BOOK REVIEWS

Fear, Favour or Affection: Aborigines and the Criminal Law in Victoria, South Australia and Western Australia, by ELIZABETH EGGLESTON, (A.N.U. Press, Canberra, 1976), pp. xx and 398. Recommended price: $10.95.

Albert Vere Dicey, in his 19th century classic, *An Introduction to the Study of the Law of the Constitution*, wrote that "the rule of law" was one of the central features of England's political institutions. One aspect of the rule of law he described as "the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary courts". Dicey's analysis has been a formative influence in the education and thought of generations of lawyers in England, and in Australia.

By the late 1960s everyone (including, belatedly, lawyers) who had any contact with Australia's Aborigines (and Torres Strait Islanders) knew that, for them, the notion of equality under the law was a myth. Officialdom, however, had long been able to deny it. Discriminatory legislation could be described as designed for the benefit of Aborigines, or at least for their protection. Such measures apart, the prevailing governmental policy was that of assimilation which positively required that Aborigines should "choose to attain" a status in the overall Australian society in which they would enjoy "the same rights and privileges" and accept "the same responsibilities" as other Australians. To the extent that the law and its administration were equal, its differential impact in practice on segments within Australian society (notably the Aborigines) could be ignored.

And yet, as Aristotle put it: "Injustice arises when equals are treated unequally, and also when unequals are treated equally". As far as discriminatory legislation and practices are concerned, fine lines have had to be drawn so as to preserve only such special beneficial provisions as the Aborigines wanted and needed (e.g. the special status of reserves, sacred sites, land rights, financial assistance) and to eliminate other "protective" provisions which denied them responsibility for their own destiny (e.g. the management of their property and earnings, the overriding discretions conferred on administrators). The final major battleground has been the State of Queensland for which the Federal Government eventually found it necessary to pass overriding legislation (the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act, 1975). Whether the inhabitants of Queensland reserves—or the managers—are actually aware of the changed legal situation is another question.

But as to equality for Aborigines under the general law, those in the know, as I mentioned, knew it to be a myth. The problem was to prove it.

In 1970 a group of young Sydney blacks and white academics sought ways to meet the problem. They enlisted the co-operation of Hal Wootten Q.C., then Dean of the University of New South Wales Law School (and now a Justice of the N.S.W. Supreme Court) who formulated a plan to establish an Aboriginal Legal Service. In the absence of any substantial funding, such a service could operate only by winning the voluntary support of large numbers of practising lawyers, and letters were written to every barrister and solicitor in the State. They had to be persuaded that there was, in fact, a problem. Elizabeth Eggleston, fortunately, had provided the evidence.

Her doctoral thesis was based on research and field work carried out during the period 1965 to 1967 in Victoria, South Australia and Western Australia. It was a careful, methodical, scholarly study. Much of the statistical information she produced showed no apparent indication of adverse discrimination affecting Aborigines in the

criminal justice system. But much of it did; and despite her dispassionate, unemotional style—or perhaps *because* of it—such information, plus various illuminating case histories which she recounts, produce a more powerful impact on the reader's feelings about justice than a purely polemical work could do.

A sampling of the statistics will suffice to indicate their potency. In the survey period Aborigines constituted 2.5% of the population of Western Australia, but comprised 11% of those convicted of offences and 24% of those in prison as a result of such convictions. The sex break-up is also significant—"Aborigines comprise 22% of the male prison population but 64% of the female prison population".

One ingredient in the differential concerns the offences charged. Dr Eggleston showed that "the Aboriginal offence *par excellence* is drunkenness, with charges constituting 48% of all charges against Aborigines. The same role is filled in relation to whites by traffic offences, which represent 57% of all charges against whites".

In successive chapters Dr Eggleston considered the initiation of criminal prosecutions, including the important topic of interrogations and confessions (ch. 2), bail (ch. 3), representation (ch. 4), the conduct of the court hearing (ch. 5), the outcome of criminal proceedings (ch. 6), special legislation (ch. 7), institutions for Aborigines (ch. 8), recognition of tribal law (ch. 9), and, for evaluative purposes, justice and the rule of law (ch. 10). In most stages of the criminal justice system clear indications emerged that, for one reason or another (prejudice, poverty, lack of education, cultural factors) Aborigines laboured under greater disadvantages than the general community. Some of the disadvantages would be shared in common with segments of non-Aboriginal society—the poor, the uneducated, those with limited command of the English language; but some are particularly significant for Aborigines, and the sheer accumulation of disadvantage clearly affects them far more than any other identifiable group.

It was this sort of information which in 1970-1971 helped to persuade a surprisingly large number of private practitioners to offer their voluntary support to the new Aboriginal Legal Service in N.S.W. It was this sort of information which helped to persuade the Federal Liberal-Country Party government to fund the establishment of a store-front office in Redfern staffed by a salaried solicitor, field officer and secretary. The level of funding was subsequently increased by the Labor Government so as to allow the establishment of similar Services in other States, the opening and staffing of offices in strategic country centres, and the provision of funds to pay private practitioners for their services. Dr Eggleston's analysis of the situation had indicated that a large number of reforms were necessary if Aboriginal "equality before the law" was to be achieved, but one central requirement was clearly access to legal services, and the new organizations were designed to achieve this. Professor Sackville in his second main report on Law and Poverty in Australia was able to report that "in 1974 the Services together handled more than 19,000 matters, including on-the-spot advice, a figure which is especially impressive considering the unfamiliarity of most Aboriginals with lawyers and legal aid services" (p. 285). The effect on Aboriginal morale has been incalculable.

A.N.U. Press is to be congratulated for its decision to publish so as to make the study more widely available. It is true, as Dr Eggleston wrote in her preface, that she had "not attempted a comprehensive revision to bring the study up-to-date. It remains a description of the situation existing during the fieldwork period (1965-1967)". She added: "Though there have been considerable changes in Aboriginal affairs since this study was carried out, it still has contemporary relevance. The most significant development has been the growth of the Aboriginal Legal Services. The availability of legal assistance specifically for Aborigines has already had some impact on the situation described here and will have more in the future. But there are still too many Aborigines being arrested and detained in Australian prisons".

