BOOK REVIEWS

THE ASSAULT ON PRIVACY

by

Professor Arthur R. Miller

A Book Review by

CHARLES R. ASHMAN*

In 1890 Louis D. Brandeis warned that mechanical devices threatened to make good the prediction that what is whispered in the closet shall be proclaimed from the house-tops.[1] In 1971 Arthur Miller warns that a "Dossier Society" nurtured by computers threatens to destroy the essence of that personal privacy that is fundamental to democracy.[2]

The 81 years between these two warnings have been filled with sophisticated business inventions and techniques making it increasingly impossible to secure to each individual what Judge Cooley called the right "to be left alone".[3]

The emotionalized concept of privacy has faced continuing difficulty in its quest to become a "right" within our legal system. Exasperatingly vague and evanescent as a doctrine, it is all things to all men.[4] Rhetoric over the conflict between constitutional guarantees of the individual and the people's right to know how often neglects to include the former beneficiary within the latter. Our national pride is offended when we dilute our open society's concentration, and yet we cringe at sacrificing personal autonomy to the intrusion of government and our fellow man.

Recently lawyers and a growing segment of social scientists have determined that a basic element of the right of privacy is the individual's ability to control the distribution of information relating to him.[5]

The author has issued a call to arms to a reticent society too busy or too naive to recognize the symptoms of computer suffocation. As a repository of knowledge and problem solving device, the computer

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1 Warren and Brandeis, *The Right to Privacy,* Vol. IV, Harv. L. Rev. 5.

2 Miller, *Assault on Privacy,* p. 259.

3 Cooley on *Torts,* 2nd Ed., p. 29.

4 Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?,* 31 Law and Contemporary Problems 326 (1966); A. Westin. *Privacy and Freedom* (1967).

5 Fried, *Privacy,* 77 Yale Law Journal 475 (1968); Beaney, *The Right to Privacy and American Law,* 31 Law and Contemporary Problems 253 (1966).

has no peer. As in the case of most other significant industrial breakthroughs, there is tremendous feed-back—in this case the sacrifice of privacy.

Professor Miller believes our legal system has not responded to the implications of this new technology. In a well organized and impressively documented treatise, he has gauged the dehumanization process that irresponsible computerizing controls.

As "Orwell's 1984" becomes only a little more than a decade away, "Big Brother" becomes less science fiction and more a relevant facet of life in the most advanced technological society history has known. One wonders if a world that watches its ambassador-astronauts putter on the moon can be less watchful of its populace at ground level.

Apprehension over the computer's threat to personal privacy seems particularly warranted when one begins to consider the possibility of using the new technology to further various private and governmental surveillance activities. One obvious use of the computer's storage and retrieval capacity along these lines is the development of a "record prison" by the continuous accumulation of dossier-type material on people over a long period of time. The possibility of constructing a sophisticated data center capable of generating a comprehensive womb-to-tomb dossier on every individual and transmitting it to a wide range of data users over a national network is one of the most disturbing threats of the cybernetic revolution.[6]

Police on every level and military intelligence agencies have gained access to communications outlets and are compiling a mass of computerized files on millions of law abiding yet "suspect" Americans.[7] The Administration's justification that an era of assassinations, violent dissent and civil disorder requires the government to accumulate dossiers on "people of interest" is not holding up to the man in the Senate or the man in the street. This issue and related spying tactics may well be the final straw in harnassing, if not breaking the back of J. Edgar Hoover's perennial personal reign of the F.B.I.

The threat of police state tactics has raised critical constitutional questions and the computer-critics have achieved formal Congressional inquiry into the indiscriminate collection and use of information on non-criminals for whatever purpose.

Computers are now fed such miscellaneous data as details from elementary and secondary schools as well as college records; aptitude, intelligence and personality tests results; tax returns, census findings and social security information; insurance applications, hospital records and military files; credit bureau records; employment reports;

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6 *Symposium—Computers, Data Banks and Individual Privacy,* 53 Minn. Law Review, 211 (1968).

7 *New York Times,* June 28, 1970, p. 1.

voter registration and court dockets; airline, hotel and automobile rental listings and credit card applications and files.

Not all sources have reached the sophisticated intrusion level of census information which is elicited under threat of criminal penalty.[8] Our courts have upheld the Bureau's growing discretion in the proliferation of census questionnaires for the dubious needs of federal agency planning.[9]

The author is rightfully uneasy about private access to governmental agency personal data and the menace to privacy inherent in the accumulation of voluminous information.

The past relative inaccessibility to federal records by employees, creditors and others was significantly reduced by the 1967 statute, idealistically entitled The Freedom of Information Act,[10] which requires broad disclosures by government agencies.

Among the diverse judicial applications of the Act to date have been a businessman's request for General Services Administration's financial records to help justify tax listings;[11] a draftee's inquiry about members of his draft board;[12] and a historian's efforts to prove-up forced repatriation of nearly a million anti-communist Russians after World War II.[13]

The law's stated purpose was insuring adequate public access to enough government agencies and administrators. Incidental to this means of possible discovery of official abuse is the sacrifice of the individual's right to restrict circulation of that which he divulges to his government.[14]

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8 13 USC §§ 221-224 (1964).

9 *U.S.* v. *Rickenbacker,* 309 F.2d 462 (2d Cir. 1962), Certiorari denied; 371 U.S. 962 (1963). (We continue to speculate as to whether Mr Rickenbacker was prosecuted for failure to honor the census or for publishing his criticisms. See Rickenbacker, *The Fourth House,* National Review, May 21, 1966 @ 325).

10 5 U.S.C. 552 (Sup. III, 1965-1967); Paul, *Access to Rules and Records of Federal Agencies: The Freedom of Information Act,* 42 Los Angeles Bar Bulletin 459 (1967); Note, *The Information Act: Judicial Enforcement of the Records Provision,* 54 Virginia Law Review 466 (1968).

11 *General Services Administration* v. *Benson,* 415 F.2d 878 (9th Cir. 1969).

12 *Martin* v. *Neuschel,* 396 F.2d 759 (3rd Cir. 1968).

13 *Epstein* v. *Resor,* 421 F.2d 930 (9th Cir. 1970).

14 The fundamental conflict between these two objectives is perhaps best illustrated by the following excerpt from the Statement of President Johnson on Signing Public Law 89-487 (the Freedom of Information Act) on July 4, 1966, reprinted in United States Department of Justice, *The Attorney-General's Memorandum on the Public Information Section of the Administrative Procedure Act ii* (1967) (hereinafter Attorney-General's Memo):

> "A citizen must be able in confidence to complain to his Government and to provide information . . .
>
> Fairness to individuals also requires that information accumulated in personnel files be protected from disclosure . . .
>
> I have always believed that freedom of information is so vital that only the national security, not the desire of public officials or private citizens, should determine when it must be restricted".

In a recent series of speeches on the floor of the Senate, Senator Sam J. Ervin, a former judge and author of the foreword in this book, has claimed that computer technology is forcing our country into an unprecedented mass surveillance system.

The information or "data base" for a Secret Service computer name check flows into the protective intelligence division from many sources—abusive or threatening letters or telephone calls received at the White House, F.B.I. reports, military intelligence, the Central Intelligence Agency, local police departments, the Internal Revenue Service, Federal building guards, individual informants.

Among the worst kept secret data sources intruding into the remnants of privacy are:

(a) "A Secret Service computer, one of the newest and most sophisticated in Government. In its memory the names and dossiers of activists, 'malcontents', persistent seekers of redress, and those who would 'embarrass', the president or other Government leaders are filed with those of potential assassins and persons convicted of 'threats against the President'.

(b) "A data bank compiled by the Justice Department's civil disturbance group. It produces a weekly printout of national tension points on racial, class and political issues and the individuals and groups involved in them. Intelligence on peace rallies, welfare protests and the like provide the 'data base' against which the computer measures the mood of the nation and the militancy of its citizens. Judgments are made; subjects are listed as 'radical' or 'moderate'.

(c) "A huge file of microfilmed intelligence reports, clippings and other materials on civilian activity maintained by the Army's Counterintelligence Analysis Division in Alexandria, Va. Its purpose is to help prepare deployment estimates for troop commands on alert to respond to civil disturbances in 25 American cities. Army intelligence was ordered earlier this year to "destroy a larger data bank and to stop assigning agents to 'penetrate' peace groups and civil rights organizations. But complaints persist that both are being continued. Civilian officials of the Army say they 'assume' they are not.

(d) "Computer files intended to catch criminal suspects—the oldest and most advanced type with the longest success record—maintained by the Federal Bureau of Investigation's National Crime Information Center and recently installed by the Customs Bureau. The crime information center's computer provides 40,000 instant, automatic teletype printouts each day on wanted persons and stolen property to 49

states and Canada and it also 'talks' to 24 other computers operated by state and local police departments for themselves and a total of 2,500 police jurisdictions. The center says its information is all 'from the public record', based on local and Federal warrants and complaints, but the sum product is available only to the police.

