trans-empirical ideas provenant from positive religions or from mere beliefs in a better world are irrational. Metaphysics as such has no place in a discussion on the world problems and justice.

This position allows the author to stay intellectually free and to be guided only by what proves tenable in the light of rational argument involving paraductive reasoning.

The book under review is recommended to all readers in all countries who are interested in legal and political philosophy.

G. MOENS*

Freedom in Australia (2 Rev. Ed.), by Enid Campbell* and Harry Whitmore.** Sydney, Sydney University Press, 1973, xi + 275 pp. A$15.00 (clothbound), A$10.00 (paperback).

This work was a pioneer of the concern of Australian legal scholarship in 1967, at a comparatively early stage of the contemporary civil libertarian fashion. Its second revised edition, after an earlier reprint of 1968, is all the more to be welcomed, for the intervening years have been crammed with a sequence of demands and responsive statutes, decisions and changing public attitudes, at a pace quite unprecedented in common law countries. It is not surprising, in these circumstances, and it is a tribute to the concern and dedication of the authors, that they have found it necessary and possible virtually to rewrite and greatly enlarge the work for the present revised edition.

Partly because of this revision and a considerable enlargment, the book may overleap the modest original design of the authors. This is to produce a book for "non-lawyers" about "what the laws of Australia do both to protect [the individual's] freedoms and to restrict them" (p. vii). Perhaps, their hope that they could assume in their readers "a rudimentary knowledge of the institutions and constitutional framework of Australian government and of the sources of the law" (p. vii),[1] was too demanding in that few laymen have even that "rudimentary" knowledge of our complex federal system. There is, of course, a danger that a book which is too esoteric for laymen may fall between the stools and also be too simple for lawyers.[2] But the wide sweep of its concerns, and the marshalling of a great variety of materials to these concerns, make it a valuable introduction to a growing and growingly complex body of law and practice.

The authors have confined their task to examining the impact of Australian law upon the "classical" freedoms: that is, to discussion and evaluation of individual rights and responsibilities in relation to the police,[3] the censors,[4] the security of the state[5] and those who wield private and public power.[6] This

* Dr. iur., LL.M.

* Sir Isaac Isaacs, Professor of Law, Monash University, Melbourne, Victoria, Australia.

** Dean and Professor of Law, University of New South Wales, Sydney, N.S.W., Australia.

[1] These basics were not merely assumed in the first edition of the book, but were briefly explained in the "Introduction." E. Campbell & H. Whitmore, *Freedom in Australia* 1-11 (1st ed. 1966).

[2] The footnotes, substantially of academic interest, happily, appear at the foot of each page, rather than being relegated to the end of the book, as was done in the first edition. For the academic, this is a most worthwhile improvement on the score of convenience.

[3] E. Campbell & H. Whitmore, *Freedom in Australia* chs. 1-12 (2d rev. ed. 1973).

[4] *Id.* chs. 13-15.

[5] *Id.* chs. 16-19.

[6] *Id.* chs. 20-24.

four-fold theme, constituting the core of the book, is developed over twenty-three chapters. A concluding chapter covers later developments occurring after the manuscript went to press. It is to be noted, however, that the authors have omitted in the revised edition any discussion of the position of Aborigines (which did appear in the first edition[7]), no doubt because of the proliferation of special problems, *e.g.*, as to land rights, in that area. On the justification for this omission, as of some other special matters, such as rights of children,[8] women, homosexuals and disadvantaged ethnic groups, there can of course be differences of opinion. Some line has to be drawn around so sweeping a title as *Freedom in Australia*, and the authors are entitled to draw their own.

An ideological foundation for their premises and criticisms is set out in chapter 1, particularly in the form of a paraphrase of the "famous sentence"[9] of John Stuart Mill. Mill had argued that "the only purpose for which power can rightfully be exercised" over an individual

> is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right.[10]

Thus, Mill found impermissible laws predicated either on the preservation of morality[11] or on paternalism.[12] These twin norms constitute the basic premise of the authors' treatment, although they are aware of the difficulties in Mill's ambiguous phrase "harm to others." "Harm" is susceptible to a wide range of meanings, including direct physical harm, nonphysical shock and offence,

---

[7] E. Campbell & H. Whitmore, *supra* note 1. The gap is not effectively closed by the authors' reduction of the scope of their work to concentrate on the freedoms of person, of expression and of belief: even an elementary investigation of the Aboriginal position with regard to such problems as land rights and tribal religions would reveal the limbo which has been established in their rights of person, expression and belief. For example, one notable problem area is the disproportionately large number of arrests of Aborigines on charges of drunk and disorderly conduct or vagrancy. One cannot escape by arguing that the crucial problems for Aborigines are of a social rather than a legal nature, requiring improvements in such areas as housing, education and technical training (and Aboriginal participation in decisions of these matters). Discriminatory legislation, and patterns of law enforcement, are deeply bound up with these other matters.

