BOOK REVIEWS

CONVENTIONS, THE AUSTRALIAN CONSTITUTION AND THE FUTURE, *by L. J. M. Cooray* (Legal Books Pty. Ltd., Sydney, 1979), pp. i-xixx, 1-235.

The immediate excitements aroused by the constitutional crisis of 1975 have long since died away, but the debate continues. And it is right that it should, since the various conflicts and lacunae in the Constitution which were then exposed have (with the partial exception of Senate casual vacancies) not been solved or removed. Dr. Cooray's book is a contribution to the general debate, aimed, one would guess, more at the inquiring non-expert than at the constitutional lawyer.

The book attempts to cover a very wide range. The many issues raised by the events of 1975 are canvassed (some of them very briefly). General theories of constitutional interpretation are discussed, and contrasts made between "literalism", "legalism", "broad legalism", and so on. The author presents a general thesis of the relations between constitutional law and constitutional convention, and, at least partly on this basis, delivers a firm verdict as to the impropriety of the Governor-General's acts.

The final two chapters, however, go beyond even this broad canvas, and discuss the questions of the adequacy of the Federal Constitution, and indeed, the very future of "constitutionalism" in Australia. In this enterprise, Dr. Cooray is clearly influenced by the experience of Sri Lanka (as Chapter 6 makes clear (see, *e.g.,* p. 212)), and the rather dramatic lessons he draws from that experience help to set the account in a broader, and, in the event, more interesting framework. (Indeed, the reader might be well advised to read Chapter 6 first, as it gives a clearer idea of Dr. Cooray's ultimate concerns than is afforded by the earlier chapters.) The final impression is that of a small 'l' liberal, interested in gradual reform, and convinced both of the impracticability, and danger, of drastic or revolutionary actions. In other words, constitutional law by consensus.

Whether it is useful to discuss the precise issues of 1975 in such a broad, even apocalyptic, way may well be a matter of taste. I would have preferred a rather more concentrated account of the precise issues, but that has been done by others; and it may be that the deliberately broad approach Dr. Cooray adopts is justified. In matters of constitutional faith, there's arguably "more enterprise in going naked".

However, at the technical level one must have some reservations. The first three chapters are mostly concerned with establishing a distinction between conventions "outside" and "inside" the Constitution, with the aim of assimilating the latter to rules of constitutional law, rules which "control the operation of constitutional provisions" (p.29). The overall thesis is that "certain rules of the English common law, the prerogative and conventions, are a part of the Constitution of Australia, having been impliedly incorporated by reference" (p. 34). But the exact status of such incorporated conventional rules remains bafflingly obscure: apparently they are "non-justiciable rules (with a question mark on whether they are justiciable)" (p. 35). If certain conventions (as at 1900) have been incorporated by reference, it is hard to see how they could change (quite apart from the problem of knowing what, in 1900, they were). The relations between the two Houses of Parliament at Westminster in financial matters were not entirely settled then (as the events of 1909-1911 were

to show): in Australia, the problem was even more vexed and uncertain. In the end, it is very doubtful whether passages such as this:

> "It is clear that the courts have resorted to English common law principles relating to the exercise of the prerogative powers of the Crown to fill in s.61 of the constitution. It is a logical step to put forward a proposition which follows from this: that English rules relating to the exercise of the prerogative powers which are embodied in unwritten rules, must be used in the same way in respect of like sections viz. 2, 5, 6, 28, 58-70." (p. 26)

do more than confuse the issue. The equivocation on the word "rules" is palpable. (For further instances see pp. 18-19, 27, 28, 30, 46, 49, 51.)

Despite these uncertainties, Dr. Cooray's actual analysis (in Chapter 4) of the events of 1975 is forthright, and his conclusion (that Sir John Kerr acted prematurely, and violated the obligation of trust between a Governor-General and a Prime Minister) can be accepted without accepting the earlier arguments as to the status of conventions. But if, as he claims "the events of 1975 can really be brought down to a crisis of interpretation" (p. 37), then, certainly, the crisis is a continuing one.

*James Crawford**

FAMILY LAW AND SOCIAL POLICY, *by J. Eekelaar* (1978, Weidenfeld & Nicolson) pp. i-xxix, 1-335.

Family Law and Social Policy is not the traditional type of legal textbook, but a work of a quite different nature which will appeal to a wide audience. The book is part of the *Law in Context* series. The author's particular distinguishing characteristic is his ability to analyse the rules of family law in their function in society. He views these rules as capable of categorisation according to their function, which may be protective, adjustive or supportive. An example of protective legislation is that dealing with child abuse; an example of an adjustive rule, that governing property distribution on divorce; and an example of supportive legislation is that under which the payment of Social Security benefits is made. This threefold division of legal rules provides anyone interested in this area with a refreshing insight into why particular laws exist, how they fulfil their stated purpose, and what reforms are desirable in the future. The author's approach is particularly well suited to this area of law which cannot without falsification be abstracted from its social context.

The scope of the book is wide, in that it discusses not only topics traditionally dealt with by works on family law but also those frequently neglected such as abortion and neglected and deprived children. The author draws on recent statistical materials, and there are many references to sociological and psychological research as well as to the reports of law reform bodies such as the Law Commission. The analysis of statutes and of case law is presented in such a way as to be comprehensible to non-lawyers, with the author constantly placing provisions and decisions in the context of their social function.

Above all, this book is concerned with the policy of family law. Written and published in England, it nevertheless contains much comparative material from the United States and from Commonwealth jurisdictions which makes it

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valuable to readers everywhere. The author's rare gift for synthesising legal with sociological material cannot fail to make this book a success with lawyers and non-lawyers alike. Arguably, it is the most refreshing book of this nature to appear since *Family Security and Family Breakdown* (by the same author) appeared in 1971. The author's gift for language and expression remain without comparison amongst those writing in this field today.

