BOOK REVIEWS

SENTENCING IN A RATIONAL SOCIETY. By Nigel Walker. Allen Lane The Penguin Press, 1969. Pp. 239. $7.50.

Dr. Walker believes that the aim of a rational sentencing policy should be to bring about a reduction of crime in society, provided that this can be done reasonably economically. He is, he says in a phrase which is 'ugly enough to be safe from kidnappers',[1] an "economic reductivist". Thus the supposed denunciatory value of sentencing impresses him not at all; nor does he want an eye for an eye, for retributivism is altogether too crude a tool for fashioning a general reduction in crime. He does not shrink from the logic of this, and would willingly abandon such widely accepted retributivist assumptions as consistency of sentencing and greater punishment for intentional than for inadvertent crimes wherever they would clash with his reductivist aim. The one limitation he would permit upon his approach is a humanitarian one—'that the penal system should be such as to cause the minimum of suffering (whether to offenders or to others) by its attempts to achieve its aims'.[2] Thus even if it could, for example, be shown that the most effective reductivist sentence for murder was death and for rape castration, Dr. Walker would wish to pause and consider whether some more abstract (and less rational) principle of "justice" was not being infringed. The second part of this humanitarian principle (that the penal system should cause the minimum of suffering to others) would justify the occasional foray into purely preventive expedients regardless of their reductivist potential; but this should only happen, says Dr. Walker, when the harm done is irremediable (which is almost never the case with property offences) and where the probability of recidivism is sufficiently high.

This humanitarian limitation apart, Dr. Walker relentlessly constructs his reductivist pattern. Perhaps the most striking aspect of it is his rejection of the individualistic approach to sentencing, his denunciation of the 'diagnostic fallacy'. There is no compelling

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1 As Charles S. Peirce said when he coined the word "pragmaticism" to describe his views.

2 Walker, SENTENCING IN A RATIONAL SOCIETY, 4.

evidence, he argues, that individual assessment of which mode of punishment is most suitable for a particular offender is at all accurate or effective; indeed, what evidence there is suggests that it is far more effective to regard all offenders as nothing more nor less than units going to make up a statistical pattern and treating them all as that pattern indicates:

> It therefore begs fewer questions to visualize sentencing not as the application of a set of uniform choices to a group of individuals of differing responsivity, but as the application of choices entailing different probabilities of reconviction to a group of individuals whose responsivity is assumed to be conditional and indistinguishable.[3]

Such an approach would indicate, for example, that fining is normally the most rational punishment for first offenders and that probation is largely wasted upon them.

Not that Dr. Walker would expunge individualization of sentence altogether; but the way in which he would give it effect would be by entrusting greater discretion to penal agents. Obviously such a proposal is primarily relevant to prison sentences. Having argued persuasively that the maximum first prison sentence should normally be two years and the maximum subsequent sentence normally five years, he spells out in detail the range of discretion that would exist within these limits. Twenty-eight months one way or the other would be the absolute and untypical maximum, a year or so more of a norm. This, Dr. Walker considers, would not give a penal agents 'enormous latitude for arbitrary decisions as to actual date of release'.

Thus, while acknowledging the force of the argument that unappealable discretions can lead to victimisation and demoralisation, he regards such occasions as statistically insignificant. Certainly this was true in California—the state from whose system he derives much of his inspiration—when its system was working at its optimum. But Minnesota's comparable system, when operating in such a way as to produce more disparity, created very low morale amongst prisoners generally.[4] What Dr. Walker does not consider, and should, is at what stage low morale itself becomes a significant anti-reductivist factor affecting not just the victims but also the beneficiaries of disparity.

Dr. Walker's scheme has enormous internal coherence, and this is because, apart from his central assumption of reductivism, it is utterly value-free. Ruthlessly he can reject both liberal molly-coddling and

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3 Id. at 108.