Certainly, if the proposed Human Rights Act were to come into operation, its guarantee of equal protection of the law would find a crucial application in the area of racially discriminatory legislation. *See* Human Rights Bill, 1973 s. 8: "Everyone is entitled without any discrimination to the equal protection of the law." See also Racial Discrimination Act, 1975; The Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act, 1975; G. Nettheim, *Out Lawed: Queensland's Aborigines and Islanders and the Rule of Law* (1973). *See generally* Evans, "New Directions in Australian Race Relations Law", 48 *A.L.J.* 479 (1974); Evans, "Benign Discrimination and the Right to Equality", 6 *Fed. L.Rev.* 26 (1974); Tatz, "Aborigines: Law and Political Development", in *Racism: The Australian Experience* 97 (F. Stevens ed. 1972). For an American viewpoint *see* Weissman, "The Discriminatory Application of Penal Laws by State Judicial and Quasi-Judicial Officers: Playing the Shell Game of Rights and Remedies", 69 *Nw.U.L.Rev.* 489 (1974). Thus, there is a great deal of scope for discussion of Aboriginal problems in a book of this nature. It is inexplicably incongruous with the title *Freedom in Australia* that such a crucial area of civil liberties should be ignored.

[8] Only passing—nay tantalising—references are made to some aspects of the children's court problems, who remain gravely disadvantaged in the areas of punishment, detention, judicial procedure, and administrative discretion under the various Child Welfare Acts.

[9] So characterised by H. L. A. Hart, *Law, Liberty and Morality* 4 (1963).

[10] Mill, "On Liberty," in J. S. Mill, *Utilitarianism, Liberty and Representative Government* 95-96 (Am. ed. 1951). (The first English edition of Mill's essay was published in 1859.)

[11] A number of trouble-brewing questions about the complex relationship between law and morality are examined in H. L. A. Hart, *supra* note 9, at 1-4; H. L. A. Hart, *The Morality of Criminal Law* (1965). *See also*, Note, "H. L. A. Hart on Legal and Moral Obligation", 73 *Mich.L.Rev.* 43 (1974); Note, "Hart, Austin and the Concept of a Legal System: The Primacy of Sanctions", 84 *Yale L.J.* 584, 590-601 (1975).

[12] *See generally* Dworkin, "Paternalism", in *Morality and the Law* 107 (R. Wasserstrom ed. 1971).

and depersonalised harm to "society."[13]

In his celebrated debate with Lord Devlin over these matters, Professor H. L. A. Hart viewed the prevention of "offence" to individuals, by involuntary exposure to disapproved activities in public, as the farthest permissible extension of the state interest. For Hart, the enforcement of morality, in itself, was not an adequate justification for a penal prohibition.[14] Lord Devlin, in contrast, was willing to tolerate a much higher level of abstraction in the word "harm." He defended the right of society to enforce morality, precisely because the law "exists for the protection of individuals."[15] It is symptomatic perhaps of what A. R. Blackshield has well called "the most famous (and most bewilderingly multipartite) debate in modern jurisprudence,"[16] that the authors have cut through the substantive problems of the participants in that debate. No doubt, in view of the sparkling of that debate by the Wolfenden Report and its aftermath, the authors had to introduce some discussion of the Hart-Devlin debate, one regrets that it had apparently to displace the introductory discussion, in the first edition, of the basic constitutional structure of Australian law, its comparison with the United States system under a Bill of Rights, and the need for legal aid.

The remainder of the first section (chapters 1-12) deals almost exclusively with the citizen/police relationship, progressing systematically from arrest through bail, search and seizure, and prosecution to crime prevention, drawing attention along the way to anomalies in the law and shortcomings in its execution, and suggesting appropriate remedies.

The vast areas of judicial and quasi-judicial discretion occur at so many stages—arrest, bail, indictment, trial, sentencing, to name but a few—that almost every case presents many opportunities for survival or shipwreck as a result of prosecutorial or judicial grace. For example, the authors point out that not everyone apprehended by the police will in fact be prosecuted. Apart from the obvious case of insufficient evidence, police and other prosecuting officials exercise a wide discretion, subject to little legal restriction, to pick and choose which laws will be enforced, and against which violators. While selective law enforcement is inevitable and often desirable, the authors believe there is an acute need[17] to establish criteria on which to base decisions (p. 104), and that responsibility for setting priorities for enforcement should not rest solely with the police (pp. 106-07).[18] Moreover, the authors recommend that, in a free society, prosecution of political dissenters at demonstrations

[13] See B. Mitchell, *Law, Morality, and Religion in a Secular Society* 53 (1967).

[14] H. L. A. Hart, *supra* note 9, at 5.

[15] P. Devlin, *The Enforcement of Morals* 22 (1965). The problem of the criminality of homosexual behaviour, as studied by the *Wolfenden Report of the Committee on Homosexual Offences and Prostitution, Cmnd. No.* 247 (1957), as well as the much debated decision of the House of Lords in *Shaw* v. *D.P.P.*, (1962) A.C. 220 (H.L.), formed the background for a debate between Lord Devlin and Professor Hart. For a "partial bibliography" of this seminal debate see J. Stone, *Social Dimensions of Law and Justice* 376 n.462 (1966) (*see also id.* at 279, 368-381). For a perceptive discussion of Devlin, Hart and Mill, see particularly Dworkin, "Lord Devlin and Enforcement of Morals", 75 *Yale L.J.* 986 (1966); Symposium, "The Philosophy of H. L. A. Hart", 35 *U.Chi.L.Rev.* 1 (1967); Comment, "Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality", 14 *U.C.L.A. L.Rev.* 581 (1967). *See also* Anastaplo, "Law and Morality: On Lord Devlin . . .", 1967 *Wis.L.Rev.* 231.