*Rebecca J. Bailey**

EVIDENCE, PROOF AND PROBABILITY, *by Sir Richard Eggleston* (Weidenfeld and Nicolson, 1978), pp. i-xiv, 1-226.

This thought-provoking monograph on the law of evidence is published as part of the *Law in Context* series. This series is intended to treat "legal subjects from a broader base than has been normal in the past" and Sir Richard fulfils this objective by discussing the rules of evidence within the perspective of the Pascalian rules of probability. This blending of two hitherto regarded technical and distinct disciplines is an awesome task, but the author has managed to produce a most readable book, written in a non-technical style, showing how Pascalian rules or probability can be used to explain not only the process of proof in courts of law but also many of the rules of evidence.

The most fundamental criticism that can be made of the work is that it assumes that rules of Pascalian probability properly apply in courts of law. It assumes that courts should attempt merely to determine in terms of chance whether past events have occurred or not, just as they must predict future events, where this is necessary, in terms of chance. If it was practical this could be done numerically, but unfortunately facts are so varied that they defy measurement. Nonetheless, probabilities are to be assessed *as if* they were measurable and the equations of Pascalian probability are to be used in combining probability judgments where necessary. Proof is achieved at that degree of chance prescribed by the law, 50% + to satisfy a balance of probabilities, more to satisfy a standard of beyond reasonable doubt. Sir Richard analyses a number of particular cases to show that they were were wrongly decided in terms of Pascalian probabilities *e.g. Mummery v. Irvings Pty. Ltd.,*[1] discussed on pages 98-100.

However, recently Jonathan Cohen[2] has questioned whether Pascalian probabilities correctly explain how courts reach decisions of fact. The difficulty is that Pascalian probability only measures chances within classes of events. To establish a fact to a Pascalian probability of 60% means that given a class of 100 events of the type in question 60 will turn out as predicted whereas 40 will not. Do courts accept being wrong in a high (or any) proportion of cases? An example given by Jonathan Cohen[3] makes the point more clearly. If one must prove that a given person A attended a rodeo without having paid, is it sufficient proof that 501 of the 1000 who attended the rodeo did not pay? If the only information available is this statistic, the Pascalian probability is beyond that required for proof on the balance of probabilities. If a court acts on the statistic it will in the long run be more often right than wrong. But, do courts intend to operate in this way? Of course the example is contrived, there will

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1. (1956) 96 C.L.R. 99.
2. *The Probable and the Provable* (Clarendon Press, Oxford 1977).
3. *Id.*, at p.75.

always be other information (most particularly A's explanation), but it does illustrate vividly the problem we are up against if we are to apply Pascalian probabilities. Are courts satisfied with being correct in the long run or are they striving to be correct in every case? Jonathan Cohen attempts to construct a theory of probability (Baconian or inductive probability) which accords more with how courts actually decide cases. Thus he would cite cases such as *Mummery v. Irvings* to show that courts do not employ the canons of Pascalian probability in determining whether past events have occurred. Of course on the other hand it would be quite permissible for a court to use Pascalian probabilities in predicting future events. Throughout his book Sir Richard fails to see that there is a fundamental distinction between discovering whether past events have occurred (and striving to be correct in every case) and predicting future events when all we can do is assess chances. This failure culminates in the chapter entitled "Probability and Prediction", in particular at p.181 where the following passage appears:

> "The distinction that has been drawn between the evaluation of probabilities in relation to past transactions, and the assessment of the value of future contingencies, naturally prompts one to ask why is it that this distinction has been drawn. In particular, why should a plaintiff who only persuades the court that it is 51 per cent probable that he has suffered damage in the past get the full amount, while a similar plaintiff whose proof relates to the future may get only 51 per cent? To this question there is no logical answer."

But there is a logical answer if one travels outside Pascalian probabilities and argues that in the first case the court is determining responsibility on the assumption that its finding is correct by virtue of Baconian probabilities, whereas in the second it is only guessing on the basis of Pascalian probabilities. The argument is made in an attempt to avoid accepting that in determining responsibility courts merely aim at being more often right than wrong. Whether courts can aim to do more than this is the fundamental point at issue.[4]

Failure to go outside Pascalian probabilities is therefore the major limitation of this book and as a result its most crucial chapters fall short of complete analysis of the fundamental issues.

My other broad criticism is that the description of the common law adversary trial and the rules of evidence, given in introductory terms in Chapters 4 and 5, fails to provide the framework for the chapters which follow. As a result they appear as isolated chapters on disparate rules of evidence rather than as parts of the fundamental issue *i.e.*, fact finding at common law. There is always the linking theme of Pascalian probability but the book falls short of providing a theory of the law of evidence, although it has, perhaps unknowingly, embarked upon such a course.

But having made these contextual criticisms there is much to praise in this book. The chapters on particular topics are written with great insight into the underlying principles. The evidential rule about similar facts is elucidated within the general principle demanding probative value; burdens of proof and presumptions are elucidated to show where rules depend upon probability and where they are dependent upon other policies; the chapter dealing with judicial notice and expert testimony shows nicely how rules are required to allow judicial notice of matters which go beyond the fact finder's experience about

4. And recently it has been hotly debated by Jonathan Cohen and Glanville Williams in the *Criminal Law Review:* (1979) *Crim. L.R.* 297, 340; (1980) *Crim. L.R.* 91, 103.

the ordinary course of human affairs (upon which experience probability judgments are based), and how expert testimony is required where that experience proves deficient; and there is an excellent chapter, entitled "Credibility and Probability", on the problems in determining the credibility of witnesses, drawing upon previous writings of Sir Richard in this area.

Sir Richard's style is non-technical and lucid, and he illustrates points wherever possible by way of example, anecdote or personal experience. These illustrations provide an insight into a man with important experience in the administration of the law, and give the reader a feeling for the practical problems of fact finding. This adds a valuable dimension for the law student and layman coming to the subject for the first time.