(e) "A growing number of data banks on other kinds of human behaviour, including, for example, a cumulative computer file on 300,000 children of migrant farm workers kept by the Department of Health, Education and Welfare. The object is to speed the distribution of their scholastic records, including such teacher judgments as 'negative attitude', to school districts with large itinerant student enrolments. There is no statutory control over distribution of the data by its local recipients—to prospective employers, for example".[15]

What constitutes a computer-worthy "threat" thus becomes important. The government claims it applies easy-going and "sophisticated" standards in deciding who is to be encoded. Critics argue that the vast capacity of a computer for names and dossiers—unlike that of a paper filing system, which has a self-limiting ceiling based on the ability to retrieve—is an encouragement to growth and error.

As Professor Miller suggests, the present state of the law on privacy is unsettled and strained as social philosophers and legislators are applying doctrines to changes far beyond their original contemplation. Further confusion is caused by the legal system's hemorrage over wiretapping. The Federal Government's justified electronic eavesdropping plans have already been ruled unconstitutional by the prestigious United States Court of Appeals for the Second Circuit[16] and Attorney-General Mitchell will appeal to the Supreme Court.

At one time "dossiers" were reserved for those few who had achieved spectacularity through public life. However, millions of Americans have now been invaded by an army of computers, programming devices and data banks. Today, it is the exceptional American who does *not* live in the shadow of his tape or electronic counterpart.

"The Assault on Privacy" is an extremely important book on a frighteningly imperative subject. Miller has shown grace and style in analyzing today's threat, and reason in prophesying tomorrow's even greater dangers. The computer cannot make a moral judgment—human dignity must be preserved even as we technologically advance or mechanical force may preempt the more vital human force.

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15 *Congressional Record*, June 27, 1970; *New York Times*, June 28, 1970 p. 42.
16 *U.S.* v. *Sinclair*, 321 F. Supp. 1074; *U.S.* v. *U.S. District Court*, 6th Circuit Court of Appeals, 4/8/71.

THE SEXUAL DILEMMA

by PAUL WILSON

UNIVERSITY OF QUEENSLAND PRESS, 1971

A Review by NORMAN S. REABURN*

Mr Paul Wilson's book 'The Sexual Dilemma' is subtitled 'Abortion, Homosexuality, Prostitution and the Criminal Threshold', and its objective is to 'assist' in the making of 'a rational solution to one of the greatest sexual problems of our time—the dilemma of having to decide whether these activities should remain illegal . . ' (Preface, p. i). The publisher's puff claims that it is 'a frank and systematic discussion', that it brings together and organises 'a vast amount of information and a number of points of view, all fully and carefully documented'. Would that it were, and would that it did. This book is no exception to the general rule that the standard of debate on these three questions in this country is probably the worst in the world—and I except only J. M. Finnis from that judgment. It is poorly written, poorly argued, and the paucity of information presented has to be experienced to be believed. The book is largely directed to the 'lay' reader as a service to 'informed public opinion'; it does him no service by failing to present the issues and the information in an adequate way.

The normal method of approach to these areas of the criminal law (by those who wish to see them 'de-criminalized') is to classify them as 'crimes without victims', crimes which present considerable problems of enforcement, and which tend to lead to 'secondary deviance', for example, police corruption, organized crime and political graft. This is usually coupled with references to J. S. Mill—at least Wilson spares us this. Instead, he has created a concept called 'the criminal threshold' (Chapter I), and seven criteria which apply to it. These criteria define those activities which lie on the criminal threshold; if "rationality prevails", they will, in the future, be no longer considered as crimes. The concept is expressed thus: 'behaviour on the criminal threshold is action which at the present time is considered by some or many people to be criminal and is legislatively labelled as such yet which, it is felt, will in the future become "non-criminal" in the eyes of the law and possibly in the eyes of the public as well'.[1]

Insofar as this is a description of what might or might not happen when particular rules of the criminal law are changed, this concept tells us nothing new. Insofar as this is a description of a condition precedent before changes can be made in particular rules of the criminal law, this tells us nothing new. We already know that the

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1 'On the theoretical level the author's most important contribution is his concept of the "criminal threshold". This potentially useful concept is quite original and is the theoretical pivot of the work likely to be quoted and discussed perhaps more than any other section'. So states the publishers puff.

normal pattern of the legislative process, particularly when it is concerned with removing the criminal sanction from some activity, is to not act without the backing of at least substantial public opinion. The phrasing of the concept seems to imply that it might be possible for some behaviour to become non-criminal in the 'eyes of the law' before it has become non-criminal in the 'eyes of the public'. Given that Wilson is discussing three areas of the criminal law which involve considerable controversy, this state of affairs is hardly likely to arise. One wonders what is intended by the use of the phrase 'it is felt'? Does this mean that it is felt by Wilson himself, or does it mean that it is felt by some particular body of opinion within the community, or does it mean that it is felt by representative opinion within the community as a whole? If it is to be felt by a general body of opinion within the community as a whole, then surely this makes what follows redundant. The real value, if any is to be found in Wilson's concept, must come from the seven criteria which he lists as determining those activities which lie on the criminal threshold.

What Wilson is trying to do in setting out the seven criteria is make a statement concerning the nature and purpose of the criminal law, and the theoretical justification which lies behind such nature and purpose. In the whole of criminal jurisprudence today, there is no more important or compelling question. Its resolution may well determine the course taken by the criminal law for the next 100 years. One might, in the light of this, have expected at least a minimum amount of discussion of the points raised by Wilson in his criteria. This he does not do. Points are presented to us *ipse dixit*. Not only is there no discussion of the points, there is no indication at any stage that a discussion is necessary. The criteria are given as accepted, and without doubt. Wilson does indicate (page 7) that the 'problem of deciding which activities should be criminal offences is complex', but he does not wish to describe in detail 'the theoretical and conceptual problems involved'. Instead, he 'suggests' his seven criteria, which will 'clarify just which crimes should be located on the criminal threshold'. He then spoils the whole effect by stating that he does not consider his list to be exhaustive.

The seven criteria adopted by Wilson are as follows:

1. 'Activities defined by legislation as crimes but which result in no visible external consequences which can rationally be shown as harmful or detrimental to the community or to individuals living within it'. The problem here, of course, is to define what we mean by visible external consequences, to indicate what is involved in rationally showing (i.e., what are our premises), and to define what we mean by harm and detriment. Why, for instance, do the consequences have to be visible and external? Can we have a consequence which can be rationally shown to cause harm which is neither visible nor external? Or, perhaps, could it be

external but not visible? I suspect that what is meant by visible and external is simply that it can be measured by the emperical methods of social scientists. And I suspect that what is meant by 'rationally shown' is simply that it can be shown by the emperical methods of social scientists. The nature of this whole book supports my belief. It is, in fact, concerned only with that which can be ascertained by the counting of heads.

2. 'Activities defined by legislation as crimes but which lack *"mens rea"* (evil or guilty mind) on the part of those indulging in the activity'. This statement appears on page 7, and is the earliest indication that we have that Wilson has neither knowledge nor understanding of the criminal law. Any first year law student knows that *mens rea* does not mean evil mind. To the extent that this criterion must be read literally, then it makes no sense. *Mens rea* does not mean what Wilson thinks it means, and his point is nonsense. On the other hand, we could endeavour to deduce some meaning from this point by not reading it literally, and assuming that he is referring to activities, defined as crimes, where the participants do not have either the sense of creating, or the intention to create, harmful effects. This gives rise to further problems. Are we talking about situations where a person did not foresee the consequences of his actions, that is, is Wilson here referring to that range of crimes wherein liability is founded on negligence; or is he saying that the consequence of actions was foreseen and intended but that this consequence was not perceived as being in itself something evil, or detrimental to the society? I suspect that Wilson means the latter. This is, of course, not the way in which the law approaches these questions. The criminal law is concerned with the description of an activity as evil which is laid down by society. The social psychologist is more concerned with a particular individual's perception of himself and of his actions. What Wilson is suggesting is that changes in the law ought, to some extent, to be brought about on the basis of the way some individuals perceive themselves, their actions, and the consequences of those actions.

3. 'Activities defined by legislation as crimes but which have no "victims" who would file complaints. (In short, people who engage in these activities would not consider themselves victims of a crime and would therefore not complain to law enforcement agencies)'. This introduces us to the more general idea of the 'crime without victims'. Wilson seems to be qualifying this somewhat by indicating not that the crime lacks a victim, but that the crime lacks a victim who would file a complaint. A significant distinction, surely. It should also be noticed that a basic question is being begged here. Wilson states as his test 'people who engage in these activities would not consider themselves victims of a

crime', and thereby completely ignores the question whether it is necessary for a particular crime to be based upon the idea of a particular person as victim. There are, surely, situations in which the real victim of an action would be the community, not any one individual. And is the deciding factor of whether a crime has been committed to be the desire of a victim to complain?