Many observers, however, fear that the future of the Aboriginal Legal Services is in question, not only because of the impact of general cutbacks in Federal Government expenditure but also because of particular conditions which the Department is attempting to impose on the Services and which are seen to threaten their independence. Again it is worth quoting the Sackville report (p. 287):

"At present the Services are funded directly by the Department of Aboriginal Affairs and this approach creates some difficulties. For example, the institution of proceedings on behalf of an Aboriginal community or a group of Aboriginals requires the approval of the Australian Government, thus creating the danger of an appearance of conflict of interest where the proceedings are adverse to the interests of the Government. The need to ensure that the Services have properly spent funds allocated to them (which is essential) may leave the department vulnerable to a charge (whether justified or not) that it is attempting to interfere with the activities of the Services. The need for independence is also reinforced by the fact that the Aboriginal Legal Services have been subjected to attacks from a number of sources, which is perhaps not surprising in view of the active role they have undertaken on behalf of Aboriginals."

Much remains to be done to place Aborigines in a situation of genuine "equality before the law". But any substantial reduction of the role of the Aboriginal Legal Services would be a major setback. Their activities may occasionally arouse controversy, but anyone seeking justification for their existence need only read this book.

Elizabeth Eggleston was Senior Lecturer in Law at Monash University and director of its Centre for Research in Aboriginal Affairs. Her death early this year from cancer at the age of 41 was regarded as a tragic loss not only by those who worked directly with her but also those who were familiar with her work, black and white. She lived long enough to see this book in print. It is a seminal work which has had, and will continue to have, a major influence in Aboriginal advancement.

GARTH NETTHEIM

International and Interstate Conflict of Laws, by E. I. SYKES AND M. C. PRYLES, (Butterworths, 1975), pp. xxxix and 914. Recommended price: cloth $32.50, paper $27.50; and *Conflicts in Matrimonial Law*, by M. C. PRYLES, (Butterworths, 1975), pp. xii and 148. Recommended price: paper $7.

These two books, taken together, constitute the latest attempt to devise a Conflicts case-book suitable for course use in Australian law schools. *Conflicts in Matrimonial Law* was produced separately, largely because The Family Law Act, 1975, brought important changes to that area when the main volume was at an advanced stage. Professor Sykes was alone responsible for an earlier case-book (*Cases and Materials on Private International Law* (2nd ed., 1969)), and the new venture with Dr Pryles owes a considerable amount to Sykes' earlier collation of materials. The authors see the main difference in the fact that in the composite work "[w]e have placed much stress on conflictual theory and this is manifest both in the layout of the book, and grouping of topics, and in the decision to have a separate part on "Choice of Law, Theory and Methods" and in the added scope given to textual and periodical literature". This review will concentrate largely on this aspect of the composite work.

The new chapter on theory occupies some fifty pages, pride of place being given to Yntema's 1953 article. "The Historic Bases of Private International Law" ((1953) 2 *A.J.C.L.* 297). Apart from the Yntema article (14 pp.), a long extract from Currie's "Notes on Methods and Objectives in the Conflict of Laws" ((1939) *Duke* L. J. 171), occupying 7 pages, and a considerable portion of Cavers, "A Critique of the Choice of Law Problem" ((1933) 47 *H.L.R.* 173), covering 5 pages, the materials suffer from the need for economy. Too often, the extracts list the conclusions which have been reached by a writer without indicating the reasons leading to those conclusions. One example is contained at 254-256, where Cavers' principles of preference are set out *in extenso*. While they follow, sequentially, immediately upon the extract from Cavers' early critical article, they do not "follow", as a matter of reasoning, from that piece. The 1933 article has, according to Cavers himself, been the subject of

much misunderstanding, and a reading of the *Choice of Law Process* (1965) is essential for a comprehension of the concept of "principles of preference", let alone their content.

A second example of this tendency to state conclusions without reasoning is found at 345-346, where there appears an extract from an article by the present reviewer, "International Contracts and Localising Rules" ((1973) 47 *A.L.J.* 22). Here again, only the conclusions are stated, the argument leading to those conclusions, themselves by no means free from controversy, having been excised. It is, of course, easy to understand how the compilers should have been led to make decisions such as these. A cases and materials book cannot contain thirty or forty full length articles, and the choice of what to include and what to omit is a difficult one. Even so, Sykes and Pryles may be judged by some to have fallen into error at times in seeking comprehensiveness at the expense of comprehensibility. No student could profitably read the extracts mentioned without immediately resorting to the original source: If this be so, the value of the extracts themselves is negligible.

The general choice of materials in a case book is not to be criticized lightly, for a reviewer's preferences for this example over that, for this judgment rather than another, are generally idiosyncratic. Even so, some comment is desirable in respect of the materials chosen in a new section on "Statutes". Some may find surprising the reproduction of passages from the judgment of *Dixon* J. alone in the *Barcelo* case ((1932) 48 C.L.R. 391), and the total omission of the judgment of *Gavan Duffy* C.J. and *Starke* J. in the *Wanganui* case ((1934) 50 C.L.R. 581), there being a risk of conveying the impression that Dixonian orthodoxy is the only important quality to be found in those cases. The omission of the judgment of *Kitto* J. in *Kay's Leasing Corporation* v. *Fletcher* ((1965) 116 C.L.R. 124) is even more surprising, since the majority judgment, unlike that of *Kitto* J., is almost devoid of conflictual discussion and explanation. The omission is particularly noteworthy in view of the inclusion at some length of the much less significant judgment of *Kerr* C.J. in *Ex parte Richardson; Re Hildred* ([1972] 2 N.S.W.L.R. 423). *Freehold Land Investments* v. *Queensland Estates Pty. Ltd.* ((1970) 123 C.L.R. 418) is excluded from the same section, but dealt with, somewhat strangely, in the chapter on "Contracts". As the High Court judgments say nothing whatever on the *Vita Foods* autonomy principle and its alleged limitations, its location in the book requires some explanation.

