On these potential difficulties Sir Garfield is wisely not prophetic; he is content to tell his audience what happened and explain why it so happened. However, in the process, he makes many illuminating comments. For example, his reminder that '*stare decisis* is more properly addressed, as it seems to me, to a court which is technically free to depart from existing decisions'. He rightly stresses that it does not apply to a court which is somehow 'bound' by other courts—or by itself (p. 6). In a similar vein, his insistence that

> Australian courts must follow a decision of the High Court and do so even if a decision not definitive of the subject matter or reasoning of the Privy Council might appear inconsistent with that decision of the High Court. The question of consistency or inconsistency will not be one for the State Court. (p. 40)

(This will give more food for debate among jurists as to what exactly in a precedent *is* binding—the *decision* or the *reasoning*?) However, he does not indicate that dramatic reversals or innovations by the 'Barwick Court' (to copy an American abbreviation) will be any more likely than they were under the 'Dixon Court'. Admittedly it has already gone a step further on one aspect of damages for nervous shock (in *Mount Isa Mines v. Pusey*[8]) that the House of Lords has been prepared to go (though there were similar *dicta* in lower English courts); and one New South Wales judge has found sufficient support in the outlook of the High Court to radically modify accepted House of Lords rules on liability for animals wandering on the highway.[9] Nor is the effect of *Parker's* case[10] yet fully worked out. These, however, are relatively rare exceptions to the general agreement on legal principle.

Meanwhile, this Lionel Cohen Lecture will have lasting value, both as a thorough historical survey and as an indication that our judiciary will continue its course of self-expression—summed up in the Chief Justice's own words about the High Court:

> The Court's task therefore is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England; these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its own understanding of the common law, its history and its development, the court's task is to express what is the law on this subject *as appropriate to current times in Australia.* (p. 11, italics mine.)

F. K. H. MAHER*

The Sexual Dilemma: Abortion, Homosexuality, Prostitution and The Criminal Threshold, by PAUL WILSON, (University of Queensland Press, Australia, 1971), pp. i-viii, 1-172. Australian Price $1.95.

Paul Wilson's purpose in writing this book is admirable. He aligns himself with those who subscribe to 'the new sociology' and discards the traditionalist's pretence of ethical neutrality. He intends a 'critical examination of criminal laws dealing with deviant behaviour' (p. 11). Australian criminal legislation is a splendid target for such a critic. Unfortunately Mr Wilson is not sufficiently well-informed, or sufficiently critical, to make the most of his opportunities.

He examines three examples of the overreach of the criminal law: the prohibition of abortion; the laws relating to prostitution and the prohibition of homosexual congress between men. He argues that behaviour prohibited by these laws falls within the 'criminal threshold' and suggests liberalization of the law in all three areas.

8 (1971) 45 A.L.J.R. 88.
9 *Reyn v. Scott* (1968) 2 D.C.R. (N.S.W.) 13 *per* Cross D.C.J.
10 (1963) 111 C.L.R. 610, 632 *per* Dixon C.J.
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It is no criticism to say that the argument is not original. Australia lacks even good derivative writing on the proper limits of the criminal law. However, Mr Wilson has not produced a good piece of derivative writing. His style is graceless and his arguments are unclear. Apart from a survey of public opinion there has been virtually no attempt to go beyond newspaper reports for factual material which might give his arguments peculiar relevance for Australia and if the book is intended to influence lawyers and legislators it would have been good policy to avoid error in setting out the present laws. The criminal law concept of *mens rea* appears to have been misunderstood (p. 7). No mention is made of the offence of homosexual solicitation in Chapter 3. Contrary to Mr Wilson's assertion (p. 66), there is at least one State where the prostitute's client may be prosecuted. Victorian legislation makes it an offence for men to invite the attentions of a prostitute in a public place. Recent prosecutions have been attended by considerable newspaper publicity. His account of the Abortion Act 1967 (Eng.) would have it that eugenic abortion is justifiable in England where the risk of mental or physical abnormality in the child is 'greater than if the pregnancy were terminated' (p. 121). Finally, 'sexual psychopath' laws in the United States are no 'recent' phenomenon (p. 126). They date back to the late thirties.