4. 'Activities defined by legislation as crimes but which are generally unenforceable in terms of detecting and deterring the vast majority of those who participate in the activities'. Again, there is a basic lack of clarity in this point. True, crimes which are difficult to enforce create special problems. Does this necessarily mean that those crimes should be removed from the statute books? I have no doubt that the proportion of traffic offences committed in any one day in any one area and which are detected and prosecuted by the police, would be a very small percentage of the total number of offences committed. Does this mean to say that we should immediately repeal our traffic laws? It should be noted that the traffic offence is the example *par excellence* of a crime without a victim. The existance of the offence is in no way dependent upon any consequences which might ensue. There is here an even more important question. Is the detection and deterrence of the vast majority of those who participate in the activities the only relevant factor in the activity being defined as a crime? Does it matter if we have a law which is broken by many people, who are not apprehended and not prosecuted? Surely, one of the functions of the criminal law, and an important one, is to manifest society's commitment to preferred values? Even if prosecutions for a particular offence were rare and the occasions of that offence were many the law could quite validly exist as such a manifested commitment and in so existing would serve a social good.

5. 'Activities defined by legislation as crimes but in which the law is operating in the field of what would generally be regarded as moral questions'. Wilson, with so many others, has failed to recognize that every rule of the criminal law is capable of being classified as a moral question. Even those rules which are concerned only with *malum prohibitum* can be seen in terms of the moral issue of obedience. What is important is to discern those areas where the criminal law is operating in an area of morality that can have no genuine connection with any issue concerning social good. It is not enough to say this is a law about a moral question, and therefore should not be a law at all. Unfortunately, too many people, Wilson included, seem to think that any rule of the criminal law which is similar in content to the deeply felt moral views of sections of the community is somehow suspect. This criterion is not a relevant one. The question he should be asking is whether any particular activity defined as a crime can be shown

to have a harmful social consequence. But he has already asked this question in criterion No. 1.

6. 'Activities defined by legislation as crimes but which by consequent legislation and enforcement give rise to secondary pathology in the society, such as police corruption, blackmail, organized crime and other behaviour patterns disruptive to the society'. I am not sure what is meant by 'consequent legislation', but no one would disagree that 'secondary pathology' is undesirable, and to be avoided wherever possible. It may be, however that it is not proper to suggest that this should be a test determinant of the content of the criminal law rules. It might be a little more constructive to see if the 'secondary pathology' could be restrained or removed by other means. Professor H. L. Packer has said, in his book, The Limits of the Criminal Sanction: 'We can have as much or as little crime as we please, depending on what we choose to count as crime'. This is hardly a responsible attitude to the problems of order in a modern complex society. It is indicative of what has been described as *L'instinct du moindre effort:* i.e., in its most exaggerated form, the problems of creating and maintaining order are just too great, so let us have chaos.

7. 'Activities defined by legislation as crimes but which, one suspects, could in the future be removed from the scope of the criminal law because public opinion now or in the future no longer considers these activities as crimes or the people who engage in them as criminals'.

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Before going on to his discussion of abortion, homosexuality and prostitution, Wilson describes for us his intention and his approach. He places himself within a 'recently formed group of social scientists who suscribe to the philosophy popularly known as the new sociology'. He contrasts these social scientists with those traditional sociologists who have worked in accordance with 'detached scientific observation'. This has involved 'ethical detachment as the proper posture of the sociologist towards his work, but selection of research problems not primarily for their importance but for their scientific manageability, and the maintenance of strict separation between the sociologist's responsibility as a scientist and his moral and political responsibilities as a citizen'. Insofar as this attitude has prevented sociologists from examining important and relevant areas of modern life, then it is to be decried. Insofar as it is meant that sociologists would impartially accumulate and assess evidence before coming to conclusions, it is to be emulated. The 'new sociologists' challenge directly the assumptions underlying institutions in society, they are not afraid of attacking old established ideas, they sometimes abandon their ethical neutrality and indulge in value judgments, they seek to change the world (page 11). Wilson tells us that he wants to change the

world in that he wants to change the law relating to abortion, homosexuality and prostitution. One would therefore expect that this book would show signs of an accumulation and assessment of evidence leading inevitably to certain conclusions, conclusions which would be pressed home with force in the concluding stages of the book. Unfortunately, one finds very little sign of this. I find it difficult to determine at exactly which point in the book Wilson moves from someone considering evidence and arguments in order to reach a conclusion to someone who has reached a conclusion and is arguing for its implementation.

Of the three areas discussed by Wilson, there is no doubt that the most important for present-day Australia is that of abortion. There are, as yet, no *significant* moves to change the law on homosexuality and prostitution. But there are significant moves to change the law on abortion, and South Australia has already done so. For this reason, and because the question of abortion raises far deeper questions than those raised in the areas of homosexuality and prostitution, I intend to devote most of my attention to his treatment of this issue. He begins, in chapter 2, with an analysis of the existing law. He points out that this analysis is largely based upon an analysis which appeared in an article in the Australian Law Journal in August 1968. This becomes manifestly clear when one reads what he has to say about the state of the law. Most of his attention is concentrated on the *Bourne* case of 1938. He regards that case as still being the most important precedent for Australian courts and criticises it for creating 'considerable confusion'. There are, he claims, no 'adequate legal criteria on which medical practitioners may make decisions'. He refers to the case of *Davidson* (Victorian Supreme Court, 1969) but gives no indication that he has any understanding of the tremendous implications of the decision of that case. In the first place, it means that *Bourne* is no longer a particularly important precedent for Australian courts. In the second place, the rationale of *Bourne* was not accepted by the Victorian Supreme Court, and was replaced by the far wider concept of necessity, a necessity which was predicated upon a danger to the physical or mental health of a woman which is greater than the normal dangers of pregnancy and childbirth. When one considers how safe pregnancies and childbirth are supposed to be today, one begins to get some inkling of the change that has been effected by *Davidson*. Wilson seems not to have understood this. He also criticizes *Davidson* for doing nothing to resolve the confusion created by *Bourne*. It seems to me that this confusion is not a real one. It is surprising that claims based on this idea have only been pressed in recent years, and that, as a general rule, such claims are not being pressed by doctors. In fact, many doctors would prefer to see this matter governed by judicial precedent rather than by statutory enactment. They themselves suffer from no confusion and feel nothing for 'clarification'. Furthermore, when Wilson

himself is putting forward proposals for a legislative scheme upon which changes in the law could be based (page 147), his basic proposal is no more clear than the ratios of either *Bourne* or *Davidson.*

His analysis of the statutory provisions in the Australian states which govern abortion is provisionary and incomplete. In Tasmania, Western Australia and Queensland, considerable problems exist because the statutory exception to the blanket prohibition of abortions is found in those sections governing the performance of medical operations. These sections are replete with subjective tests, and have had little judicial interpretation. Had Wilson made any reasonable investigation of the law of abortion he would have discovered that it is possible for a person to be found guilty of murder as a consequence of performing an abortion, and further, that this is a proposition relevant to the law of every Australian state. Wilson should ponder upon the implications of the case of *Castle,* decided in his own home state, and to be found in 1969 Q.L.R.

There is something rather strange about Wilson's approach which should be mentioned here. It is described as a 'modern' one, using rationality and the insights deduced from sociological study. Yet his idea of crime and criminals contains nothing of these qualities. Consider the following passage. On page 49, he states that "in the eyes of the community the type of behaviour in which the homosexual indulges is at best classified as abnormal and unnatural, and at worst as criminal". Now, I would have thought that the reverse of this was more likely to be true, so I doubt that this statement is a valid appraisal of the community mind. But I do not doubt that it is a valid insight into Wilson's. It is as if he wanted to show that crime and criminals are so terrible, so reprehensible, so *special,* we should forbid only the worst acts, and that the 'class' of criminals should include only the worst people, and certainly *not* any person who could be regarded as 'ordinary' or 'respectable' or 'non-deviant'. This sort of approach is reminiscent of a long-gone time. It is so out of touch with reality (how would Wilson cope with the assertions that the proportion of crime committed and reported is about fifteen per cent of the total or the estimate that nearly a third of all men in England and Wales will be convicted of an indictable offence at some time in their lives?), so totally unconnected with the best of modern criminal sociology and jurisprudence, that it hardly bears consideration: save for the queer fact that this approach seems to lie behind most of the current clamour for repeal in selected areas of the criminal law. This is to me a further proof of the point I have already made—that what is important is not the content of particular rules of the criminal law, but the theory and justification from which they all flow.

Wilson then proceeds to place the problem of abortion into its social context. His first task is to arrive at a figure for the number

of abortions performed annually in Australia. His discussion of this leaves much to be desired. He fails to point out that the American figures which he quotes have been subjected to severe criticism, particularly the figures arrived at by the Kinsey Institute, which were based upon a grossly non-representative survey. He indicates that almost all the figures which he quotes for England and Australia are little more than guesses, and can have no real authority. He finally arrives at the figure of about 75,000, as this would be 'an average of opinion'. He ends by pointing out an 'inevitable conclusion'. This is that there must be many thousands of female criminals in Australia today. I cannot help thinking that this conclusion, for Wilson, is most important. He seems to be suggesting that this is somehow a criticism of the law. To call it an 'inevitable conclusion' is to suggest that this is an unpalatable one, an unpalatable conclusion, and one that we do not wish to see. It is to suggest that there should not be tens of thousands of female criminals, and any law which is responsible for such a situation ought to be immediately repealed. I would suggest that this concern is based more upon the idea that people who do not perceive of themselves as criminals ought not to be criminals, than any other. Is it necessarily a bad thing to be aware of the extent of criminality among all classes in society? Might not such an awareness, in fact, be beneficial, in that it would enable us to see criminality as something ordinary rather than as something extraordinary?

