a large reference library to understand what the author is saying. It is not without defects; but, unlike the curate's egg, the defective parts do not infect the parts which are good.

As a book for law students, *The Idea of Law* attracts one of Professor H. L. A. Hart's pet strictures. It is a Cook's tour in a hurry of a vast territory. In some 330 pages of text Professor Lloyd sets out to describe in simple language: the thinking of the philosophers—ancient and classical, mediaeval and modern—about law and government and human society; the relations of law to morals, to physical force, to justice, to custom, to society, and to the state; the nature of legal reasoning; the ways of courts and the nature of the judicial process; the effects on law of modern knowledge about man and the world he lives in; and, in addition, he tries to state some fundamental problems which he believes must be resolved in the future if law is to continue to be one of the main civilizing factors in the life of man.

To conduct such a tour, of course, requires enormous compression and gross over-simplification; and Professor Lloyd has not been frightened of those requirements. He disposes of the problems of crime and punishment in little more than three pages, of Plato and Aristotle on natural law in three, and of the Stoics in one page. So far as undergraduate students are concerned, if this is all they are to have, then all Professor Hart's strictures are justified—for this would be like feeding pap to babies and no really scholarly nor educational purposes would be served. But as a preliminary Cook's tour for students who will be required or encouraged later to work closely with some of the materials on which this book is based, it could be very useful indeed. For the intelligent layman who may never read any of those materials it could be invaluable. It might even lead him to seek greater enlightenment by reading some of the more advanced works upon which Professor Lloyd relies.

I have said that this book reveals defects. They are of two kinds: one quite serious and the other trivial. The serious one is that the treatment of the matters discussed is uneven—even allowing for the dgree of compression and oversimplification required for a book like this. In particular, Chapters 6 ('Law and Justice') and 8 ('Law, Sovereignity, and the State') are weak. On the trivial side, it is odd to see a legal writer using the verb 'to try' followed by 'and'[1]; and even more odd to see in print the common solecism 'disassociate'.[2]

DAVID P. DERHAM*

Australian Criminal Law, by COLIN HOWARD, LL.M. (Lond.), Ph.D. (Adelaide), Hearn Professor of Law in the University of Melbourne (Australia: The Law Book Company Limited, 1965), pp. i-xxxvi, 1-372, Index 373-379. Price $9.50.

This book was written, Professor Howard tells us in the preface, in response to the manifest need for a narrative account of Australian criminal law. Undoubtedly there is a need for books about the law as it has developed in the states of Australia in many fields: and this book is a most valuable contribution towards the satisfaction of that need. Yet the very title raises at once the question—Is there really such an entity as Australian criminal law? Professor Howard, it may be thought, tends

[1] *e.g.* p. 35.
[2] *e.g.* p. 200.

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to exaggerate the extent to which that question can be answered in the affirmative, both the extent to which there is a body of Australian criminal law common to all the states and the extent to which, outside the code states, anyhow, it is a separate thing from the common law of England.

The plan of the book is to state the law of Australia with regard to certain specific crimes and with regard to certain general principles of criminal law. The authorities cited for the various propositions are predominantly Australian; English authorities are cited only subordinately and very often only in default of Australian authority and American authorities seem sometimes to be treated as of equal weight with English ones. Some of these American decisions sound strangely in the ears of an Australian lawyer, such as the decision of the Supreme Court of Indiana that a man who rapes a woman is guilty of her murder if she subsequently commits suicide out of distress or shame.

This approach inevitably leads, it seems to me, to some distortion of emphasis. It is of course contrary to the normal mode of preparation for the conduct of a case before a court of criminal appeal, where research, generally speaking, begins with an English textbook such as Halsbury or Archbold and the Australian Digest is then consulted to add the Australian cases on the topic. In fact, a decision of the Full Court of one state will not necessarily be followed by the Full Court of another, especially in preference to an English decision. It is, in my view, a valid criticism of this valuable book that the author tends to treat such a decision in one state as settling the law of Australia. An example is the decision of the Full Court of Victoria in the case of *The Queen v. Bonnor*[1] which decided that the onus of proving, in a case of bigamy, that the accused acted under an honest and reasonable mistake of facts rests on the accused. This is cited as authority for the bald proposition, stated without hesitation or qualification, that the burden of proving this defence is always on the accused. This proposition is highly disputable and it by no means follows that it will be accepted by all Supreme Courts despite the Tasmanian case of *The Queen v. Martin*.[2] *Bonnor's case* is a majority decision, disapproved of by Glanville Williams and apparently contrary to the famous dictum about onus of proof in *Woolmington's case*.[3] There seems no reason why this defence should be in a different evidentiary category from other defence such as duress, self defence, provocation and the like. The pronouncements of the High Court about mistake in relation to *mens rea* and statutory offences could be regarded as falling under a different head of law.

