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## Book Review: Fundamental Law in Criminal Prosecutions, edited by Arthur L. Harding

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*Fundamental Law in Criminal Prosecutions.* Edited by ARTHUR L. HARDING. Dallas: Southern Methodist University Press. 1959. Pp. ix, 121. (\$3.00 U.S.)

This is a collection of four essays based on papers delivered by distinguished American legal scholars at the 1958 Conference on Law in Society held at Southern Methodist University. The essays are directed to the informed and inquiring citizen, layman as well as lawyer and concern what the editor aptly describes as "the minimum decencies of criminal prosecution". Much of the book is naturally concerned with the problem of federal control over state courts which depends on the "due process of law" provision of the Bill of Rights. At the moment "due process" is not a term of art in Canadian jurisprudence and even if such a phrase be incorporated in a Canadian Bill of Rights, we have no reason to anticipate a constitutional struggle between province and Dominion, criminal law being within the exclusive legislative authority of the Dominion. Of what interest then is this book to the Canadian citizen, lawyer or layman? The answer is clear. Whether or not we acquire the technical phrase "due process" to describe them, "the minimum decencies" should be of interest to us all. Further, such an authoritative study of the constitutional problems facing the American lawyer will be of the greatest value to those of us who specialize in criminal work and are faced with the problem of working with the many American decisions on due process.

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Of especial value in this regard is the first essay by the editor, an historical study of the basic constitutional issues.

The remaining essays deal with specific protection afforded an accused person. Thus, the second essay by William M. Beaney, concerns the right of an accused person to have the assistance of counsel in his defence. This right, guaranteed by the Sixth Amendment, was construed as nothing more than the right to retain counsel until 1938 when in *Johnson v. Zerbst*<sup>1</sup> the Supreme Court held that in every federal criminal case, the accused must either have counsel appointed by the court, where indigency made retention of counsel impossible, or must waive counsel after proper instruction by the judge. According to the author, there was no professional nor public criticism of this generous interpretation of the Sixth Amendment. It was apparently accepted that the adversary system functions best with each side represented by competent counsel. Critics of our present legal aid schemes in the various provinces may find ammunition in the author's reference to the solution furnished by the public defender system presently used with great success in the city of Los Angeles and other areas in the United States. As he points out, "it is hard to conclude that there are differences between those using the public defender plan and the rest of the United States which prevent widespread adoption of this solution" (p. 55).

The third essay, on compulsory self-incrimination, emphasizes the highly unsatisfactory state of the law of evidence in this regard. Professor Fairman, the author, holds, as I do, that the rule excluding coerced confessions depends largely, if not exclusively, on public policy against the incorporation of coercion as part of our judicial process. In other words, the rule excluding involuntary confessions is aimed at the elimination of third-degree methods on the part of the police. In this respect, it is interesting to note that the author endorses the proposal made by Dean Roscoe Pound, in 1934,<sup>2</sup> of a statutory procedure for questioning a suspect before a magistrate, under suitable safeguards. Professor Fairman links this liability to be questioned with a right to refuse to answer and a liability to have such failure commented on by the judge at trial. In 1940, Dr. C. A. Wright<sup>3</sup> proposed that our rules of evidence be amended so as to afford an accused protection from having his record, if any, exposed on entering the witness-box under the guise of testing his credibility.<sup>4</sup> He suggested that at the same time the judge should be given power to comment on

<sup>1</sup> (1938), 304 U.S. 458.

<sup>2</sup> Legal Interrogation of Persons Accused or Suspected of Crime (1934), 24 J. of Criminal L. & Criminology 1014.

<sup>3</sup> (1940), 18 Can. Bar Rev. 808.

<sup>4</sup> The construction placed upon s. 12 of the Canada Evidence Act, R.S.C., 1952, c 307 is too notorious to require exposition.

the failure of an accused to testify. This is substantially the position in England and it may be that this indirect withdrawal of the present privilege not to give evidence would be more acceptable to the Canadian lawyer and citizen than Professor Fairman's proposal.

The final essay follows naturally from this discussion of the indirect protection of the citizen's freedom from unlawful coercion, the late Professor Reynard taking as his topic "The Right of Privacy". In England, where every man's home is his castle, evidence obtained through a police wire-tap was used in the recent "trial" of a doctor for professional misconduct before the General Medical Council with the apparent approval of the Home Secretary. While, in Canada, wiretapping has not yet presented a problem, there has been a recent tendency by the police to limit the extent of the citizen's right to privacy by the indirect use of provincial legislation, e.g. to use a right of search conferred by the Ontario Liquor Control Act for the purposes of general search. Such Canadian cases as *R. v. McNamara*,<sup>5</sup> *A.G. for Quebec v. Bégin*<sup>6</sup> and *R. v. St. Lawrence*,<sup>7</sup> heavily reinforced by such Privy Council authority as *Kuruma v. R.*,<sup>8</sup> tend to give the police every encouragement by admitting real evidence procured by tortious or even criminal violation of a suspect's rights. On the whole, the American cases tend the other way, with a marked difference between practice in matters within federal jurisdiction and those within the jurisdiction of some of the states. As Professor Reynard notes:

On the one hand there is society's deep and abiding concern for the individual's right of privacy. On the other, there is an equivalent interest in the prompt and effective apprehension of criminals. Neither interest should be sacrificed on the altar of the other. (p. 117)

This book will be of interest and value to the intelligent reader rightly concerned with a proper accommodation of the rights of citizen and society.

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<sup>5</sup>[1951] O.R. 6, affirmed. at p. 11.

<sup>6</sup>[1955] S.C.R. 593.

<sup>7</sup>[1949] O.R. 215.

<sup>8</sup>[1955] 1 All E.R. 236 (P.C.)

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