Review of *Ivory Scales: Black Australia and the Law*, ed. K.M. Hazlehurst. Sydney: New South Wales University Press, 1987. pp i-xx, 1-291. $19.95.

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Ivory Scales is an anthology of twelve essays dealing with various aspects of the impact of Anglo-Australian criminal law on Aborigines. All the essays in the volume are well researched and the book gives access to information and presents a survey of policy options which make it à timely contribution to contemporary concern with racism in Australia. Moreover, several of the essays, in going beyond dominant paradigms of social science and liberal utilitarian policy, challenge and make a reader aware of the ethnocentricity of white legal and criminological professionalism.

To this extent, the editorial strategy of the anthology, which is to stimulate further debate by presentation of a variety of views, works well. If some readers, like the writer of the Foreword, Justice Michael Kirby, put the book down with an overall feeling of "profound depression", this may be because their own commitment to liberal professionalism is shaken. For most of these essays presage awareness that the degraded record of the white Australian legal system in its dealings with Aborigines is not external to that system. It is debated, as the differing views of John McQuorquodale and John Walker illustrate, whether judicial racism or some more complex causal pattern emanating from the societal context of the judicial system, explains the over-representation of Aborigines in prisons.[1] While such differences of opinion are significant in developing

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1. On the basis of National Prison Censuses 1982 – 1986, Walker shows that the overall rate of Aboriginal to non-Aboriginal imprisonment is 16:1 (p. 107).

policies aimed at ameliorating this record, only a divorce of the judicial system from its social context can construct the problem as external. Such a divorce may, in the first instance, enable us to rest content with the judicial system. But it does nothing to dispel "the distinct possibility that Australia, in a more subtle way, is as racist as South Africa in its treatment of indigenous people."[2] If our judicial system cannot respond to this possibility, any complacency with and within it must be short-lived or myopic.

Ivory Scales does not promote complacency. From Garth Nettheim's opening identification of Aboriginal sovereignty, land rights and the status of customary law as the critical, hard issues through John Coldrey's catalogue of the difficulties standing between Aborigines in the criminal process and the possibility of their getting a fair and just trial,[3] to the commitment to careful research and viable recommendations evident in an account of the Australian Law Reform Commission's reference on Aboriginal Customary Law by James Crawford, Mary Fisher and Peter Hennessey, a reforming perspective is clear.

There remains however the disquieting fact, evidenced in official documents, reports, and declarations throughout the last two hundred years of Australian history,[4] that the road to Aboriginal decimation and dislocation, has been paved with the good intentions of white missionaries, officials and professionals. So while continuing efforts to translate those intentions into practical measures should not be viewed dismissively, it is the few essays in this volume which attempt to de-centre white culture and paradigms of thought and language, which command closest consideration.

2. Walker, 107.
3. Coldrey lists traditional politeness and courtesy together with a submissive response to white authority figures, the different and untranslatable meanings of concepts of place and time in Aboriginal and white cultures, the meaninglessness of complex Anglo-Australian legal concepts such as self defence and the right to stay silent to many Aborigines, and confusion caused by roles within an alien adversary system, as posing problems with the fairness of police interrogation which rules of court such as the Anunga Rules cannot fully address. The taking of effective instructions by defence counsel may also be hindered by these factors.
4. For a recent recovery of "lost" history regarding British colonial office recognition of Aboriginal land rights in South Australia, see Henry Reynolds, *The Law of the Land*, (Melbourne: Penguin, 1987).

David Hope's essay raises a problem which, lying at the heart of Aboriginal confrontation with European law, extends to the very project of *Ivory Scales* itself, namely the ethnocentricity of professionalism. In "Policing in Aboriginal South Australia", he explores the use of Aboriginal police aides in the tribal communities, particularly the Pitjatjantjarra. He begins by pointing out that while different cultural groups may share cultural categories, the "invocation of custom almost certainly ensures that expectations, assumptions and values will be mismatched."[5] Using sovereignty, social relations, and relations between the secular and the sacred domains, as examples of such categories, Hope argues that the use of police aide schemes to deal with problems of child delinquency and petrol sniffing in Pitjatjantjarra lands itself contributes to cultural breakdown. According to Pitjatjantjarra culture, sovereignty is vested in each adult male. Outside an esoteric realm of sacred offences, seizure of the person is a secular offence — a violation of sovereignty which is dealt with by community polarisation along kinship lines. Aboriginal police aides, if recruited from the community, are of course within this kinship system.