Professor Howard's book affords patent evidence of wide research and a wealth of cogent reasoning and argumentation on the traditional thorny problems of the criminal law. Undoubtedly it is a book which will have to be considered by anyone concerned with the preparation of an argument relating to any of the topics with which it deals. It is, therefore, a matter of regret that the traditional order and method of dealing with those topics should have been so widely departed from. It is comparatively unimportant, though surely logically unsound, that the specific crimes covered are dealt with first under the general headings of homicide, assault and theft and the general part later. What may be productive of more perplexity is the way in which larceny, false pretences, embezzlement and fraudulent conversion, instead of being segregated, are mixed up under the

1 [1957] V.R. 227.
2 [1963] Tas. S.R. 103.
3 [1935] A.C. 462.

general heading of theft. No doubt it may be jurisprudentially accurate to do this and it is much to be deplored that the law relating to offences of dishonesty has not been placed on a more rational footing. A defendant is, however, charged with one or more of these specific offences and his counsel is concerned with the law relating to the charges in the indictment. So with the law of homicide: murder and manslaughter are discussed with thoroughness and acuteness, but the traditional concepts of justifiable and excusable homicide are not discussed and though the reader is told what homicides are crimes he is largely left to infer what homicides are not. The generality of the title, by the way, as Professor Howard points out in the preface, is not borne out. Many crimes, treason, riot, forgery, perjury, arson and other malicious damage to property, besides a host of statutory offences, are not covered.

Something should be said of Professor Howard's treatment of various specific topics. He places great stress on the concept of recklessness which, as he says, has received considerable attention in recent times particularly since the decision of the High Court in *Vallance v. The Queen*.[4] For Professor Howard recklessness is equated with intention: acting with foresight of the consequences as likely leads to the same result as acting with the desire for them. There is of course considerable authority for this, yet despite *Vallance's case*, it is hard to believe that a man who drives a car at high speed through a city street, foreseeing that death or grievous bodily harm is likely to be caused to someone, is guilty, if death results, of murder and not merely of manslaughter. It may be doubted whether any jury would be so directed or that the direction would be upheld if it were.

The law of attempt has always provided insoluble difficulties to textbook writers. Professor Howard grapples valiantly with the problems of proximity and impossibility but his formulations are likely to prove as vulnerable as those of his predecessors. They are as follows:

Proximity: 'The correct statement of the law, it is submitted, is that P (the prosecutor) must prove some overt act of D (the defendant) because the very idea of attempt connotes purposive conduct: but that how close or proximate the act proved has to be to the accomplishment of the purpose charged depends on how clearly D's purpose appears from the rest of the evidence in the case.'

Impossibility: 'Factual impossibility is irrelevant to the law of attempt except of course where it is known to D. [This] does not mean that D can be convicted of attempting a non-existent offence. The reason why he cannot be convicted has nothing to do with factual impossibility but is simply that the law of attempt by definition requires that D be charged with attempting some crime.'

Under the first of these definitions it would seem that D is liable to be convicted of attempted arson if he buys a box of matches for the purpose of burning down a house and confesses to the police that that was his intention: under the second, that D is liable to be convicted of attempted murder if he is a believer in witchcraft and makes a wax image of his victim and sticks pins in it. My own view is that in both these cases an acquittal would be directed (as to the second example see the decision of the Supreme Court of South Australia in *The King v. Lindner*[5] cited by Professor Howard himself in another context).

Particularly to be commended are Professor Howard's discussions of duress and necessity as defences. Here authority is scanty and the neces-

[4] (1962-63) 108 C.L.R. 56.
[5] [1938] S.A.S.R. 412, 415.

sary conditions and limitations of these defences have seldom been so thoroughly explored.

The present status of the felony murder rule is investigated with thoroughness and Professor Howard boldly suggests that its counterpart in the case of manslaughter, the rule that killing even accidentally in the course of or as a consequence of performing an unlawful and dangerous act, even if less than felony, amounts to manslaughter, may well be no longer in force in Australia. His arguments will have to be taken into account when the point arises. He has some forceful remarks on the highly unsatisfactory law of conspiracy. There will be widespread agreement about 'the mysteriousness of the view that an agreement can be more socially menacing than its fulfilment'. Professor Howard thinks that *Shaw's case*[6] is not likely to be followed by the High Court. It is to be hoped that he is right.

There are, as is to be expected in a book where the author expresses trenchant views on tendentious topics, many matters where issue could be joined with Professor Howard. In doubtful matters he advocates what to most contemporary minds would seem the desirable solution, sometimes perhaps too sanguinely. It may well be, for example, that it is too favourable to the accused to say that superior orders are a defence unless the act is known to be unlawful or is manifestly so. It may well be that superior orders are never a defence to an unlawful act, even if the unlawfulness only ultimately appears *ex post facto* from a majority decision of a superior court. The very fact that the book is capable of such fertility of controversy is an eloquent proof of its merits. Professor Howard is to be congratulated on the breadth of his research, the incisiveness of his logic and the boldness of his conclusions.

J. J. BRAY*

The Inductive Approach to International Law, by GEORG SCHWARZENBERGER, published under the auspices of the London Institute of World Affairs (London: Stevens & Sons; Australia: The Law Book Company Limited), pp. i-xv, 1-192, Index 193-209. Price $7.00.

In this volume there has been assembled a selection, with a certain amount of revised and new material, of the author's writings on the inductive approach to international law. Professor Schwarzenberger is here concerned not with doctrine as such but the methodology by which doctrines of international law are determined; that is, in an investigatory sense. So the inductive approach is a device for selecting relevant source material, analyzing it, and then assessing its meaning.

In performing the task, the author invokes the disciplines and ambitions of Socratic dialectics; these he summarizes as a search for truth, an address of challenge to others, and that nothing be taken for granted. It is beside the point to question this as a faithful assessment of Socratic dialectics, the reference to which, in the author's exposition of the inductive approach, is more as a preliminary exhortation than an essential. However, the point is made that this approach involves the application of conscious disciplines and the task ahead is seen by the author to be analysis, synopsis and guidance.

The inductive approach admits as sources treaties, international customary law, and the law recognized by civilized nations. The law-formative

6 [1962] A.C. 220.

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