Welcome though the inclusion of the new material may be, there is an unfortunate implication to be drawn from the author's inclusion of the new section on "Statutes" in a Chapter entitled "Choice of Law Techniques". The implication is, of course, that statutes are a thing apart from the common law and are to be treated separately for conflicts purposes, particularly in relation to the vexed question of their territorial claims. This is unfortunate for two main reasons. First, it seems to mirror only too accurately a conservative view of the relationship between common law and statutes, according to which statutory prescriptions have neither generative power nor common law influence (see, *e.g.*, "The Legitimacy of Civil Law Reasoning in the Common Law: Justice Harlan's Contribution" (1972) 82 *Yale L.J.* 258). Second, it obscures the possibility of conflictual constructional techniques being used in respect of common law rules as well as statutory ones. In *In re Mitchner* ((1922) St. R. Qd. 252), for instance, the Queensland rule against perpetuities was held inapplicable to a trust of movable property despite the fact that it was established by the will of a testator who died domiciled in Queensland. A similar conclusion was reached in the earlier case of *Fordyce* v. *Bridges* ((1848) 2 Ph. 497). The nexus between these decisions and the constructional techniques applied to statutes is apparently overlooked by Sykes and Pryles, who note the two cases briefly only in the separate section on "Property". The true significance of the "statute" cases extends far beyond legislative provisions. It lies in the rejection of common law choice of law rules as the exclusive means for settling the territorial claims of forum law in general.

There can be little doubt that the new casebook is a significant improvement over its predecessor. One may be forgiven, nonetheless, for doubting whether the end result is as successful as it might be and for wondering whether all students will find

it an eligible alternative to direct use of library resources. The criticism which has already been made concerning the danger of excerpting conclusions rather than argument, and of selecting one from several judgments for special, even sole, treatment, highlights a problem which faces all case-book editors. Lack of library space and of resources adequate for the demand sometimes requires risks to be taken. They can, in any event, be minimized by a judicious use of comment and explanation after each grouping of cases and other materials. In this regard, Sykes and Pryles' work could certainly be improved. The policy of using considerable space in simple digests of numerous cases might profitably give way to the type of reflective comment and discussion characteristic of the best American case-books, notably that of Cramton and Currie (*Conflicts of Laws* (2nd ed., 1975)). Little would be lost and much gained by such a change of emphasis.

Whether students will regard the composite work as an eligible alternative to direct contact with original sources is largely dependent on the use made of it by teachers of the subject. A strict case method requires the materials to be available in class; other forms of teaching may not. If a free choice were left to students, there is reason for suspecting that many of them would feel obliged to deny themselves ownership of the work. The two volumes together cost $34.50 in paper cover, a considerable cost for materials published in offset from typewritten originals, even if compensated for, to some extent, by their length. A student could hardly be expected to purchase both this book and Nygh's *Conflict of Laws*, the combined cost of which would approach $55. If a choice had to be made, many students would probably prefer a text book to a set of cases and materials. Given escalating publishing costs and diminishing student numbers in this subject, law teachers may finally be forced to abandon such publications on a commercial basis and resort, as some already have done, to the production of roneoed materials for students in the Conflict of Laws.

D. ST. L. KELLY

Computers and the Law, by COLIN TAPPER, (Weidenfeld and Nicolson, London, 1973), pp. xvi and 314. £5-25 (U.K.).

For any one wishing to have an easy introduction to computers and the law this is the book to read. We lawyers are alleged to be jargon-ridden; I feel that computer people are too. For example, did you know that an argument is "an independent variable, e.g. in looking up a quantity in a table, the number, or any of the numbers, that identifies the creation of the desired value"? Thus, when lawyer and computer technologist attempt to communicate, it is like a meeting of the United Nations without a simultaneous translation service. One feature of Colin Tapper's book is that it is relatively free from technical jargon and those terms that are used are explained in simple terms. Just a thought: or is it that I have now become steeped in the jargon myself?

However, this book is more than a simple introductory text. Certainly the greater proportion of the text is taken up in giving factual information, most of which can be found in other sources, including Tapper's own writings; but much of the theory and many of the ideas behind the development of the use of computer technology in the law are woven into the text. Over the years Tapper has, of course, made a major contribution to this thinking. The difficulties, disadvantages and disappointments are discussed in the book as well as the advantages and advances. Incidentally, it comes through, yet again, in Tapper's text that we owe an immense debt to the techniques devised and the ideas postulated by John F. Horty and his team in the University of Pittsburgh almost twenty years ago—several aeons of time in computer terms.

One of the problems facing any researcher or any practitioner in any field is over-enthusiasm and over-selling. The computer field has been no exception to this. In any new endeavour there are likely to be failures. A long time certainly elapsed

between Icarus coming unstuck and the development of the Concorde. In the application of computer technology to the law, I think that we are hovering, if that be the right word, somewhere along the line between the Wright Brothers and the Spitfire. I am tempted to settle for the Red Baron, but I may be over-cautious. In Australian work, we are not very much further on than Leonardo da Vinci, but we are developing fairly rapidly now. One lesson that we learnt from overseas is that some people did try to do too much too quickly, and failure meant a dropping off of enthusiasm and vital support.

On the nothing succeeds like success principle, I have always argued that the way to success in this area, as in others, is to start with a modest successful exercise that grows. That is why I hope that we may see some progress made on the carefully staged, and, at first, quite modest, proposals for a system of retrieval recommended in 1974 by the Australian Committee on Computerization of Legal Data. An initial small statutory data base was gradually to have added to it more statutes, statutory rules, and case law related to the existing data; finally, secondary sources were to be added. The essence of the exercise was to be careful and gradual extension. I have long argued that some such computerized system could eventually be useful in law reform efforts. For not only would it help greatly in the task of law reform in any jurisdiction which was fortunate enough to have access to such a system, but also it may help to rationalize and eliminate some of the overlap of endeavour that has occurred in the past in Australasian law reform.

Colin Tapper emphasizes the question of retrieval and deals with computers and legislation, computers and case law (commenting on the problems and techniques, experiments that have been undertaken and systems that were operational at the time he was writing), computers and litigation, computers and international law and computers and land registration. He also has chapters on the problems of evidence thrown up by computerization, the critical problem of privacy and data banks and a balanced one on prediction of judicial attitudes—an area where polarization of views is not uncommon. But he does not intend that the book be exhaustive. For example, he does not deal with the problem of giving protection to computer software or those industrial law difficulties that are thrown up, or such specific computer applications as occur in banking, estate planning, criminal law enforcement or, one of the most fertile possibilities in my view, administrative law. Nor does he deal, except in an incidental manner, with the need of the legal profession and the law schools to develop means of training members of the profession to use the new research techniques and the new technology.

