THE CRIMINAL INJUSTICE SYSTEM

edited by John Basten, Mark Richardson,
Chris Ronalds and George Zdenkowski
Sydney: Australian Legal Workers Group, 1982
321 + xii pp, $14.95
ISBN 0 95947 2711

THE PRISON STRUGGLE

by George Zdenkowski and David Brown
Melbourne: Penguin, 1982
440 + xxii pp, $14.95
ISBN O 14 022324 X

THE RAY DENNING DIARY

by Ray Denning
Box K153, Haymarket: Ray Denning Publications, 1982
200 pp, $4.95

WILFUL OBSTRUCTION

by Tony Vinson
Australia: Methuen 1982
232 pp, $11.95
ISBN 0 45400 3684

THE STATE OF THE PRISON

by Mark Findlay
Mitchellsearch Limited, 1982
182 pp, $12.95
ISBN 0 9595987 5 8

There is no doubt that the last 15 years has witnessed an upsurge of debate and struggle in and around criminal justice and the legal system more generally. This has in large part been a struggle born amongst and waged by "client" groups,

traditionally thought of as quiescent and consigned to the margins of the political process: women, blacks, prisoners, mental patients, tenants, welfare recipients, youth, *etc*. The directions and forms that these struggles have taken locally have been among the most interesting, imaginative and successful to be found anywhere. This has been especially so of criminal justice and prison-related struggles and it is therefore not surprising that there is now emerging a literature which chronicles and takes forward these struggles. It is witness to its strength and vitality. Herein lies the collective significance of these books despite their many differences and the unfortunate fact that for the most part they deal only with events and experiences in New South Wales.

Space does not allow for a detailed and critical review of each of these books. Therefore, the context of each will only be briefly surveyed before some of the important issues and arguments they pose in common are addressed in more detail.

The Criminal Injustice System (hereafter CIS) is an edited book of some of the papers presented to a conference of the same name organised by the Australian Legal Workers Group and the Legal Service Bulletin and held in Sydney in February-March 1981. The papers are grouped around three areas — police interrogation, trial procedure and the politics of reform; and a short introduction has been added to each. An important and useful part of the book which conveys something of the spirit of the conference is the inclusion of edited transcripts of the discussion from the floor of the conference. The papers cover the following ground: police verbals; the results of empirical studies of police interrogation of women homicide offenders and confessional evidence in the district court; a detailed analysis of the law, administrative rules and procedures and procedures in the different states relating to the interrogation of aborigines and children; controlling prosecutions; the withholding of exculpatory evidence by prosecutors; representation and legal aid; the jury; the Beach inquiry on the police in Victoria; some of the problems associated with achieving law reform. These problems do not reflect the random interests of academic and practitioners but, on the contrary, have emerged as significant topics of debate because of real struggles being waged around them by prisoners, their supporters and legal workers. In this respect, it is significant to note how often the issue of police verbals is alluded to in *The Ray Denning Diary* and *The Prison Struggle* as the focus of collective action and protest by prisoners.

From the perspective of struggle, and not merely that of academic debate and reform, the interrelatedness of the various issues becomes clear. The various papers in the CIS collection deal with the rules, procedures and practices which influence and determine the construction of outcomes in the criminal process and thus also the constitution of a criminal population. It is these rules and practices, more than simply some isolated realm of individual or social pathology, that constructs the social reality of crime in our society, that distinguishes between the keepers (routinely immune from the "normal" processes of justice despite revelations such as those of the Nagle Royal Commission on New South Wales Prisons and the Beach and Lucas Police Inquiries) and the kept, that creates the conditions in which the physical lives and security of some are made dispensable and that reproduces what Michel Foucault has called "an enclosed milieu of delinquency". That this is not the product of some grand conspiracy or design makes it all the more important to conduct specific analyses and contest the system at particular points.

It is against these processes and their effects that the struggles of prisoners and their supporters have been waged.

