Book Reviews

An Introduction to the Law of Contract by STEPHEN GRAW (Sydney, Law Book Co. Ltd, 1990), pp xxi, 355

In recent years a number of introductory texts on the law of contract have been published in Australia: *Understanding Contract Law*, by D Khoury and Y S Yamouni, *Outline of Contract Law* by J W Carter and *Concise Contract Law* by P Gillies. The most recent addition to this commendable list is Stephen Graw's book. In the Preface the author states that his aim is 'to provide a concise but comprehensive treatment of the principles underlying the law of contract in an easily readable and logical form.' He adds that the book has been written especially for students who undertake a study of the law of contract in non-law courses, such as accounting, business or economics courses.

An introductory book of this nature must certainly be concise and readable, and logical in form. These characteristics are well in evidence in Stephen Graw's book. There are ten concise chapters covering the standard contract topics, and these topics are presented in a logical order. There are no distracting footnotes. At the end of each chapter there are useful questions to test the students' knowledge and to provide problems for analysis. A separate manual for teachers is available and this provides suggested answers to the questions.

The only unusual feature of the format of the book is the inclusion of the topic of formalities in the Introduction. While it might be convenient to dispose of this topic in the Introduction rather than deal with it in a separate chapter, a student reading a book on contract for the first time might be somewhat put off the subject by confronting formalities on page 2 and having to grapple with the doctrine of part performance on page 5. An Introduction should contain more manageable and perhaps more inspiring material. It might be appropriate to introduce the reader to the theory of contract.

An attractive feature of the book is the highlighting of selected summarised cases. These cases provide apt illustrations in digested form of principles previously enunciated in the text. Many of the cases are well known English and Australian cases, but two or three American cases are also included. The choice of cases inevitably indicates the author's own predilection. For example, to illustrate the question whether a collateral contract must be consistent with the main contract the author chooses (at p150) *City & Westminster Properties (1934) Ltd* v *Mudd* [1959] Ch 129. Some contract teachers might prefer to see a digest of (or at least a reference to) *Hoyt's Pty Ltd* v *Spencer* (1919) 27 CLR 133 and then a consideration of the extent to which the doctrine of estoppel has in effect modified the common law rule. Also, to digest (at p 49) two cases as illustrations of the rule that acceptance by telex is

not complete until it is received may seem to be a bit of a luxury in an introductory book. But these are largely matters of taste.

Although an introductory book on contract cannot, by definition, provide a detailed examination of the subject, there is a danger that reducing the subject to basics may give a misleading impression as to what the law is. Stephen Graw has largely avoided this danger in his comprehensive treatment. Again, it may be really a question of taste as to where the line is drawn in terms of detail. For example, in the discussion of non est factum (at p 172) it is arguable that some reference should be made to the point that carelessness in signing the document is not necessarily a bar to reliance on the doctrine where no innocent third party is involved. In the discussion of incorporation of terms by a course of dealing, the author (at p 174) quotes Lord Devlin's dictum in *McCutcheon* v *David MacBrayne* [1964] 1 WLR 125 at 134 that previous dealings are relevant only if they prove actual knowledge of the terms. However there arguably should be a reference to the fact that this view was rejected in *Henry Kendall & Sons* v *William Lillico & Sons Ltd* [1969] 2 AC 31. In the discussion of limitations upon rescission for misrepresentation the author quotes (at p 225) the view of Lord Denning in *Leaf* v *International Galleries* [1950] 2 KB 86 that once a buyer has 'accepted' goods and the contract cannot be terminated for breach of condition, rescission for misrepresentation is also precluded. But arguably reference should be made to a contrary view as expressed for example in *Leason Pty Ltd* v *Princes Farm Pty Ltd* [1983] 2 NSWLR 381 at 387–8. In the discussion of anticipatory breach at p 305 the author states, citing *White and Carter (Councils) Ltd* v *McGregor* [1962] AC 413, that the innocent party may continue with the performance required under the contract, notwithstanding the anticipatory breach, and upon completion sue for the contract price. It could be added however, that there is a possible limitation in respect of a plaintiff who has no legitimate interest in performing the contract as distinct from claiming damages. Again, in the discussion of s 52A of the *Trade Practices Act* 1974 (at p 252) there is no reference to the fact that the provision is restricted to goods and services of a kind ordinarily acquired for personal, domestic or household use or consumption. Another example could be pointed to at p 330 where the author states that the remedy of specific performance will be refused if the plaintiff has been in default. It could be added, however, that in certain cases a court may deem it appropriate to decree specific performance in favour of a party in default eg in giving relief against forfeiture of an interest in property.