Tapper points out that statutory applications are more fully developed than case law and commentary, and that this is understandable because of the very different and less uniform nature of these last two. But, for the very reason that they are more difficult to search by conventional means, and more voluminous, I think that it is important that we develop case law and commentary retrieval systems. Or, as I see it, we should aim to develop a legal retrieval system that includes not only statutes, but all sources of legal data including statutes, regulations, cases and learned commentary. For, although it is my view that computerized retrieval systems will be complementary to other forms of retrieval for many years to come, I also think that a computerized system becomes the more valuable if there can be interrelation between the various classes of data. The provision of an element of browsability is, in my view, essential if members of the profession are to be persuaded to adopt, and adapt their research methods to, computerization.

The chapter on privacy and computerized data banks is a very good summary of the position and again Tapper carefully eschews the extreme position. He cites the American material freely here but, oddly, in view of the later land registration citations, does not mention the considerable volume of Australasian writing in this area.

It is always good to see a balanced view being taken on the question of privacy. Those of us in Australasia who started off the computers, law and privacy debate in the 1960s usually saw the media concentrate on our criticisms of the technology rather than the enormous benefits which we believed could accrue to society from

computerization. This was no doubt on the bad-news-drives-out-the-good-news principle, but it did lead to distortion. Recently, a start has been made in Australia on developing practical solutions to privacy problems generally, and the headlines and media coverage have been repeated virtually word for word from those of eight or ten years ago. I trust that, as further legislation is proposed to complement the law and practice that already exist in the field, it reflects a balance of values. For example, a modest and successful start has been made in the Queensland Privacy Act and in the very valuable work of the New South Wales Privacy Committee. As I said in 1969 when suggesting the development of the concept of *habeas notas*—that you may have the secret writings—"I believe it is too late to wait for our courts to develop a solution. Nevertheless, we must move in a carefully balanced way, for in most privacy areas things are not all one way. There is a paradox here; we have the clash of two principles, both of them good: on the one hand, a person's privacy should be respected; on the other hand, the truth should be discoverable". Tapper, with his vast experience of the good and the bad of computers, puts his finger on the vital point of linkage of records when he says (at p. 43):

> The real thrust of the attack should be aimed at the criteria for the cross-use of records, and their suitability for each purpose rather than a blanket attack. . . .

Although Tapper does not catch up with the Australasian writing on privacy, he does cite some of the Australasian endeavours in the registration of titles field. There are generous references to our work here, even if I might be egotistical and grieve at the incorrect spelling of my own name. In fact, this is one of the very few mistakes that I noticed in the book (is this a consequence of the demanding accuracy which is a necessity when working with computers?) which is generally very carefully produced. Of course, the registration work has now been taken much further in this part of the world. This is particularly so in New South Wales where an imaginative and successful feasibility study has been undertaken into the computerization of the Torrens registry.

In conclusion then I thoroughly recommend this book. It is written by one of the authorities in this rapidly growing field. Because it is so fast moving I shall look forward to the second edition, for the work is sure to become a standard text.

DOUGLAS J. WHALAN

Federal Industrial Law, Fifth Edition of "Nolan and Cohen", by C. P. MILLS AND G. H. SORRELL, (Butterworths, Sydney, 1975), pp. li and 503.

In the last five years, our laws have been altered and refashioned in order to meet the ever evolving social and economic needs of our nation. Although the changes to federal industrial law have been less marked than in other commercial areas, nevertheless alterations have occurred of major significance. Throughout the years, each succeeding edition of *Federal Industrial Law* has faithfully recorded all the major parliamentary and case law changes in this branch of law. Any person wishing to examine the evolvement of our labour relations system, could do no better than to examine all the editions of this work. Those of us awaiting the fifth edition were not disappointed, for it accurately chronicles the eight amendments to the Conciliation and Arbitration Act from 1968 to 1973. The book is a statutory annotation of the Conciliation and Arbitration Act 1904-1973. A detailed history of each section of the statute is given and all the relevant cases are discussed, analyzed and, where appropriate, criticized. Furthermore, annotations on the Conciliation and Arbitration Regulations are also included.

In particular, this latest edition examines the 1970 amendments which dampened down the heavy handed effects of the penal provisions. The detailed 1972 amendments are also discussed. The main thrust of these changes was that Sections 22-35 inclusive

of the principal Act were repealed and replaced by new Sections 18-35 inclusive. These new Sections deal with the powers of the Conciliation and Arbitration Commission and in effect, tidied up this part of the Act which, after successive amendments, had become difficult to comprehend. The 1972 changes also inserted Part VIII A which laid down the procedure for union amalgamations. The relatively minor changes of 1973 are also noted.

One of the useful features of this book is that all the available references to a reported decision are given. Not only are the Commonwealth Arbitration Reports, the Federal Law Reports and the Commonwealth Law Reports used, but all the references to the unofficial reports are given. Thus you can find the appropriate reference in the Industrial Information Bulletin, the Australian Industrial Law Review Reports, the Argus Law Reports (now the Australian Law Reports) and the Australian Law Journal Reports and, where appropriate, to the Appeal Cases.

It is hoped that a sixth edition will find its way on to our book shelves in a year or two, for already the winds of change are upon us once more. In 1974 the Act was amended to deal with the problems of the joint registration of federal and state trade unions and, in early 1976, some provisions relating to further secret ballots were enacted by Federal Parliament. Since 30 April 1975, "wage indexation" have become household words and the successive quarterly decisions by the Commission are continuously adding to and amending the general principles of wage determination.

RONALD C. MCCALLUM

Critical Criminology, by IAN TAYLOR, PAUL WALTON AND JOCK YOUNG, (Routledge & Kegan Paul, London, 1975), pp. xii and 268. $20 (hard-bound).

