LAW, POLICY, AND INTERNATIONAL JUSTICE: ESSAYS IN HONOUR OF MAXWELL COHEN Edited by William Kaplan and Donald McRae, forward by the Right Honourable Brian Dickson (Montreal & Kingston: McGill-Queen's University Press, 1993)

As with other works in the *Festschrift* genre, this book is unified not by subject or methodology, but by the personality and career of the party celebrated.

Maxwell Cohen's career was of broad span. He was born in Winnipeg on March 17, 1910.[1] In the 1930s, he received a B.A. from the University of Manitoba, an LL. B. from the Manitoba Law School, and an LL. M. from Northwestern University in Chicago.[2] His master's thesis concerned the origins of the writ of *habeas corpus*. In 1938, after spending a year at Harvard University as a Research Fellow, Cohen became the first lawyer employed full-time by the Canadian Department of Labour's Combines Investigation Commission.[3] Cohen enlisted with the army in World War II, and performed military journalism and analysis duties. He rose to the rank of major.[4] Cohen obtained a teaching position with the Faculty of Law of McGill University in 1946. His main area of research and teaching was international law.[5] In the 1950s, Cohen published the first of many articles on legal education in Canada.[6] He worked with United Nations organizations, and was a general consultant to the U.N.[7] From 1964 to 1969, Cohen was Dean of the McGill Faculty of Law.[8] He played leading roles in the development of the Institute of Air and Space Law, the creation of the Institute of Foreign and Comparative Law, and the establishment of the McGill National Programme, a four year programme leading to both common law and civil law degrees.[9]

In 1964, Cohen took on one of his most significant projects; he chaired the Special Committee on Hate Propaganda.[10] The Committee was established by the federal Department of Justice to consider legislative responses to the perceived increase in the circulation of anti-Black, anti-Catholic, and anti-Jewish literature in Canada. The Committee — whose members included then professors of law Mark R. MacGuigan and Pierre Elliot Trudeau — unanimously recommended amendments to the *Criminal Code*, which are now embodied in ss. 318 and 319.

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1 R. St. J. Macdonald, "Maxwell Cohen at Eighty: International Lawyer, Educator, and Judge" (1989) 27 Can. Y.B. Int'l Law 3.

2 *Ibid.* at 5.

3 *Ibid.* at 6.

4 *Ibid.* at 7-8.

5 *Ibid.* at 9.

6 *Ibid.* at 10.

7 *Ibid.* at 22-23.

8 *Ibid.* at 32.

9 *Ibid.* at 32-34.

10 This job was thrust on Cohen: "One night my wife and I were sitting watching T.V. and saw the Minister of Justice [Guy Favreau] announce the creation of the Minister's Special Committee on Hate Propaganda, Chairman — Dean Maxwell Cohen. No one had asked me! No one told me." *ibid.* at 39, fn. 150.

From 1974 to 1979, he was co-chairman of the International Joint Commission, which adjudicates disputes between Canada and the United States respecting boundary waters.[11] In 1981, Cohen was appointed a Judge Ad Hoc of the International Court of Justice in the Gulf of Maine litigation between Canada and the U.S.[12]

Some main themes of Cohen's career are reflected in the eighteen contributions to the book, which are grouped into four areas — Public Law, International Law, Legal History, and Legal Education. A select bibliography of Cohen's many publications, compiled by Annemienke Holthuis, rounds out the collection. The collection, as may be gathered from the wide range of topics, has no single target market. Some of the contributions — particularly those of Shabtai Rosenne ("The Agent in Litigation in the International Court of Justice"),[13] Donat Pharand ("The Case for an Arctic Regional Council and a Treaty Proposal"),[14] and Louis A. Knafla ("The Writ of Habeas Corpus in Early Modern England: A View From Within")[15] — are geared toward specialists, rather than the general reader. The remaining papers, however, are accessible and informative. To give the flavour of the whole, I shall offer some comments on some of the contributions.

The most stimulating contributions may be those concerning hate propaganda, and the connected issue of the use of international law in domestic cases. In "Maxwell Cohen and the Report of the Special Committee on Hate Propaganda",[16] William Kaplan reviews the background to the establishment of the Committee, some of the workings of the Committee, the Committee's report, and the civil libertarian responses to the report. Kaplan's paper may lead a reader to consider at least three issues. First, one may, with a sense of unease, wonder about the tardiness of the federal government's legislative response to hate propaganda. Hate propaganda legislation was adopted in Manitoba in 1934 and in Ontario in 1944.[17] World War II ended in 1945. The Canadian Jewish Congress began lobbying for appropriate legislation in the early 1950s.[18] The Cohen Committee was not struck until late 1964. The recommended hate propaganda amendments to the *Criminal Code* did not come into force until 1970. One ought not to carp: we have the legislation, and better late than never.[19] A lengthy debate may have been necessary, since hate propaganda legislation was considered, by some, to involve an improper use of the criminal law (i.e. criminal law as an educational tool)[20] and to violate freedom of speech. Nevertheless, if World War II proved nothing else, it proved

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11 *Ibid.* at 45.