The remainder of his discussion of the social context is concerned with descriptions; first, of a study of backyard abortionists made in England in 1963, some mention of the possibilities inherent in the existence of women who induce their own abortions, some references to abortionists who are members of the medical profession. Second, he describes a survey made in America of a group of women who sought and gained abortions from one particular doctor. It is a survey which is hardly likely to be representative of the general community, both because of the particular circumstances in which the women were chosen and because of the small number involved. Having set his problem into a social context, he then goes on to present his discussion of what he sees as the main issues. He states (page 25) that the central issue 'lies in the definition of the moment when human life begins', and indicates how important this issue is. Unfortunately, that is all he does. Nowhere else in the book is there presented any argument on this question, nowhere else in the book is there presented any information on this question. He completely fails to discuss something which he has himself stated to be the most important issue in the whole question. There is a brief quotation from Glanville Williams on the point (page 28) but this quotation contains no argument, simply an assertion. Instead, what Wilson does, is to slide from this vitally important issue on to another, which has a considerably lesser relevance. He says 'there are then endless

arguments and theories which attempt to define the moment at which life begins'. These endless arguments and theories to which he refers are nowhere mentioned in this book. All he has done is point out that the Catholic Church holds the view that life begins at conception, and that most Protestant Churches do not accept that view. He in no way attempts to analyse or describe the reasons and justifications which lie behind these viewpoints. Instead, he moves on to a consideration of whether Catholics subscribe to the doctrine of their Church, and whether, if you do subscribe to this doctrine, you must reject all direct abortion. He quotes a survey of women patients taken in La Fayette, Indiana, which shows that 21 per cent of the Catholic women interviewed did not accept the official view of their Church. The survey he quotes cannot be, however, entirely free from criticism. The question which was asked was 'When does the fertilised egg have its right to life as a human being'? It is possible for one to believe that life begins at conception, but yet not believe that human rights should begin at the point of conception. This is a reasonable alternative explanation of at least some of the results of this survey, and it is one that Wilson does not mention. The survey further showed that among those who thought that the fertilised egg has rights to life as a human being from the point of conception, a significant percentage would be prepared to allow abortion, nearly all of them before a period of three months had elapsed. What exactly does this prove'? It may prove no more than that a large number of people have been successfully fooled by the argument that abortion is solely a moral question, and that people who hold moral views are not entitled to impose them on others by means of legislation. This again is a credible alternative explanation of the figures, and one that Wilson does not mention. But is this really relevant'? If the most vital issue in this whole area is the question of when human life begins, what kind of criteria are we going to adopt in order to settle the question'? Are we really going to say that the question can only be satisfactorily settled by taking a public opinion poll of what people think is the answer to the question (people who might have no information upon which to arrive at a decision, and who may have no particular care for the consequences of their decision), or are we going to decide the question by looking at more objective standards? How this issue can be satisfactorily discussed without making copious reference to the medical literature on the subject is totally beyond me. There is now an enormous volume of writing on the issues involved in the abortion debate. Wilson has examined scarcely any of it. In the whole of this book there are only five references to learned books or articles on the subject, to be precise, two books and three articles. None of these books or articles could be remotely regarded as the most important. There is a vast wealth of significant literature which Wilson has completely ignored. This is a manifest failure in the stated purpose of this book to provide

'a frank and systematic discussion', and it would seem to me that it renders his whole discussion nugatory.

This is not the only instance of Wilson posing a problem in order to avoid it. He raises an argument 'that if destruction of the unborn is permitted, other human rights might be progressively eroded until ultimately human freedom is completely lost and anyone's life could be taken from him at will'. This argument is, of course, based upon the idea that acceptance of abortion clears the way for acceptance of euthanasia, and ultimately, of the possibility of the 'disposing' of the sick, infirm, and mentally retarded. This is a real fear in the minds of many people. How does Wilson deal with it? He says 'it is extremely unlikely that legalising abortion would result in the termination of sufficient pregnancies to endanger the human race or even to cause serious under-population', that 'it seems extreme to take the view that legalised abortion would remove man's desire to procreate' (page 34). In other words, he does not answer the question at all.

Far too much of the information presented in his discussion is either out of date or incorrect. He implies (page 25) that the abortion laws were introduced to protect the lives of mothers. Anyone who cares to read the preamble to the English Act of 1803, which is the original basis of Australian law, can see that this is not so—that the statute was enacted to protect the lives of unborn children. He claims that prior to 1803, in England, abortion was largely a Church offence. But yet, on page 50, he states 'in 1533 Henry VIIIth relieved the Church of Rome of its legal responsibility'. He seems not to understand that the position of the ecclesiastical courts in the early middle ages was more analogous to the position of the ordinary manorial courts, rather than to some sort of moral inquisition. His simplification of the rather complex views of St Augustine on this view is tantamount to mis-representation. His description is probably based on a supposed quotation from Augustine, known now to be spurious, which taught expressly that there was no soul before form. Had Wilson examined Augustine's writings, particularly *de nuptiis et concupiscentia,* he would have discovered his mistake. St Thomas Aquinas did not introduce the principle that life is related to movement and so begins not at conception but at quickening. This principle appeared much earlier, and can be found, for instance, in Gratian's *Decretals.*

On page 32, he claims that legal abortions in Great Britain did not exceed 55,000 annually, yet the figures for 1970 show that over 90,000 legal abortions were performed in that year. On page 95, he describes as a 'wide-spread misconception' that an abortion under any circumstances was dangerous, pointing out that fewer deaths result from abortion performed under sterile conditions by a doctor than from child-birth itself. This is not true. In 1969 the number of

deaths from pregnancy termination, i.e., legal abortions performed in accordance with the rules laid down by the English Abortion Act, was higher than the mortality rate for child-birth, including miscarriages. Under the special heading, Social Issues, he discusses two points. Firstly, he attacks opponents of 'abortion reform' for engaging in 'shock tactics' and a 'world-wide campaign'. He then points out that abortion will always be necessary because of the deficiencies of contraceptive techniques. But, in chapter 6, in his discussion of the situation in other countries, it is made quite clear that abortion is by far the cheapest 'contraceptive' method, and is desirable for that reason.

The discussion in chapter 6 referred to centres largely upon the situation in Japan, Russia and the Iron Curtain satellite countries. He claims that these are the only countries which have done something about that 'equality of women' to which western countries pay so much lip service. One or two comments are pertinent here. When one considers Japan as a country where 'face' is the most important ethical tradition, it is doubtful whether any valid analogy of any kind could be drawn between the situation there and the situation in Australia. Second, his remarks concerning the socialist countries of eastern Europe bear some examination. Are we to be guided in our response to social problems by the response of countries whose government ideology involves total subservience to the state, and places considerably less value on the importance of the individual and his right to life than does our entire western cultural tradition?

Wilson's discussion of prostitution and homosexuality does not raise questions anywhere near as deep as the questions raised in the abortion area. So I do not want to comment on this discussion in any detail. I consider that the same slip-shod approach runs throughout the discussion, and I will content myself with giving a few representative examples. An argument that an act contrary to the natural order is thus against the will of God has nothing whatsoever to do with 'the enjoyment of a forbidden pleasure'. This is simply an attempt to link natural law arguments with the supposedly discredited 'puritan ethic'. The fact that there is a 'relative lack of official Church pronouncements and discussions in Australia on the whole question of homosexuality', indicates very little that is certain. We certainly cannot assume that it indicates what Wilson assumes it to mean, that is, agreement with his own views. It might simply be that the Churches see no reason to make statements or engage in discussions. Please, could we have a new explanation of why Australians dislike homosexuals so intensely: I find myself becoming increasingly bored by the argument that suggests that this dislike indicates that Australians are a race of latent homosexuals.

Wilson's discussion of prostitution begins with an attempt to piece together a 'social profile' of the prostitute. He indicates that it would

be hard to establish a relationship between the level of intelligence of the average prostitute and the level of the rest of the community. Having said this, he then decides that the level must be similar. He claims that the low intelligence of many prostitutes 'would probably' come from a bad education, and that it is obvious 'that some of them are extremely clever'. His only evidence for this is that one of them is supposed to own a lot of property in Kings Cross. He points out that there is no simple explanation as to why a girl becomes a prostitute, but then immediately describes a girl he interviewed as a 'classic case'. Wilson's analysis of the 'social context' of prostitution contains the following gem of insensitivity. He states 'few of them are ashamed of their way of earning their living or try to conceal it, except from family, neighbours and perhaps some close friends whom they prefer to keep in the dark—in fact, many are proud of their job'.

There is one further important criticism that must be made of Wilson's discussion of prostitution. In chapter 5, when he is presenting the results of his opinion poll, he shows us the results obtained by asking this question: 'Prostitution should not be legal or allowed under any circumstances—do you agree'? He points out that 45 per cent of the sample considered that prostitution should be legal under some circumstances. But he has already told us, in his summary of the law (page 65) that prostitution is not illegal. In fact, Wilson's whole argument in this part of the book is that there should be licensed brothels. So that when he presents the results of his opinion poll, he *presumes* that the people who answer his question understood prostitution to mean soliciting and/or brothel keeping. Why he presumes this is not made clear. I have no doubt that there are large numbers of people who think that prostitution, i.e., a woman offering sexual services for money, is forbidden by the law. In the light of this it would seem to me that the results of Wilson's opinion poll are worthless.