In the result this book is welcomed for a variety of reasons, it provokes thought about the fundamental issues in the law of evidence, it lucidly explains the law of evidence in introductory terms within a context of general principle and it gives to us some of the experience of a man who has dedicated himself to the humane administration of the law.

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FAMILY LAW IN AUSTRALIA, *by H. A. Finlay* (2nd ed., 1979, Butterworth), pp. i-xxxii, 1-365.

The appearance of the second edition of *Family Law in Australia* is welcomed by students and teachers of family law alike. Since early 1976 (when the Family Law Act, 1975 (Cth.) came into operation) until now, there was a conspicuous absence in Australia of a comprehensive and scholarly text in this important and fast-moving field of law. The appearance of Professor Finlay's book remedies this situation. The first edition (with A. Bissett-Johnson as co-author) appeared in 1972; in 1975 the face of family law in Australia was transformed by the passing of the Family Law Act (Cth.). Professor Finlay has undertaken such extensive rewriting of his work in order to take full account of the change that the second edition might better be viewed as a new book.

One of the principal merits of this book is its comprehensiveness. Although many aspects of family law now fall within the scope of the Family Law Act, the division of jurisdiction between the States and the Commonwealth remains. A drawback of other recently published texts is that they are confined in their scope to proceedings under federal jurisdiction. Professor Finlay's book covers the whole area of family law in Australia. As well as matters falling within federal jurisdiction (*e.g.*, marriage, divorce, maintenance, custody and property proceedings between husband and wife), this book analyses the important areas still governed by State law, such as adoption, the rights of unmarried couples and the Status of Children Acts. In these areas governed by State law, the author presents a valuable comparative analysis of the detailed variations between the laws of each State.

Despite the enactment of the Family Law Act, the precise delineation of the boundaries between State and Federal jurisdiction remains complex and even uncertain, particularly in the area of property proceedings. Such complexities are the unavoidable result of the wording of the Australian Constitution and the High Court's interpretation thereof. No student can hope to achieve a

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satisfactory understanding of family law in Australia without a sound grasp of the basic constitutional issues. Another merit of Professor Finlay's book is that it contains (principally in Chapter 2) a thorough analysis of the constitutional basis of family law. Moreover, in later chapters, the author takes up in greater detail the problems of delineation of the two jurisdictions in specific areas such as custody and property proceedings.

As well as analysing the laws governing family relationships in Australia, Professor Finlay's book describes the courts which administer and apply those laws. In particular, Chapter 8 contains a critical account of the new Family Court of Australia, which some have seen as the greatest innovation of the Act. The author conveys to his readers an understanding of the nature of this specialised jurisdiction, the principles which it applies, the modifications to the traditional adversarial system incorporated into its procedure, and the counselling services attached to it.

Whilst retaining its character as a text designed for use by law students at tertiary level, this work strikes a critical note throughout, and the existence and possible solution of social and legal problems are never far from the author's mind. Academics and students will welcome the extensive citation of articles and other published material. *Family Law in Australia* can rightly be regarded as the principal textbook in its area.

*Rebecca J. Bailey**

LAW AND LEGAL SCIENCE, *J. W. Harris* (Oxford, 1979), pp. 1-174.

This is an interesting, well-written and clear account of a concept, legal science, which is best known in the work of Hans Kelsen, but was certainly by that writer never clearly stated.

Legal science, according to Dr. Harris, is the discipline by which we describe the law (that set of rules which constitute a legal system). This may seem simple enough, but there are various logical principles or axioms necessary to the discipline, and it is in relation to these that Harris proceeds beyond Kelson.

He proposes in place of Kelsen's basic norm a fiat in the following terms:

> 'Legal duties exist only if imposed (and not excepted) by rules originating in the following sources:...or by rules subsumable under such rules. Provided that any contradiction between rules originating in different sources shall be resolved according to the following ranking amongst the sources:...and provided that no other contradiction shall be admitted to exist.'

This fiat is constructed to account for four basic logical principles: exclusion, by which is meant the principle that legal science presupposes a determinate number of sources for a legal system; subsumption, the principle of hierarchical connexion; derogation, the principle by which legal science rejects a rule if it conflicts with another originating in a superior source; and non-contradiction, the principle that one rule cannot contradict another. These are logical principles intended to function in a way analogous to the principles of classical logic; they are not legislated principles, but simply the conditions of the usefulness of the discipline.

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The principal superiority of the fiat over Kelsen's basic norm is that the latter accounted for exclusion and subsumption, not (at least in Kelsen's later writing) derogation and non-contradiction.

It is important to notice that legal science is a science of norms or rules; it is not a science of the acts and actions of judges, legislators or citizens. Harris makes an important criticism of Hart here. A sociological description of the behaviour of judges, legislators and citizens is incapable of accounting for validity. A rule not actually adhered to might nonetheless be valid: validity seems to require a certain relationship between norms. Further, and more basically, Harris doubts whether a complex rule of recognition could be inferred from mere observation of behaviour. I agree with Harris, here: I think that Hart's book *The Concept of Law* was seriously flawed by his attempt to run together two things, descriptive sociology and analytical (conceptual) jurisprudence.

However, I don't think legal science is the answer to this problem, or any problem. At best it is trivial. At worst it is an unnecessary fiction.

Legal Positivism as a theory of analytical jurisprudence, for instance as propounded in the subtle and rigorous work of Joseph Raz, is in my view false and fallacious; but it is not trivial. The reason for my thinking that legal science is, in contrast, trivial is that it allows to be described just so much of the law as can be described.