The legal material is presented with impressive clarity throughout the book. In one or two instances, perhaps further clarity could be achieved. For example, in the discussion of third party collateral contracts at p 133, *Shanklin Pier Ltd* v *Detel Products Ltd* [1951] 2 KB 854 could be understood as a case where the main contract was between the *defendant* and a third party (ie, the contract to supply paint) whereas the case is presented at p 149 as one where the main contract was between the *plaintiff* and a third party (ie the contract to paint the pier). Also, in dealing with revocation of postal acceptance at p 50 the author uses concepts of 'repudiation' and 'estoppel' before these concepts

have been explained to the reader. The concepts are, of course, considered later in the text, but 'repudiation' is treated as a remedy at pp 151–2 and a form of breach at p 303. Some clarification may be needed here.

The book has been well proof read. At p 27 however, 'effect the determination' should be 'affect the determination', and at p 191 Lord Atkin is quoted as saying 'affect a transfer' whereas he avoided this slip and said 'effectuate a transfer'. At p 73 'breach of a right' should probably read 'violation of a right', and this reviewer (whose Latin is admittedly rusty) would prefer 'contra proferentem' to 'contra proferentum' at p 174. At p 155 there is a reference to 'the dictum' of Lord Reid but no dictum is quoted in the text.

Students studying contract law in non-law courses will certainly find the book useful, but so will students studying law in law courses. For this latter group, the book will be ideal for preliminary reading and will provide in addition a useful summary of the basic law and an overview for revision purposes. Students studying contract law in detail at tertiary level risk not seeing the wood for the trees. Stephen Graw's book will help them see the wood.

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Constitutional Change in the Commonwealth by LESLIE ZINES, (Cambridge University Press, 1991), pp 118

Australian constitutional lawyers will undoubtedly be familiar with the writings of Professor Leslie Zines, Robert Garran Professor of Law at the Australian National University. His masterly account of the work of the High Court as a constitutional guardian (*The High Court and the Constitution*) is regarded as the leading text on Australian Federal Constitutional Law which commands the respect of constitutional scholars, practitioners and the judiciary. The master craftsman has been at work again, and from his labour has emerged another fine contribution to legal scholarship: *Constitutional Change in the Commonwealth*. This slim handsome book should be extremely attractive to constitutional scholars with a particular interest in comparative constitutional law.

Constitutional Change in the Commonwealth is based on three lectures delivered by Professor Zines at the University of Cambridge under the auspices of the Smuts Memorial Fund. The lectures were delivered on 8, 15 and 22 November 1988; but Zines has updated them to take into account recent developments such as the important decision in *Street* v *Queensland Bar Association* (1989) ALR 321.

The focus of the book is on the fundamental changes which have occurred and are occurring in the United Kingdom, Canada, Australia and New Zealand.