[16] Blackshield, "The Hart-Devlin Controversy in 1965", 5 *Sydney L.Rev.* 441, 442-43 (1965-67).

[17] Especially in relation to juveniles, alcoholics and the mentally ill, for whom prosecution may not always best serve the purposes of the crimina law.

[18] In this regard, it is interesting to note that in Germany the discretion of the prosecutor is strictly limited by the Code of Criminal Procedure, which sets up statutory standards and, by a system of compulsory prosecution for serious offences, eliminates many of the problems of plea bargaining. *See generally* Langbein, "Controlling Prosecutorial Discretion in Germany", 41 *U.Chi.L.Rev.* 439 (1974); Herrmann, "The Rule of Compulsory Prosecution and the Scope of Prosecutorial Discretion in Germany", 41 *U.Chi.L.Rev.* 468 (1974).

should be restrained, particularly in view of the possibility of subsequent martyrdom and disorder (p. 108).

This section is in a form in which the whole book might, perhaps, have been effectively used for the whole work. Rather than embark upon academic discussion of legal principle, as they often do elsewhere, the authors have brought the law within the grasp of the relatively uninitiated. The practical effects of the law upon the citizen are set forth lucidly; the technicalities of prosecution and defence are thoroughly and patiently explained; and matters which require further elucidation, or which are abstract by nature, are explained, by means of succinct, relevant hypothetical illustrations. Such illustrations are used, for example, to explain the exercise of a constable's discretionary power to arrest and the fine distinction therein (p. 23), to explain inchoate crimes (p. 126) and to show what would constitute obstruction of a police officer in the exercise of his duty (p. 38).

The authors condemn the vagueness which permeates the laws pertaining to police powers. In the law of arrest, lack of definition can leave police and suspects alike unsure of the power of arrest (pp. 32-37); in the granting of bail the vague and inconsistent criteria laid down by the superior courts allow police and magistrates to exercise a wide discretion (p. 55); in dealing with public meetings and processions the discretion allowed to police officers establishes them as the real arbiters as to whether or not a meeting or procession may be held or continue, with generally no standards to control the exercise of these discretions (p. 173).

To counter these defects the authors advocate the development of rules to clarify standards for discretionary decision; avoidance of vague legislation; and review and codification (p. 47; pp. 55-56). For "situations which can be handled only by [police] team work, for example, demonstrations," their argument in favour of a "centralized decision on which laws are to be applied and what conduct is to be regarded as an occasion for arrest" (pp. 24-25) is an attractive one. The argument offered by other sources that maintaining the exercise of discretion by individual police officers elevates the office of law enforcement to the status of a true profession (*i.e.*, one with the responsibility for making value judgments and for exercising discretion based upon professional competence) is rather impractical. Weighed against the necessity for a uniform enforcement of the law in a particular situation, the need for a professional status for police becomes of secondary importance. Yet the implications of *centralised*, but still *ad hoc*, decisions in relation to politically sensitive situations are also disturbing. What is needed rather is a positive and general statement of the rights of the citizen, with firm guidelines to be followed by the police in their duties, and the introduction of a right of judicial review for citizens who claim to be aggrieved. The authors' comparison between the relative uncertainty of Australian laws, and the positive rights conferred elsewhere, especially in the United States, makes a subtle case for a similar guarantee in Australia—a Bill of Rights.

This case is further strengthened in the next section (chapters 13-15), which covers censorship of literature, films and plays, and television. The overall picture, as drawn by the authors, illustrates the glaring disparities between the protection of freedom of expression in Australia and guarantees in other countries. Their examination of the activities of the control bodies—the Broadcasting Control Board (pp. 274, 284), the National Literature Board of Review (p. 261) and the Film and Theatre Boards of Review (pp. 290-94)—raises the question: Can administrative censorship ever be consistent with true freedom of speech in a democratic society? It cannot. The very idea of any individual imposing restrictions, based purely on his own subjective reactions, is repugnant. If censorship must exist at all, the most equitable solution is, as the authors suggest, that material should always be evaluated

by a supreme court judge sitting with a specially selected representative jury (p. 268). In fact, this reviewer would advocate the abandonment of all but the minimal censorship required for the protection of children. The reviewer shares the same confidence as Mr. Justice William O. Douglas expressed "in the ability of our people to reject noxious literature, as I have in their capacity to sort out true from false in theology, economics, politics or any other field."[19] Therein lies the basic difference between Australia and the United States: paternalism, as opposed to allowing a person to be the judge of his own interests. Judicial control of the censors in America is largely maintained by the guarantee of freedom of expression in the first and fourteenth amendments to the United States Constitution.[20]

The next section (chapters 16-19) is concerned with the ongoing conflict between liberty of expression, and the security and integrity of the state and its institutions—a conflict in which basic rights of individuals *may* be involved on both sides. For example, as to contempt of court, the authors acknowledge that the restriction of comment on pending proceedings may be necessary to protect the parties' right to a fair trial (pp. 297-306). With this exception, they conclude that criticism of the judiciary should be a right of every citizen. Contempt in the face of the court can be dealt with by "judicial tolerance" (p. 307).