Harris has two concepts of legal system relevant to this. First, there is a momentary legal system which consists of all the laws that hold at one moment clearly and indisputably enough to be described by legal science; and second there is a concept of legal system as 'a congeries of normative expressions of disparate types forming part of a tradition of a body of officials' (165). Now, of the first concept of legal system Harris's book is a rigorous and admirable analysis; but of the second it is anything but rigorous. In manipulating the materials of a legal system of the second type a lawyer, according to Harris, employs a mixture of legal science and *any* number of modes or rationality (Harris lists four, but is amenable to suggestions) to make recommendations for, or predictions of, court decisions. Anything at all can be accommodated in this second type of legal system with its attendant hotchpotch of reasoning. Anything at all in law and its analysis which will not clearly fit the first concept of legal system (and its attendant rigorous conception of legal science) is simply shoved into the second. And this with the greatest of ease because anything can be accommodated in the second. Such a method of philosophical analysis is bound to succeed, but it is not illuminating.

At best the concept of legal science is trivial. I think we can go further than this, however, and say that it does not exist at all.

Where are the legal scientists? Judges are not legal scientists. They do not ordinarily describe the law on the matter before them, and then in a separate process perform the normative act of applying it. No judge says (except where there is a revolution in issue): having described (as legal scientist) that such and such is required by a statute of Parliament, I shall now go on to decide whether I should apply that statute. In describing the existence of the statute (if his judgment happens to take that form) a judge at the same time performs the normative act of applying it. There is a description which is a norm application. Now, which is to be taken as the logical character of the statement? Descriptive or normative act? Obviously normative act, for that is a necessary

and sufficient condition of the disposal of the case. The description is neither necessary nor sufficient; so where is the legal science?

Legal sociologists are not legal scientists. They are not concerned to describe the law. Rather, their concern is with what for them must be the more precise and useful notions of what judges, citizens and parliaments do. This is not legal science; we have seen that Harris is anxious to establish (by contrast with Hart) that legal science is not the science of what judges, citizens and parliaments do, it is the science of law (that set of norms which constitute a legal system). If a sociologist were to say these things are equivalent, that what is the law is equivalent to what judges do and what parliaments do, he would be foolish, for he would be venturing into a philosophical dispute that was quite unnecessary for his purposes; for him, the science of what judges do and what parliaments do will do. So he is not a legal scientist.

Legal advisors are perhaps the most promising candidates. But we can see that a legal advisor must be doing one of two things. Either he is concerned to predict judges' decisions (in which case, like a legal sociologist, his science is not legal science but the science of judges' decisions); or else he is concerned to perform the normative act of giving advice (in which case analysis would lead to a conclusion equivalent to that in the case of the judge — the normative act has primacy and it is not a case of legal science). There is no third possibility.

So, where do we find legal scientists? And if they don't exist is it likely that we need to invent them?

Harris's achievement in this book (and this is no mean achievement) is to have taken the Kelsenian notion of legal science, which in Kelsen's work was confused but fascinating, and to have subjected it to an analysis of sufficient rigour to enable us now to suggest (a trifle ungratefully) that we can do without it.

*M. J. Detmold**

BARWICK, *by David Marr* (George Allen & Unwin, 1980) pp. i-x, 1-330.

Atmosphere permeates David Marr's biography *Barwick*. The fragile gentility of the Methodist origins, the immemorial mustiness of Phillip Street chambers and courts between the Wars, and above all the lawyers crowding the pages, with Barwick dominating at every turn, save for his brief foray into federal politics. The Sydney Bar haunts the book. Litigation-mad eighteenth century English society transported to the shores of Port Jackson brought with it habits which could only encourage the aggrandisement of an independent bar: the legal problems of federation exacerbated the condition. Evatt, Barwick, Whitlam, Kerr and Ellicott dog each other from Phillip Street to Taylor Square and thence in their respective roles to Canberra, pursued by or pursuing their various demons and visions.

This sense of an institution viewed through the life of an outstanding participant is one of the fascinations of *Barwick*. Sir Garfield emerges as the ultimate product of the Sydney Bar, in contradistinction with his predecessor in the office of Chief Justice, the cold, precise and classics trained Dixon from Victoria. The pattern was set early by Professor Peden at Sydney Law School, and

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along with the pattern the paradoxes that are apparent throughout Barwick's life and work. Peden's approach to the law was mechanical, and its treatment "as bits and pieces of judicial meccano" has been a hallmark of the Barwick style. The young advocate's early notable victories cited by Marr appear to have been won on technicalities for clients whose cases were singularly lacking in merit. A barrister should be resourceful on his client's behalf, and Barwick's mental agility understandably won him the approbation of his peers, but that it entailed his dominance over District Court judges should raise questions in at least some minds.

There was the first paradox: inventive in attack or defence, agile in the thickets of the hard-and-fast black-letter law, but on the bench satisfied to clamp the bits of meccano firmly into place. Marr understandably concentrates on the constitutional decisions of the Barwick court, but as Professor Sawer has recently pointed out, such cases make up only 15% of the work load of the High Court, the remainder being decisions largely at the apex of Australian common law. In that broad field what examples of mechanical and unsophisticated thinking may be added to Marr's collection of constitutional jurisprudence! "Law by pigeonhole" assumes that the state as employer is never vicariously responsible for police torts[1] but see Windeyer J's more thoughtful analysis.[2] The inadequately reasoned statement of the Privy Council in *Bombay*[3] that statutes are presumed not to bind the Crown was accepted without demur by Barwick in *Rhind*[4] and the cases following. Contemporaneously, the Indian Supreme Court, arguably closely tied to the *Bombay* decision, simply jettisoned the doctrine as irrelevant to social reality.[5]

The persistent desire to reverse from the security of the bench defeats suffered as advocate is a Barwick trait relentlessly explored by Marr. Those few insights we are granted into Sir Garfield's limited interest in jurisprudence reveal the extent of this self justifying inflexibility. Barwick asked, "What do they mean when they say there is a *right* to strike? What sort of a *right* is that?"[6] Four decades later the inability to handle abstract and inchoate "rights" was still a feature of Barwick's thought: between *Salemi*[7] and *Forbes*[8] the remainder of the High Court was able to accept the concept of a "legitimate expectation" in the context of natural justice, but not Sir Garfield.