In 1973 Taylor, Walton and Young published their book *The New Criminology* which has come to be regarded as one of the most important pieces of criminological writing in the last twenty years. *The New Criminology* comprised an extensive and comprehensive analysis of all previous European and American studies and academic theorizing regarding crime and deviance. The authors offered a radical critique of traditional criminology, defending the authenticity of deviance by rejecting the orthodox characterization of a consensual homogeneous social order in which a minority of inadequate deviants existed on its fringes, in favour of a perception of society which emphasized the diversity of values existing within industrial society's numerous subcultural groups the conduct of whose members could (or should) not be explained by reference to some social or personal pathology. They condemned criminology's tie with correctionalism and its dutiful support of existing social arrangements, not only by the more obvious guardians of the *status quo* like prison administrators and the judiciary, but also those in psychiatry, psychology and social work who exercise their "scientific" knowledge as social control agents. The thrust of their new criminology was that crime producing features of contemporary capitalism were largely bound up with the inequities and divisions in material production and ownership and it therefore must be possible to envisage societies free of any material necessity to criminalize deviance and thus, by some form of social transformation, create social and productive arrangements which would, in effect, abolish crime. Forms of human diversity which, under capitalism, were labelled and processed as criminal would not be subject to control in a diverse and expressive socialist culture.

In this new volume Taylor, Walton and Young, in a lengthy introductory essay, extend the theoretical position developed in *The New Criminology* and, through nine other contributed pieces, seek to place on record the attempts now being made by radical criminologists and activists in the United Kingdom and the U.S.A. to

confront the facts of extension of the criminal law and the ensuing political dilemmas of the radical criminologists. The western world's experience of a vast increase in the range of social behaviour deemed appropriate for control by criminal law has created new criminals who are no longer so easily identifiable with the stereotyped offenders of the 1950s criminology of Sutherland, Tappan or Barnes and Teeters. The population vulnerable to the risk of being identified as offenders is much more extensive and ambiguous and includes social, political and economic movements whose activities might more easily be regarded as political than criminal in nature.

The criminalization of house squatters in England and draft resisters in Australia are examples of this process and it has become increasingly difficult to sustain the notion that criminality is a behavioural quality monopolized by a particular and limited section of the lower class whose behaviour is qualitatively different from the everyday activities of the law conformers. The radical criminologists see their political responsibility as evaluating the legal norms and underlying morality of a society that criminalizes some economic and political activities and not others and they regard any theoretical position which does not, at least minimally, focus in this direction as falling into "correctionalism" *i.e.* a misdirected emphasis on individual pathology or tangential and minor social reforms.

Taylor, Walton and Young, in their introductory essay, balk at criminology remaining merely an adjunct of the forces of social control under existing social arrangements. They probe the unquestioning acceptance of a given legal system and given legal norms, asserting that the failure of criminology to look behind these norms undermines its claim to scientific objectivity. They attribute the inconclusive search for individualistic explanations of the differences between criminals and non-offenders to the unwillingness or inability of criminologists to confront the facts that crime is largely concerned with interference with property rights, and property crime has much more to do with inequality in ownership or property than individual pathology:

> "In suggesting that criminologists have to make the judgments about the kind of society in which they live, we are arguing simply that criminologists must understand (and analyse) the social forces which shape their 'science'; and the criminologists who refuse to do this, because of the unpleasant political implications involved, are obstructing the development of criminology. Social problems become individual problems in an ahistorical criminology: and the task of criminology is reduced to the examination of 'the causes of crime' largely in terms of individualistic explanations, with the occasional dash of social factors or determinants. Much of modern criminology continues to operate in ignorance or avoidance of the essence of crime—that, above all else, it is a breaching of a legal norm—and that legal norms, like any other social norm, can be outmoded or obsolete." (pp. 45-46)

They take a strongly Marxian view that historical analysis of man in society reveals the primacy, not of legal science or analysis, but of material conditions as the determinants of normative change in general, and criminal and legal norms in particular. Indeed, almost all the essays offer Marxism as their philosophical underpinning since, presumably, it is the most powerful socialist expression of the conflict approach to crime, deviance and law enforcement. But the proper reading of Marx is the subject of some disputation and three of the essays are given over to a debate over whether orthodox Marxism can legitimately give rise to a "Marxist theory of deviance". And even the radical criminologists are attuned to the fact that some forms of Marxist theories of social defence (*e.g.* as practised in the U.S.S.R.) have been used to justify an inventive range of repressive initiatives particularly, in recent times, the psychiatric hospitalization and "treatment" of political dissenters.

In an interesting paper on "Prospects for a Radical Criminology in the U.S.A." Tony Platt describes radicalism's attempt to establish an identity independent of the prevailing ideology of liberalism and reformism which pursues the belief that, through the rehabilitative ideal, it is possible to create a well regulated, stable and humanitarian system of criminal justice under existing economic and political arrangements. This form of liberal reformism supports the extension of welfare-state capitalism and gradualist programs of amelioration whilst rejecting radical and violent forms of

social and political change. Liberal reform is accompanied by a reliance on technocratic solutions to social problems and belief that progress will occur through enlightened managers and policy makers rather than by organizing those who are processed by the system. Despite the proliferation of new sanctions, programs, treatment centres, and other "reforms", the American Friends Service Committee in its report *Struggle for Justice* (1971) was still able to observe "the legacy of a century of reform effort is an increasingly repressive penal system and overcrowded courts dispensing assembly line justice". Liberalism, in contrast to the radicals, rejects macroscopic theory and historical analysis in favour of an emphasis on behaviourism, pragmatism and social engineering, a tradition typified by the prestiguous *Journal of Criminal Law, Criminology and Police Science* which characteristically encourages narrowly conceived microscopic studies which fail to examine general moral and political questions about the criminogenic nature of society. In Platt's view the most imaginative criminology is to be found in the writings of criminals such as Brendan Behan, Eldridge Cleaver and Angela Davis. Radical criminology in the United States was centred at the School of Criminology at the University of California, Berkeley, where Platt and others developed a radical curriculum with courses on colonialism and imperialism in crime, crime control and the rise of the corporate liberal state, sexism, racism, and the crime policies of Richard Nixon. In addition they formed a Union of Radical Criminologists in the summer of 1973 and later set up a new journal *Crime and Social Justice.*

In his essay, Platt discusses a relationship between radical criminology and so-called academic freedom, noting that there were already moves to sanitise the School of Criminology of its radicalism. His fears were well founded since, shortly after, the funding of the school was withdrawn, it ceased to accept further enrolments, and will cease functioning completely by the end of the academic year 1975/1976. This assault on the Berkeley criminologists coupled with a decline in student activism and populist movements following the end of the Vietnam war may have limited the subsequent growth of the radical movement in the U.S.A., but it is certainly premature to discount it. Its journal continues publication and, by all accounts, the Berkeley experiences only serve to confirm the theories and strengthen the will of the American movement.