Contempt of parliament is superbly investigated (pp. 316-23). Instead of leaving the adjudication of such contempt to the parliament—an interested party responsible to no one—the authors suggest that the quesion of a person's guilt or innocence should be transferred to a judicial tribunal. Then, provided that maximum penalties are defined by statute, the actual sentence can be determined by the relevant House (p. 323). To this reviewer such a solution seems rather inconsistent. If the parliament should not be allowed to judge its own cause regarding liability, why should it be allowed to determine the quantum of punishment? One answer might be that some concession must be made to the historical autonomy of the parliament as originally a *curia regis*; and that once extreme arbitrariness on the issue of guilt is excluded by reference to judicial conviction, sentencing is a tolerable tribute to history.

After an accurate summary (pp. 324-39) of the various offences directly related to state security (sedition, espionage and unlawful associations), the authors turn to "the right to know" (and the corollary right of the press to report) in their conflict with official secrecy of government procedures and papers. The American law concerning public disclosure of official documents, with its "firm commitment to the idea that the public has a right to such information as is necessary to underpin a truly democratic society" (p. 346), is contrasted with the Australian pattern of systematic legislation to prevent such disclosure, even in matters of immediate concern to the general public (p. 346). The authors are rightly indignant that official secrecy in Australia "has become a way of life, or a way of government, than is the case in most western democracies" (p. 340). Writing in 1973, they welcome the Labor Government's commitment "to the introduction of a more open form of government," but are perhaps unduly sanguine that "a change is in the offing" (p. 340).

Concerning the area of reporting, the treatment of restrictions on reporting, of defamation and the defences therefor, is informative and erudite. One recommendation is that journalists should be given some form of privilege not to divulge their sources (pp. 360-61); it is regrettable that the authors were not more precise in this regard. That competing public interests are involved

[19] *Roth* v. *United States*, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting).

[20] *See, e.g.*, Gellhorn, "Dirty Books, Disgusting Pictures, and Dreadful Laws", 8 *Ga. L.Rev.* 291 (1974); Richards, "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment", 123 *U.Pa.L.Rev.* 45 (1974).

should more clearly be recognised by Australian courts. State interference with any voluntary source necessarily narrows the scope of the right to gather news information. In the United States, it has recently been recommended that a general standard be developed which would require the state to justify disrupting confidential newsgathering relationships.[21]

An area of growing concern to most Australians is privacy (p. 372). Clearly, an area of civil liberties so threatened by technological advances cannot be effectively protected, as the authors perceptively observe, by a "ragbag of common law and statutory provisions developed primarily to achieve other purposes" (p. 372). However, although no "coherent corpus of law [to protect privacy] has yet developed in Australia" (p. 372),[22] the authors are too generous in asserting that "[i]t is otherwise in the United States" (p. 372). Although, increasingly, American law has appreciated claims to privacy, the internal coherence of this evolving law and its relation to a general concept of privacy have been debated.[23] True, common-law tort notions recognise privacy in a variety of contexts;[24] the United States Constitution Bill of Rights has been construed as yielding emanations which create "penumbra" for right of privacy;[25] and legislative and executive branches on occasion

---

[21] *See generally,* Clark, "Holding Government Accountable: The Amended Freedom of Information Act . . .", 84 *Yale L.J.* 741 (1975); Note "The Rights of the Public and the Press to Gather Information", 87 *Harv.L.Rev.* 1505, 1533 (1974); Note, "The Freedom of Information Act—The Parameters of the Exemptions", 62 *Geo.L.J.* 177 (1973). A convenient index and synopsis of all the reported decisions until mid-1974 is set out in *Subcomm. on Administrative Practice and Procedures of the Senate Comm. on the Judiciary, Freedom of Information Act Source Book: Legislative Materials, Cases, Articles, S. Doc.* 93-82, 93d *Cong.,* 2d *Sess.* 115-90 (1974); an excellent review of the salient cases appears in Note, "The Freedom of Information Act: A Seven-Year Assessment", 74 *Colum.L.Rev.* 897 (1974).

[22] Various developments in the law of libel, slander and defamation demonstrate that the Australian and English legal systems have been singularly unsuccessful in the formulation of a specific right to privacy. The dissenting judgment of Mr. Justice Rich in *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor,* 58 C.L.R. 479 (1937), argued strongly that the courts may be forced to "recognise that protection against the complete exposure of the doings of the individual may be a right indispensable to the enjoyment of life". *Id.* at 505. But it is almost four decades since Mr. Justice Rich wrote his dissent and despite the realisation of his worst fears the courts have been silent in the formulation of a common law right to privacy. See generally Sharma, "Credit Cards in Australia: Some Predictable Legal Problems", 3 *Lawasia* 106, 131-33 (1972); Swanton, "Protection of Privacy", 48 *A.L.J.* 91 (1974); Storey, "Infringement of Privacy and Its Remedies", 47 *A.L.J.* 498 (1973); W. L. Morison, *Report on the Law of Privacy (to Parliament of New South Wales)* (1973).

[23] A large body of private civil law, both common law and statutory, has developed in the wake of the seminal article of Warren & Brandeis, "The Right to Privacy", 4 *Harv.L.Rev.* 193 (1890), that first argued that privacy should be recognised as a distinct, legally protected concept. However, in Dean Prosser's view, Warren and Brandeis synthesis was more apparent than real; Prosser's argument has in turn been criticised *Compare* Prosser, "Privacy", 48 *Calif.L.Rev.* 383 (1960) *with* Bloustein, "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser", 39 *N.Y.U.L. Rev.* 962 (1964). *See generally* A. Miller, *Assault on Privacy* (1971); J. Rosenberg, *Death of Privacy* (1969); A. Westin, *Privacy and Freedom* (1967); M. Mayer, *Rights of Privacy* (1972).