Hope makes it clear that it is mainly Aborigines who suffer from Aboriginal crime. Child delinquency and petrol sniffing concern tribal elders because they tend to break down traditional cultures, and Aborigines from various communities have themselves wanted to use Aboriginal aides. But while he does not reduce the complexity of the situation, Hope argues that the police aide scheme is a further instance of providing a professional approach to a transcultural problem, and that governmental resources are better spent preventing cultural breakdown than in anticipating it. Professionalism, he argues, poses even greater difficulty than naively ethnocentric policies of assimilation or empathy backed reliance on consultation, because of its

> . . . ideological flavour, together with the sense of exclusiveness that goes with the monopolisation of expert knowledge. The problem is that the accommodation required in transcultural dealings may directly challenge the professional edifice. Given that this edifice is largely composed of a body of doctrine and myth that is non-negotiable cultural property, the scope for cultural dovetailing is minimal.[6]

5. Hope, 94.
6. Hope, 98.

If reference to legal expertise as doctrine and myth is surprising to lawyers, this reflects a central paradox of the whole situation. Viewed from within our culture, the legal system and its institutions are clearly secular. Yet the very idea of law as a set of objective rules, can be justified only by reference to natural law or transcendental philosophy.[7] We cannot, without denying conceptions of the secular and the sacred embedded in our culture and the humanist ideals of our legal system, admit that at this level, as Hope's transcultural analysis argues, the law, European or Aboriginal, is in the realm of the sacred.

Paradoxes are intractable things. Where commitment to the ideals of the Anglo-Australian legal system is combined with awareness of the hardship which Aborigines suffer under it, the tendency to ignore or discount paradox and the theoretical questioning which reveals it, and to press on with practical measures to alleviate that hardship is understandable. The problem is that such measures serve only as an irrational justification of the commitment if their consequence is further dislocation of Aboriginal culture and individual identity. When this becomes evident, the same two initial factors of commitment and concern lead to abrupt policy changes and further disorientation. On the other hand, if pragmatic problem solving is an inadequate response to our dilemma, theoretically impeccable policies are in themselves, equally insufficient. Contemporary governmental policies of autonomy and self-determination for Aborigines, for the first time, extend the liberal ethical principles of our own *polis* to Aboriginal-white dealings. Yet unless these dealings are such as to allow joint Aboriginal *and* white determination of the meaning of "autonomy" and "self-determination", we are bound for yet another costly policy failure and change.

These points are illustrated by Nancy Williams' essay on local autonomy and the operation of community justice mechanisms in the community of Yolgnu-speakers at Yirrkala. Williams sees the viability of Aboriginal community justice mechanisms as dependent on autonomy and insists that at its most basic level this must

7. It may be objected that this is untrue of legal positivism of the Anglo-Australian variety. This objection however is sustainable only insofar as such theories are concerned with description as distinct from justification.

exclude unilateral intervention by white authorities in offences involving Aborigines. Intervention, she argues, must be at the invitation of Aboriginal community leaders, must allow for their continued involvement in dealing with the offender and must support and not supercede Aboriginal authority. Williams' study is specific, but her analysis of past dealings with the Yolgnu community has wider applicability. Paternalism, the imposition of European models, changing government policies and funding guidelines, lack of respect for Aboriginal authority structure and lack of understanding of their social structure are typical problems of white-Aboriginal relations. Williams' makes two simple points. First, that we should begin by asking what Aborigines mean when they make autonomy claims. Her finding is that no question of separatism arises here; that "ultimately they want, just as do all other people, a reasonable degree of control over their own lives."[8] Second, that understanding Aboriginal ways is a condition of the possibility of their autonomy.

In different contexts, Greta Bird's account of field-work in four South Australian towns and her observations on drunkenness and policing there, and Dorothy Parker's broader view of the administration of justice and its penal consequences in Western Australia, are both distinguished by their authors' commitment to understanding. Both essays moreover, though using methods of analysis different from Hope's trans-cultural perspective, show a theoretical sophistication which brings the Aboriginal standpoint into view. Bird argues that the roots of Aboriginal crime do not lie in the criminal law system *per se* but in a legacy of dispossession and colonisation which continues to shape Aboriginal-white relations. She points to *de facto* segregation in three out of the four towns surveyed, a segregation which results in a visible Aboriginal population which is heavily policed and comments

> . . . race, poverty, alcohol use and crime are inextricably bound together, and the criminal justice system is neither neutral nor autonomous but rather a micro-image of a wider racist society. The background to this situation lies in the 'civilising mission', the criminal law is the contemporary version of the early missionaries and white reserve officials engaged in moulding the Aborigines to fit the imposed Christian/capitalist culture.[9]

8. Williams, 228.
9. Bird, 67.

Aborigines in Bird's towns have no place to go and nothing to do. The white community largely determines the structure and setting of this Aboriginal "leisure". Aborigines gather in parks and in the open because, with their extended families, they are not welcome in pubs and clubs. White alcohol consumption, Bird points out, is also high, as is white public drunkenness, but in this context (witness television commercials) drinking is constructed as a reward for hard work and so does not challenge white values of work, thrift and sobriety. Ultimately, Bird concludes, the drunk charge is more dependent on the identity of the person being charged than on the act.

