The Criminal Prosecution in England, by Sir Patrick Devlin. London, Oxford University Press, 1960. viii and 118pp. (12/6d. in Australia.)

In 1956, Sir Patrick Devlin delivered the Sherrill Lectures at Yale Law School; *The Criminal Prosecution in England* is the text of those lectures brought up to date by references to cases decided since 1956. This book, together with his Hamlyn Lectures published in 1956 under the title *Trial by Jury*, and his Maccabaean Lecture in Jurisprudence to the British Academy in 1959, *The Enforcement of Morals*[1], make up a statement of Sir Patrick's philosophy of the criminal law. Of the three, *The Criminal Prosecution in England* is the least satisfying because it contains the least that is original. There is an air of condescension about the four lectures which is lacking in those which Sir Patrick delivered in England. They were written for an American legal audience who were assumed to know very little indeed about the investigation and prosecution of crime in England.

Four topics are discussed. The first is called "General Principles" but is in fact a general description of the relevant English authorities — the police, the coroner, the Justice of the Peace, the Director of Public Prosecutions, and the Attorney-General — concerned with the investigation and prosecution of crime up to the stage of the trial itself. The theme of this lecture is that these authorities all started as arms of the executive and that their growth has in England been consistently, steadily and effectively away from purely administrative functions and towards an assumption by them of a judicial role which they then by convention retained. "There is," Sir Patrick writes:

> a constant drift, always in the same direction, from unfettered administrative action to regulated judicial proceedings. Anyone who wishes to understand the part that the police now play in England in the investigation of crime, needs to have observed and understood that drift. If he has understood it, it will not surprise him to hear that the police have already in some respects become a quasijudicial body. Beginning their work of inquiry as freely as the justices began theirs, the police find themselves more and more controlled by rules, partly self-imposed and partly derived from the mandates of the judges.

The exegesis of this theme is not, it is submitted, sufficiently well worked out to be persuasive concerning the role of the police. The illustrations which Sir Patrick chooses concern the development of evidentiary rules by the judges, partly to control excessively robust or aggressive investigating or prosecuting techniques by the police, and the existence within the police forces of England (which fortunately we also have in Australia) of a general sense of fair-play, of a widespread respect for human rights. These are admirable rules and qualities but they do not, it is submitted, really illustrate the development Sir Patrick suggests of a quasijudicial police function.

The remaining lectures deal with interrogation and the Judges Rules, arrest and detention, and proceedings before the examining magistrates including the English arrangements for free legal aid for the defence in criminal cases. They cover familiar ground in a succinct and readable way. Their value to anyone other than the student reading his first book on this topic is limited by Sir Patrick's possibly exaggerated view of the lack of knowledge of his audience and by his other self-imposed limitation: "There are many matters, especially those which involve praise or criticism of the police, on which, since I hold judicial office in England, I should not think it right to express a personal opinion. In fact I have not done so anywhere." This is frustrating to the reader who is allowed occasional glimpses of the force and vitality of the analysis at

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[1] For a trenchant, hard-hitting, almost devastating review of that lecture see "Immorality and Treason" by Professor H. L. A. Hart published in *The Listener*, July, 1959.

his command were he prepared to unleash it (such as in Sir Patrick's discussion on pp.40 to 45 of the tendency of the police to "embroider" their evidence, to agree to its precise and often ponderous terminology between them and to stick inflexibly to it, and of the pressures and processes in the court that have brought this about; and in his discussion of the surprising frequency of signed confessions). On contentious subjects, such as the admissibility of evidence obtained by illegal searches and seizures and of evidence obtained by unauthorized wire-tapping, the author's careful avoidance of difficult issues becomes obvious. He even manages on p.63 to offer a rationalisation of the lack of power in an English court of appeal to order a new trial as being a useful technique of compelling the police not to keep back any material which might be relevant, because were it subsequently disclosed as admissible new evidence to an appellate court, that court, not being able to order a new trial, might be compelled to quash the conviction. The proviso to s.4 of the Criminal Appeal Act, 1907, is not discussed.

The philosophy of Pangloss is not easily applicable to the criminal prosecution in England. It may, as an exercise in national *amour-propre*, be a useful philosophy for an English judge to assume when lecturing in Connecticut, but I wish his Honour had decided to carry the analysis closer to the heart of the subject when modifying the lectures for publication in England. Mr. Justice Devlin's fitness for that task is unquestionable and is tantalisingly revealed in the rare glimpses he allows in this book behind the exquisite judicial facade which he assumes. Several writers have been led to regard Sir Patrick Devlin as the successor in this generation to Sir James Fitzjames Stephen. In the willingness of both men to step outside the conventional judicial reluctance to write books or articles on the law, a convention which has little to commend it, the comparison is just; and there are other points of fair comparison, not the least their mastery of the criminal law. But Stephen was an open critic of those rules and practices with which experience, study and the protracted effort of original thought led him to disagree; Sir Patrick Devlin seems in his recent writings to be avoiding this duty. This is the path of conventional popularity; it is not the path of creation.