The "use" of the law is probably the great single theme to *Barwick*, and the question that must be asked of its subject's life-work. In *A Man For All Seasons* Robert Bolt portrayed Sir Thomas More refusing to accept Roper's idea of cutting down all the laws to pursue the Devil. Roper accused More of making a golden calf: "the law's your god", to which More replied, "Roper, you're a fool, God's my god." Perhaps it could not help but be otherwise with a lapsed Methodist and self made man: he would perforce have to turn afresh to worship his maker, or at least that instrument by which he had climbed from obscurity.

Marr records Barwick's early facility in the practice of pleading, of mastering those technicalities of presentation important to the "legal museum" at which the Sydney Bar practised, but markedly irrelevant to the pursuit of

1. *Ramsay* v. *Pigram* (1968) 118 C.L.R. at 279.
2. At 289.
3. [1947] A.C. 58.
4. (1966) 119 C.L.R. at 598.
5. *State of West Bengal* v. *Corporation of Calcutta* (1967) 54(1) All India Reporter 997.
6. p.34.
7. (1977) 137 C.L.R. 396.
8. (1979) 53 A.L.J.R. 536

justice in the litigant's cause.[9] Would Barwick have even cared to know that in 1870 another Chief Justice, Doe of New Hampshire, had begun dismantling the rigid forms of pleading by judicial fiat: "Our time is too much needed for the consideration of subjects of some importance, to be properly occupied with the unnecessary and barren question of pleading".[10] Barwick marked his success by buying a rare, straight-eight American Reo Royale which he proudly claimed "would turn in its own length under power". There is a certain cast of mind here, best summed up by our present Prime Minister's comment: "Vroom vroom". Charles Doe of New Hampshire owned only a "democrat waggon".[11]

And so to the great paradox of the man, the contradiction that ultimately affects every Australian. The law is concrete, solid, waiting only to be found, and yet

> "....the law is a mystery;
> and those who have mastered its intricacy
> have indeed great power in their hands
> and great responsibility" (Barwick in the frontispiece).

Only the Bar could "secure the continuance of the Rule of Law" (p. 103), but from his youth Barwick had known the fall back positions for circumventing the Rule of Law when the exalted in the community required it. Monarch and Upper Houses as excuses and devices for flouting the popular will he had learnt from Peden. As an upwardly mobile King's Counsel he used the High Court and the Constitution to attack "issues of...fundamental policy [which] would, in other societies, be fought through the ballot box" (p. 58).

Prime Minister Menzies referred to "our masters, the Australian people" (p. 90) while authorising unlawful telephone wire tapping (p. 149): Barwick helped avoid possible difficulties. He justified the Telephonic Communications (Interception) Bill (Cth) with the maxim *salus populi est suprema lex* — the safety of the people is the supreme law (p. 151), but it was 300 years since Sir John Selden had recorded in his *Table Talk* the irreconcilability of this maxim with a coherent legal system.

But what a legal system! The great issues were the liberty of the potato (p. 97) and the liberty of trucking (p. 128), at a time when, for instance, Frankfurter on the United States Supreme Court was propounding principles of fairness and "due process" with moving and irrebuttable eloquence.[12] But in the whole common law world the one place where Frankfurter would have been laughed to scorn was Phillip Street for "The Sydney Bar had a special, withering contempt for men who set out to change the world. To believe society might be better ordered was seen as naive..." (p. 19). Marr muses in an appendix on Labor's failure to appoint radical lawyers to the High Court (p. 305). It may be forgotten that Albert Piddington (son and son-in-law of Anglican clerics and later President of the N.S.W Industrial Commission) was appointed by Labor in 1913, but was driven to resignation within a month by the Sydney Bar's harassment. It is hardly surprising that such guardians of the law would make "the burglar the caretaker" in 1975.

I disagree with Marr's analysis only in the final chapter *Look on My Works*. The black-letter law reported of this latter day Ozymandias may prove as

9. pp. 27-28.
10. J. P. Reid, *Chief Justice* (1967), *96.*
11. Reid, *op.cit.,* 180.
12. *Joint Anti-Fascist Refugee Committee* v. *McGrath* 341 U.S. 123, 162ff. (1950).

ephemeral as a very expensive automobile which might be marketed as the Mundroola 260 (for leasing only — of course). Fashions change in the law, as in automobiles, but not in the use and abuse of power. Gough Whitlam finished his review of *Barwick*[13] in the hope that with a new Chief Justice "the tide of judicial arrogance and autocracy" would recede in this country. I find such optimism misplaced. Barwick's lasting contribution was to reinforce to us that we are a subject people: our sovereign will is frail, indeed pointless. In such a condition we remain irresponsible for our destinies, someone else is in charge. This was brought home with peculiar vividness by a newspaper headline in the days before the Queen of Australia arrived to open the Palace by the lake. A V.F.L. footballer who had been sidelined for the season for assaulting a player and an umpire was to "seek Royal pardon". There it was — in this most scrofulous of countries, even in the penultimate decade of the twentieth century, the Monarch's touch might cure the King's Evil of being found guilty of head butting an umpire, just as in other days the "royal radicals" called upon that magic to cure the evil of the Banking Bill (p. 59) or any other unacceptable, though lawful manifestation of the will of the Sovereign People. That is Barwick's enduring monument: I see no likelihood of change in the condition.

Concluding that Barwick is taking his sunset ride into a judicial dead end, Marr betrays no bitterness in the treatment of his subject, although the book is anything but a hagiography. Frequent extracts from the original sources are matched by a fine ironic commentary: the irrelevance to Sir Garfield's life of non-black-letter lawyers may be gleaned from the index entry to "Hawke, R.J.". An error of fact is the reference to H.V. Evatt's doctoral thesis being reworked as *The King and His Dominion Governors* (p. 11). The thesis, *Certain aspects of the Royal Prerogative* dealt with the quite separate problems of the prerogative powers and immunities of the Crown in general, not merely those relating to Parliament. It would have astounded Evatt as it should shame us all that Barwick set about creating a new "prerogative" in the position of Chief Justice (pp. 211-212 and *passim*), when the medieval inheritance of "extra-legal" Crown prerogatives was coming under scrutiny.[14] Such a strange Rule of Law to be the supposed centre of a life's work — for position, preeminence, power and privilege all have their "prerogative", and armed with such prerogative, one is of course above the law.