[24] See, *e.g.*, *Melvin* v. *Reid,* 112 Cal. App. 285, 297 P. 91 (1931) (allowing tort judgment for public disclosure of private facts); *Commonwealth* v. *Wiseman,* 356 Mass. 251, 249 N.E. 2d 610 (1969), *cert. denied,* 399 U.S. 1970 (enjoining distribution of film about mentally ill to the general public as unreasonable intrusion on solitude). For a comprehensive collection of decisions dealing with the privacy tort under state laws, *see, e.g.,* D. Pember, *Privacy and the Press* (1972); M. Ernst & A. Schwartz, *Privacy: The Right to Be Let Alone* (1962), Prosser, *Privacy, supra* note 23.

[25] *Griswold* v. *Connecticut,* 381 U.S. 479, 483 (1965) (state birth control law violates marital privacy rights). See Blackshield, "Constitutionalism and Comstockery", 14 *U.Kan. L.Rev.* 403 (1966). The constitutional status of privacy has been recognised in several distinct areas. *See, e.g., Roe* v. *Wade* 410 U.S. 113 (1973) (state abortion laws interfere with woman's personal privacy); *Rowan* v. *Post Office Department,* 397 U.S. 728 (1970) ("right to be left alone" justifies statute allowing addressee discretion to refuse mail); *Stanley* v. *Georgia,* 394 U.S. 557, 654-65 (1969) (statute prohibiting the possession of obscene material in the home impermissibly invades private thoughts and fantasies). A very comprehensive recent treatment of such extensions appears in Note, "The Constitutional Right of Privacy: An Examination", 69 *Nw.U.L.Rev.* 263 (1974).

have sought to protect privacy in certain areas as a matter of public policy.[26] The exact parameters of privacy in the tort, constitution,[27] and policy contexts are still evolving through a process of case-by-case development—and the courts have advanced no such general theory of privacy[28] as the authors seem to imply.

This is not to suggest that the failure to formulate a well-formed and consistent concept of privacy should be emulated in Australia. On the contrary, as the authors wisely point out, technical surveillance and computer information must be kept to a minimum; the right to privacy must be stated positively and not simply left to be inferred from lack of restriction. There is particularly an urgent need, as the authors suggest, to protect consumers from nonconsensual investigation by credit companies of their private financial affairs and earning capacity. If legislation is to keep pace with modern developments, it should at least affirmatively require credit organisations to notify customers when a credit report is distributed, so that it might be examined for errors.[29]

The expansion in recent years of government powers and the allied development of a substantial body of administrative law has produced a need for protection of the citizen from power and a guaranteed right of redress against administrative decisions. The authors point out the inadequacies of the present system: Ministerial and cabinet responsibility is by no means an effective safeguard—partly because of the magnitude of the area for which the individual would be responsible and partly because much of the work of the administration is beyond public scrutiny (pp. 408-09); judicial review of administrative action has only progressed from a "hands off" attitude to one of restrained interference (pp. 413-14); the office of ombudsman is shackled by its own limitations and has been found to achieve satisfactory results only in the case of relatively small grievances, and there is a danger that creation of the office may be viewed as a simple, final solution to a very complex problem (p. 428). There has been some response to these problems in the court and in Senate committees; however, the need to replace the present haphazard scheme remains. Perhaps, the establishment of a central administrative review body (p. 430) will be an effective step toward solving the problem.

As the authors have effectively shown, there is a drastic and immediate need for reform of the laws pertaining to civil liberties; and their frequent comparisons of Australian and American law would seem to suggest a Bill as part of a possible solution. Although the tacit logic of the whole book—at least to this reviewer—overwhelmingly supports the argument for a Bill

---

[26] See 13 U.S.C. s. 99 (1972) (confidentiality of census information); 21 *id.* s. 1175 (confidentiality of patient records in drug treatment programmes); 42 *id.* s. 242(a) (confidentiality in drug research programmes).

[27] For example, the first amendment poses serious obstacles to the vindication of some privacy rights through private causes of action. *See Time, Inc.* v. *Hill*, 385 U.S. 374 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964). For a discussion of the impact of these decisions, *see* Slough, "Privacy, Freedom, and Responsibility", 16 *U. Kan.L.Rev.* 323, 332-34 (1968); *Miller* v. *California*, 413 U.S. 15 (1973); *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 54-55 (1973). But see *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974) and *Cox Broadcasting Corp.* v. *Cohn*, 231 Ga. ——, 200 S.E. 2n 127 (1973), *consideration of the question of juris. postponed*, 415 U.S. 912 (1974), *reversed and remanded*, 43 U.S.L.W. 4343 (U.S. March 3, 1975) (adopting a balanced approach in the press freedom/privacy constitutional contexts). For an excellent discussion *see* Beytagh, "Privacy and A Free Press: A Contemporary Conflict in Values", 20 *N.Y.U.L. Forum* 453 (1975).

[28] *See, e.g., Katz* v. *United States*, 389 U.S. 347, 350-51 (1967) (Stewart, J.): "But the protection of a person's *general* right to privacy—his right to be let alone by other people—is, like the protection of his property and of his very life, left largely to the law of the individual states." *See also* Rehnquist, "Is an Expanded Right of Privacy Consistent with Fair and Effective Law Enforcement? Or: Privacy, You've Come a Long Way Baby", 23 *U.Kan.L.Rev.* 1 (1974).