In praising the English police to an American audience, Sir Patrick allows himself one penetrating comparison between the problems facing the police in England and those confronting the American police:

> the English system of criminal prosecution is designed for a fundamentally law-abiding country. The vast majority of criminals who come into the dock at Assizes or Sessions are pitiable creatures, a nuisance rather than a danger to the state. The English police are able to fulfil their difficult role because it is not necessary for them to develop a strong animus or sense of hostility against the criminal, as might well be the case if they had constantly to match themselves against violent and bitter enemies of society.

There are, however, signs of the development of this animus or hostility by the police both in England and in Australia.

Thus, although this book is in some ways disappointing, there can be no doubt of the social importance of the topics Sir Patrick opens for discussion and one must be sincerely grateful to him for doing so.

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Essays on Constitutional Law, by R. F. V. Heuston. London, Stevens and Sons Ltd., 1961. 186pp. (£2/19/0 in Australia.)

Perhaps Mr. Heuston's stay in Australia as a Visiting Professor at Melbourne University Law School was partly responsible for the enthusiasm which he shows in these essays for the constitutional ideas of Sir Owen Dixon, in particular for the notion that there are "logical" pre-suppositions of parliamentary sovereignty. His seventh essay ("Judicial Control of Powers") was not worth the printing, because the problem is too great for useful handling in so short a span. The other six ("Sovereignty", "The Rule of Law", "The Prerogative", "Parliamentary Privilege", "Personal Liberty", "Civil Disorder") contain much useful material and occasional original insights. Mr. Heuston is at his best when analysing in detail a range of cases; for example, he gives an excellent account of the problem of successive applications for the writ of Habeas Corpus (pp.109 ff.). However, as usual with works on the English "Constitution", it is sometimes not easy to see why detailed problems in the criminal law (e.g., pp.123ff.), or the rulings of Speakers which might be overruled at any time (p.66) should form part of such a work at all. This is not merely a question of the "definition" of constitutional law; it is a question of the sense in which particular legal rules are relevant to the study of government, and the extent to which such rules are (in some sense which needs defining) "fundamental".

So we get the usual English mish-mash of political and moral principles, legal rules having some enduring or "fundamental" importance, and ephemeral rules having some detailed relevance to the relations between government and citizen. Mr. Heuston is for the most part a sentimental, naive admirer of the "common law" and of the Diceyan tradition, and like most such he readily identifies any sociological constant or probability with the "common law". He accepts some of the criticisms of Dicey but defends the substance of what Dicey had to say and dismisses most of the criticisms as not touching the "heart of the matter" (p.44) or as "pedantic and verbal" (p.38). But this requires a restatement of Dicey's theses; thus we are told that the rule of law is not "in some way a legal principle" but only "a constitutional principle based upon the practice of liberal democracies of the Western world" *(ib.)*. This brings us back to the definitional problem — should "constitutional principles" which are not "law" figure in a book of essays in constitutional law?

Mr. Heuston adds to the Diceyan principles the conception of "sovereignty" made familiar through the observations of Dixon J. (as he then was) in *Trethowan's Case*, by the decisions of the Court of Appeals in South Africa in the *Coloured Vote Cases* and by Mr. Geoffrey Marshall in *Sovereignty and the Commonwealth*. This is the notion that any collective "sovereign", such as the Parliament at Westminster, is by definition a body proceeding in accordance with rules determining its structure and activities, so that these rules must be "logically prior" to the institution and must have a more fundamental quality than the Acts of the institution itself. This leads to a conclusion that the United Kingdom could acquire a rigid constitution capable of judicial review. But Mr. Heuston does not carry his analysis far enough. What gives authority to the rules determining the structure and activities of Parliament? Why was it possible for the revolution of 1688 to make a complete break with the preceding structure? Do the rules which govern the structure and activities of the courts possess any independent fundamental quality, and if not what is to prevent the Parliament from so affecting the position of the courts that judicial consideration of the "logically prior" rules is rendered impossible? How far do we go with the "prior" definition of Parliament if, as Heuston concedes (p.21), the procedural rules of the Houses — which convert two mobs into two meetings — are beyond judicial inspection? Considerations of this sort drive one back to regarding the Parliament at Westminster as both a potential constituent assembly or revolutionary mob, whose authority depends on no prior rules, and as the regularly operating legislature which the constituent assembly from time to time re-creates. Such a view also renders a good deal more plausible the notion, which Mr. Heuston dismisses without discussion, that the Parliament Acts, 1911-49, operate as a form of delegated legislation (p.24).