Chapter 1 ('Constitutional Autonomy') provides an overview of the steps which were taken by Canada, Australia and New Zealand, to end their constitutional ties with the United Kingdom Parliament and Government. This tale which revolves round the notion of 'the Crown' is a fairly complicated one but Zines tells it in a lucid fashion. A perplexing question which has often been asked about these countries by foreign scholars relates to pinpointing the date by which independence from Britain was obtained. As Zines, at p 1, graphically puts it: 'The difficulty is that, unlike the case with other Commonwealth countries, one cannot point to an occasion when one flag was lowered and another raised at midnight amid sentiments of joy and nostalgia.' That these countries have secured their independence today is beyond doubt; it was, however, attained by an 'evolutionary' process. In consequence, this has 'left many legal problems in its wake and, to some degree, it still does'. These conundrums constitute the focus of the chapter which Zines concludes with the following pronouncements (at p 27):

> For Australia, Canada and New Zealand the starting point of constitutional reasoning now is that the United Kingdom Parliament and Government are not part of the internal legal systems of those countries. Their basic constitutional instruments *were* law because they were enacted by a superior law-maker. They are *now* law because they are accepted as fundamental legal rules of their respective systems and the basic constitutive documents of their communities.

Chapter 2 ('The Entrenchment of Individual and Democratic Rights') is the most interesting chapter in the book for the simple reason that the fascination with a Bill of Rights remains undiminished. Zines explores the various initiatives which have been taken to enhance the protection of the citizen from an ever increasingly powerful executive arm of government. The contempt which had been harboured against those countries that had a need for entrenched constitutional rights rested smugly in the view that 'the common law, British justice, and remedies such as habeas corpus and the prerogative writs, were regarded as of more worth in protecting the individual than elaborate and exotic lists of abstract rights.'

This complacency no longer exists. The sovereignty of Parliament is no longer a sacrosanct principle. A number of factors have changed public perceptions, especially the political decline of Parliament and the ascendancy of the Executive. Zines then asserts his view (at p 35): 'In the present state of affairs, however, the only obvious constitutional check on overweening executive power seems to me to be the judiciary.' Zines paints with a broad brush the instances in Canada, Australia, and New Zealand, which evidence the 'extraordinary upsurge in judicial boldness in challenging legislatures in the cause of individual and democratic liberties and the rule of law.' Zines believes that if this trend should develop further it would be 'highly dangerous' and 'certainly undesirable' simply because restrictions on the legislative power 'which are not based on any specific provisions, provide no guidance or check to judicial aggrandisement or personal predilections' (at p 51). Zines is

not totally distrustful of judges when it comes to the protection of the individual or of minorities: he is simply against them having or grabbing a 'blank cheque'. Zines then explores in particular the Canadian experience with the Charter of Rights and Freedoms as entrenched by the *Constitution Act* 1982 and the movements towards a Bill of Rights in New Zealand (which has now enacted the *Bill of Rights Act* 1990 as an ordinary Act of Parliament) and the stymied attempt in Australia. The story of a Bill of Rights in Australia is not a closed chapter; but what has been effectively jettisoned is the 'old complacency about individual liberty.'

The idea of converting the United Kingdom into a federal state was once described by A V Dicey in 1915 as 'absolutely foreign to the historical and, so to speak, instinctive policy of English constitutionalists'. Ironically the entry of Britain into the European Economic Community has undermined the notion of the British Parliament as 'the omnipotent legislature of a sovereign unitary state unconcerned with the distribution of powers.' In the final chapter of the book ('Federal and Supra-National Features'), Zines examines this ironical situation. He draws on his wealth of knowledge to show the workings of the federal principle in Canada and Australia. The contrast between these two federal systems is highlighted. The Australian colonies had rejected the Canadian model as the Canadian Constitution was perceived to resemble a unified rather than a federal constitution. Instead, they opted for the American model. Zines points out:

> Since their enactments, the provisions of the Canadian and Australian Constitutions, in relation to the distribution of powers, have not in form changed significantly. Yet, as a result of judicial construction, the Canadian Provinces are more powerful and the central Government weaker than ... in any other federations. By the same judicial means, the power of Australian central government has grown and continues to grow, while that of the States has waned, to a degree that would have astonished the framers.