[29] *See, e.g.,* The Privacy Committee Act, 1975 (N.S.W.); Invasion of Privacy Act, 1971 (Qld.); Fair Credit Reports Act, 1974-75 (S.A.).

of Rights, any "advocacy" the authors offer is still rather hedged about with qualifications and restrictions: "We ourselves have yet to be persuaded that a Bill of Rights, especially of the entrenched and judicially enforceable variety, would inevitably provide better security against unwarranted invasions of individual liberty than is provided at present." (Pp. 455-56.)

Notwithstanding this somewhat puzzling ambivalence, the authors consider in detail—often illuminatingly—many intricate and numerous range of issues involved in the adoption of a Bill of Rights. They doubt whether a referendum to incorporate a Bill of Rights in the Australian federal Constitution would be successful. One suggestion is that the state legislatures entrench a Bill of Rights in their constitutions. The authors do not further investigate the possibility of a federal Bill of Rights, foreshadowed by the Attorney-General when the book was written, though the form it was to take was unknown. The proposed Human Rights Act embraces much of the Declaration of Human Rights of the United Nations, but its constitutional validity as an exercise of the federal government's "external affairs"[30] power is yet to be tested. The method of entrenchment used in the Human Rights Bill of 1973 follows the Canadian model in that incompatible legislation would only operate when it expressly declares that it shall do so notwithstanding the Human Rights Act.[31] (This mechanism would however operate differently than in Canada, since in Australia inconsistent state statutes would be overridden by virtue of section 109 of the Constitution.) The authors' analysis that Canadian law might well be adopted in Australia, so as to make this "manner and form" safeguard legally operative (p. 437), may be weakened by a recent Canadian Supreme Court decision suggesting that such mechanism may not be fully effective.[32] While the discussion of the legal difficulties involved in this question is excellent, the authors tend to overlook some of the wider, more practical attributes of the safeguard, if legally operative. True, in theory, the legislature may override the Human Rights Act by the simple use of a magic formula in the wording of a later act. However, in practice, political embarrassment will effectively thwart imprudent restrictions on individual liberties.

The authors' proposition that review and maintenance of the Bill of Rights could be carried out more effectively by an extrajudicial parliamentary institution than by the court raises important considerations. Their premise is that, because the Constitution is concerned mainly with the distribution of powers between a central and regional governments, reviewing a Bill of Rights would cast the court in an "unfamiliar role": whereas before it had to decide on strictly legal questions, now it would not be able to ignore the nonlegal consequences. Judicial review is spasmodic and depends upon the accidents of litigation. The authors propose as an alternative to judicial review "an

---

[30] Aust. Const. s.51 (xxix). The debate over the question of whether or not there ought to be an Australian Bill of Rights is nicely summed up in Evans, "An Australian Bill of Rights", 45 *Aust.Q.* 4 (1973); Evans, "Prospects and Problems for an Australian Bill of Rights", 1970-1973 *Australian Yearbook of International Law*—(1975); Evans, *supra* note 7; Campbell, "Pros and Cons of Bill of Rights in Australia", *Justice*, No. 3, 1970, at 1. One thing is certain. Australia will need all of the Bill of Rights, and philosophy as well, to recapture in the next fifty years the sagacity of the Duke in Shakespeare's *Measure for Measure:*

> There is scarce truth enough alive to make societies secure; but security enough to make fellowship accurst:— much upon this riddle runs the wisdom of the world. The news is old enough, yet it is every day's news.

Act III, scene ii, lines 218-22.

[31] The Human Rights Bill, 1973, s.5 (2) and (3).

[32] *Attorney-General* v. *Lavell,* (1973) 38 D.L.R. (3d) 481. See also *Regina* v. *Burnshine,* (1974) 4 W.W.R. 49. *See generally* Hogg, "The Canadian Bill of Rights—'Equality Before the Law'", 52 *Can B. Rev.* 263 (1974); Tarnopolsky, "The Canadian Bill of Rights and the Supreme Court Decision in *Lavell* and *Burnshine:* A Retreat from Drybones to Dicey", 7 *Ottawa L. Rev.* 1 (1975); Sanders, "The Indian Act and the Bill of Rights", 6 *Ottawa L. Rev.* 397 (1974); Driedger, "The Canadian Bill of Rights and the *Lavell Case:* A Possible Solution", 6 *Ottawa L. Rev.* 620 (1974).

independent extra-parliamentary body charged with the responsibility of scrutinising legislative proposals and evaluating them" (p. 446). Nevertheless, may one not observe with Mr. Chief Justice John Marshall,[33] that courts, in deciding "ordinary" disputes before them, cannot avoid applying and, therefore, interpreting a statutory and, a fortiori, a constitutional Bill of Rights? And it might also be thought that the educational value for judges of conferring this "unfamiliar" role on them would be very great for decades ahead, when individual rights will be increasingly threatened by the complexities of government and the endless reach of technology.