In a book which is supposed to be a sociological examination of particular areas of law enforcement, there is surprisingly little reference to the important sociological literature. The questions that Wilson raises have implications of considerable importance, not least in matters pertaining to the problems of enforcement of different types of laws. But yet, there is no reference to, for example, Durkheim. In truth, the areas which Wilson has sought to cover cannot be dealt with without the possession of considerable knowledge, both theoretical and empirical. I do not think that Wilson has this knowledge. This is a pity because a good book needs to be written on these problems. Unfortunately, *The Sexual Dilemma* does not even come within cooee of being that book.

AUSTRALIAN WILLS PRECEDENTS

by F. C. HUTLEY, Q.C.

Sydney, Butterworth & Co. (Aust.) Ltd, 1970
116 pages. Clothbound: $7.50; limp cover: $5.50

This book as its preface suggests is a useful adaption of Parker's Modern Wills Precedents to N.S.W. conditions. Provided he is aware of any significant differences between the law of N.S.W. and that of the state in which he practices, no doubt any other Australian practitioner will also find Mr Huntley's book useful.

The foregoing implies that it is a book aimed solely at the practising solicitor with little regard for the requirements of students: with one exception this is the case. Like the volume on which it is based, it successfully discards much of the traditional and unnecessary verbiage that still suffocates will-draftmanship in many legal offices. Every precedent provided by Mr Hutley demonstrates how effect may be given to a testator's wishes without invoking magic formulae or elaborate ritual, and in this sense, students attending a course on legal writing would benefit from frequent reference.

There is one short chapter setting out 5 complete wills, but the remainder of the book seeks to provide only the necessary clauses for the particular section under discussion, on the grounds that it is easier for the draftsman to select the appropriate clause if it is located in a chapter on such clauses rather than in a complete will. Mr Hutley in fact goes further, and in many cases breaks his clauses down to single, simple directions, leaving the draftsman the interesting task of fitting these jigsaw pieces into a coherent and meaningful document.

Undoubtedly from all practical viewpoints, this 1970 approach to legal language is warmly to be welcomed; but blessed be the draftsman who succeeds in covering Mr Hutley's linguistic bones with a rag or two of pre-1970 elegance.

E.R.O'S.

INTRODUCTION TO MATRIMONIAL CAUSES LAW AND CASES

by N. M. BROWN

(Butterworths) pp. 194

In his preface to this new book, Mr Brown quite rightly contends that the student of Family Law needs some guide to the basic principles and " . . . a straightforward exposition to guide him through a wilderness of single instances, each depending largely on the circumstances of the particular case". The book consists of seven chapters, a glossary, a brief historical introduction and an appendix consisting of what is described in the table of contents as, "A Précis of some Important Provisions of the Marriage Act 1961" and "Marriage

Overseas". Although Mr Brown describes "Introduction to Matrimonial Causes Law and Cases" as a text book, it is not, in fact, so. It can be more correctly described as a note-book, for the author has made no attempt to write a cohesive text but has, in the main, been content to quote the statutory provisions and illustrate their operation by shortly digested cases.

The form which he has chosen to adopt has led the author into considerable difficulty. The necessity for brevity has resulted in infelicities in both style and law, some of which are merely bizarre, others positively horrific. A fairly random selection is sufficient to illustrate this point. In the section on constructive desertion (p. 90), the complex case of *Lang* v. *Lang* is dismissed in four inaccurate lines. The author has completely confused the fundamental distinction between inference and imputation. In the consideration of cruelty as grounds for dissolution, the facts of *Crawford* v. *Crawford* are dismissed, ambiguously, as, "Husband bullying, guilty of indecent exposure seven times". On the same page (p. 97) the factual distinction between *Gollins* and *Le Brocq* is not made sufficiently clear, nor are a number of "miscellaneous" examples of cruel conduct backed up by citation of cases. The selection of cases on cause for desertion (pp. 86-7) is most unlikely to help the student get to grips with the complexities of the *Glenister* rule. There seems no valid reason for the inclusion of *Cox*, a clear case of where the rule would not apply, and the omission of *Baker*, which demonstrates that the rule may not only be used defensively. It is also difficult to tell from the condensed case-notes which cases refer to which aspect of the "cause or excuse" situation. The Glossary and the list of text books on Divorce at the beginning of the book cannot escape criticism. The author cites three meanings for the term "cohabitation" without placing them in their context, so that the nuances of this composite notion are lost to the reader. Nor is the reviewer certain that cohabitation and consortium can ever mean the same thing. It is difficult to justify the choice of text books listed on page 20. Mr Brown quotes Wilson's *Divorce in a Nutshell* but mentions neither *Johnson* nor *Bromley's* texts on Family Law, nor does he mention Jackson's important work, *"The Formation and Annulment of Marriage"*. In general, insofar as the limitations of form will allow, "Introduction to Matrimonial Law and Cases" is produced in a reasonably attractive manner and is relatively free of misprints, although the conception of Mr and Mrs Pettit's son is described (on p. 125) as a "fecundatio ab entra".

It may well be that a need exists for a short revision guide to Divorce Law, but there are other and more successful ways in which it could have been done. A more systematic approach to the problems involved rather than an emphasis on facts of particular cases would have produced, it is suggested, a more satisfying as well as more

accurate book. Similarly, a good introductory text for students of Family Law is an urgent requirement, it is unfortunate that Mr Brown's book is not it.

Frank Bates

POLICE KILLINGS IN AUSTRALIA

by R. W. HARDING

(Penguin Books 1970, $1.00)

On the cover of this book is a statement which claims that the most important power given to a policeman is the power to kill. There is no doubt that this is a claim with which few would disagree. It is because of the importance of this power that Richard Harding, Senior Lecturer in Law at the University of Western Australia, has written this book. His interest in this subject was awoken by the killing of an allegedly fleeing criminal in Perth. As he says in his foreword, the killing occurred about a hundred yards from where he was then living and at a time in the early morning when he was often out and about. If he had crossed the path of a policeman brandishing a loaded unsafe revolver over which he had insufficient control, the death that occurred might well have been his own. It was these reflections which caused him to examine the police use of weapons in more detail, and it is from that examination that this book has come.

At least the facts show that over the period looked at by Harding no innocent bystanders have been killed by police use of weapons. He presents us with descriptions of several incidents however, which indicate that this may have been more a matter of luck than anything else. To read that a policeman fired shots at a fleeing car during the peak rush hour in crowded Martin Place, Sydney, does little to increase one's confidence. It is possible that bystanders have been wounded but this book is concerned only with cases where a death has occurred.

Harding has done extensive research in the newspaper files and followed this up with an examination of the transcripts of inquests. He has then supplemented this by interviews with many of the people involved. He warns us that there is a world of difference between reading the transcript of inquests and actually being present. There is an enormous amount to be gained by examining the demeanour of witnesses while they are actually being questioned. All of this is denied to someone who later reads the record. In spite of this qualification however, his findings give cause for considerable disquiet.

His method of approach is to concentrate on those facts which are scientifically and objectively ascertainable, to note the implications raised by those facts and to compare these implications with the statements made by the people directly involved, and the ultimate finding of the Coroner. Too often he finds that the verdict of the

inquest is at worst inconsistent with the objective facts, or at best consistent only with the least plausible explanation of those facts. Too often, he finds examples of inquests where vital evidence has been withheld from the Coroner. Too often, he finds cases where public officials are prepared to accept police explanations without proper examination of their truth or falsity.

But Harding is not concerned with iniating witch-hunts nor with making particular members of police forces scapegoats for matters which have become built into the institutions involved. He is concerned instead with three vitally important questions which have considerable implication for the law.

First, are the powers given to police which enable them to kill certain classes of person in certain specified situations necessary or proper for the second half of the 20th Century? Most of the rules relating to police powers of arrest, apprehension and detention were formed by the Common Law before the existence of organized police forces. They were formed at a time when there was every probability that a felon who was not immediately apprehended would never be caught. There was, therefore, some point in permitting an official, or a private person, to kill him. The situation today is not quite the same. A number of the people killed by police are well known to the police and one wonders whether there would have been any real difficulty in apprehending them at some later time, and whether this difficulty was of significant magnitude to justify their deaths. Harding seems to imply that the only justification for police killings today is self-defence. I doubt if this is so, but this does not affect the validity of the question which he has raised.

Second, he is concerned with the effectiveness of the procedures for Coroner's inquests. He is highly critical of the involvement of the police at all stages in such inquiries and of the lack of any provision for proper legal representation in every case. He is in favour of a rule which would prohibit the results of police departmental inquiries into the matters being investigated by the Coroner being given as evidence, as he considers that the only point served by such evidence is an effort to browbeat the Coroner into agreement with the police findings.