Bird's essay focusses on the main form of adult Aboriginal crime, the street offences of drunkenness, offensive and indecent language and vagrancy. Her contribution needs to be read against Broadhurst's extensive statistical analysis of Aboriginal crime in Western Australia so that, in particular, the significant increase in serious and violent offences by Aborigines is not overlooked. There are two points here. Firstly, it is Aborigines themselves who suffer the brunt of this increase and there is a need to assist Aboriginal communities to protect themselves against such violence. Secondly, Broadhurst's analysis supports Bird's claim that Aboriginal crime must be understood within the broader framework of white colonisation and dislocation, by pointing to a coincidence between rising proportions of Aboriginal incarceration and intensified European settlement, exploration and mineral exploitation of the North-West since the 1960s.

Parker brings the violence of Aboriginal-white relations and the hegemony of European culture and practices in the structural determination of those relations into sharp focus by an essay which moves from generalised observations on the failure of white academic and professional initiatives to achieve a dimunition of Aboriginal imprisonment to a case-history of Mary Nanji — an Aboriginal woman sentenced to life imprisonment in 1984 for murder and grievous bodily harm. Nanji's crime was violent. Sexually harassed by two old men in a squalid boarding house she had visited for the purpose of getting money for drinking, she cut off one man's penis and killed another. Nanji's life was one of suffering violence. Her family, truly isolated, traditional Aborigines were forced to leave the Western Desert at the time of testing the Blue Rocket missiles. They were transported in rapid succession to a fundamentalist mission

then to the Wiluna reserve, where Mary was born. She was removed from her family by Seventh Day Adventist missionaries, taken to Sydney, then later dumped back on the reserve. Subsequently she was raped by her uncle, had her baby taken from her by white authorities and became an alcoholic and a prostitute.

Parker makes no polemical mileage on this case-history. Her reservations about the trial are not directed toward accusations of unfairness or bias at the particular level. Nor does she justify what Mary did. To try to understand, to look at Mary's case from her standpoint and within the context of her whole life, is neither to excuse nor to justify. Understanding, as hermeneutic theorists have made us aware, is part of knowledge;[10] it is a necessary step in moving from description to explanation and that is the move which Parker wants us to make.[11] What comes home from Parker's study is the *non sequitur* between the systemic violence in which Mary Nanji was enmeshed and the necessarily narrow focus of the criminal trial on an artificially isolated act of the accused.

The authors of the essays on which this review has concentrated make a number of theoretical demands on their readers, because, for them, orthodox legal theory and social science, with its unwitting commitment to the dominant standpoint in white society, is an inadequate tool with which to understand the situation. But they are making only one general demand of the Anglo-Australian legal system and the society of which it is part: that it brings Aborigines within the reciprocity condition which legitimates it. That is, the accord of equal concern and respect to *all* its citizens. Their perception is to see that where individuals live within paradigmatically

10. C. Taylor, *Philosophy and the Human Sciences Philosophical Papers*, v. 2. (Cambridge: Cambridge University Press, 1985). See esp, cc 1 and 4.

11. Parker's call on this point is endorsed by several contributors to this volume and deserves to be quoted in full.

"We have been collecting for almost half a century evidence of the spectacular injustices which were perpetrated on Aboriginal Australians by the dispensers of Anglo-Saxon law... Yet we allow these injustices to continue as we add to the historical, anthropological and legal records. It really is time to move from *description* to *explanation*; to demonstrate the connection between what happens on the one hand on the station, in the street, in the courts and in prisons and on the other hand the political and economic forces in particular historical periods which result in the location of property and power in the hands of a few who then control relations of production as well as cultural beliefs and practices" (p. 140).

different cultures, or where disruption of Aboriginal community has structured the social relations of urbanised and fringe-dwelling Aborigines, the accord of concern and respect requires an approach which makes different social and cultural standpoints visible.