One drawback of their own proposal which the authors mention—but tend to brush over rather lightly—is that it introduces yet another layer of government. This reviewer feels that any proliferation of governmental institutions must be considered carefully and those who advocate any new adjunct should have a very heavy onus. The fact that judicial review of constitutional rights has been effectively carried out in America and in many Commonwealth countries[34] is an important consideration and must be a valid point in its favour. It is true that some Australian judges, with their tradition of legalism, may find themselves cast in an "unfamiliar role"; however, as time goes by, it might be beneficial that they should come to articulate more clearly the policy adjustments underlying their decisions. There is no reason why our courts should not be able, in due course, to make a notable contribution to the protection of individual liberty. This is so, even if it also remains true that effective protection for the rights of individuals and minorities must finally, in the long run, wait upon the temper and disposition of the people. However strongly the courts may affirm these rights in such cases as come before them, they can do little to assure their consistent, steady observance in daily social life.

It would be unusual, in a book of this range, if some defects or even errors had not crept into its pages.[35] Some, perhaps, are due to the difficulty of itemising the variations in state law, which creates temptations which sometimes elude the authors' own resolve "not to over generalize and over-

---

[33] *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 87 (1803). See van Alstyne, "A Critical Guide to Marbury v. Madison", 1969 *Duke L.J.* 1; L. Baker, John Marshall: A Life in Law (1974); Johnson, "John Marshall", in 1 *The Justices of the United States Supreme Court, 1789-1969: Their Lives and Major Opinions* 285 (L. Friedman & F. Israel eds., 1969).

[34] *See, e.g.,* M. Cappalletti, *Judicial Review in the Contemporary World* (1971); C. Friedrich, *The Impact of American Constitutionalism Abroad* 92 (1967) ("the basic idea of judicial review is of American origin"); Kauper, "The Supreme Court: Hybrid Organ of State", 21 *Sw.L.J.* 573 (1967); E. McWhinney, *Judicial Review* (4th ed. 1969), originally entitled *Judicial Review in the English-Speaking World;* Wright, "The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint", 54 *Cornell L.Q.* 1 (1968); R. Baker, *Judicial Review in Mexico: A Study of the Amparo Suit* (1971); R. Johnston, *The Effect of Judicial Review on Federal-State Relations in Australia, Canada, and the United States* (1969); T. Franck, *Comparative Constitutional Processes: Cases and Materials* (1968); B. Strayer, *Judicial Review of Legislation in Canada* (1968).

[35] For example, citations throughout the sections on vagrancy and consorting (pp. 131-39) are to the N.S.W. Vagrancy Act of 1902, though that act was repealed by the Summary Offences Act, 1970. The section on consorting also asserts that there must be some foundation in fact for a criminal reputation (p. 136). The validity of this proposition is highly questionable, and the citation of two old English cases (p. 136 n.65), in the light of recent Australian authority tending to the contrary (*Canino* v. *Samuels,* (1968) S.A.L.R. 303), is far from satisfactory.

Further, the citation of the English cases, on such a specific point, not accompanied by a page reference, is disconcerting when it is considered that one of the authorities (*Ledwith* v. *Roberts,* (1937) 1 K.B. 232) contains three separate judgments, encompassing some thirty-six pages in all. The book is unfortunately replete with such citational and stylistic inelegancies. This is regrettable in that Professor Campbell is a co-author of a widely-used manual on proper citation system. E. Campbell & M. MacDougall, *Legal Research: Materials and Methods* chs. 21-22 (1967).

simplify to the point of misrepresentation" (p. vii).[36] This problem also creates some difficulties on the level of comparisons of Australian law with the law of the United Kingdom and the United States. While English law may generally be regarded as the "mother" of Australian law, the constant switching back and forth between the two may be here rather overdone, notably in the section on defamation (pp. 365-72), a topic in which diverging social values are often reflected in the law,[37] making comparison extremely difficult. Moreover, the differences between the constitutions of the United States and the Commonwealth of Australia are often so great that analogies are hazardous to draw, especially in a few paragraphs.[38] Paradoxically, this problem is rather aggravated by the authors' cautious attitude toward the Bill of Rights. Since most of the American decisions are based on the "due process of law" and "equal protection of the laws" provisions of the fourteenth amendment to the United States Constitution, they are not readily transposable in terms of precedents, though they would be invaluable if treated as political-philosophical discussions concerning the desirable and feasible scope of individual rights which ought to be guaranteed.

These, however, are but minor blemishes on a pioneering volume which brings together a rich amount of basic material, much of it unfamiliar and arresting. For students of comparative civil liberties, even beyond the ranks of lawyers, it brings out significant contrasts between American and Anglo-Australian law, as well as particular insights into how each society administers its civil libertarian policies. For the practitioner, it offers a brief textbook

[36] In Tasmania (Police Offences Act, 1935, s.6) and Victoria (Vagrancy Act, 1966, s.6(1)(c)), it is a statutory defence to a consorting charge that the accused can show "good and sufficient reasons" for his associations. The authors suggest that this defence is available even under the statutes of New South Wales, South Australia and Queensland which contain no such provision. Yet the South Australian authority cited for this proposition (*Reardon* v. *O'Sullivan*, (1950) S.A.L.R. 77) does not even deal with the point at issue, and the proposition stands unsupported in the face of an implied holding to the contrary in a subsequent case (*Wilson* v. *Giles*, (1966) S.A.L.R. 361, 362).

Likewise, the statement that "[i]n most Australian States, the law provides that a person committed for trial on a misdemeanour charge, subject to [*sic*] some exceptions, has a right to bail" (p. 52) is backed by citations to the Justices Acts of all six states; but only those of New South Wales and Western Australia in fact support the statement.