Zines provides a quick conspectus of some areas in which, as a result of judicial interpretation by the High Court, there has resulted a clear shift of power to the central legislature. Zines seeks to show the parallel with the entry of Britain into the European Economic Community. The recent *Factortame* decision [1989] 2 WLR 997 shows the irrelevancy of the formal sovereignty of legislative power in Britain. The European Court by treating the Treaty of Rome as 'the framework of government of a polity in which powers were divided between the centre and the regions' thus brought into play 'many principles and doctrines that are familiar in the constitutional law of the federations'. This leads Zines to conclude (at p 112):

> Although not a member of a federation and still clinging to the doctrine of parliamentary sovereignty, the position of Britain in relation to the Community strikes the outside observer as having marked similarity in that respect, to the federations that Britain created.

Dicey must be turning in his grave!

Overall, this book is a pleasure to read. The author through economy of

words and lucidity of presentation has produced a fine gem which can take pride of place in the literature on comparative constitutional law.

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Law at the Margins: Towards Social Participation? by TERRY CARNEY, (Oxford University Press, Melbourne, 1991, 199pp.

In this book, Terry Carney presents his readers with a fundamentally optimistic view of law's role in rendering welfare services more accountable and generally democratic. In particular, he is interested in examining recent legislative developments in areas such as mediation, guardianship and health, showing how examples of legislative change support his more general case for the place of legislation in facilitating desirable changes in relationships between the state and disadvantaged citizens.

In contributing to the redefinition of this relationship, Carney argues, the role of law is not to be overly prescriptive but rather to establish certain minimal conditions upon which citizens and the state can negotiate the precise terms of their mutual involvement. Carney clearly favours state-based services, at least in the areas of health and guardianship, for which the relevant legislative prescription of policy embraces a minimal degree of paternalism. The message seems to be that the welfare state does not by any means always know what is best for the client, and that the law's role is to both encourage that recognition and provide a framework for the progressive realization, within realistic limits, of client participation and autonomy in relation to welfare services. In making this argument, Carney relies upon the related concepts of 'responsive law' and the 'responsive state'.

Definitional statements of what Carney envisages by the notion of responsiveness are somewhat scattered throughout this concise book, underlining both the key role intended for this concept but also the absence of an extended theoretical discussion for such a foundational concept. Early in chapter 2, 'soft/responsive' law is contrasted with the 'traditional model of writing laws' which is 'highly detailed, prescriptive and anticipatory' in nature, while the former involves 'creating space for negotiated outcomes to be reached between the citizen and the state, with both operating as equals within a flexible setting; the focus of the law is on creating the optimal environment for decision-making' (p15). In essence, Carney is suggesting that in light of the well-recognized socio-legal observation that many decisions of practical legal significance take place 'in the shadow of the law', rather than according to the precise stipulations of the laws themselves, public law should recognise this fact and make express provision for this phenomenon, ensuring however that the discretionary element inherent in such practical decisions is not simply exercised by the state against the citizen in a high-handed fashion.

Later in the book, Carney discusses the notion of responsiveness further.

The task of responsive legislation is to 'create balanced environments for negotiation and decision-making', in other words, providing 'legal control of self-regulation'. In this section, and especially by this last phrase, Carney acknowledges the influence of the work of Gunther Teubner, a contemporary German public lawyer and social theorist. Teubner's own work attempts a challenging and unique synthesis of ideas from the contemporary German social theorists Niklas Luhmann and Jurgen Habermas, but also from Americans Philippe Nonet and Philip Selznick, who, to my knowledge, first posed the notion of responsive laws in their jointly authored *Law and Society in Transition* (1978). However, Carney does not undertake anything approaching a detailed exposition of the genesis of this term, preferring to make passing reference to Teubner, mainly in footnote form, while attributing to such a decentralized model of legal decision-making the capacity to more consensually and equitably attend to the distribution of state resources. For Carney, 'responsiveness' is a means for the re-legitimation of welfare law and the welfare state, but in forms significantly different from their traditional means of operation.