The Prison Struggle by George Zdenkowski and David Brown chronicles this struggle as it has emerged in New South Wales over the last decade. It is a struggle in which they have been vitally involved. *The Ray Denning Diary* details from the inside the personal struggle of one militant New South Wales prisoner between mid 1978 and his escape in April, 1980. Tony Vinson's book also deals with the recent past and is an insider's account of a different kind, being his memoir of the period he served as Chairman of the New South Wales Corrective Services Commission. This was a period of intense political and public controversy and conflict in and around the prison system following the revelations and recommendations of the Nagle Royal Commission into the New South Wales Prison System. The Prison Struggle, aside from addressing a range of political, theoretical and legal issues relating to the prison, provides a detailed account of the earlier period of struggle to bring about this Royal Commission following the Bathurst bashings of 1970 and the subsequent destruction of Bathurst prison in 1974. It discusses the course of events, the organisations involved, the findings of the Commission and its aftermath within a framework of analysis in which the struggles of prisoners, ex-prisoners and their supporters are seen as the crucial lever for change, and the essentially political nature of their struggles is stressed.

Mark Findlay's book is more narrowly focused. It discusses prison policy in New South Wales, again in the context provided by the Royal Commission. It summarises the law, policy and practice relating to a range of issues such as prison security, internal discipline, prison industry, *etc.* There is a particularly useful discussion of the Department's confused and contradictory thinking with respect to the building and proposed use of Katingal, the super maximum security prison closed only after a sustained campaign by prisoner organisations despite the recommendation for closure contained in the report of the Royal Commission. The book is focused very much on the Royal Commission document itself, although there is a final chapter which deals with the politics of prison reform.

These books deal with many of the same issues, some of which will be discussed at a later point, but they are markedly different in their approach to reform. Tony Vinson documents from the inside the political, bureaucratic and industrial frustration of his attempted implementation of the Nagle reforms (the spirit as well as the letter.) Here the perversity, conservatism and incompetence of politicians, prison officers and sections of the media are documented. These are the manifest obstacles to humane prison reform but it might be questioned whether a well-intentioned reformism can successfully ameliorate this most resilient and intractable of institutions. It might be that the prison itself effectively isolates those persons in its charge politically and ideologically, as well as socially, such as to enable a range of differential processes (discipline, *etc*) legitimately to operate with respect to them. Politicians are no less subject to the effects of the prison on our social organisation. "Humane" reform cannot remove the status of a criminality that is at once established and reproduced by the prison and which in turn institutes a differential regime of penal, police and legal practices to combat crime. Claims to equality, humanity for *all* notwithstanding, the effect of the prison in distinugishing a "less eligible" class in our society is real. In important respects, these effects can only be

contested by a movement in which prisoners themselves play a crucial role in exposing and resisting the manifold disciplines and subterranean practices that secure their status inside and outside the prison.

Beyond the events described and the analyses made, these books individually and collectively open up a whole range of issues for debate amongst those interested in reform of the criminal justice and penal system. The balance of this review seeks to identify and discuss some of these issues.

Theory, Political Strategy and Reform

The Prison Struggle is the only one of these books which is explicitly theoretical. The first four chapters are devoted to a critical review of some of the principal areas of debate within contemporary radical criminology and penology, including historiographical work on the prison,theories of the state, law and punishment and the politics of crime. These chapters address important writings within social history and contemporary and classical Marxism and the recent influential work of Foucault. Some of the specific issues raised in these chapters (which inform the analysis in the rest of the book) will be discussed at a later point. Beyond a few comments I do not wish to reiterate the case for a theoretical approach made out in *The Prison Struggle* and again by David Brown in the discussion sections of the CIS collection (see pp 300-302). Arguing for theory in general or in the abstract will always encounter scepticism and retorts in the form of accusations of elitism, obscurantism and irrelevancy. Sometimes this may be valid, but I have recently heard many lawyers, in particular, who would be perfectly at home reading the Australian Law Journal and such like, make such criticisms of the early chapters of *The Prison Struggle* as if their difficulties in reading it resided in the text rather than their unfamiliarity with its language, concepts and unwillingness to grapple with them. If anything I believe the authors make too much concession to the view that theory is a separate sphere above or opposed to concrete and "practical" debate. There seems to be an effort to avoid contamination of the rest of the book with theoretical issues and problems with the twofold result that certain inconsistencies and confusions in formulations occur in different parts of the book and theory does indeed emerge as separate and ancillary to the main issues.

The point that needs emphasising here and which is crucial to the way in which the theory/practice debate is conducted or appears implicitly in the pages of these books and more generally, is that the rejection of theory is itself a theoretical attitude. It entails (varying) assumptions about how you know and change the world which are formed or influenced by material conditions and in turn influence political action. The nub of the matter lies not in arguments for and against theory so much as in recognising that different theories and approaches are possible and co-exist, but often with very limited efforts to articulate and openly debate these differences. These differences do have consequence for the way reform and politics are approached.