Similarly, in the chapter on police interrogation, the authors cite the House of Lords' decision in *Commissioners of Customs and Excise* v. *Harz*, (1967) 1 A.C. 760 (H.L.), for the proposition that the inducement to an accused to confess must relate to the offence for which he is being charged. In fact, the case stands for the directly contrary proposition.

Such inaccuracies, chosen at random, and which could be multiplied indicate that there are perils, too, in the oversimplification that fails to encompass essential distinctions and discriminations.

[37] See, *e.g.*, observations of Lord Morris of Borth-y-Guest in *Australian Consolidated Press Ltd.* v. *Uren*, 117 C.L.R. 221, 238-41 (1967) (P.C.).

[38] This is borne out (to take another random example) by the authors' treatment of police interrogation (pp. 78-85). Unlike the nonconstitutional evidentiary bars in Australia, which exclude information that is untrustworthy or not sufficiently probative in light of the prejudice it will cause to the defendant's case, the American constitutional exclusionary rules often bar the admission in criminal trials that has been obtained in violation of the fourth (*Weeks* v. *United States*, 232 U.S. 383 (1914); *Mapp* v. *Ohio*, 367 U.S. 643 (1961)), fifth (*Miranda* v. *Arizona*, 384 U.S. 436 (1966)), and sixth (*Escobedo* v. *Illinois*, 378 U.S. 478 (1964)) amendments. In the course of comparing such safeguards with their Australian counterparts, the authors perfunctorily mention (p. 82) *Escobedo* v. *Illinois*, 378 U.S. 436 (1964). Unfortunately, the paradigm case, *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is not discussed at all and one looks in vain for any analysis of post-*Miranda* developments, notably *Harris* v. *New York*, 401 U.S. 222 (1971) and its progeny. In *Harris*, there was some erosion of *Miranda* when a majority of the Court held that a confession obtained without the required warnings could nevertheless be used to impeach the credibility of the confessor after he had taken the stand and denied the commission of the offence. *See generally* Dershowitz & Ely, "Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority", 80 *Yale L.J.* 1198 (1971).

Moreover, the authors are rather misleading in asserting starkly that *Escobedo* was mandated by the fifth amendment (p. 82); rather it was predicated primarily upon the sixth amendment right to counsel.

outline of areas of the law for which, as a whole, no such easy and accessible treatment exists. The authors' observation and proposals for reform combine legal acumen with robust commonsense. And, over the whole field which it covers the book remains a valuable introduction to the newly emerging field of civil liberties in Australia.

K. M. SHARMA*

Principles of Company Law, by H. A. J. Ford, Australia, Butterworths Pty. Ltd., 1974, 1 + 503 pp. (including index). $10.00 (limp cover), $14.00 (hard cover).

"What this country really needs" said U.S. Vice-President Thomas R. Marshall "is a good five cents cigar." In this country there has long been a far more pressing need for a good, comprehensive, general text book on Australian Company Law. At last that need has been satisfied. This book, written by a most distinguished senior Australian academic, fully deserves to be warmly welcomed by students, teachers, legal practitioners and businessmen. Indeed one could confidently predict that it will gain acceptance as one of the leading texts on the subject not only in Australia but in other countries such as Malaysia and Singapore which have borrowed from the Australian experience in this field.

Hitherto, students and teachers, in particular, have had to rely on the classic English text books such as Gower's *Principles of Modern Company Law*, assisted in some cases by an Australian supplement. Such works have made immeasurable contributions to the development of Australian legal scholarship. Our so-called "uniform" Companies legislation, enacted in the early 1960s was, after all, modelled substantially on the United Kingdom's Companies Act of 1948. But even from the time of its introduction there were important differences between the provisions of the uniform legislation and the United Kingdom model. These differences arose partly because we were able to anticipate certain of the recommendations of the *Report of the Company Law Reform Committee* (the Jenkins Committee), most of which still remain unimplemented in the United Kingdom. Over the years the differences have been increasing as a result of very substantial amendments to the Australian legislation, especially those enacted in 1971. The spectacular company crashes of the 1960s, the mining boom and associated scandals in the securities industry, the interim reports of the *Company Law Advisory Committee* (the Eggleston Committee) and the work of the Senate Select Committee on Securities and Exchange have all contributed to an increasing and continuing demand in this country for reform of company law and closer governmental supervision of the affairs of companies and the securities industry. Unfortunately a parochial approach adopted by some of the States has made it impossible to preserve the symmetry of the uniform legislation. Although attempts are currently being made through the Interstate Corporate Affairs Commission to reduce and perhaps eliminate the substantial disconformity which now exists, only some of the States are parties to the agreement which established that Commission. It is unlikely that the present unfortunate position will be adequately remedied unless and until the mooted National Companies Act is enacted by the Federal Parliament and its constitutionality upheld by

* B.A., 1959 (Rajasthan), M.A., 1961 (Rajasthan), LL.B. 1963 (Rajasthan), LL.M., 1965 (Rajasthan), Assistant Editor, *Journal of The Indian Law Institute*, New Delhi, India (1965-1967); LL.M., 1968 (Harvard), S.J.D., 1970 (Harvard); Faculty of Law, University of New South Wales, Sydney, N.S.W., Australia (1971-); Editor, *Lawasia* (1971-1974).