4 See Tappan, CRIME, JUSTICE AND CORRECTION, 460-463.

authoritarian moralising where they do not contribute to his reductivist aim. But this value-free quality is also the weakness of his thesis. For the reductivist strategy he proposes would be equally valid whether the crime whose incidence he was seeking to reduce was robbery with violence or expressing opinions critical of the State or conscientious objection to military service or failing to carry one's passbook. One can imagine his book getting a nod of approval as readily in Pretoria or Prague as in London or Stockholm. He is a masterly strategist certainly, but one who is insufficiently concerned with the propriety of his objectives. Admittedly, he makes a rather cursory attempt to head off such a criticism by devoting his second chapter to the scope of the criminal law. His conclusion is that the most appropriate underpinning for the criminal law is Lord Devlin's administrative principle —that the smooth functioning of society and the preservation of order require that certain activities be regulated. Such a criterion, Dr. Walker points out, depends on factors that are potentially measurable, and thus imports an objectivity that is frequently lacking in other, more emotive, discussions of the proper scope of the criminal law. But unfortunately an element in measuring the smooth functioning of society is bound to be what society thinks will contribute to its smooth functioning. And it is notorious that many recent law reforms in western societies—particularly in areas of victimless crime such as abortion, homosexuality between consenting adults and pornography —have come many years before society would otherwise have regarded them as acceptable. Dr. Walker's criterion would have temporarily curtained off such areas of law reform, while providing in the meantime a strategy by which these crimes could be reduced. That is not sentencing in a rational society; it is reductivist sentencing in an irrational society.

Apart from this one important flaw, Dr. Walker's book is wonderfully provocative and stimulating; he tramples without apology on many sacred cows and white elephants. No one who reads his book will ever think about sentencing in quite the same way again.

R.W.H.

CASES ON EVIDENCE IN AUSTRALIA. By E. J. Edwards. The Law Book Co. Ltd. 1968. Pp. v-xxiii, 1-653, [Index: 655-667]. $16.80 (hard cover), $15.30 (soft cover).

Since the publication of Rupert Cross's "Evidence", practitioners teachers and students have had a well-written accurate and complete

work of reference which has established itself as a leading textbook in the field. An Australian edition, by J. A. Gobbo, was published in 1970. One effect of the creation of such a book is, at one stroke, to make the life of teachers of evidence much easier and much harder. Easier, because it is possible to advise students with confidence that they should read all or most of Cross; if that advice is taken they should absorb an authoritative and clear account of the subject. Harder, because there is so strong a temptation to tell oneself that since Cross says everything so well, nothing remains but to repeat, less felicitously, what is there set out. Now that an Australian version exists, there is no need to direct attention to the substantial number of issues where Australian doctrine has developed in a manner distinct from England's; the Australian teacher as local glossator may need to seek another role.

The existence of a fine textbook stimulates, in my view, the teacher of evidence to adopt the device of case teaching. If the students themselves work through the basic cases and statutes, and present their views and air their difficulties in an atmosphere of lively controversy, the teachers can employ the textbook most valuably to provide an introductory survey, a subsequent review and a continuing critique or background of opinion. (This is especially true with Cross, which is full of creative appraisals, suggestions and criticisms of existing doctrine.) Dr. Edwards's book is designed for Australian teachers and students who want to work through the law of evidence in class analysis and discussion. It fills a gap which the English collections cannot, and were not designed to close. The author has used his materials in his own classes in Western Australia in just that context; they come now with the mark of consumer trial and reaction.

It is a good collection. One can always argue in this subject about classifications and order. I would myself have put the first three chapters of Part Four (on conduct and motive, and the special instances of similar facts and character) into Part One, after the introductory material on judge and jury functions. Dr. Edwards has adopted a clear and coherent scheme, and served his readers a full diet of Australian materials, drawn from all jurisdictions. There are, indeed, very few cases decided before 1968 which I want my students to read that are not here, either as substantial extracts or in note form. One exception is the Queensland case of *Eichstadt v. Lahrs*,[1] which is better than *Kriss v. City of South Perth*,[2] on so-called circumstantial evidence,

1 [1960] Qd. R. 487.
2 [1966] W.A.R. 210; EDWARDS, 5-6.

and which may be taken admirably with the cases in Chapter 15 (conduct, motive and opportunity).