This is not in any way an argument in favour of general theory for its own sake and does not carry the assumption that political problems can be resolved theoretically. In fact, it is hard to disagree with Virginia Bell's argument in her general comments on the CIS conference for a concrete and specific approach to reform (p 306). However, here (at least) just as implied criticism of "broader"

approaches refers to proponents of theory it could also be extended to (virtually) all the papers at the conference for whilst they deal in great detail with specific legal issues, problems and processes, they all rest upon an unarticulated bedrock of (theoretical) assumptions with respect to the existing mechanisms and aims of change or reform. I am sure (and there is evidence in the CIS collection) that this silence conceals considerable differences in the understanding of different issues of the expectations, goals and methods of reform. For example, it is implicit in many of the papers and explicit in some (*cf* Sallmann's article on the Beach Inquiry) that a solution to problems of injustice would lie in the restoration of the role of law or legal control over the criminal process: the effective recognition of the basic rights of suspects, the provision of safeguards (in relation to interrogation, for example), the introduction of procedures of review and duties of disclosure with respect to the prosecution, *etc* all in the name of guaranteeing that equality of treatment before the law and impartiality that is enshrined in the ideology of our legal system. Apart from such a general liberal concern to bring practice into line with ideology it is unclear what other substantive aims these participants regard as important: these convictions, wrongful or otherwise? (see p 3) more convictions? (see p 194) merely fairer procedures by which convictions are obtained? With other papers I suspect there is a more deep-seated suspicion of both the practice and ideology of the criminal justice system even if exploring the gap between them is regarded as important to expose injustice and initiate change. The title of the conference and the book certainly suggest this to be the case. More fundamental change might here be regarded as necessary to actually combat "injustice", the problem being as much in the substantive criminal law and *who* gets criminalised as in the procedures by which it is done. Peter Duncan's paper is the only one that explicitly adopts such a wider analysis, seeing the necessity of a socialist critique of what he argues is a class weapon and class justice. I will suggest below what I think are the problems with his arguments. Suffice it to say here that these are real differences and that, although it is necessary to have specific analyses and to avoid reducing all the issues to mere epiphenomenon of the economy or capitalist state, these questions of analysis, strategy and aim need to be debated if what is otherwise a shopping list of specific legal reforms is to be articulated to a wider politics. This by the way is not an argument for the imposition of some false unity, the creation of a political vanguard or some artificial resolution or suppression of the differences where they exist, only for a more open and political approach to the issues at hand. The final chapter of *The Prison Struggle* dealing with a political strategy for prison struggle (questions of priority, alliance, *etc*) is an example of the type of political and strategic debate that needs to be extended into forums such as the CIS conference and the Legal Service Bulletin and organisations such as the Australian Legal Workers Group (whatever the particular direction the debate actually takes in consequence).

The type of analysis that is brought to bear upon issues does have political implications and effects and this is so whether it is explicitly "theoretical" or not. In this respect it is important to turn to some of the particular conceptions of and attitudes to reform and the processes associated with it that are to be found in some of these books and articles.