In advocating a more decentralized, bilateral approach to the formulation and application of welfare policies, Carney sets for himself as a public lawyer the task of specifying ways in which the discretion delegated under this revised approach can be flexibly applied without giving way to the abuses of power. The law should exhort more and command less, he suggests. Some ways in which this balance might be approached would be through resort to charters, objects clauses, and lay advocacy networks (p75). In his discussion of guardianship laws, Carney makes clear his preference for the 'legalistic' model of guardianship, in contrast to the 'social workistic' (sic) model, because of the former's stress on responsible self-development and procedural protections rather than the latter's emphasis on professional paternalism and an absence of legal checks and balances on welfare practice.

While Carney clearly opts for some version of legal restraint on strong state paternalism, nowhere does Carney really outline convincingly how his ideas about procedural checks and balances might realistically confront the challenges of discretionary power and particularly professional power. Carney seems to assume that by such measures as mixing up relevant professionals on review bodies which examine decisions made with respect to health, guardianship or some other aspect of welfare law, professional power can be rendered relatively benign. Another suggestion is the provision of specialist advocates to assist clients in representation before various boards and other review bodies.

While this line of argument seems in keeping with the evidence gathered over the past twenty five or so years, concerning the excesses, abuses and plain failures of the so-called medical model both in its private and welfare-state manifestations, Carney seems to assume that the injection of legalisms of a mainly procedural kind will counteract more or less successfully these excesses, and restore to state clients greater autonomy and general recognition.

Here Carney reveals himself as very much the legal optimist, having a fundamental belief in the capacity of law to do real justice. While it is difficult to disagree with Carney that his suggested changes will offer substantial improvements in many cases on previous practice, the empirical picture of current examples of such procedures provided in the book which is used to support these proposals is relatively modest. Moreover, it might be suggested that Carney's optimism does not give sufficient weight to the influence of welfare discourses on the practice of law, inasmuch as courts and tribunals make arguably increasing use of expert testimony of one kind or another in reaching decisions in welfare matters. In addition to exaggerating the law's ability to modify the impact of welfare discourse, Carney arguably gives insufficient attention to non-legal approaches to the regulation of discretion. Experience in a variety of spheres indicates that legal procedural checks and balances are not a sufficient answer to abuse of discretion without corresponding attention to the education and training of the professionals who provide and administer the service in question, particularly on questions of ethics and good practice. It is indeed evidence of Carney's fundamentally optimistic and reformist outlook that he places such faith in self-regulation and the good intentions of welfare professionals without considering in any detail the actual or likely preconditions under which a responsive state and legal system might achieve the 'new welfare' he seeks. As with other optimistic reformist accounts, the absence of an historical perspective on these issues detracts from the plausibility of the normative case being made in this book.

While the tone and argument of the book clearly spring from the author's commitment to the notion of a substantial welfare state, one might well doubt how many new supporters for this objective the book might persuade. Carney's commitment to using the law to establish a 'culture of entitlement' (p76) would seem unlikely to sit easily in the current political climate, for example, with those committed to less direct and more indirect forms of taxation. Sceptics of Carney's mission will find little discussion in this book of notions of individual responsibility, although Carney does posit his version of what he calls 'citizenship theory'. This concept envisages some sort of reciprocal relationship between citizen and state, but a kind of reciprocity which emphasises what the state can do to ensure greater participation by citizens. There is really no explanation in any discussion of this notion of citizenship of precisely what makes this a reciprocal relationship. Such unstated benefits are presumably taken on faith by the author, for otherwise the notion of reciprocity is misplaced. Their absence from discussion makes the notion of reciprocity difficult to grasp, and therefore is likely to frustrate the reader.

Another criticism of a theoretical kind can also be stated. It is difficult in addressing notions of welfare and the role of the state not to get dragged into some fundamental philosophical questions about social justice and the actual and desirable shape of the polity. Welfare is obviously concerned with redistribution, in more recent times, arranged mainly through state channels. It is therefore somewhat surprising to see the extent to which Carney's argument

ignores a number of major works on redistributive justice, such as those by Rawls, Nozick and Barry, to name a few. While each of these authors would not necessarily stand opposed to Carney's argument, the latter's reliance upon T H Marshall's conception of citizenship, from an essay written in 1948, says something about how the author's task is not to question the basic outlines of the system which interests him but rather how to harness the law, and specifically legislation, to further the basic goals of the now-traditional welfare state model. In other words, the emphasis is procedural rather than substantive.

