurred on a number of occasions in this period. In an article that is a model of comparative legal history, "Judges and Treason Law in Lower Canada, England, and the United States during the French Revolution, 1794-1800," Greenwood demonstrates that the courts in all three of these places reacted strongly against supposed revolutionaries.[7] He argues convincingly that Canadian judges were the most willing to take a hard line and push the law of treason and sedition to its limits. In another article co-authored with Jean-Marie Fecteau and Jean-Pierre Wallot, "Sir James Craig's 'Reign of Terror' and Its Impact on Emergency Powers in Lower Canada, 1810-13," it is evident that the same forces are operating.[8] An even clearer example from Upper Canada is discussed in Paul Romney and Barry Wright, "State Trials and Security Proceedings in Upper Canada during the War of 1812."[9] Fears about the political reliability of the thousands of post-Loyalist American settlers in the colony led the Assembly to pass a draconian *Sedition Act* as early as 1804. When the war began this legislation was used to deport hundreds and eight people were hanged for treason in 1814.[10] The legislature followed up with legislation to confiscate the estates of convicted traitors and deportees.

The trouble with the "garrison mentality" theory is that there are as many or more examples of governments under threat behaving with restraint and moderation. The colony of New France lived with the constant menace of declared or undeclared war with the English territories to the south who outnumbered them ten to one. Yet as Peter Moogk's article, "The Crime of Lèse-Majesté in New France: Defence of the Secular

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5 F.M. Greenwood & B. Wright, "Introduction: State Trials, the Rule of Law, and Executive Powers in Early Canada" in *ibid.*, 3.

6 F.M. Greenwood, *Legacies of Fear: Law and Politics in Quebec in the Era of the French Revolution* (Toronto: Osgoode Society, 1993).

7 In Greenwood & Wright, *supra* note 1, 241.

8 In *ibid.*, 323.

9 In *ibid.*, 379.

10 *Ibid.* at 382 and 395.

and Religious Order," shows, the colonial regime made use of its extensive arsenal of anti-subversive legislation less frequently than the government of France in the same period.[11] Although Governor Carleton proclaimed martial law in Quebec after the first invasion by American soldiers in 1775, as Jean-Marie Fecteau and Douglas Hay point out in their article, "'Government by Will and Pleasure Instead of Law': Military Justice and the Legal System in Quebec, 1775-83," civilian courts were restored within weeks of the last Americans being driven out the following summer.[12] Ernest A. Clarke and Jim Phillips in "Rebellion and Repression in Nova Scotia in the Era of the American Revolution" note that the official response to the attack by rebels led by Jonathan Eddy on Fort Cumberland in 1776 was relatively mild. Only two of the rebels were convicted of treason and both escaped from jail and fled to the US while waiting to hear if their applications to London for pardons had been successful.[13] The government resisted loyalist pressures to confiscate rebel lands and Clarke and Phillips' argument that the handful of private lawsuits that resulted in the loss of property by participants in the rebellion amounted to the "privatization of repression"[14] seems to me rather silly.

Many of the examples of government repression had little, if anything, to do with external attack or internal insurrection. These grew instead out of the power struggles that accompanied the constitutional evolution of the colonies. Some of the best essays in the collection deal with these episodes. Barry Wright's "The Gourlay Affair: Seditious Libel and the Sedition Act in Upper Canada, 1818-19" is an excellent discussion of the legal issues surrounding the outrageous persecution of the reformer Robert Gourlay.[15] Paul Romney's piece on Upper Canada in the 1820s continues the story and shows how the Gourlay episode concentrated the attention of the reform opposition in the colony on the control of prosecutions and enabled them to use it against the government.[16] Barry Cahill does an equally good job of examining the intersection of law and politics in Joseph Howe's trial for seditious libel in Nova Scotia in 1835.[17]

For those with a taste for the arcana of legal history there are a couple of genuine curiosities. In a very well written article Evelyn Kolish and James Lambert sort out the legal, political and personal issues involved in the only attempt in Canadian history to impeach judges. In 1814 a committee of the Lower Canadian Assembly instituted impeachment proceedings against Chief Justice Jonathan Sewell and King's Bench Justice James Monk, accusing them of a long list of illegal and subversive acts. The authorities in Quebec City and London did not find it difficult to dismiss the charges.[18] J.M Bumsted recounts an even greater oddity that took place in Prince Edward Island in the 1820s.[19] Here a newspaper editor named James Douglass

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11 In *ibid.*, 55.
12 In *ibid.*, 129 at 144.
13 In *ibid.*, 172 at 184.
14 *Ibid.* at 200.
15 In *ibid.*, 487.
16 "Upper Canada in the 1820s: Criminal Prosecution and the Case of Francis Collins" in *ibid.*, 505.
17 *"R. v. Howe* (1835) for Seditious Libel: A Tale of Twelve Magistrates" in *ibid.*, 547.
18 "The Attempted Impeachment of the Lower Canadian Chief Justices, 1814-15" in *ibid.*, 450.
19 "Liberty of the Press in Early Prince Edward Island, 1823-9" in *ibid.*, 522.

Haszard was tried for printing, verbatim and without editorial comment, a petition from a group of islanders for the recall of the unpopular lieutenant governor of the colony, Charles Douglass Smith. So far the situation resembled that in other British North American jurisdictions but instead of being indicted for libel, Haszard was charged with contempt and tried in the island's Court of Chancery by the Chancellor, Charles Douglass Smith. As Bumsted notes, it was an episode worthy of Gilbert and Sullivan.[20]

This is a balanced collection; conspiracy theorists will object to those articles that find government anti-subversive measures even partially reasonable, others will find the relentless search for repression in other essays exaggerated. Most readers will find the contrasting points of view interesting and instructive. In a time when the *Charter* is the sole focus of libertarian concerns, it is good to be reminded that the Canadian civil rights tradition goes back to the beginnings of our political and legal systems.

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[20] *Ibid.* at 529.