It should not be thought that the new criminology is monolithic in structure. In his separate essay on "working-class criminology", Jock Young questions the romantic conception of society envisaged in the new deviancy theory with its image of naturally good men and women whose rationality and goodness would be expressed more effectively were it not for government interference and its brutalizing mismanagement of deviancy. He points out that, however much the theorist talks of diversity and pluralism, he has to come to terms with the high degree of conformity and consensus in the community (*e.g.* as evidenced by the relative *lack* of crime and deviancy). Even in a typically industrial society like Britain, where some 7 per cent of the population own 84 per cent of the wealth, there was not only no large scale struggle for revolutionary change, there appeared to be general support for laws against property crimes and victimless crimes. And, if law was a weapon constructed by the powerful few to aid them pursue their own economic and political interests how is the theorist to explain the current widespread exposure of lawbreaking by powerful corporations and politicians:

> "On the one hand, then, the new deviancy theory is unable to cope with the relatively infrequent and unextensive amount of working-class deviancy in a divided society: and, on the other, it cannot explain the prevalence and persistence of the criminality of the powerful." (p. 73).

Moreover, Young recognizes, as many critics of the new criminology have pointed out, that the writings so far provide few guidelines or pointers to practical change (while, paradoxically, the old criminology is guilty of no such omission). If the final arbiter of the truth or validity of a theory is its practical utility, the new criminology, at this stage, is stridently non-interventionist. Again, though the new criminology implies deviancy is a product of reason, constructively adapted and impeded only by the intolerance and clumsy criminalization of the state, Young warns that crime

and deviancy encompasses a wide and uneven array of activities and behaviours and though some are justifiable as rebellions against property and repression, others turn out to be irrational, negativistic and quite inimical to the fulfilment of socialist ideals. He would have society take up the progressive elements of pluralism but reject those components which are "directly the product of the brutalizations of existing society (however diverse, expressive or idiosyncratic their manifestation)" (page 90). But who is to distinguish between tolerable crimes which are cultural adaptions of the people and intolerable crimes of brutalized individuals, and how, and with what consequences is not explained.

Though the field is still in its infancy, Australia has already seen the impact of the new criminology in the establishment, last year, of the *Alternative Criminology Journal* as this country's response to the orthodoxy of the *Australian and New Zealand Journal of Criminology* though, at the present time, it is indulging in the moral indignation of exposé criminology with only intermittent attempts to develop a more radical redefinition of the subject-matter, concerns and commitments of criminology in Australia.

Critical Criminology, perhaps even more than the earlier volume *The New Criminology* represents a basic guide to the current politicization of deviance and puts an end to any remaining pretence of criminology being a value-free science.

RICHARD G. FOX

European Competition Policy, edited by the Europa Instituut of the University of Leiden, (A.W. Sijthoff, Leiden, 1973), pp. xi and 265.

This is a series of papers prepared for the Instituut by ten eminent Dutch lawyers and economists, both academic and professional. The papers have been prepared independently of each other, though they do cover most significant aspects of competition law in the E.E.C. Some inconsistencies are inevitable, but the editor could have provided cross-references. Thus, in dealing with joint ventures, Professor Mok affirms that it is uncertain whether they fall under article 85 of the Treaty (p. 135 ff.) while Wertheimer provides citations of cases where the Commission subjected joint ventures to article 85 control (p. 202).

These papers are backed by a comprehensive bibliography, a list of all the formal decisions on competition matters made by the European Commission and Court of Justice, and a satisfactory (if brief) index.

European Competition Policy is and will remain a valuable secondary source in the area for those not already familiar with E.E.C. Competition law. It does, however, suffer from three defects.

First, much of the book has been overtaken by events. Since it was published, the Court of Justice has handed down a series of vital decisions, notably the *HAG* case [1974] 2 C.M.L.R. 127 and the twin *Centrafarm* cases [1974] 2 C.M.L.R. 480 on industrial property rights, and the decision involving the *Commercial Solvents Corporation* [1974] 1 C.M.L.R. 309 holding that the company had breached Article 86 of the Treaty. These cases mean that chapter 8 on industrial property, especially, must be read with caution and with an eye to later events. Dr Wertheimer's excellent paper raises three issues which he regards as at least partly open. He suggests that article 36 of the Treaty, which deals with industrial property rights in the context of quantitative restrictions, does not create rights which individuals may rely upon before their national courts, and that a national judge may apply his national laws on industrial property in non-competition industrial property disputes (p. 220-222). He regards the crucial question of what constitutes the essence of an industrial property right which may still be vindicated as an open one (p. 223). He regards it as uncertain whether a licensor may avoid the E.E.C. rule forbidding a licensor to prevent his licensees from exporting their products out of their own exclusive

territory simply by a series of parallel licences, one for each State (p. 224). The first point has been rejected entirely by the Court, the second has been filled in for patents and trademarks, and the third has been answered in the negative. Short of a surprising turn-around by the Court, the burden of the latter part of Wertheimer's paper is now wrong. Wertheimer's view, arguably acceptable at the time it was written, has had a short life.

The second defect in the book is partly fortuitous. It is that the papers were written at a time when two vital decisions of the Court of Justice were being handed down. They were the *Continental Can* case [1973] C.M.L.R. 199 and the *Haecht II* decision [1973] C.M.L.R. 287. Because the papers were written at various times between 1971 and 1973, only some of them take these landmark cases into account. The first chapter, introducing and comparing E.E.C. and United Kingdom law, in particular suffers because it was not updated. It mentions neither case though it deals with the points involved in both and relies upon the cases leading up and overruled by *Haecht II*. The Wertheimer paper also states the law based upon the pre-*Haecht II* cases. On the other hand, a separate chapter was included on *Haecht II*—chapter 7 by Dr van der Wielen. While timing made matters difficult, there can be no excuse for the failure to change the odd sentence outdated by printing time, or to make the appropriate footnote referring to more recent material. The expert will scarcely be relying upon a volume such as this, and the novice may well be misled.