12 *Ibid.* at 53-54.

13 W. Kaplan & D. McRae, eds., *Law, Policy, and International Justice: Essays in Honour of Maxwell Cohen* (Montreal & Kingston: McGill-Queen's University Press, 1993) 41-68.

14 *Ibid.* at 69-106.

15 *Ibid.* at 365-384.

16 *Ibid.* at 243-274.

17 A. Holthuis, "Maxwell Cohen's Perspective on Human Rights in Canada: The Entrenchment of the Charter and the Enactment of the Emergencies Act," *ibid.* 207 at 209.

18 *Ibid.* at 244.

19 The delay in enacting the legislation was much less than Canada's delay in dealing with the prosecution of Nazi war criminals in Canada: see D. Matas & S. Charendoff, *Justice Delayed: Nazi War Criminals in Canada* (Toronto: Summerhill Press, 1987) 139f.

20 Kaplan & McRae, *supra* note 13 at 261-263.

— not by slippery slope arguments, but by cold and bloodied fact — that hate propaganda is dangerous. The federal government can move quickly when it wants to. One wonders why it did not want to.

Kaplan raises a second issue in his contribution, that of the relationship between factual findings and normative (or political) judgments. MacGuigan, Kaplan reports, wanted the Committee to undertake "multidisciplinary research" (a modern-sounding wish); he desired a "sound factual basis" for the Committee's work.[21] MacGuigan, apparently, eschewed an explicitly normative approach to hate propaganda. He felt that the Committee should not simply take "judicial notice" that hate propaganda was a serious problem in Canada.[22] At the conclusion of its multidisciplinary labours, however, the Committee found that "only a small number of individuals and organizations were involved in the dissemination of hate propaganda."[23] The finding that the pool of hatemongers was small, however, did not demonstrate that legislation was not needed. The situation, the Committee judged, was serious enough to require action. One might suggest that the normative judgment implicit in the "judicial notice" of the serious problem presented by hate propaganda was returned to after the detour through "multidisciplinary research."[24]

The third issue arising from Kaplan's contribution concerns the conflict between hate propaganda legislation and freedom of thought, belief, opinion, and expression. "...if we create a law to stop the mouths of the ugly little neo-Nazis we create a law that sometime, somewhere may be used to stop other mouths, and those other mouths may belong to prophets and redeemers."[25] In "The Right to Protection against Group-Vilifying Speech: Towards a Model Factum in Support of Anti-Hate Legislation,"[26] Irwin Cotler takes up the cudgel against the free speech argument Kaplan describes. Cotler's presentation is cast in a somewhat artificial factum form. Cotler argues that hate propaganda is not protected expression. This position is, strictly speaking, contrary to Chief Justice Dickson's majority decision in *Keegstra*:[27] Chief Justice Dickson's position is that the hate propaganda legislation does violate s. 2(b) of the Charter (i.e. hate propaganda is protected expression), but the legislative limitation of expression is justified under s. 1. Cotler might

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21 *Ibid.* at 249.

22 *Ibid.*

23 *Ibid.* at 256.

24 One might also suggest that the detour was unnecessary, on the facts. An argument could have been made that no further surveys, questionnaires, polls, interviews, experiments, or investigations were necessary. History had already made the case. From the small and pathetic knot of lunatic members of the anti-semitic German Workers' Party sprang the fire that consumed some six million Jews, in addition to millions of gypsies, Poles, Russians, and German undesirables. What further "multidisciplinary research" was required? Perhaps the thought was that Canada was not Germany, and that hate propaganda could not have the same effects here. A further point, again not requiring additional "multidiscipinary research," is that the sheer enactment of hate propanganda legislation is insufficient: the legislation must be enforced. Weimar Germany had legislation which it could have used to prosecute hatemongers; the legislation was not enforced effectively: see I. Müller, *Hitler's Justice: The Courts of the Third Reich*, trans. D. L. Schneider (Cambridge, Massachusetts: Harvard University Press, 1991) 18-21. I thank Prof. June Ross for this point.

25 Kaplan & McRae, *supra* note 13 at 279, fn. 58. "A Stick for the Neo-Nazi is a Stick for All", *Globe and Mail*, (18 May 1966) 6.

26 *Ibid.* at 275-297.