Third, and perhaps most important, he is concerned with the effect on the law. His investigation has shown him that police involved in killings are treated more leniently than the law allows. Because police are treated in this way, private watchmen have become also so treated and gradually this leniency is extending to private persons. The effect of this is to produce a change in the law. Certainly the legal rules relating to accidental or intentional killings remains the same, but a de facto exception has been made for certain cases. On

a matter as important as this, it would seem that changes ought to be made by legislature rather than by the default of those responsible for applying and enforcing the law.

It is highly significant that none of Harding's cases come from Tasmania. Police in Tasmania carry weapons as often as their counterparts, but, unlike their mainland counterparts, they hardly ever use them. This is because of the nature of crime in Tasmania. We do not have the problem of organized criminal gangs that exist in Melbourne and Sydney (it should be noted that almost all of Harding's cases are from those two cities). This is not to say that Tasmanian police do not use their weapons—they do from time to time. But the situations in which they use them, and the frequency with which they are called upon to use them, are significantly different from those on the mainland.

N. S. Reaburn

THE LAW RELATING TO THE CONTROL OF COMPETITION, RESTRICTIVE TRADE PRACTICES AND MONOPOLIES IN NEW ZEALAND

by JOHN COLLINGE

(Wellington, Sweet & Maxwell (N.Z.) Ltd) 1969. $15.60

This is a well produced book with 300 pages of texts, 50 of statutes and an 80 page compendium of cases. With quiet competence it describes the law relating to monopolies and restrictive trade practices in New Zealand, a country which, perhaps even more than Australia, is the happy home of the monopolist and price-fixer. Most kinds of restrictive practices flourish in the New Zealand economy, many of them traditionally encouraged by the Government, whichever party has been in power. During and after the last war, prices were fixed as a matter of Government policy. Even now, the Government's attitude to the enforcement of the law is tentative and half-hearted. Mr Collinge, though he pays the usual formal respects to the history of his subject in a short introduction, does not set out to criticise the law or its application from an economic and political standpoint.

The task which he sets himself is to describe and analyse the law, taking for granted the values of the present economic and political system in New Zealand. He does this with skill and the result is complete, thorough and readable. The convolutions of the judges when faced with decisions depending directly on economic policy are as amusing in this context as they are anywhere else. Mr Collinge treats them gently and respectfully, but does not attempt to hide the uneasiness which they feel. For one who shares Mr Collinge's assumptions, this will be a thoroughly satisfying book. But there are some questions which should remain in the mind of the reader, though it is not criticism of Mr Collinge to say that he does not attempt to answer them, for that is not his purpose. For instance,

the basic question is not whether the Trade Practices Act has judicial support (page 8), but whether the Government of the time wants to make it bite. Unless things have changed in the last two or three years, the Government has so little intention of implementing the provisions of the Act that a complainant who considers himself affected by a restrictive practice had to collect prima facie evidence before he can get the Commissioner to investigate. Another interesting comment (page 292) is that the Government considers that the Department of Industries and Commerce should be given power to regulate restrictive practices by Statutory Regulation, because, unlike Parliament, that Department can be assumed to have "the time, possibly the expertise and certainly the inclination to become involved in such lengthy, difficult and sensitive issues". I doubt whether it has any of these three qualities.

This book is an important and worthwhile contribution to the comparative study of its subject. No law library should be without it. Any Australian lawyer who has to deal with a restrictive practice case should consult this book and take advantage of the longer experience which New Zealand has, even though the legislation is dissimilar in many important ways.

D.R.

CROSS ON EVIDENCE

(AUSTRALIAN EDITION ed. J. A. GOBBO)

751 pp. Butterworths 1970

The excellence of *Cross on Evidence* as a work for both student and practitioner is firmly established. It is, as Mr Stephen Chapman (1965) 81 L.Q.R. 150 has said, ' . . . a gem of a book'. Thus, Mr Gobbo, the editor of this new Australian edition, has fine basic material with which to work, but this must in no way be taken as detracting from his own achievement. The task which faces anyone who seeks to produce a Commonwealth Edition of a standard English work is largely one of interpolation. This very often produces its own problems: the editor's prose style may well be at odds with the original author's, or conflicts of principle may take convincing interpolation difficult. Hence, to say that the Australian *Cross* reads extremely well is no small praise. Mr Gobbo has also resolved the problem posed by the statutory provisions which differ among the States more than adequately, and mention here must be made of the State consultant editors, who include Mr Coatman of the Tasmanian Solicitor-General's Department. Perhaps, (most important), the learned Editor has covered the considerable Australian case law extremely well. The topics in which your reviewer is particularly interested are dealt with in considerable detail and with notable skill. The section on the vexed problem of standard of proof in matrimonial causes contains cases from Canada and New Zealand as well as England and Australia. Although Mr Gobbo has perhaps not

explored the possibilities of the English Court of Appeal's decision in *Bastable* v. *Bastable & Saunders* [1968] 3 All E.R. 701 as fully as he might, the section provides a fascinating starting point for comparative study.

The Australian Edition of *Cross on Evidence* is attractively produced, with a variety of type faces, and is thankfully free of misprints. It is also well indexed and clearly and conveniently divided into sections. In conclusion, both Mr Gobbo and the publishers are to be congratulated on the successful completion of a task which is certain to prove worthwhile for all those concerned with the law of Evidence in Australia.

Frank Bates

PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW

(4th Edition) by D. G. BENJAFIELD and H. WHITMORE

Law Book Co. 1971, pp. 377

There are considerable difficulties involved in reviewing a book which, like this one, is so obviously well written and researched. The reviewer does not wish to give the impression that he has determined to discover as many errors as possible (usually, the smaller the better), nor does he wish to appear sycophantic at the same time. Although it is usual for a reviewer to reserve judgment on a book until the end of the review, one is compelled to say at the outset that 'Principles of Australian Administrative Law' is to be wholeheartedly commended in almost every respect.

The recent case law, some of which has resulted in dramatic change, particularly in Britain, is considered in a detailed and lively manner. The House of Lords decision in *Conway* v. *Rimmer* [1968] A.C. 910 is discussed in considerable detail, though the book went to press too soon to admit of a discussion of the interesting decision of Moller J. of the Supreme Court of New Zealand in *Pollock* v. *Pollock and Grey* [1970] N.Z.L.R. 773. *Padfield* v. *Minister of Agriculture, Fisheries and Food* [1968] 2 W.L.R. 924 and the *Anismic Case* [1969] 2 W.L.R. 163 are dealt with more than adequately in all their facets.

Benjafield and Whitmore is written in a particularly lively manner and is extremely well produced. Both style of writing and the manner of production (particularly of the hardbound edition) provide an excellent example for writers and publishers of law books which ought to be emulated.

Frank Bates

CRIMINAL ONUS AND EXCULPATIONS

by SIR FRANCIS ADAMS

(Practice note No. 12) Sweet and Maxwell (N.Z.) 1968

The subject matter of this book falls midway between criminal law and the law of evidence. It is concerned with problems of the onus of

proof in criminal and quasi-criminal cases, in particular with those situations where the "golden rule" laid down in *Woolmington* is not applicable. So neatly does this subject fall between two stools that Sir Francis Adams considers that this must be the reason why his small volume is the first detailed consideration of the topic.

He begins by setting forth the *Woolmington* rule itself and the implications that arise from it. He carefully draws the necessary distinctions in terminology between the nature of an onus in proof, and the nature of a persuasive evidentiary burden: and he devotes considerable space to an indication of the differences between an exception and a proviso. In so doing he makes it quite clear that a whole group of problems, which are normally encountered under the canopies of "burden of proof" and "strict liability", involve a simple question of statutory interpretation (simple in the exercise, perhaps not in the consequences) linked with the appropriate implication from *Woolmington*. He follows this with an elucidation on the nature of the burden which might fall upon both prosecution and defence.

The second part of the book is concerned with indicating the differences which might arise, depending upon whether the trial is on indictment or is being dealt with summarily. It is in this area that he discusses a number of Australian cases and contrasts them with English and New Zealand decisions and it is in this area that perhaps the only criticism can be made. It almost seems as though Sir Francis, spellbound by the elegance of a rule of statutory construction, is not sufficiently aware of the possibility that occasionally it becomes necessary to forsake the elegance and create a confusion in order to strengthen the value of a more important principle. It is obvious that this is what the Australian courts have done and, although Sir Francis thinks otherwise, the confusion thus created may well be worth the principle thus emphasised. My own viewpoint is that wherever possible the onus of proof ought to lie on the prosecution and that a certain loss of consistency among the cases in order to achieve this is a price well worth paying.

But this is the only criticism that can be made. I said that this was a small book—it contains only 74 pages of text—but so tightly constructed is his argument that a more leisurely writer might well have extended the same content into a book twice the length. If the other volumes in the series of practice notes, of which this is number 12, are of the same high standard as this one, then the New Zealand profession is very well served indeed.