The Problems of Reform

Firstly, within the CIS collection Peter Duncan's paper is directed specifically at law reform. As suggested above, he adopts a radical posture, arguing for the necessity of fundamental change: "Legal reformers have failed. What is needed is a sweeping and fundamental change in the political, social and economic system" (p 291). This apparent rejection of reformism is accompanied by more specific comments on the problems confronting social reform governments in relation to law reform. Peter Duncan draws closely upon his own experience as South Australian Attorney-General. He refers to the role of law reform commissions, the importance of a committed and and knowledgeable personal staff in any reforming minister's office and the politics of drafting. All of these matters are important in understanding how more favourable conditions might be brought about in relation to the actual institutional process of law reform, but given his initially general arguments, the nature and limits of his more particular comments are a little surprising. He suggests that: "...there has been no fundamental law reform because no widespread community concern to reform the law has developed in this country" (p 298). This seems to assume that some generalised and effective community concern is possible quite independently of the political and organisational means by which it might be represented at levels of public debate, policy formulation and law making. We might in this context have expected a more critical appraisal of the Labor Party (not just Labor Governments or Ministers) as the principal national political vehicle of reform in this country. An alleged gulf between Australian Labor Party (ALP) reformism and so-called "public opinion" is often lamented by supporters of the former, but the ALP itself does not fulfil a mass organisational and educative role in relation to the community; it is not the carrier of alternative values in the sense that it works at constructing a progressive consensus around progressive policies, around the possibility of alternative forms of economic, legal and social regulation. Rather, as an electoral machine it is permanently caught up in seeking after the often illusory and certainly limited and temporary rewards of government rather than in any way waging the more fundamental and permanent ideological and political battle for a progressive hegemony. The latter would seem to be an essential political prerequisite and aspect of the radical change in a socialist direction that Peter Duncan regards as necessary. But his image of socialism is not as a *process* that begins in the here and now with critical political debate, especially around the role and nature of the ALP itself, but something to be instituted, or which will magically come into existence,at some unspecified time in the future. This permits him then to fall back into a narrow, electoralist appraisal of the specific institutional aspects of the reform process, claiming an unfettered ministerial control over these processes as the way forward, as if the structural constraints elsewhere said to be fundamental can be thereby made to disappear. The institutional processes are crucially important, but if we are to transcend a contradictory oscillation between traditional reformism and the complete rejection of reform, then the analysis must be conducted in wider terms. The institutional processes of drafting, *etc* must be taken seriously but not in terms which reaffirm reform as the property and privilege of a handful of politicians and as a purely legal-bureaucratic process isolated from other forms and sites of struggle. In this respect his argument to the effect that because law reform entails

political judgments these should be made only, or to the maximum extent possible, by the government or within the ministerial office untrammelled by independent analyses, proposals and initiatives such as those of law reform commissions needs to be sharply questioned given that the Labor Party can be as prone to political inertia once in government as the conservative parties.

The dichotomy between a commonsense appraisal of specific issues and policies on the one hand and general ideological or political statements and analyses on the other, is also apparent in *The State of the Prison*. Whilst the bulk of Mark Findlay's book deals with specific events and areas of policy the final chapter addresses itself to the politics of penal reform. He seeks to locate the prison and penal reformism historically and structurally as fulfilling certain important functions in the reproduction of capitalist society. Here, it is argued, reformism and its accompanying rhetoric have a role to play in both shoring up the legitimacy of the prison during those periods when its contradictions become manifest and diverting energy and attention from a more thorough ongoing critique of criminal justice. Reform is thus regarded as a process of incorporation and neutralisation of the prison's antagonists. In the context of a *political* discussion of prison reform I find this unhelpful, especially since it contrasts sharply with the constructive discussion sought to be offered elsewhere in relation to policy and reform in specific areas. If reformism is a matter of the ceaseless reproduction of what is basically the same apparatus, in perhaps different but equally objectionable forms, then why seek to adjudicate between alternative policies of control and amelioration. And on what basis can we do so? Our politics and analysis need to not only inform some general vision of the future but also be constructed around and inform responses in the particular instance and reform in the day-to-day sense. Such politics cannot be read off from a general abolitionist position.

Within any consideration of reform in the criminal justice area an obvious obstacle stands out, especially over recent years: the organised resistance and growing militancy of criminal justice personnel, in particular prison officers and police. As the principal opponents of Tony Vinson's efforts at penal reform much of his book documents the campaigns of prison officers to frustrate his policies. His book is a useful descriptive account of the activities of the Prison Officers Association in his period of office which fortunately will probably be widely read. Where it is lacking is in presenting any analysis of the phenomenon of prison officer militancy in New South Wales and its rise in the recent past. Although his book is a personal account one might have expected him to draw out some conclusions or lessons and present some analysis which would shed light on the process of penal reform more generally. After all, the militancy of prison officers in the recent past is not confined to New South Wales or Australia; it is emerging as one of the central penal issues within many western penal systems. The need for an analysis of the nature of the political and industrial role of prison officers is obvious. It is perhaps precisely because Tony Vinson's book is a personal account that he tends to interpret many of the forces ranged against reform as merely perverse, ignorant or weak-willed opponents of *his* enlightened policies rather than bringing a wider analysis to bear upon the issues. So far as the prison offficers are concerned neither *The Prison Struggle* nor *The State of the Prison* set out to a deal with the issue in any detail although both acknowledge the absolute necessity of work in this area.