27 *R.* v. *Keegstra* (1990), 77 Alta. L.R. (2d) 193 (S.C.C.).

have provided arguments showing Chief Justice Dickson's error in deciding too quickly that hate propaganda is protected expression, but he does not. Cotler mentions the civil libertarian argument that restrictions on hate propaganda will lead to greater and more pernicious restrictions on free speech. Cotler does not demonstrate that the slippery slope argument of the civil libertarians is wrong; he only points out another slippery slope, in the direction of hate, which he feels the civil libertarians miss.[28] Cotler provides useful references to international law materials bearing on hate propaganda legislation.

In what may be the most significant contribution to the collection, "International Human Rights Law in Canadian Courts,"[29] Anne F. Bayefsky addresses Canadian courts' references to international law. In the last section of her paper, she describes various errors made by our courts in the application of international law, particularly international human rights law. International human rights law is an important resource for the interpretation of the Charter; Bayefsky's message is that if we are going to refer to international human rights law, we might as well get it right: "Improvement will require at least increased judicial education, expansion of the number of law students reached by related law school courses, and significantly enriched library collections."[30] This last desideratum may be a vain hope in these hard times.

Another contribution in the international law area which may interest readers, on a theoretical if not a practical level, is Oscar Schachter's "Legal Aspects of the Gulf War of 1991 and Its Aftermath."[31] Many of us, I am sure, spent countless hours watching the Gulf War unfold on CNN. Lawyers though we may be, we may not have considered the complex legal framework embracing both the U.N. and the Iraqi actions. Schachter provides an informative analysis of the international law bearing on the participants' actions in the Gulf War.

Contributions which may interest readers, on a practical if not a theoretical level, are those by Roderick A. Macdonald[32] and Edward McWhinney[33] on Cohen's educational career. The descriptions of Cohen's successes in curricular reform and in the development of Institutes should be useful to, at least, those involved in teaching law, in the way that T. H. White's *The Making of the President, 1960* was useful, in days gone by, to political workers: ideas, tactics, and possibly even inspiration may be gained from a review of successful campaigns.

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28 Kaplan & McRae, *supra* note 13 at 293. I am not sure that civil libertarians do ignore the slippery slope pointed out by Cotler. A civil libertarian might respond to Cotler that he or she recognizes that great evils have occurred, but these evils were the product of over-powerful States; to preserve us all, State powers must be limited — even if that means allowing hatemongers free speech.

29 *Ibid.* at 107-143.

30 *Ibid.* at 128.

31 *Ibid.* at 5-40.

32 "Dreaming the Impossible Dream: Maxwell Cohen and McGill's National Law Programme", *ibid.* at 409-430.

33 "Anglophone Quebec and the Quiet Revolution: Maxwell Cohen at McGill University", *ibid.* at 431-439.

J.P.S. McLaren's contribution, "Maxwell Cohen and the Theory and Practice of Canadian Legal Education,"[34] should also appeal to those involved in legal education struggles. McLaren describes Cohen's work on what we might call the "mission" of the law school. A lesson one might draw from McLaren's contribution is that the law school is an essentially conflicted institution. The issues of institutional identity confronted by the law school in Cohen's day are the issues the law school confronts today. These issues arise from the law school's entanglement in three sometimes inconsistent relationships — the law school's relationships with the university,[35] the practicing bar (and bench),[36] and the larger community.[37] The different relationships and positions within the relationships must be balanced by the law school as a whole and by professors in course delivery. McLaren observes that Cohen did not tell us, precisely, how to accomplish a proper balance. This is not a surprising conclusion; there is, presumably, no single right way to run a law school, any more than there is a single right way to run any other organization.

Not every reader will be interested in every contribution to this collection. The collection does contain provocative, well-written papers on a wide range of legal topics. The collection is certainly worth a reader's perusal and sampling. One might borrow an epigraph for the collection from Ken Mitchell: Everybody gets something here.

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34 *Ibid.* at 440-454.

35 Does the law school fit within the global mission of the university? To what extent should the law school be administratively or educationally (or socially) integrated with other faculties? The law school should be both a teaching and a research institution: how are the research and teaching responsibilities to be balanced? To what extent should the law school draw on other disciplines (other resources in the university) to inform the teaching of law? To what extent can divergent theoretical approaches to law be accomodated under one law school roof?

36 A law school should provide professional training to those who wish to enter the practice of law, but to what extent should the curriculum be oriented to professional training? What other academic options ought to be made available to students?

37 The law school educates, as a matter of fact, many community leaders; what responsibilities does that impose on the law school? To what extent should the law school provide training in "leadership" (and in what sort of "leadership")? To what extent should law school resources be deployed outside the university? How should admissions policies reflect access to justice or social justice concerns?