Mr Wilson's concept of a 'criminal threshold' might have amounted to a useful innovation had it been defined with care. It lacks, however, even the relative precision of Schur's similar concept of 'victimless crime'. He lists seven criteria which must be met before prohibited behaviour may be located within the criminal threshold (pp. 7-8). The concept is intended for application beyond the specific offences discussed by Mr Wilson. However, something far more rigorous will be required to stimulate 'social scientists and other interested individuals into giving further consideration both to the concept of the criminal threshold and to forms of behaviour which lie within it' (p. 9). Of the criteria listed number (2) is either incomprehensible or superfluous. Number (5) is, in this context, so vague as to be meaningless, while (6) would provide a good utilitarian basis for repeal of some objectionable laws without reference to the other criteria. Numbers (1) and (7) deserve more extended discussion. The first criterion is cast in the following form: '[a]ctivities defined by legislation as crimes but which result in no visible external consequences which can rationally be shown as harmful or detrimental to the community or individuals living within it' (p. 7). This is very vague. Too vague perhaps ever to amount to a *criterion*. And if it is so intended it is hard to see the need for other criteria. Coupled with number (7) it raises interesting problems: '[a]ctivities defined by legislation as crimes but which, one suspects, could in future be removed from the scope of the criminal law because public opinion now or in the future no longer considers these activities as crimes or the people who engage in them as criminals' (p. 8). (The author's evident difficulty with tenses leads to considerable obscurity here.) This criterion looks forward to Chapter 5, Public Opinion and the Criminal Threshold, which presents in a more accessible form, articles by Chappell and Wilson.[1] That chapter sets out the results of a public opinion survey taken in 1968.

The possibility of conflict between rational arguments for repeal of laws and public opinion favouring their retention is obvious. It is not at all obvious, however, why the case for reform should depend on public opinion. Nor does the author offer any serious discussion of the relationship between his first and seventh criteria. This analytical failure is reflected in those sections of the book where he suggests legislative reforms: three relatively specific questions arise from his use of the survey results.

(1) LEGISLATIVE FORM AND PRACTICAL SUBSTANCE: ABORTION LAW REFORM

A majority of those polled (64%) considered that abortion should be legal under some circumstances. Risk to the mother's life, risk of abnormality in the child and pregnancy resulting from rape were considered by majorities to justify

[1] (1968) 42 *Australian Law Journal* 120, 175; and 40 *Australian Quarterly* 7.

abortion. Only nineteen *per centum* agreed that economic distress should amount to a justification. Mr Wilson's proposed reforms appear to follow the opinions of the majority. He suggests provision for legal abortion where there is substantial risk to the physical or mental health of the mother or of grave physical or mental abnormality in the child. Pregnancies resulting from criminal intercourse would also be legally terminable. After outlining these very modest reforms he remarks that they 'come very close to abortion on demand' (p. 148). As a result of adopting them 'thousands of unmarried and married women who simply do not want a child, or could not cope with an additional one, would benefit . . .' (p. 149). Mr. Wilson may well be right. His quite limited provisions for legal abortion might, in practice, amount to abortion on demand.[2] However, if, as the author implies, the proposed reforms are an elaborate exercise in hypocrisy what was the point of consulting the public? Was it to ascertain the most attractively deceptive form of legislation?

(2) PUBLIC IGNORANCE OF THE LAW: PROSTITUTION

Forty-five *per centum* of those polled disagreed with the statement that '[p]rostitution should not be legal or allowed under any circumstances' (p. 105). Forty-six *per centum* agreed with the statement. In fact the provision of sexual intercourse for money is not illegal in Australia. Our laws prohibit only some of the activities peripheral to the act of prostitution. Probably the survey question was devised to take account of an assumed general ignorance of the present laws. What is surprising is that anyone could have considered that the results of such a survey might be of use as a guide to law reform. The unanswered question here is fundamental. On which issues is the public sufficiently well informed to make a survey of opinion of more than passing journalistic interest?

The proposed reforms in this area bear little if any relevance to the survey results. It could hardly be otherwise. Soliciting in public places would remain an offence. A licensing system for brothels would be instituted and they would be subject to regular 'governmental health and other relevant inspections'. All prostitutes would be required to register and legal prostitution would be confined to licensed brothels (p. 152). The 'reforms' look suspiciously like repression masquerading as liberalism. The part-time, 'amateur' prostitute who might not solicit in public places and who receives clients in her own premises is, at present, immune from prosecution. Under the proposed scheme her activities would be presumably criminal. Such legislation would be generally unenforceable and it would result in random injustice in particular cases. If control of veneral diseases is the object of this repressive proposal it is an odd line to take in view of Mr Wilson's earlier argument that 'the prostitute is outstripped as a source of infection by the promiscuous girl' (p. 88).