A starting point must be to recognise the relative autonomy of the struggles waged by the prison officers both as individuals and collectively. It is no longer adequate to treat the administration as monolithic; the internal conflicts and contradictions must be explored and exploited politically. At one level Vinson's book demonstrates forcibly the fact of these conflicts but because of its personalised nature it tends to obscure their more deep-seated, structural aspects which certainly predate and survive his period in office.

Similar points might be made about the growing political pressure group role of the police in the Australian states and overseas, although beyond a few obvious tendencies you cannot generalise about police and prison officers together. Peter Sallmann in the CIS collection documents the response of the police to the Beach Inquiry into various corrupt and illegal activities of police in Victoria and the political and other effects that this response seems to have had. The militancy of the response was remarkable although Sallmann suggests that some internally generated reform was apparent in the aftermath of Beach. He interprets this as a short-term tactic aimed at mounting pressure for increased police powers, for this seems to be one of the only ways of making sense of it at a time when the police were riding the crest of a wave of public power. However, this power may be more apparent than real. Their reaction might be equally consistent with a sense of isolation, frustration and confusion. In this respect, an exploration of internal relations and developments is necessary and might be revealing. There are references to conflicts between the rank and file and the Commissioner but no real attempt to take internal contradictions seriously. In this respect the recent hardline campaign of the Commissioner against the jury system *etc* is not inconsistent with simultaneous pursuit of a policy of internal reform. This tactic of a visible external campaign around police powers and the rights of accused is precisely the approach adopted by Robert Mark in the early 70s when he was trying to clean up the metropolitan police in London. This is not to suggest that the two situations are identical but I think it is important to reiterate the need to break from a monolithic view of state apparatuses such as the police and the prison system.

Justice, Rights and the Rule of Law

As suggested earlier a general theory of law in society is not adequate to inform specific responses to the many issues raised by these books. That is also true of the theory of law that is implicit in references to the "rule of law" and general notions such as equality, neutrality, impartiality, *etc.* a view of the law which sees it as a seamless web that might be stretched to cover all groups and instances. Often this is the conception of law present in legal analysis: a situation becomes worthy of analysis because inequalities between different groups (or parties to an adversary process) are revealed, and reform in turn becomes a process of (re)instituting equality. A corollary of this notion of legality is the view that wherever the law is seen not to apply or extend there lies a sphere of unrestrained arbitrary power, perversion of the truth, *etc.* Two areas, the interrogation process and the prison, have been the focus of such arguments in the recent past. Although the analyses presented in various sections of these books are uneven they do indicate the inadequacy of arguments for the generalisation or extension of the rule of law as a panacea to the problems that arise in these areas of criminal justice.

Nina Stephenson concludes from her study of court papers from a sample of criminal trials in the district court that: "The study cases indicate that the right to silence, albeit supplemented by the requirement to caution a suspect, fails to regulate, in any meaningful way, the relationship between the suspect and the police during an interrogation ... the standard police procedures and interrogation methods, and the legal rules which purport to regulate them, at times operate to negate the right" (pp 131-2). The other papers in the CIS collection on interrogation (dealing with women homicide offenders, Aborigines and children) and the police practice of verballing suspects reach a similar conclusion. Stephenson's paper is particularly useful as it provides a practical examination of some of the strategies employed in the production of confessional evidence (and thus importantly of convictions) which goes beyond an analysis in terms of the corruption, brutality or abuses of individual police officers. She demonstrates that whilst law provides only a limited guide to the processes in question they are not simply a realm of lawlessness or unrestrained power: there are determinate practices, procedures and techniques that are employed to produce confessional evidence. Take this with the fact that confessional evidence plays an absolutely central role in criminal trials and the securing of convictions and it becomes clear that demands for reform in this area have ramifications far beyond the matters of procedure that are involved. Invocations of the rule of law or demands for the introduction of technological aids such as tape-recorders do not suffice as strategies to combat what is a "regulated" domain of techniques and practices for the production of confessional statements and criminal convictions. Therefore, as Neil Rees points out in his discussion of interrogation of Aborigines, it is absolutely essential when formulating proposals in relation to the insertion of new agents and controls (such as lawyers, or a prisoner friend system) into interrogation procedures, to closely define the agents in question, the role they are to play and the powers of capacities necessary to achieve these ends. Analysis and reform of interrogation processes which fails to address their complex determinants and effects both theoretically and politically risks being a hollow exercise.