While Carney's philosophical discussions might be truncated and his notion of substantive welfare time-honoured rather than critical, his avowed principal objective is rather to make the case for a new form of legal involvement in welfare. Yet, as I have hinted at earlier, even in this respect his attempts are not entirely convincing. To go further, his attempts to contextualise his argument suffer from excessive brevity on occasions, with the result that vague or even banal propositions are put forward. For example, it is not evident how statements such as 'the real engine of change (or conservation) is arguably constituted by economic, social and political forces' (p114) or 'historians correctly discern that change is a natural, rather than an artificial or transitory, state' (p120), add anything to our understanding of the issues or the author's argument.

At other times, propositions can be just plain question-begging rather than vague. For instance, Carney alludes to 'the sense of alienation from the welfare state' (p130) without making it clear exactly to whom he is referring, while the following sentence is hardly self-explanatory: 'A broad-grained, (non-detailed and non-perscriptive), and a 'coal face focused' approach to implementation, seem to be called for here' (p122). While individually these instances may seem minor, they are more numerous than I have indicated and collectively they inevitably detract from the force of what is undeniably an interesting and provocative thesis about law's potential in the welfare sphere. Perhaps a 'broad-grained' critique of the book would focus less on such instances, but in a book that comprises only one hundred and thirty nine pages of text, this type of critique is difficult and one must inevitably consider all the book's parts.

In summary, while this book is inspired in some respects, the execution is patchy at times, and in particular, frustratingly brief on some aspects of the argument. Carney raises a rather novel challenge to the welfare state, in terms of its willingness to allow the law to ensure and facilitate greater citizen participation. It is a challenge couched in part by reference to some recent European social theory which has had little or no appreciable impact to date on Australian socio-legal scholarship. The book, rather than being fundamentally flawed, is incomplete and should be seen as providing Australian public lawyers and legal theorists with the opportunity to pursue in more depth some of the forms of legal intervention either described or anticipated in the text. In this book at least, Carney has taken a significant step down a road that Australian public lawyers have been reluctant to tread: the road of theoretically

informed scholarship. In this sense, it is a welcome addition to the small but increasing body of literature of this kind starting to emerge in the past ten years in the United Kingdom and the United States.

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Partial Excuses to Murder edited by STANLEY MENG HEONG YEO (The Federation Press, Sydney (with the assistance of the Law Foundation of New South Wales) pp xvii, 283, index 285–7 ISBN 1 86287 047 0

Thomas de Quincey, in his essay, 'On Murder Considered as One of the Fine Arts', remarked that 'if a man once indulges himself in murder, he comes to think little of robbing; and from robbing he comes next to drinking and Sabbath-breaking; and from that to incivility and procrastination.' There is something of the 'Where will it all end?' about *Partial Excuses to Murder*. This book of essays, without de Quincey's inverse whimsy, deals in a thoughtful and stimulating way with questions such as — Is murder ever excusable? Can it be justified? What is the difference, if any, between an excuse and a justification? — Questions which might form the basis of an examination in philosophy or theology.

Fortunately the conceptual framework is provided by Suzanne Uniacke in the introductory essay. She draws the battle lines in the demarcation between excusers and justifiers. The distinction is referred to in the following terms:

> Although justification admits of degrees, an *act* is either permissible or right, or it is not. Excuses, on the other hand, are relevant to assessing an *agent's* responsibility and blameworthiness for wrongful conduct; and excuses need not be entirely exculpating because agents can be responsible and blameworthy in varying degrees (p 10).