Norman S. Reaburn

INSANITY AND INJUSTICE

by J. P. BOURKE and D. S. SONENBERG

The Jacaranda Press, $3.95

"Insanity and Injustice" is an account of the *Sodeman* case. His trial took place in February 1936, but the facts which gave rise to it

had begun in November 1930, with the murder of a 12-year old girl in Melbourne. This was followed by the murder of a 16-year old girl early in January 1931, also in Melbourne, by the murder of another 12-year old girl on New Year's Day 1935 at Inverloch, in Victoria, and by the murder of a 6-year old girl in December 1935 at Leongatha in Victoria. The police investigation of the fourth murder implicated Sodeman and in the course of questioning he confessed to all four. The Honourable J. P. Bourke was involved in the case as one of the counsel for the defence. He, and D. S. Sonenberg, have set out the basic facts relating to these murders, the police investigations and the subsequent trial and appeals. More than half the book is taken up with an account of the legal issues that were involved and upon which Sodeman's appeals, ultimately to the Privy Council, were based.

It is a pity that the accounts of the police investigations are no more than quick sketches. Following the first murder, the Victorian police endeavoured, on the basis of totally unsatisfactory identification evidence, to prosecute a known sexual criminal. This man had a complete and unshakeable alibi—at all relevant times he had been in New South Wales, yet the police never thought to check it. His claims were ultimately investigated by the Crown Prosecutor who had been given the responsibility for handling the conduct of the case, and who recommended that the prosecution be dropped. It is interesting to note that this prosecutor, Mr C. H. Book, as he then was, is described by the authors as a man of "scrupulous fairness". Mr Book some years later prosecuted Sodeman and is criticised by the authors for a "burst of forensic enthusiasm". After the second murder, the police endeavoured to implicate, again with little or no evidence, the dead girl's father. After the third murder, the police had quite clearly decided that it had been committed by a young man who was a friend of the murdered girl's family. In fairness, it should be said that all these events took place before the Victoria Police set up the Homicide Squad and before the type of comprehensive expertise that has been built up by that Squad was generally available to members of the Force.

Sodeman's case is known to every law student, as the case in which the High Court decided that irresistible impulse was not an insanity defence under the common law. At this point, those students from the three code states of Tasmania, Queensland and Western Australia adopt a superior and knowing smile, secure in their knowledge that whatever the common law may say, a defence of irresistible impulse is guaranteed by their codes. *Sodeman's* case, for them, is more important as the High Court case which firmly sets out the civil standard of proof as being the standard to be met by an accused seeking to establish his own insanity. The major part of the legal discussion in this book is, however, concerned with the defence of irresistible impulse.

From some of the remarks which are made in the course of this book, it looks as though what happened at Sodeman's trial was this. Before the trial none of the people who were to be involved, on either side, had very much doubt that Sodeman would be able to show insansity. He came from a family with a long history of mental disease, and the murder bears all the hallmarks of having been committed by an insane person. But during the trial itself, Mr Book, not content with vague generalisations from the medical witnesses, questioned them closely and under his questioning each took up a position which indicated that Sodeman's illness was of an obsessional nature which at times he was unable to control. The defence never regained its initiative and never managed to swing the main issue of the case back to a question of more general insanity.

When an appeal went to the High Court all the judges were of the opinion that evidence of an irresistible impulse could be evidence relevant to the questions which, under the *M'Naghten Rules* must be asked. This unanimity is not satisfactorily brought out in the discussion of the appeal. The final chapter in this book, "Sodeman and Medicine", is contributed by Dr L. Howard Whittaker, who discusses the results of the post-mortem which was performed after Sodeman's execution and presents the opinion that his "behaviour was not a symptom of an organic brain disease, whatever brain disease may in fact have been present". Dr Whittaker concludes with several pages of discussion and criticism of the *M'Naghten Rules.* Unfortunately this criticism is superficial and based upon an incomplete understanding of the operation of these rules.

Norman S. Reaburn

SHADOW OF DISPUTE

by D. I. WRIGHT

Australian National University Press, $3.95

In Shadow of Dispute, Mr D. I. Wright, lecturer in history at the University of Newcastle, has presented part of his work on aspects of Commonwealth-State relations during the period 1901-1910. He covers three main areas—the States' right to independent communication with the Imperial Government, the selection of the Federal capital site, and finally, some of the problems which were involved in the transfer of administrative departments from the States to the Commonwealth. The modern State Premier, with his knowledge of the present nature of Federal-State relations, might well see this book as a description of something which looks suspiciously like a golden age. But all the seeds of the current situation were clearly present in the period discussed.

The fight between the States and the Commonwealth over the question of independent communication with the Colonial Office indicated, from the very beginning of Federation the attitude that

the Commonwealth was to take on the nature of the external affairs power. This was that the Constitution had given Australia one voice when it came to speak on any external matter, and that voice was the Commonwealth. The recent furore over the statements made by State immigration ministers has shown us that this fight is not yet completely over.

Manoeuvring, prompted by Victorian and New South Wales rivalries and jealousies, delayed the establishment of the Australian Capital Territory until the beginning of 1911. Interesting though they may be, what is even more interesting is the constitutional argument that underlay these manoeuvrings. New South Wales had claimed that the Commonwealth's only power was to fix the site of the Federal city within the territory which was granted by the State, and that the Commonwealth had power only to compulsorily acquire territory if the State declined to make such an offer. The Commonwealth replied that there was nothing in the Constitution to justify the assumption that the Federal city was necessarily a smaller area within the Federal territory. It would seem from the judgments in *Spratt* v. *Hermes* (1965) 114 C.L.R. 226 that this particular argument has not been entirely settled.

It is those parts of the book which deal with these two questions which are the most interesting for lawyers, but these are not the only points of interest that are to be found. It makes an amusing anecdotal sidelight to the Wire-netting Case (*R.* v. *Sutton* (1908) 5 C.L.R. 789) to see the reaction of Deakin to the granting of a K.C.M.G. to J. H. Carruthers, the then Premier of New South Wales, in spite of a Federal recommendation to the contrary. He claimed that this was a "blow to Federal prestige" and that a man who, a year before, out of jealousy of the Commonwealth had removed a load of wire netting from the wharves without paying duty, should be honoured by the King, was a thing that "ordinary reasonable men fail to understand".

It is a pity that that part of Mr Wright's work which might have been of the most interest to lawyers, his survey of the political significance of implied immunities over the same period, does not appear in this book. However, it can be found in volume 55 of the Journal of the Royal Australian Historical Society at page 380. It is to be hoped that one day he will draw upon his detailed researches into particular aspects of Federal-State relations during the early days of the Commonwealth and present us with a volume which is a broad over-view of these problems, relating them to their subsequent development.

Norman S. Reaburn

THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL

by NORVAL MORRIS and GORDON HAWKINS

University of Chicago Press, 1970, $5.95

This book has attracted a considerable degree of attention; not a surprising thing when one looks at the claims made for it. "We have a cure for crime" state the authors. Given the situation of America and its crime problem, such a statement is bound to have enormous impact. "It is the best treatise on crime control" said Justice Tom Clark; to Sanford Kadish it "presents the distillation of the best thinking on the subject"; and Karl Menninger describes it as "an enlightened book". It is addressed to the "general reader without any specialized knowledge of the criminal justice system", but, happily is not condescending, and in no way talks down to its readers. The authors offer a comprehensive over-view of the problems of criminal law, administration of criminal justice, police organization, corrections, and research, with proposals for the solution of these problems.

When approaching this book, an Australian reader will need to take several precautions. The first is to be continually aware that this is an American book written for an American audience about American problems. This means, for a start, that we do not need to read Chapter 8, wherein the authors endeavour to dispel the idea that organized crime is controlled and totally managed by an invisible "criminal government". For Americans, there is obvious importance in such a task; firm belief in the existence of an all-pervasive, say, "Casa Nostra" can lead to a paralysis of the will when confronted with the problems of crimes, a sort of "we-cannot-cope-so-why-try" attitude. Other parts of the book, relating to American problems, will produce a different reaction, one involving a fair degree of detached amusement. How quaint and some-how olde worlde this country must be; they have no off-track betting facilities (none that are legal, anyway) and hardly any state-run lotteries (page 11), so of course gambling is an enormous crime problem; they have no proper gun and knife control laws (pages 64-71); they have not been able to introduce laws on drunken driving and breathalyser testing, which the rest of the world considers ordinary (pages 72-75).

But to strip away these specifically American problems is to touch only a small portion of this book. Indeed, there are some matters, which although discussed in relation to a particular American problem, would take very little transposing to be able to deal with particular Australian problems. The discussion on the use and abuse of criminal statistics, and the need for care and uniformity in the compiling of them, is a case in point. And the kind of model which Morris and Hawkins propose for the criminal law, and the administration of criminal justice, in the United States is a model which could easily be imposed upon Australian systems. All it would need would be for Australian legislators to make the kinds of decisions

which Morris and Hawkins are urging upon their American brethren. So that this book says much that is of relevance for Australian problems today. In fact, what it sets out to do is to say something of relevance to virtually every kind of problem, either American or Australian, which is inherent in our criminal process. The book starts with an examination of what is called "the overreach of the criminal law" wherein is examined the proposition that our codes of criminal law tend toward the creation of crime and would benefit from some pruning. Having deleted large areas of the present criminal law, the authors then proceed to urge us to institute schemes of compensation for the victims of crime (a matter in which Australia seems to be considerably in advance of the United States), go on to urge most strongly a reasonable estimate of the incidents of crime, and demand the prohibition of all research (or at least, Government supported research) into the causes of crime. This particular complaint about the direction of criminological research is one that consistently crops up throughout the book. The authors feel that little of value is to be found in a search for some mysterious all-embracing unifying "cause" of crime. They demand instead that all aspects of the criminal justice system contain divisions which are engaged in evaluative research of the successes or not, of different measures directed toward preventing crime. I personally think that their injunction is a little harsh: perhaps their point might have been better made had they stressed that funds should only be expended on research which examined the variables which lead to crime and indicated areas in which certain variables appeared more dominant than others. It seems to me that the evaluative research divisions envisaged by the authors would achieve this result by working backwards, and that it might be easier and quicker to gain the same results by working forwards. One would, surely, need *some* indication of the variables of cause in order to be able to realistically plan proposals for prevention.