The strengths of these essays highlight an overall weakness in the editorial conception of *Ivory Scales*. This is the lack of attention to philosophical and theoretical questions germane to the book's concerns. Two issues in particular cry out for attention. First, given the record of white dealings with Aborigines and editorial reference to the "moral imperative"[12] of our situation, the threshold question of how reference to the criminal *justice* system is justified should have been given careful consideration. It is raised in the title to Garth Nettheim's essay, but not pursued. To ask this question is not to imply that the reference to justice is unjustified. It is merely to invite analysis of and reflection on our own cultural paradigm; in particular on the values which legitimise Australia as a constitutional State governed by the rule of law. Without such questioning of values, terms like "autonomy" and "self-determination" become meaningless buzz words.

Second, serious methodological problems beset contemporary social science and these need acknowledgement and exploration. This is particularly the case where the research subject crosses social and cultural boundaries. Pluralism in views and methods is undoubtedly healthy, but even if pluralism is thought to be a permanently desirable feature of social science, it cannot be the case that anything goes. And if some methods are regarded as inadequate, then there must be standards against which such adequacy is judged. These standards too must be the subject of critical scrutiny. If they are not, then social science is reduced to a convention bound, professional discourse with the same hostility to cultural dove-tailing as noted by Hope.

Without working on questions so basic to our own culture and society as the two mentioned, it is unlikely that our future dealings with Aborigines will show more wisdom than our past ones. Ethnocentricity is an acknowledged defect of past dealings with Aborigines. We do not escape ethnocentricity by deploring it in past

12. Hazlehurst, 6.

practices and presuming it absent from present ones, nor even by genuinely desiring to avoid it. Given the economic, political and scientific power of European culture, ethnocentricity is immensely difficult to avoid; and it is not avoided by going to the other extreme, and trying to abandon our own ways of thought to Aboriginal ways. It must therefore by kept consistently in view as a theoretical problem of truth and method. But were it not for the essays by Bird, Broadhurst, Hope, Parker and Williams, *Ivory Scales*, far from attempting to confront it, would itself be open to the charge that it is an all too familiar white contribution to black problems.

Two examples serve to illustrate this last point. It is entirely inappropriate in a volume such as this, and is, indeed, an illustration of the very hostility of white professional expertise to the realisation of Aboriginal autonomy and self-determination, for its editor to criticise Aboriginal political leadership and issue policy prescriptions to them.[13] It is simply not up to white experts to tell Aborigines what kind of leadership they need. And to do so in terms of the kinds of politics that, in Hazlehurst's view, have worked for indigenous people elsewhere is doubly insulting. It is, yet again, to deny Aborigines their own particular identity. Garth Nettheim's recognition of the "increasingly regular and sophisticated use of international agencies"[14] made by Aboriginal people is a far more sensitive and perceptive comment on the remarkable endurance and political wisdom Aborigines have shown in surviving the past two hundred years.

The second matter is admittedly contentious — how are Aborigines to be called? Awareness of the power of language to shape perceptions and its capacity to frustrate a people's efforts to regain a self-determined identity by naming or describing in a derogatory way or without regard to conscious preferences of self-description, is now, surely, widespread. Cogent arguments by Aborigines for being called "Aborigines" and not "Aboriginals" have been made on the ground that the word "aboriginal" is an adjective of which the noun is "aborigine". Capitalising the "A" where reference is being made to the indigenous people of Australia, it is said, is an insuffi-

13. Hazlehurst, 272-3.
14. Nettheim, 26.

cient recognition of Aboriginal demands to be referred to, as a people, by use of the noun work "Aborigines".[15] Kayleen Hazlehurst's inaccurate editorial note on this point[16] underestimates its significance. Moreover, she legitimises following the "preferred usage" of the Australian Government's *Style Manual*, by the naive argument that there is no consensus among Aboriginal people on the matter. Of course there is no consensus among Aborigines on the issue. Official language use is bound to have its effects. But as Eve Fesl has argued: "There would be no governments in control in Australia if total support was required. So why are Aborigines singled out for having to have full consensus and no diversity of opinion amongst their members?"[17] This is a debate about language and its ideological effects and to dispose of it by the reference to a government style manual begs some large questions.

That said, it is important to return to my starting point. *Ivory Scales*, mainly through the essays of Bird, Broadhurst, Hope, Parker and Williams, makes a valuable contribution to one of our most significant contemporary national debates. I hope it will be widely read.

15. Pamphlet: "*How the English Language is used to Put Aborigines Down*" (Melbourne: Monash University, 1986).
16. Introduction, 7. Five, not two, contributors either use the term "Aborigines" or use tribal names in place of either term.
17. Ibid., n. 17.