*Steven Churches**

A CONSTITUTIONAL HISTORY OF AUSTRALIA, *by W. G. McMinn* (Oxford University Press, Melbourne, 1979), pp. i-xiii, 1-213.

Law students beginning their study of Australian constitutions have long needed an accurate, readable introduction to the history of the subject. Presumably the same need has been felt by students of Australian history. In many respects, this is a successful attempt to fill these needs. *A Constitutional History of Australia* is clearly and well written. It provides, in only 197 pages, an account of Australian constitutional development, colonial, State and federal, from 1788 until 1978. (No mention is made of the constitutional development of the federal territories.) The text is clear and uncluttered,

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13. *Sydney Morning Herald,* 23 May 1980.

14. *e.g., Statement on Priority of Crown Debts* by the Hon. W. Fife, Aust. Parl. Deb. H. of R. 13 Sept. 1979, 1107.

almost to a fault, since there are no footnotes (although a useful bibliographical note is provided (pp. 200-6)). Especially in the chapters dealing with the pre-federation period, an attempt is made to trace the constitutional developments against their background of social and political conflict and change. In general, assessments are balanced and fair. For these reasons, the book can certainly be recommended as useful introductory reading for beginning law students, and for others seeking a historical undertaking of Australian institutions.

Unfortunately, however, this recommendation has to be a qualified one, especially with regard to the second half of the book. Having to provide for law students an introduction to the history, and to history students an introduction to the law, it seems as if the author's focus changed at federation. The four chapters (pp. 1-91) dealing with the pre-federation period are predominantly historical in emphasis, setting the statutory and other developments in their context, attempting to explain, at least in outline, the motives of the principal actors, and without excessive concern with the many technical legal issues that arose. My only criticism is that these chapters might have been rather longer, and in particular, have included more quotation of primary sources, as a stimulus to further reading and to give a greater feeling for real events, real people. But these chapters are well calculated to introduce law students (many of them with little or no historical background) to historical method.

By contrast, the chapters dealing with post-federation developments (chapters 6-8, pp. 119-197) are predominantly and rather narrowly legal in subject-matter; the account focusses extensively on High Court cases, on legal doctrine, attempts at constitutional change, constitutional conventions, and other formal developments. The attempt to relate the law to the social and political context is less obvious, and certainly less successful. This section (which, inevitably, also suffers from brevity) seems to have been intended more for the history student new to law than *vice versa.* And it is doubtful whether either class of reader would gain as much from it as from Geoffrey Sawer's equally balanced and readable but (from a legal point of view, at least) more perceptive accounts in *Australian Federalism in the Courts,* and *Federalism under Strain.*

Admittedly, one can appreciate the difficulty of treating historically, constitutional developments brought about by the predominantly intellectual process of judicial decision. Constitutional doctrine, though it is influenced by historical and political developments, has a certain autonomy, a separateness. A standard error of historians is to ignore or understate this autonomy (just as lawyers tend to exaggerate it). McMinn makes neither error, but more could have been done to provide a political and intellectual background for the decisions. And, of course, the other elements of the story are even more susceptible to such treatment.

Two other substantial reservations may be mentioned: one relating to content, the other to organisation. The former involves the treatment of the 1975 crisis (pp. 164-8), a topic which a constitutional historian writing in 1978 might have been forgiven for excluding from his coverage. To say that the argument against the propriety of Sir John Kerr's acts is "politically subjective" (p. 168) is to ignore compelling arguments (not dealt with or only mentioned in a cursory way) that the dismissal was premature and violated the cardinal principle of trust between the Crown's representative and the first minister. On both points the action taken in 1975 contrasts unfavourably with Game's dismissal

of Lang in 1932. In the earlier case, clear illegalities were being committed. Lang was given distinct notice of Game's intentions, and the opportunity to resolve the situation or to go to an election as Premier. None of these circumstances existed in 1975. The unevenness of McMinn's account here is compounded by the statement that "the electors [in 1975 as in 1932] endorsed the exercise of the reserve powers" (p. 168): what they did, despite disquiet on the constitutional issues, was to choose a government. It is novel doctrine that a Governor-General is entitled to dismiss a Prime Minister if he believes (even rightly) that he will lose the ensuing election.

The organisation of the work might have been improved by the use of shorter chapters, and the adoption (for the post-1901 period) of a more chronological, less thematic account. Certainly, post-federation constitutional developments cannot be adequately dealt with in three chapters (78 pages).

A few particular points may be mentioned. *Barger's* case seems to be approved (pp. 129-130), but without a clear articulation of the issues. The High Court's role as a *general* court of appeal might have been pointed out (*cf.* pp. 126-7); indeed, the place of the courts in the constitutional structure after 1850 is largely ignored. The effect of the Statute of Westminster, 1931 on Commonwealth competence is probably overstated (p. 152). It is a confusion in terms to say that the Governor-General has "emergency reserve powers" "in strict law" (p. 161). *Dennis Hotels* is not mentioned in the treatment of s.90, though it is more important in practice than *Hamersley Iron* (p. 170). Important distinctions between the "Dixon doctrines" of s.92 and s.90 and those of Barwick C.J. are missed (pp. 180, 188): in both areas, Dixon's view was considerably the narrower. The reference to the "dubious" status in Australian law of United Nations resolutions (p. 185) seems to confuse the problem of the external affairs power with that of the legal effect of treaties and resolutions (the latter not being "dubious" at all). A journalistic description of the 1975 Constitutional Convention as "the first major review" of the Constitution since 1901 is quoted without comment (p. 195), despite the fact that it is wrong.