The authors next discuss the particular problem of the high incidents of violent crime in the United States. It may be that that is the way the whole of the western world is heading. Is there not a distinct possibility that what the United States is today the rest of us will have become in ten or fifteen or twenty years? Be that as it may, there is no doubt that the archaic gun and knife control laws in the United States (or rather the lack of them) have had a vital and significant effect upon the rates of certain types of crime. In the light of that, it is unlikely that we in Australia will ever rise to the same heights. Next, the authors solve the problems of the police. They indicate that the police role is becoming a more difficult and a more complex one, that the greatest load of decision making in the whole of the criminal process devolves upon the police, and they accordingly make a number of specific proposals. These range from a new scheme of police training, promotion and pay (they

envisage the modern police force as one which is highly paid, trained, at least as far as officer level is concerned, to university level, and with flexible internal promotional mobility) to relaxing police recruitment standards in respect of height, weight, and vision. Police academies must be established in order to provide basic recruit training and in-service training for all ranks. In conjunction with this new scheme of police force there shall be some form of independent review of complaints made against members of the force. Finally, normal traffic duties shall be taken away from the police and given to a special force of traffic wardens. The remainder of this particular chapter deals with a number of recommendations relating to technological and equipment matters. Here we find a number of old friends—portable police two-way radios to be carried by all patrolling policemen, automobiles to be equipped with competent anti-theft devices, and so on. A number of their recommendations concerning police forces have considerable merit and Australia is rapidly moving towards implementation of some of them.

The book next attacks the "correctional" system. Much of what Morris and Hawkins have to say in relation to the American system is of considerable relevance to Australian systems. They start with bail and moving on, suggest various alternatives to periods of imprisonment, call for the modernisation of penal systems, an increase in the numbers of probation and parole officers and finally discuss various alternatives for the release of prisoners. They sweep in the same wide ranging way over the whole field of juvenile delinquency and the juvenile court system which deals with it. Again, much of what they have to say is relevant to Australian conditions—save that we do not have constitutional guarantees forcing our juvenile system in certain directions, as do the Americans. Their basic claim is that the juvenile system has failed and that the sooner it becomes more or less a replica of the adult system, subject to the same kinds of rules and limitations, the better. Their next discussion, the relationship between law and psychiatry, I find a little confusing. In it, they recommend that the defence of insanity should be abolished. Well and good, but the next point is that an accused person's mental condition must be relevant to the question of whether he did or did not, at the time of the crime, have the *mens rea* of the crime of which he is charged. This seems in essence to indicate basic dissatisfaction and frustration with the operations of the rules of the defence of insanity, which, after all, were supposed to answer that very question. What they seem to be saying is that the results given us by the application of our rules are not the kinds of results that we ought to be obtaining if we look at the reason why we have the rules: and that if we were to do away with the specific rules and ask instead the general question, we might achieve a more satisfactory and just result. Certainly an idea worth considering, but I am not sure that the consideration in this book is the best that it could be given.

As I have already said, this book endeavours to provide the answers to all the problems contained in a modern criminal justice system. The trouble with trying to provide such a wide range of answers to such a wide range of problems is that you may run the risk of sounding like a collection of editorials from a famous progressive weekly journal. I found this to be the most jarring aspect of this book, and it is at its strongest in the first chapter. That chapter is the one which deals with the "overreach of the criminal law". Consider the very first lines of this book: "The first principle of our cure for crime is this: we must strip off the moralistic excrescances of our criminal justice system so that it may centre on the essential. The prime function of the criminal law is to protect our persons and our property . . . " The remainder of this chapter indicates that the original pristine purity of the criminal law has now been engulfed by a mass of distracting alternative functions. I am not so sure that Anglo-American criminal law has ever passed through such a "golden age". The history of the criminal law seems to me to be an almost continuous history of "moralistic excrescances". In fact, a number of those important crimes which are supposed to protect our property are relative late-comers to the corpus of criminal law rules. Morris and Hawkins indicate that they are "broadly in agreement" with the definition of the proper sphere of the criminal law given by Mill in *On Liberty*. They then quote the well-known passage which suggests that the only justification for interfering with the liberty of some person is that of self-protection, either for the individual or the society, to prevent harm to others. It is not sufficient justification to interfere with the liberty of a person "for his own good". Most of what follows in the whole of the book is predicated upon this theoretical basis. To the extent that the "honest politician" is convinced of the correctness of Mill's opinion, he will find this book invaluable. The difficulty is, of course. that a considerable number of people do not agree and to that extent they will find the book partly helpful, partly irrelevant, and partly obnoxious. It is to be hoped that our legislators, in great flushes of enthusiasm, do not rush in to effectuate the decisions urged upon them by Morris and Hawkins without first considering whether they would agree with their basic theoretical premise. The number of ad hoc decisions concerning particular areas of the criminal law may suddenly, without anyone either thinking of it or realising it, transform the basis of our criminal law from that which it is to something totally different. It seems to me that our basic problem today is not entirely how to deal with particular problems arising in particular areas of the criminal system: rather it is to decide the whole nature and direction of our criminal system. Once that has been done, the solution to particular problems will be easy. And should it be that the decision is one which agrees with the decision obviously reached by Morris

and Hawkins, why then, their book is perhaps the finest blueprint for the solving of particular problems that has so far been published.

Norman S. Reaburn

THE POLICE AND THE PUBLIC

by D. CHAPPELL and P. R. WILSON

University of Queensland Press (1969), $3.95

In the author's own words, "this book discusses a research project which sought, as its principle aim, to establish objectively and authoritatively both what the Australasian public think of the police and what police think about the public". To this end, the authors took the survey used by the British Home Office in 1960 and applied it to the Australian conditions. Over 1,000 interviews were conducted in Australia, a proportionately similar number were conducted in New Zealand, and questionnaires were distributed to officers within the police forces of Queensland, Tasmania, South Australia and New Zealand. The results obtained in these surveys are the basis of this book.

A number of conclusions are arrived at by the authors. Anti-police attitudes are not as virulent or wide-spread in Australasia as previous writers have suggested. A considerable proportion of the public feel great respect for members of the police force, although this proportion is not as great as that of the United Kingdom. Young people are more antagonistic toward the police than other age groups within the community. Motorists showed strong anti-police feelings. The majority of people who had asked for police assistance were satisfied with the services they received. Police are optimistic about their public image, although concerned with the attitudes of young people and motorists. Most policemen do not think overmuch of the career opportunities available in a police force. They also thought that far too much time was wasted on trivial duties. Policemen thought that the type of man coming into the force today was probably better than it had been. Most police feel that young people, university students, university staff and the mass media all dislike them.

There is a considerable discussion on how police forces may be improved. A long list of recommendations include relaxing present height (and other physical standard) requirements, entrance examinations, higher minimal educational qualifications, a cadet training scheme based on the South Australian system, expanded in-service training programmes, police officers should have university training, higher salaries, and so on. The police should have access to computer facilities, and there should be standardised crime reporting and recording procedures. Traffic law enforcement should be taken away from the police. Many of the duties currently performed by police could be more properly handled by civilian personnel.

Perhaps the most disappointing thing about this book is the sense of inevitability that comes upon one as one reads through its recommendations and conclusions. Did we really have to undertake such an enormously expensive survey of public opinion in order to know that university students and other young people are not particularly fond of the police? Did we have to go to these lengths to know that police salaries ought to be increased, that police educational qualifications ought to be increased, and that there ought to be significant modernisation of police equipment? There seems to be a considerable tendency in modern life to show more concern with the public image of a thing, than with the reality of that thing. This book seems to me to be an example of that. Nowhere do the authors define what they mean by police-public relations, and nowhere do they indicate just what kind of functional aspects of the work of a police force are bound up in questions of public relations. It seems to me that a far more satisfactory way of approaching the question of improvement of our police forces would be to subject their various tasks to functional analysis. It may be that some of those tasks might involve public relations, and that good police-public relations might be essential to the performance of some particular tasks. But this kind of approach is not even hinted at in this book. None of the recommendations that are made are particularly original, or indeed, having been so often proposed, particularly exciting.

Chappell and Wilson spent a lot of public money to produce this book and their recommendations. A considerably greater amount of public money was spent to obtain a report on the Victoria Police Force by Colonel Sir Eric St Johnson. And an even greater amount of American public money was spent to produce the President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police. In this particular area, there must be no doubt that the more you spend the better the results obtained.

Norman S. Reaburn