

present-day law it is necessary to trace developments since the end of the eighteenth century. The first third of the book is devoted to the English background, while the remainder is about Australian legislation and its interpretation. In this latter part there is a treatment of such things as the law governing industrial agreements, awards, subscriptions, fines and levies, voluntary and compulsory unionism, government control over trade union affairs and legal controls of industrial conflict. The book deals not merely with federal legislation but also the legislation of all Australian States.

In sum, this is a very useful work. Mr Portus has handled a vast amount of detail in a manner which must compel appreciation by anybody who has had to investigate this area of the law.

As our society becomes more dependent on the highly trained technologist and higher education becomes more general the structure of the work force will undoubtedly change and it will then be necessary to re-examine the basic assumptions of our trade union law. A conspectus such as this book provides is a prerequisite for that task.

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*Studies in Jurisprudence and Criminal Theory*, by JEROME HALL, Distinguished Service Professor of Law, Indiana University. (Oceana Publications, New York, 1958), pp. i-vi, 7-295, index 297-300. Price \$6.

In this volume, Professor Hall collects fifteen discrete essays he has made over the years into the field of jurisprudence. Only three of them are appearing for the first time. In the foreword he expresses a hope that the reader will be persuaded by cross-references in footnotes and index to view the book as an integrated unit. This hope is not realized. The field of jurisprudence is a limitless one; and, although in Chapters I and II the author makes a sincere but wordy gesture towards an 'integrative jurisprudence', he himself studiously avoids attempting to reduce the field to a simple binding formula. The reader will be disappointed if he looks for any such simple approach by which he could 'tab' the author.

But this is not a defect in the book. On the contrary, its value is much enhanced by the fact that the author, a jurist whose learning has been internationally appreciated for many years, can still avoid the pitfall of offering a misleadingly simple key to an essentially complex field. As we are assured by the confessedly great Parkinson, 'A perfection of planned layout is achieved only by institutions on the point of collapse'. Hall is more concerned to sharpen the tools of legal analysis; for until that is done we are not ready to tackle the larger integrative problems.

This collection can readily be divided into two parts—

Part I: Chapters I to IX, Jurisprudence—General.

Part II: Chapters X to XV, Jurisprudence—Criminal Theory.

Perhaps the most captivating essay in Part I is Chapter VI, a discursive ramble through 'Culture, Comparative Law and Jurisprudence'. In this very readable piece, Professor Hall draws interesting comparisons between the American and Korean legal climates. Then he pursues a tangential study in semantics, criticizing the excessive philosophical concentration on words as self-sufficient integers, and exhorting us to get down to the only profitable pastime, that of discovering and making objective a specific identifiable referent for each word.

The author's special skill is evinced in Part II, Criminal Theory, note-

worthy for its forthright treatment of all the more fundamental problems of criminal science. One gains the impression at times, however, that one is being regaled with a succession of apparently logical conclusions from years of intensive thought, rather than with the reasoned steps of an argument. This makes for good reading when one already subscribes to the asserted dogmata, but is frustrating to the serious agnostic or unbeliever who would dearly like to be let into the secret processes of the author's mind. The agnostics (we who are still students) end up with a set of faiths which we are in no position to defend; and the unbelievers (psychiatrists and others ubiquitously assailed by the author throughout what must appear to them to be a series of polemics) cannot clearly see the points at which they ought to join issue.

The longest essay, Chapter X, is a penetrating analysis of 'causation' in the criminal law. Here, Hall isolates the three important meanings of 'cause' so far as the law is concerned, incisively clearing away several irrelevancies and misconceptions. Just how elementary is legal analysis of causation is exhibited in this paper. For with all his purity of approach, the author still employs an abandon of verbiage which is frightful after the clear enunciation in Chapter VI of his views as to what is required for the development of a science of the law. As substitutes for 'cause' and 'causation' he uses variously: agency, antecedents, cause for which the defendant is responsible, cause in general, cause-in-law, condition, connection, contribution, control, determinants, element in cause, factor, force, incentive, influence, invariable antecedent, invariant co-variation or order or succession, means-end action, motivation, recurrent or recurring pattern, regularity, and sum of all the necessary conditions. As qualifying adjectives he uses: actual, antecedent, autonomous, but for, contributory, direct, effective, efficient, essential, external, final, foreseeable, formal, imputable, inadvertent, insubstantial, intervening, involuntary, irrelevant, justly attachable, legal, legally significant, material, mechanical, mere, natural, necessary, negligent, new, non-voluntary, operative, probable, proximate, relevant, *sine qua non*, subsequent, substantial, sufficient, supervening, teleological, and voluntary. Since, compared with other authors, this is a modest list, the prognosis for the law is not good.