The book is divided into four parts covering the well known and difficult partial defences to murder. They are provocation, diminished responsibility, excessive self-defence and intoxication.

Provocation

Finbarr McAuley re-engages in his debate with J Dressler over whether provocation is partial justification or partial excuse to murder. (See McAuley (1987) 50 *Mod LR* 133 cf Dressler (1988) 51 *Mod LR* 467). The title of his essay, 'Provocation: Partial Justification Not Partial Excuse', is self-explanatory. Not everyone would necessarily agree that the defences of insanity or diminished responsibility should govern the difficult issue of 'an impulsive disposition . . . rooted in a chronic inability to control one's behaviour . . .' (p 24). As the author acknowledges there are some jurisdictions where dim-

inished responsibility does not operate as a partial defence. In passing and in the interests of accuracy one might think that the appellant in *R* v *Semini* (p 34 n 42) was a native of Malta. Not that this derogates from the point being made.

Diminished Responsibility

Diminished responsibility, for those jurisdictions in which it operates, is not without its own difficulties. David Fraser deconstructs diminished responsibility from social-diminished responsibility into diminished social responsibility. He reconstructs an increased social responsibility into a form of redemptive salvation for those who are neither mad nor bad but who are dangerous. His article represents murder as the human condition at its most desperate and one is inclined to add disparate. Susan Hayes examines the role of the expert witness in relation to diminished responsibility with a salutary reminder of the sort of information which is useful in defining abnormality within the terms of legal discourse.

The theme of abnormality underlies the chapter by Jill Hunter and Jenny Bargen. They concentrate on two cases *Whitworth* v *R* (1987) 31 *A Crim R* 453 and *R* v *Troja* unreported NSW Supreme Court, 4 June 1990 and analyse psychiatric and psychological positions in relation to the concept of abnormality. The warning, contained in examining the theoretical roles of psychiatry and psychology, is of the danger of 'reinforcing the class, race and gender stereotyping to which both law and medicine are prone' (p 139). Their chapter also provides a useful study of the tactical problems involved in running a defence where diminished responsibility overlays with provocation.

More Provocation

Stephen Odgers supports the jury role in reducing murder to manslaughter with an emphasis on the substantial impairment to self-control. Bernard Brown comments on the New Zealand experience of provocation and the unhappy interplay of subjective and objective elements produced in the *Crimes Act* 1961 (NZ) as a reaction to *Bedder* v *DPP* [1954] 1 WLR 1119 (HL). Ironically the adoption in *DPP* v *Camplin* [1978] AC 705 of this hybrid creature — 'an ordinary person but otherwise having the characteristics of the offender' — came shortly after its condemnation by the New Zealand Law Reform Committee in 1976. The underlying difficulties might be best avoided by abolition of the doctrine. In an elegant piece Mathew Goode cogently urges this solution. Whilst your reviewer is almost persuaded to this view, the underlying problems may not be so easily disposed of. Early medieval legal history (see J M Kaye 'The Early History of Murder and Manslaughter,' (1967) 83 LQR 365–95, 569–601) right through to the emergence of the doctrine in the 17th century (see *State Trials* for murder during that century) indicate that society's approach to the taking of life requires a considerable sophistication in the continuous process of reforming categories of offence and defence.

One such instance is provided by Julia Tolmie's chapter. 'Provocation or Self Defence for Battered Women Who Kill?' discusses one of the 'modern' problem areas in relation to homicide. Unfortunately neither of the High Court's recent pronouncements on provocation were available to the writers for inclusion in this volume. (*R* v *Falconer* (1990) 65 ALJR 20 and *R* v *Stingel* (1990) 65 ALJR 141.) Whether *Falconer*, in particular, presents a new complete defence of non-insane automatism for battered women who kill their partners, remains to be seen. It can be added to the less 'immediate' self-defence proposal which may now be available and is urged by Julia Tolmie as more fairly and equally reflecting the life experiences of battered women who kill.