At the level of assessment, the argument of Chapter 8 ("The Decline of the States") that the States have now dwindled in importance to minor administrative agencies is, I think, overdone. No doubt, the eighty years since federation have seen a marked accretion of Commonwealth power, legal and *de facto,* but the consequent diminution of the States can be exaggerated. State complaints at Commonwealth financial dominance are not made more convincing by the States' failure, for the last twenty years, to impose income tax despite their technical (and at least under Stage Two of the "New Federalism", federal-political) freedom to do so. McMinn's argument is not made more convincing by his construing Wheare's definition of federalism (requiring independence of each level of government from the other) in absolute rather than structural terms (p. 197). No doubt State policies are markedly affected by Commonwealth acts, but the reverse is also true. The attempts, only recently successful, by the Commonwealth to get State agreement to the terms of ratification of the United Nations Civil and Political Rights Covenant are an example. If "Australia has long since ceased to be a federation" (p. 197), then the species is probably now extinct.

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LAWYERS AND THEIR WORK IN NEW SOUTH WALES: Preliminary Report, *by Roman Tomasic and Cedric Bullard* (The Law Foundation of New South Wales, 1978), pp. 1-349.

LAWYERS IN COMMERCE? *by Rosemary Hoskins* (The Law Foundation of New South Wales, 1978), pp. 1-157.

These two reports are part of the growing amount of literature analysing the legal profession, its attitudes and workings and its place in the community.

Lawyers and Their Work records the findings obtained as a result of what was obviously a very detailed survey of the legal profession in New South Wales. The survey was conducted in 1977.

The questionnaire used as a basis for the survey was detailed and the report includes a detailed breakdown of the replies to the survey. The report itself (which occupies just over one quarter of the book, the other three quarters containing the methodology and detailed results) summarises the findings in the following areas. First, the process of becoming a lawyer. The survey examined the background of those who became lawyers, the factors which influenced them to become lawyers, and the process by which they entered the profession. Secondly, the social backgrounds of lawyers. This covered matters such as age, sex *etc.*, occupation of relatives, religion, schooling and political views. Thirdly, involvement in community and professional associations. Fourthly, three different aspects of the work done by lawyers. Specialisation and in particular the extent to which it occurs, the prestige and remunerativeness of the various specialities and their importance. The organisation of lawyers covering matters such as size and location of practice, allocation of time to various types of work, levels of income and overheads and so forth. Both solicitors and barristers are dealt with in this context. The relationship between lawyers and their clients. Matters such as the sources from which new clients are obtained, the nature of the clientele and so forth are dealt with. The final chapter of the report deals with various aspects of litigation. How much time is spent in litigious work, the extent to which barristers are briefed, how work is shared as between solicitor and barrister and like matters.

It is impossible in a review to do justice to the detailed summary of the findings contained in these chapters. Some of the material in the report would be of interest only to those engaged in the practice of the law in New South Wales but much of the material is of interest to legal practitioners at large and one might expect that much of it would also be of interest to persons quite outside the profession who have an interest in the nature, structure and workings of the profession. While it is not the sort of report which one takes as light reading for a holiday, there is nevertheless a certain amount of interesting material about the social backgrounds of lawyers and their own perception of their roles; and this is material which no doubt could be used not just by those concerned to study the profession but also by those wishing to indulge themselves at the expense of the profession or simply wishing to indulge their own sense of humour.

Lawyers In Commerce? is a more limited report and reports on a survey which evaluated the attitude of employers in the commercial sector towards the employment of law graduates.

It is a work of more limited application and relevance. The survey proceeded on the assumption that there were insufficient vacancies in private practice to

accommodate the supply of new graduates. It also proceeded on the assumption that law graduates are not being assimilated into the commercial community to any great extent. These assumptions are probably valid Australia wide.

However, the survey then explored the attitudes of employers and it would seem likely that the attitudes of employers would be affected by the type of law school found in the State, the type of course or courses which it offered and the type of business community in which employment was being sought. One might expect a much greater variation from State to State in these matters. It is also worth noting that the sample was a limited one and involved contact being made with 66 companies (of whom 48 were interviewed) and 50 corporate lawyers (28 of whom completed the questionnaire). Twelve corporate lawyers were interviewed personally.

This report also contains a detailed report of the responses together with detailed findings and analyses of the responses.

The broad conclusion reached was that there are "definite barriers against recent law graduates being assimilated into the commercial section to any great extent". It was found that law graduates were significantly disadvantaged relative to graduates with economics/commerce qualifications. Employers had a somewhat unfavourable image of lawyers and their understanding of the content of law degrees was superficial. They saw law graduates as being suitable largely for specialised legal roles. Corporate lawyers in their turn had some difficulty adjusting to the commercial environment. Areas of opportunity in the commercial arena were seen for the future but these were fairly limited both in the short term and in the long term.

If the report can be taken as valid on an Australia wide basis it dispels that comfortable assumption that a degree in law provides a good stepping stone to a career in commerce. This is a notion which has long been current and has probably remained unchallenged because until comparatively recently employment opportunities in the legal profession itself and in government were such that very few with legal qualifications sought employment in commerce. Where they did seek such employment it was probably sought more on the basis of their having the university degree rather than on the basis of their having a law degree.

The structure of university courses is not easily changed and the overall orientation of legal training even slower to change. This report should be useful reading for those concerned with such matters. This is not to suggest that the findings, even if valid, mean that changes must be made. Simply that those who assumed that a law degree has certain attractions for employers in certain fields should be aware of the doubts that might be cast upon that assumption.

To the general reader the real interest in each of these books lies in the chapters which present the findings in a general way. The authors are to be commended in that they have resisted the temptation to move from the area of reporting findings to the area of broad and tendentious conclusions so often indulged in by those who compile such reports. For all one knows a statistician might object that even these reports go further than the statistical material warrants but to one unversed in such matters the findings as reported appeared factual and cautiously expressed, but at the same time interesting.