The fundamental meaning of cause in the criminal law, says Professor Hall, is the control exercised by human beings of lesser animals and physical things (pages 162-163). Although it is not immediately apparent, this understanding of causation is in my opinion itself determined by our generally held (if not articulated) views of the basis of criminal responsibility. Some criminal lawyers, including the author, justify the judicial infliction of punishment on the basis of a freedom of choice between proscribed and not-proscribed conduct plus the 'wrong' exercise of that choice. Scientists and other determinists have grave difficulty comprehending this metaphysical position of independent units outside the ordinary laws of cause and effect. But determinists, and particularly the psychiatrists so severely castigated by Hall, will take comfort from Hall's own implied equation of free will with the matter-of-fact notion of the degree of control exercised by a human over his environment. This seems an eminently sensible equation, unlike the position of some intolerable plurality of independent free-moving units, who, by definition, could never be moulded into social order.

This gets us into the most basic of all criminological problems, the

question of criminal responsibility. The writer tackles this squarely in the last two chapters, developing firmly the stand he took in 1947 in his *General Principles of Criminal Law*, where he wrote (page 213), 'Penal law is concerned with social harms which include moral culpability as an essential element'. At pages 257-258 of the book under review, the writer continues logically from his premiss: 'The law of strict liability is not criminal law . . . The thesis that *criminal liability should be rested exclusively on moral culpability* does not represent an unwarranted inflexible attitude towards serious problems or a sentimental disinclination to use sharp instrumentalities to meet social needs.' Surely this is reactionary, a recoil from the startling growth in number of statutory and regulatory offences, an inability slightly to modify the traditional classifications of criminal law to admit what really belongs there. Of what do these 'sharp instrumentalities' partake if not of the selfsame nature as the sanctions of the criminal law? Of what different nature could they be? And surely it is the order of the court, 'the disorganized mass of penal sanctions' (page 275), that must hold the key to the jurisprudential classification of normative rules. To permit a non-legal force, morality, to have the sole determining of our legal classifications is self-demeaning and unnecessarily confusing, to say the least.

Time was when criminal sanctions would be religiously applied only to immoral conduct. But that was the time when dictates of criminal law and the precepts of morality were still indistinguishable. Today there are many areas in which these two socially cohesive forces, now differentiated, no longer overlap. This is particularly so, for instance, in the area of sexual behaviour, where (in Australia, anyway) adultery, lesbianism, and the willing participation by females in non-incestuous carnal intercourse, amongst other things, are never criminal offences, although generally recognized as immoral.

There is a transient passage (page 248) in which the author seems impliedly to approve the aim of 'distinguishing criminal law from ethics and a theory of ethics from one of law'; but two pages later he reverts to form. Is there today any necessary connection between morality and criminal law? Since the separation of criminal law and morality, criminal-type sanctions may have been applied to immoral conduct, but they have not been applied to *all* immoral conduct, nor have they been applied to immoral conduct *as such*. The draftsmen of the Model Penal Code state their opinion (Draft 4, section 207) that: 'The Code does not attempt to use the power of the state to enforce moral or religious standards. We deem it inappropriate for the government to attempt to control behaviour that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational and other social influences.' Carrying this a step further, it is a commonplace today, despite attempts to restrict the meaning of the word 'crime', that criminal-type sanctions are daily applied to conduct that is neither negligent nor immoral nor even avoidable with the strictest exercise of care.

Why does morality still enter these considerations at all? The two cohesive forces, morality and law, espouse quite different and irreconcilable ends: the one seeks to elicit individual maxima of performance, the other to impose a social minimum of behaviour.

One result of completing the separation of morality and law would be to render psychotics criminally responsible. And the objection is taken that you cannot possibly make an insane person criminally responsible.

The answer to this is short: By whatever abuse of language we perpetrate, in fact we impose one of the harshest criminal-type sanctions upon persons insane at the time either of the offence or of the trial, namely, the indeterminate sentence. Maybe the insane are not 'criminally responsible'; but there is no doubt that they are in every case subject to the operation of the criminal law.

This brings us to the contribution of psychiatrists to the development of criminal science. 'The principal effort of the [psychiatrists] has been to widen the definition of incapacity, to enlarge the area of exculpation' (page 275). I submit that as the law stands at present, we are not only permitting, we are actually compelling, this growth in the area of exculpation. The more we analyse and classify behaviour problems, the smaller will grow the area of normal behaviour, and the greater the area of deviant or abnormal behaviour which we are prepared to excuse as 'not responsible'. Soon the myth of the ideally reasonable man, long since caricatured by A. P. Herbert, must finally be exploded; and we will say of him, as Alexis de Tocqueville said in another connection, '*Il n'existe point!*'

What then is the contribution of the psychiatrists? Naturally, a determinist is going to deny the validity of the concept of moral guilt, or culpability: he is bound to say that *no* human is 'responsible' in the sense of ever being morally guilty. But this is a far cry from saying that there exists any human who should not be subject to the sanctions of the criminal law. Psychiatrists are extending the area of exculpation merely because the approach of the law demands it. The law insists that psychiatrists answer a question to the effect, Is the defendant morally culpable? But the psychiatrists are not permitted to challenge the sense of the question, a question which is stark nonsense to them.