All of the prison books see claims for equality of treatment of prisoners before the law as central to the reform struggle. The recognition of prisoner's rights is regarded as a basic goal of reform, a necessary element in any prison system which recognises the "... inherent human dignity" of its inmates and that their freedoms should be limited only to the minimum extent compatible with the fact of their imprisonment and the maintenance of security (Vinson p 48). Chapter 8 of *The Prison Struggle* documents the extent to which this has not been the case in the past by examining judicial disinterest in internal prison life in this country and elsewhere and the apparent contemporary reversal of this history of non-intervention through largely prisoner-initiated litigation. There are problems with the notion of the prisoner "... as an incarcerated citizen" who has simply had his/her civil rights unnecessarily and wrongly suspended. In the first place, the prison is not so much a "legal vacuum" as a regime of subjection incorporating detailed rules and regulations for the surveillance and discipline of its inmates and to some extent its own administrators and officers. It is not a free-for-all, evidence to the contrary notwithstanding. The discussions of rights as a matter of self-evident humanity which should be "extended" to prisoners risks lapsing into irrelevancy through

ignoring the fact that competing claims such as security *etc*, rather than being merely discrete and quantifiable entities, permeate every aspect of the organisation of prison life: a set of rights, if they are to provide meaningful security to prisoners, cannot be simply grafted onto existing prison relations. Ray Denning's account of his struggles with the legal system reveals the obstacles to the assertion of any "right" that arise as a matter of course in the daily administration of prisons. Secondly, it must be asked who and where is the model of the free citizen of rights upon which such claims to rights in the prison are based. An examination of legal practice beyond the walls would reveal no such universal subject and set of principles, as many of the papers in the CIS collection dealing with law and practice as it relates to citizens at liberty demonstrates. The specificity of the prison, and thus of possible alternative forms of legal administrative regulation, must be addressed if there is to be a redefinition of the legal status of prisoners and this task not left to a few tenacious prisoners, such as Ray Denning, to advance in the form of (physically) costly personal actions.

The other issue around which claims to equal legal treatment has been most crucially posed in the recent past is the criminal prosecution of prison officers in the light of the findings of the Nagle Royal Commission. It perhaps throws up more obviously, if ironically, some of the problems of advancing such claims in terms of equality. *The Prison Struggle* provides the most detailed empirical and theoretical discussion of this issue, devoting a lengthy chapter to the different standards of justice that apply to prison officers in their treatment of prisoners, and elsewhere discussing the problems associated with the prosecution of officers named as responsible for acts of violence by the Nagle Commission. In the theoretical section of the book, claims to equal treatment are discussed and analysed, not as the bedrock of some universal legal discourse, but as the peculiar form taken by bourgeois capitalist law and deriving from the formally equal status of economic subjects in commodity exchange relations (ch 3). Claims to equal legal treatment can therefore be seen as affirmations of capitalist social and economic relations and the substantive inequalities upon which they rest. The authors are not uncritical adherents of this view and take the issue of prosecution of prison officers as posing real political problems for such a general theory of law. However, they are mindful throughout the book of the problems of pursuing individual remedies, prosecuting a few prison officers, *etc* as this is seen as adding weight to the familiar "rotten apple" thesis and detracts from the view of prison (and for that matter police) violence as systemic. "Witch-hunts against individuals are a far from ideal solution — particularly as such action legitimates and reinforces notions of individual fault and deflects attention from institutional abuses" (p 185; See the stronger formulation of this argument on p 225). Yet in the early part of the book a general abstentionism based on the abstract theoretical grounds alluded to above is eschewed in favour of a more tactical approach in which subjecting prison officers (and agents of repressive state apparatuses generally) to the sanction of the criminal law is seen as necessary even though such claims must be clothed in the garb of legal equality:

> In this struggle some demands will undoubtedly be formulated in terms of 'equality before the law', backed by references to examples of differential

> application and double standards of justice...Such formulations are part of the currency of the popular debate. To attempt to relocate totally or transcend this debate by adopting the purist, abstract and formalistic posture that such demands not only are contained within the bourgeois legal form but actually strengthen it, is to forfeit any possibility of practical, here-and-now political intervention, of participation in bringing about change. Quite simply it would lead to political irrelevance and the sort of 'worse is better' positions unfortunately too common on the left (p 33).