(3) WHEN DOES PUBLIC OPINION MATTER? HOMOSEXUAL LAW REFORM

Only twenty-two *per centum* agreed with the statement that '[i]t should no longer be an offence for consenting males to engage in homosexual acts in private' (p. 105). A majority of sixty-three *per centum* disagreed. No explanation is given of the reason for the change in form of the test statement on homosexuality. When the survey dealt with abortion and prostitution those who were satisfied with the *status quo* were required to agree with the test statement. Here supporters of the *status quo* were required to disagree. The results of the survey on homosexuality are sufficiently discouraging. They might have been more discouraging still had the form of the test statement not been changed.

Despite the unfavourable response Mr Wilson urges that legislative reform is an '*immediate* priority on the part of all state governments' (p. 151, author's italics). Presumably this is an area where, in the embracing terms of his seventh criterion, 'one suspects' that 'public opinion in the future' will 'no longer consider these activities as crimes'. It would be unsympathetic to point out that immediate

[2] See Finnis, 'Abortion and Legal Rationality' (1970) 3 *Adelaide Law Review* 431, 444-5.

and public repeal of the laws against homosexuality would effect *that* change overnight. But that cannot be what Mr Wilson means. Rather he is answering a question 'which the Wolfenden Committee recognised but did not resolve: should the law lead public opinion or follow it?' (p. 93). If the question is worth asking it is worth a more articulate answer than it gets here. When does public opposition to the repeal of repressive laws matter?

Mr Wilson's book is, regrettably, important. I have mentioned before that there is very little scholarly writing in Australia on the overreach of the criminal law. What debate there is tends to be the preserve of lawyers. In conducting the public opinion survey the author broke new ground. What was needed in addition to the results of that survey was a discussion of the relevance of such research data to law reform.

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The Law and Computers, by DOUGLAS J. WHALAN, LL.B.(N.Z.), LL.M.(N.Z.), PH.D.(OTAGO), (University of Queensland Press, Australia, 1970), pp. 1-22. Price $0.75.

At the outset, Professor Whalan states

> It has been customary for the new incumbent of a chair of law to devote his inaugural lecture to a consideration of legal education. . . . I do not hold myself bound by this precedent. (p. 1)

Consequently, the rest of the pamphlet covers the application of computers to law and the legal consequences of the mechanization of society. It is symptomatic of the rapid development of computers that it is difficult and sometimes impossible to apply precedent to legal problems which concern computers.

The author is to be congratulated on his deep understanding of the capacities and limitations of computers, although he does, on occasion, reveal the layman's tendency to assign human capabilities to a computer. While Sir Alan Herbert's examples can be both amusing and instructive, I found the quotation from *Haddock v. The Generous Bank Ltd Computer* a little disheartening. If the machine that made the mistake had been an accounting machine, there would have been no question of fining it £5,000 in its *personal* capacity. The use of such material can only increase the mythical status attributed to computers, which takes no cognizance of the fact that they are merely a more complex and efficient method of computation and that they are subject to a predictable rate of failure.

The discussion of Evidence, Tort, privacy and individual freedom does, however, reveal some very real problems with which the law will be increasingly faced as computerization takes place. The privacy problem is already with us and I agree with the author's suggestion that legislation should be enacted to protect the individual.

The other section of the pamphlet is devoted to the direct application of computers to legal work (ranging from the provision of more sophisticated office systems to their use as an aid to legislative control). The greater part is rightly devoted to a consideration of the analytical possibilities of the machine to provide more accurate and more meaningful data. Professor Whalan briefly mentions the costs involved in such application. (I stress that these cannot be underrated, but agree wholeheartedly that 'this factor must not be allowed to become a reason or excuse for postponing feasibility studies'.)

Finally, although this short pamphlet covers a vast ground, I found it very informative and I recommend it to all lawyers. The lawyer should not, at this time, be concerned with how a computer achieves its end result—the author's

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