Self-Defence

Three authors advocate a return to the *Howe-Viro* doctrine of excessive self-defence. The Editor, Stanley Yeo, an unrepentant excuser, persuasively argues that matters of excessive force should not be subsumed under the offence of negligent manslaughter. Paul Fairall uses internal inconsistencies to expose some of the difficulties in *Zecevic* v *DPP* (1987) 162 CLR 645, for example, with respect to non-fatal assaults and the use of excessive force. Likewise: 'It seems paradoxical that a mistaken belief as to the occasion should have greater exculpatory force than a mistaken belief as to the degree of force required to repel a genuine threat' (p 184). Finbarr McAuley re-appears with reassuring words on the continued well-being and operation of excessive force as a partial defence in Irish criminal law. None of this will be of much comfort to trial judges and criminal law students and we will return to the problem of self-defence.

Intoxication

The cultural encouragement of the use of alcohol and the effects of intoxication cause difficulties in attributing culpability. It is surprising that intoxication issues do not appear more frequently in reported cases. Loane Skene, in 'Medical Aspects of Intoxication', reports that in 302 murder prosecutions in Victoria between 1981 and 1987 up to three-quarters of the accused had taken alcohol, other drugs or both before the crime (p 253 n 1). After a survey of the relevance of evidence of intoxication in various aspects of defences to homicide, the use of expert medical evidence is emphasised as an aid to interpreting the significance of intoxication in relation to the strategy being promoted by the defence. David Lanham explores the voluntariness of conduct affected by intoxication to support convictions for involuntary manslaughter in appropriate cases. Ian Leader-Elliott compares the different approaches to intoxication in the common law and code states. In a thought provoking article he resuscitates Jekyll and Hyde. (See I D Elliott, 'Regina v. Jekyll, sub. nom. Hyde: Metaphors of the Divided Self in Criminal Responsibility' (1984) 14 MULR 368.) To the defence 'but it was not really me', the answer may be 'but it was the real you which appeared under intoxication'. However as

Leader-Elliott argues, such an accused is no different from others who succumbed to stress and other pressures and are provided with partial and sometimes full defences. He presents a persuasive case for a defence of unintentional intoxication in appropriate circumstances. One of the circumstances being that an acquitted person undergo a process of atonement and reconciliation.

Replication on Self-Defence

In the final chapter Brent Fisse draws on the contributions of the other authors and formulates six critical assumptions. These assumptions are utilized in a hypothetical appellate judgment of Hindsight AJ involving a re-play of *Zecevic* v *DPP*. The critical assumptions taken into account may be listed as an historical perspective, theories of justification and excuse, degrees and type of blameworthiness, offence and defence to be defined cohesively, the accused as a person and a principle of workability. In a *tour de force* the assumptions are wielded to reformulate the law of self-defence.

Conclusion

The editor, publishers and Law Foundation of New South Wales deserve praise for their production of this volume. The restricted budget has not marred the editing and has the great advantage of producing endnotes to each chapter rather than footnotes at the bottom of each page.

Overall the political debate on the nature of criminal law remains mute, with notable exceptions in David Fraser's, Julia Tolmie's and Jill Hunter and Jenny Bargen's contributions. There was only a passing reference to Aboriginal Customary Law. Nevertheless the Postscript (p 283), concerning the Interim Report of the New Zealand Special Consultative Committee on the Crimes Bill 1989, indicates the political dimension more clearly than an article might. The suggestion in the Postscript is that the change of government in that country may mark a less responsive approach 'to calls for major change on social and "law and order" issues.'

The book throws down a challenge summarized by David Fraser's disturbing question from Talking Heads: 'Psycho Killer qu'est ce que c'est?' This reviewer would add another thought from Edgar Wallace's *The Man with the Canine Teeth*, where Leon Gonsalez says, 'Murder, my dear Manfred, is the most accidental of crimes'.

It would be a 'negligent accident' for any lawyers and others interested in this area not to avail themselves of the criminal lawyer's fine art produced by the authors of this book.

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