It is possible to agree with the general thrust of this reasoning — that an abstentionist approach in respect of legal remedies is politically unhelpful — and yet reject entirely that such claims should be, or can successfully be, couched in terms of equality. There are two prongs to my argument. In the first place, the failure to successfully prosecute prison officers following the Nagle Royal Commission *should not* be regarded as simply a consequence of political conspiracy and/or gutlessness. (Likewise the question of prosecuting police in similar circumstances: see Sallmann's discussion of the Beach inquiry in CIS). The findings of Royal Commissions and "what we all know" about the existence and prevalence of prison and police violence has to be distinguished from the process of proof of specific illegal acts committed by particular individuals before a court or tribunal. Here it is often the available modes of investigation, legal and administrative rules and rules of evidence that militate against successful prosecution, and not simply the individual politicians, lawyers, magistrates who preside over the processes. And so, just as in the case of prisoners' rights, the conditions of effectivity of legal and other safeguards need to be defined and established in relation to specific institutional sites. It is not a question of applying or extending the general criminal law. Indeed in relation to those sites, police and prison in particular, which are characterised by informal codes of secrecy, solidarity, *etc* it would probably be necessary to modify legal rules, such as the right to silence, if the criminal law were to be employed as the principal means of control. Of course, specific apparatuses of discipline along the lines of those that presently exist might be a preferable focus for reform. The point is that the debate must be advanced around specified forms of legal and institutional regulation which is not served by advancing claims to legal equality. The second point relating to the dangers of this should now be apparent: if the language of equality is to govern debate over reform it will be very difficult to argue for institutionally specific measures of control, *eg* special rules of disclosure to apply to police in relation to complaints against them if that is regarded as necessary. Indeed there is, I think, a growing realisation on the part of some police that the "concession" of a wholly independent mode of investigation and prosecution of complaints against police would bring more than its fair compensation if they retained, as they insist it is fair for them to do, the rights which apply in relation to all suspects. (Certainly, this is one situation in which such rights could provide effective safeguards for the individual.)

This leaves open the question of whether the political significance of campaigns and demands around police and prison officer violence and malpractice lies in advancing them rather than actually realising specific legal and administrative change. Thus the focus may be upon "expose and delegitimation" of a system that

is regarded as endemically corrupt, violent and beyond reform. The problem with this position is that it is constructed upon an unprovable, though self-supporting, thesis. Insofar as specific reforms are not struggled for now the thesis will be confirmed. But if we cannot simply locate the prison (and other institutions of criminal justice) by reference to some general theory of the laws of motion of capitalist society there is no necessary guarantee of an alternative penal future inscribed in the processes of history. In this respect, struggles around the prison and criminal justice must not only retain a certain political autonomy but must also confront questions of what forms of legal, penal and social regulation are desirable.

Politics, Crime and Law and Order

Individuals and organisations on the liberal-left wing of the political spectrum have always found it difficult to talk about questions of control, seeing demands for law and order as inevitably reactionary and the preserve of the right. References to "the crime problem" are usually met with a mixture of denial, loose sociological arguments about crime being caused by poverty and other social conditions and a demand that, in any case, certain individual rights and liberties must be preserved in the face of changing forms of control. Such arguments have a very limited purchase on crime debates, as the invocation of abstract notions of right and freedom just do not address the genuine and well-grounded fear of crime that is to be found amongst the mass of the population. This is not to suggest that such fear is not socially constructed and mediated — through, amongst other things, media treatment of crime (see ch 13 of *The Prison Struggle)*, political campaigns around law and order and a whole range of other popular and academic discourses. However, this merely highlights the absence of any alternative popular and political intervention which seeks to redefine the problem in terms which recognise that it is a problem of order and control and not merely one of injustice. There are exceptions: campaigns by women in New South Wales and some other states have recently made such inroads on the traditional attitudes and silences with respect to domestic violence. Usually though, and despite what I think is a widespread, if largely unarticulated and inchoate, dissatisfaction with the agencies of criminal justice (especially the police), it is their spokespersons and organisations that are able to intervene popularly and effectively on crime issues often because they seem to be the only ones saying anything *effective* about policing and crime control.

It is possible to make arguments and demands with respect to crime control, recognising the serious problems and insecurities it presents, without mimicking their position. Without such arguments and demands it will remain difficult to build popular support and broaden the struggle for the criminal justice and penal reforms, anti-verbal campaigns, *etc* that are dealt with in these books.

Russell Hogg