Thirdly, none of the writers has English as a mother tongue. It was, therefore, essential that a competent editorial job be done on the manuscript. Some writers, indeed, write beautiful English. But Professor Snijders, writing on exclusive agencies and resale price maintenance, was almost incomprehensible. His first sentence indicates his style:

> "Among the several types of private agreements, and arrangements, in which clauses are figuring, that are restrictive of competition in some or other way, the cartel is the most characteristic phenomenon, albeit not the one occurring most frequently." (p. 52).

He goes on to speak of a "prejudicial decision" instead of a preliminary decision under E.E.C. Treaty article 177 (p. 68), and uses the foreign abbreviation "a.o." for *inter alia*. His chapter bore more than its share of typographical errors.

The standard of contribution is high intellectually. If the papers are rather expository, that was intentional; the major value for the reader lies in the perceptive comments and summaries of the writers. The chapters on the "rule of reason" by Dr Alexander, on agreements between members of groups of companies by Professor van Oven, and on governmental concessions to private enterprise by Professor verLoren van Themaat were particularly perceptive and stimulating. Wertheimer's paper, while largely expository, contained many valuable insights. Professor de Jong made an interesting contribution on the theory of parallelism and concerted practices. Only Dr Ham's introduction to E.E.C. and United Kingdom law was wholly bland.

European Competition Policy has its value, but it could have been outstanding.

G. D. S. TAYLOR

The Law of Admiralty, by GRANT GILMORE AND CHARLES L. BLACK, (2nd edition, The Foundation Press, Inc., 1975), pp. xxi and 1101.

Some seventeen years ago, maritime law scholars scrutinized the first edition of Gilmore and Black from contrasting vantage points. R. P. Colinvaux,[1] of the London bar, commended it as an overview of United States law and therefore more useful to English practitioners than the minute analysis of reference volumes. He described the text as "within its compass a complete encyclopedia of United States admiralty

[1] 1959 J. Bus. L. 400.

law". A. W. Knauth,[2] of the New York bar, acknowledged its quality as a teaching text but was more reserved about its usefulness to American practitioners. It was, he commented, "an arouser from the law schools; it remains to be seen how much it helps the Bench and Bar". From the teacher's point of view, Professor G. K. Gardner[3] described it as "an excellent and important book" and ventured the interesting prediction that "there will be future editions . . . and one of them will be the definitive treatise in the field". The release of a second edition now fulfils that prophecy, for it succeeds to the prestigious reputation of the first edition, in its lifetime acclaimed by academics, practitioners abroad and the bench and bar at home.

To regular Gilmore and Black readers I need say nothing about the second edition, other than it updates and improves the first. The authors themselves preface the second edition with the admission: "We have, on occasion, been forced to the unhappy conclusion that our original discussion of one or another point was inadequate, unsound or flatly wrong. Our policy has been to confess, and attempt to rectify, our own errors".

To those unfamiliar with this work some comment is necessary. *The Law of Admiralty* is not a ponderous study of the jurisdictional ambit and procedural technicalities of admiralty courts. It is a reliable treatise and engaging analysis of substantive maritime law which condenses a variety of topics, each a study in its own right, into a complete and authoritative text. True, its source of reference is American law. But to Australian maritime lawyers its value transcends the limitations of a reference book. The universality of maritime issues ensures the relevance to Australia of the penetrating analysis and incisive commentary so fluently expressed by the authors. Gilmore and Black is a reference source, an instructive text and a stimulating critique.

The first chapter—*History and Jurisdiction*—introduces the reader to the nature, sources and institutional framework of maritime law. Too often such background information is neglected by text writers. By tracing the development of maritime law, these authors equip the reader with the insight to appreciate the substantive issues discussed in the following chapters. Of course, no potted account can capture the drama of admiralty history and no abridgment can substitute for Sir Travers Twiss' *The Black Book of the Admiralty*, R. G. Marsden's *Select Pleas in the Court of Admiralty* and F. R. Wiswall's *The Development of Admiralty Jurisdiction and Practice*, to mention but a few. However, the authors do supplement their text with compendious footnote references for those who wish to pursue historical research in further detail. Brevity also constrains discussion of jurisdictional issues but the authors do provide an excellent profile of United States admiralty jurisdiction which is interesting to compare with our jurisdiction derived from the Colonial Courts of Admiralty Act, 1890.

The second chapter is devoted to *Marine Insurance*. It is refreshing to find a text which recognizes the importance of insurance to maritime law both in formulating principles and resolving litigation. To quote the authors "there is no better way to a four-square understanding of the whole pattern of the maritime law and the maritime industry than the study of the subject of marine insurance". Of course, this single chapter does not challenge *Arnould on Marine Insurance* as a reference volume nor Ivamy's *Marine Insurance* as a comprehensive text. But it capably explores general legal principles and acquaints readers with common insurance clauses. It touches upon the structure of the underwriting industry and the role it plays in cargo, hull and liability insurance, the importance of which would perhaps justify textual expansion in future editions.

The third and fourth chapters comprise an excellent analysis of *Bills of Lading* and *Charter Parties*. The reliance placed on these chapters by United Nations' organs in the course of international shipping enquiries testifies to their world-wide esteem. They do not reproduce the volume of detail contained in *Carver's Carriage of Goods by Sea* and *Scrutton on Charter Parties and Bills of Lading*; indeed to attempt

[2] (1958) 58 Columb. L.R. 425.
[3] (1957) 71 Harv. L.R. 201.

such coverage would be counterproductive. But Australian lawyers should not underestimate the value of these two chapters. Comprehensive footnotes qualify them as an authoritative statement of United States law. Moreover, the relatively large volume of American maritime litigation exposes issues which remain untested in our courts. And because of the universal usage of charter parties and the Hague Rules, American law is very relevant to the local scene. Of course, some local differences are inevitable. The most obvious in Chapter three is that under Anglo-Australian law the bill of lading does not aspire to that American quality of negotiability whereby the holder may acquire a title better than that of his predecessor. A "non-negotiable" bill of lading in the United States is assignable yet incapable of conferring a superior title, whereas in our legal system it is simply incapable of assignment.