Professor Hall speaks favourably of fostering an interdisciplinary approach to the problem, of developing a 'forensic psychiatry' (page 269). An interdisciplinary study is, of course, just as legitimate a study in its own right as are the 'original' disciplines. And no progress will be made so long as an 'original' discipline abuses its entrenched power, as the law (in an academic sense) is doing in this area. The law, through the pen of Jerome Hall, is intransigent to a degree that only the law can be, with its dangerously inbred smug satisfaction in a supposedly self-sufficient system of precedent. The law will force the expert witness into the age-old moulds of an unadaptable rule rather than consider the witness's suggestions as to how he can make his best contribution. The last sentence of the book reads, 'The progress of forensic psychiatry depends upon a sound synthesis of existing knowledge and an appreciation of legal values and methods'. An appreciation of *legal* values and methods! This is not an interdisciplinary approach. Apparently the marriage of psychiatry and criminal law is doomed to fail unless the former bows completely to the stolid authoritative tyranny of the latter. Such a marriage might subsist for a while, but only if psychiatry prostitutes itself for what it holds to be a meaningless ideal. And the law will reap but a hollow, short-lived gain from its intractability.

To the author, a change in the law seems a thing to be abhorred. He intones (page 276): And now abideth certainty predictability and stability; but the greatest of these is stability. But certainty can be achieved without stability. Stability is no more than a means to notoriety. It is not a worthy end in itself, for a totally stable law is a dead law.

Running through Chapter XIV is an indictment of punishment as a legal sanction. The author, assuming that criminal sanctions are necessarily punitive, seeks therefore to cut down the area of operation of the criminal law. But there are other approaches to the nature of criminal sanctions. The author notes these (pages 242-247), but under the common question-begging title of 'Purposes of *Punishment*'. It surely cannot be impossible to regard rehabilitation of the corrigible, together with isolation of the serious offenders who are incorrigible, as a non-punitive sanction. The author disagrees, on the ground that even the kindest rehabilitation involves interference with the liberty or behaviour of the subject. But the discomfort or even pain with which we visit the subject of treatment is not punishment in the sense of punishment-for-its-own-sake, or retribution. As well might we say that the doctor and the dentist punish us in their sincere efforts to treat us. I think this analogy is sound and might be extended if space permitted.

Many will agree with Professor Hall that punishment should be inflicted only in cases of moral guilt. But some will see solutions different from the reactionary retreat proposed in this volume.

Casting back through this review, I am disappointed to find it more critical than it was meant to be. But the work is of such stature that not only can it well withstand, but it will certainly invite, a good deal of critical analysis. One feels the author would wish this. For he has achieved a remarkable blending of three controversial fields—philosophy, sociology and criminal law—a blend which in the Second Part adds up to the interdisciplinary study of criminology. And none would see more clearly than the author the full extent of unsettlement in the field he has broached.

STANLEY JOHNSTON\*

*Modern Company Law*, by L. C. B. GOWER, LL.M. (London), Cassel Professor of Commercial Law in the University of London. 2nd ed. (Stevens and Sons Ltd, London, 1957), pp. i-xlvii, 1-631. Price £3 10s.

Professor Gower, the most substantial modern disseminator of company law ideas, has probably earned himself a place beside the great textbook writers of the Oxford school in the class of Anson, Dicey and Cheshire. But, unlike the works of some of these, *Modern Company Law* is so soundly practical that it is likely to become as much a standard reference of the enterprising company planner as are *Buckley*, *Palmer* and *O'Dowd and Menzies*, although not being in all respects an alternative to them.

Shortly after this work became available in Australia, it was learned that the Victorian Companies Act 1938 was to be reviewed by Parliament. It was then decided that a discussion of the work in this *Review* should await the passing of the legislation so that, rather than receive a conventional analysis, the book might be shortly evaluated in the light of its particular utility to the Victorian lawyer having to order his affairs under the new Act.<sup>1</sup> It is for this reason that it is being reviewed over eighteen months after its publishing date.

When the first edition of the book was published five years ago, its intrinsic merits, style and arrangement were so extensively and thoroughly reviewed in legal journals that there would be little purpose in wholly repeating the performance here, for there has been no substantial altera-

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<sup>1</sup> Companies Act 1958 (No. 6455), passed 2 December 1958.