What is the place of such books in legal literature, to whom do they appeal and how is their merit assessed? Such works can, perhaps, be classed as

"literature" only in the very broadest sense but each of these books appears to be a worthwhile contribution to the fund of knowledge relating to the profession and its workings. There is some real interest and value in the material for a range of people. In particular *Lawyers And Their Work* should be of value for lawyers concerned about the workings and structure of their profession and its future development. The findings do not provide any immediate answers to the difficult questions confronting those involved in the shaping of the profession of the future but they do provide a fund of useful information against which to test ideas and assumptions. *Lawyers in Commerce?* should be of value to those concerned with legal education.

Primarily but not solely these are reports for those with specialised interests. At the very modest prices marked on the copies reviewed ($5.95 and $4.00 respectively) they are very reasonably priced.

*J. Doyle**

CASES AND MATERIALS ON EVIDENCE, *by P. K. Waight and C. R. Williams* (Law Book Co., 1980), pp. i-liii, 1-860.

The casebook under review is the most recently published of four sourcebooks on evidence addressed to or adaptable for use in Australian law schools. Of these, that published by Professor E. J. Edwards in its second edition in 1974 is no longer sufficiently useful without supplementation in view of the many legislative developments and changes in the common law which have taken place since its publication. The casebook of Messrs. Waight & Williams is therefore in active competition with the source books of Professor Heydon and of Messrs. Aronsen, Reaburn and Weinberg and must be judged in comparison with those works. As the most recent of the trio, the book under review has the temporal advantage of being the most up-to-date, stating the law on the basis of materials published before 1 October 1979.

As the authors indicate in the Preface, the book is intended for use by students in all Australian jurisdictions. Material has been included from all the States and from the Australian Capital Territory with commendable and impressive thoroughness. The comparative material is presented very lucidly and in such a way as to minimise confusion. No doubt the book will be of great value to Australian law students. According to the publisher's accompanying statement, the book is also held out as being useful to practitioners. In the very nature of things, the book is unlikely to appeal widely to practising lawyers except as a reference book of first and brief resort. It is as a text for students that the book under review stands to be judged.

Given the nature of the book, the authors have quite properly refrained from adding voluminous comments on the material extracted; the material is allowed to speak for itself, through the medium of the individual teacher. Some comment has been added to the skeleton of the abstracted material with a view to providing cohesion and fluency. The book does, however, suffer to the extent that the material is not presented at all polemically; editorial comments are neutral and devoid of criticism of the rules of law as tools of policy.

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The student is not likely to be provoked, by a mere perusal of the materials and comment, to approach the rules and policy of the law with an inquisitive, challenging mind. Unassisted by a sceptical instructor, there is a danger that a student will close the book at its final page with an excessive willingness to accept the rules of the law of evidence as the ultimate wisdom. A second objection to the book as a whole is that it tends in places to present the law of evidence as a series of unconnected or disparate categories of rules; no attempt appears to have been made to link the subject matters of each chapter to one another or to present evidentiary rules contextually, that is, as part of a very intricate and complicated procedural framework for the orderly and peaceful resolution of disputes through an adversary process in which the fact-finding phase is of paramount importance. This shortcoming is consummated at the end of the book where no attempt is made to tie together the myriad of rules emerging from the preceding pages. Again, this is an objection that can be obviated by the individual teacher.

At a more specific level, there are other features of the book which may leave individual teachers of evidence with a feeling of some disappointment. First, Chapter 3 (which deals with the Burden and Standard of Proof) does not allude to the debate, still current in Australia, whether a civil tribunal of fact is entitled to find a fact proved if the allegation that the fact happened is shown merely to be more probably true than the denial of the allegation, even if the court has no belief that the allegation is true. This debate has been kept alive by Sir Richard Eggleston in his book *Evidence, Proof and Probability* and by the decisions of the High Court in *TNT Management Pty. Ltd.* v. *Brooks* (1979) 23 A.L.R. 345 and in *Goodwin* v. *The Nominal Defendant* (1979) 54 A.L.J.R. 84. This shortcoming is offset by the very lucid presentation, at the commencement of this Chapter, of material relating to the nice distinction between the evidential and tactical burdens of proof, material which without commentary or explanation creates confusion in many students.

Secondly, the chapter on "similar fact" evidence (Chapter 9) is introduced somewhat unsatisfactorily. While the "classical" formulation of the relevant rules of law is rightly challenged by the authors, as productive of an unworkable reciprocal tension and of many inconsistent and irreconcilable decisions, the formulation substituted in its place by the authors may strike some as being rather simplistic and insufficiently detailed to provide case-to-case guidance to students. The explanation at p.396 of the connotation of the term "prejudice" is not altogether satisfactory. This branch of the law is one with which students have severe difficulty and it is, therefore, essential that it be presented as precisely as possible.

Thirdly, the material on "prior determinations", that is, on prior convictions and acquittals, is included in the chapter on Opinion Evidence. No explanation is offered for this. The treatment of issue estoppel in civil and criminal matters is rather cursory. For example, there is no material as to the effect which must be conceded to an acquittal in subsequent criminal proceedings despite that this area is one of continuing controversy in Australia.

Finally, in Chapter 15 (which deals with Hearsay), no allusion appears to rules of court which authorise the admission of hearsay in certain forms. (See, for example, Federal Court Rules o.33 rr. 2, 3; Family Court Regulations, reg. 108; N.S.W. Supreme Court Rules Part 36, r.4(2); South Australian Supreme Court Rules o.30, r.6(2)(d)). This minor oversight justifies comment only because the material in the casebook is an almost exhaustive collation of statutory laws.

Taking the work as a whole, however, one is compelled to congratulate the authors on their achievement and to admire their thoroughness and perseverance. In order that the utility of the casebook be sustained, it is hoped that biennial supplements will appear to alert those using the book to those inevitable but baneful changes in the law which, to the dread of every writer, all too soon render every legal work obsolete.

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