The fifth chapter embraces *General Average*. The authors remind us that general average is as ancient as the Rhodian Law, was perpetuated by the Laws of Oleron and is as recent as the York-Antwerp Rules 1974. The chapter discusses the concept of general average and the specific Rules governing perils, sacrifices and the calculation of contributions. Nor does it overlook mention of the average adjuster's function. Commendably it raises the debate on the desirability of general average in the context of commercial shipping. Regrettably it does not pursue the arguments in greater detail.

The sixth chapter deals extensively with the *Rights of Seamen and Maritime Workers*. This is a topic which could assume mammoth dimensions if not confined, as the authors have wisely chosen, to compensation for injury and death. Even then it is a topic neglected in Anglo-Australian legal literature. This chapter does revolve around domestic legislation and must be read subject to the Seamen's Compensation Act and the Navigation Act and regulations thereunder. Yet it does provide concepts, principles and arguments which could well direct the development of law in Australia. By Australian standards the American judicial trends are adventurous, reflecting the movement in some states towards strict products' liability. For example, the shipowner is under an absolute duty to seamen to provide a seaworthy vessel—a duty which is more onerous than that owed to cargo owners. Injuries caused by acts or omissions falling outside the parameters of "unseaworthiness" may be redressed by principles of negligence. In both respects relief is available to harbour workers and crew. Practical relevance aside, this chapter provides a fascinating account of the judicial process at work and its influence on legislative policy.

The seventh chapter is entitled *Collision*. It represents a concise yet penetrating analysis of collision liability law. In one section the authors criticize the American divided damaged rule and advocate its judicial rejection. Ironically, the very persuasiveness of their argument has brought about its obsolescence. Since the publication of this edition, the United States Supreme Court in *United States* v. *Reliable Transfer Co.* 1975 A.M.C. 541 has accepted the view propounded by these authors. Citing, indeed quoting from, Gilmore and Black and relying upon dissentient judgments, the Court overruled this ancient admiralty rule to bring American law into line with our Navigation Act s. 258.

The eighth chapter on *Salvage* maintains the scholastic standard and comprehensive coverage exhibited in other chapters.

The ninth chapter demonstrates the complexity of *Maritime Liens and Ships Mortgages*. This chapter exposes issues which are applicable to Australia though rarely litigated. Their solutions in the United States are partly dependent upon local legislation but the proprietary concepts may be equally transposed to Australian law which is itself only partially reliant on the Merchant Shipping Act 1894. And in this context English texts must be treated with the caution that the Administration of Justice Act 1956 (U.K.) and Lien and Mortgages Conventions 1926 and 1967 have not been adopted here.

The tenth chapter analyses the law governing *Limitation of Liability*. Shipowners' liability was first limited in the 18th century when British legislation set the maximum liability for cargo stolen at the value of the vessel. By the mid 19th century both Britain and the United States had conferred absolute immunity from liability on shipowners, in respect of precious cargo the nature and value of which had not been

disclosed to the shipowner. The shipowner was also absolved from liability for loss and damage caused by fire. For other categories of liability the quantum of damages was limited, but whereas Britain linked its limitation formula to vessel capacity, the United States retained the vessel value as its measure of maximum liability. In an attempt to unify the law in international sea trade, international conventions on limitations have been prepared and are presently undergoing revision. Britain has enacted the conventions but not so Australia and the United States. Consequently Australia relies upon the obsolete formula contained in the Merchant Shipping Act 1894 and America its Limitation Act. In this chapter the controversy, complexity and confusion which surrounds United States legislation is subjected to skilful analysis and critical appraisal of the highest scholastic standards. At a time when Australia is revising its law, this chapter provides a valuable commentary on legal concepts of limitation.

The eleventh and final chapter briefly explains *Governmental Activity in Shipping.* In commending the authors for including a chapter on governmental framework and policies, two critical observations come to mind. One, that this chapter might be more suited to the opening chapter of the book as background material. Two, more detail should be developed to anti-trust regulation of shipping in the United States.

To the academic requiring an analysis of general principles, this book is a masterly treatise. To those engaged in the constructive development of Australia's maritime law this book is an invaluable commentary. To the lawyer and businessman, who practice in international trade and commerce, the informational content of this book is an authoritative source of American principles and American attitudes to universal concepts. In all respects, it is a study of the highest calibre. *The Law of Admiralty* is a truly outstanding text.

C. W. O'HARE

OTHER BOOKS RECEIVED

N.B. Books which will be among those reviewed in the next issue of this journal are included in this list.

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GERARD NASH, *Civil Procedure: Cases and Text* (Law Book Co., Sydney, 1976).

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M. I. ARONSON, N. S. REABURN AND M. S. WEINBERG, *Litigation—Evidence and Procedure* (Butterworths, Sydney, 1976).

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H. H. MASON, *Casebook on Australian Company Law* (2nd edition, Butterworths, Sydney, 1975).

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Criminal Law and Criminology

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BARBARA WOOTTON, *Crime and the Criminal Law* (Stevens & Sons, London, 1963).

A. E. BOTTOMS AND J. D. MCCLEAN, *Defendants in the Criminal Process* (Routledge & Kegan Paul, London, 1976).

GORDON HAWKINS, *The Prison—Policy and Practice* (The University of Chicago Press, Chicago, 1976).

Evidence

F. BATES, *Principles of Evidence* (Law Book Co., Sydney, 1976).

Jurisprudence

C. G. WEERAMANTRY, *The Law in Crisis—Bridges of Understanding* (Capemoss, London, 1975).

Landlord and Tenant

MARTIN PARTINGTON, *Landlord and Tenant* (Law in Context Series) (Weidenfeld and Nicolson, London, 1975).

Private International Law

P. E. NYGH, *Conflict of Laws in Australia* (Butterworths, Sydney, 1976).

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P. H. LANE, *A Digest of Australian Constitutional Cases* (Law Book Co., 1976).

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