There are some criticisms which I hope may be remembered when a second edition is prepared. First, some of the extracts are too short and so produce confusion. It should not be necessary for users of this book to have to read the whole case in the reports in order to appreciate it; what is in Edwards should be enough. For example, in *Plomp v. R.*[3] the reader should be able to find out what the trial judge said in instructing the jury,[4] in order that he may appreciate the force of the judgments in the High Court. Second, the book is badly set out in places. There are instances where Dr. Edwards's own valuable notes and comments cannot be distinguished easily from the text of a case extract or statutory provision: see, for example, the mosaic on pages 18-19. Third, evidence is a subject which calls out for a coherent statement of its nature and the general problems of proof in our legal system. There are indeed some brief extracts from modern institutional writers set out by Dr. Edwards—Wigmore, Thayer, Stephen and Cross are all shortly quoted. But an overview is lacking. It is a pity that Dr. Edwards has not written one himself. The very brief introduction he provides is not even an appetiser. I think the best perspective I have so far read is Sir James Stephen's brilliant essay in "A General View of the Criminal Law" (1863). Perhaps Dr. Edwards may consider whether parts of this account, by a great master of the subject, could serve as a general introduction.

These criticisms are not serious. I commend this book warmly to Australian and overseas readers. I recommend it, with approbation, to my students.

LOUIS WALLER

PRINCIPLES OF AUSTRALIAN ADMINISTRATIVE LAW (4th edition). By D. G. Benjafield and H. Whitmore. The Law Book Co. Ltd. 1971. Pp. xxxviii, 377. $10.75 (hard cover), $8.75 (soft cover).

In this sound treatise on administrative law two assumptions prevail. First, that mediocrity is the keynote of Australian executive government. The assumption is evident in the section on the public services (pages 42-46) which is a curious presentation of fact and opinion. One is left wondering whether the courts would take judicial notice

3 (1963) 110 C.L.R. 234; EDWARDS, 420-425.
4 Id. at 236.

of such an assessment, and whether academic lawyers are suitably qualified to make this assessment. Secondly, there is no such presumption in regard to the administration of justice in the courts. We are told that there is a problem of 'poor quality recruitment' for the public service (page 43), but nothing is said of the quality of the judiciary. There is no objective assessment of the suitability of review by the courts in relation to the administrative process. The rules elaborated by the courts are carefully examined and explained. But what do the public administrators think of the courts, their occasional interventions and the need for review by the courts? To one who has spent thirteen years in an African colony and who adjudged the humanity and efficiency of the administration as far superior to the unimaginative application of English law in the courts, a change of attitude is necessary in the Australian scene. Perhaps the appointment of ombudsmen in the states would establish whether there is maladministration (pages 364-366), but it is interesting that so far the English Parliamentary Commissioner has revealed so little bad government.

As the authors indicate, the book is written for students. The omission of a list of statutes makes the book unsuitable for use by a practitioner, as frequently his lead into administrative law is through a problem arising out of a statute, for example, licensing. Many problems arise out of local government and town planning legislation. The practitioner is often looking for particular decisions on particular sections of a statute and this book is not designed for that purpose. One queries whether town planning, an important area covered by administrative law, can be disposed of in a page or two (pages 48-49). The volume of litigation on town planning involving principles of administrative law suggests that fuller treatment is required.

The inclusion of elementary material in the first four chapters suggests that the book is intended for first year law students. But in the case of final year students one would have thought this material would have been adequately covered in constitutional law or jurisprudence. This reviewer would have preferred fuller treatment to the meat of administrative law, namely natural justice and local government, at the expense of the introductory matter.

The generous space given to the English cases at the expense of the Australian cases is unexpected. Why give so much space to, say, *McEldowney v. Forde*[1] (pages 118, 124) and so little to, say, *Ex parte*

1 [1969] 2 All E.R. 1039.

The Angliss Group[2] (page 151)? The latter case explains authoritatively aspects of bias, and other matters. This is not an isolated instance and it strikes this reviewer as odd that in Chapter VII the lion's share is occupied by relating what the Law Lords have had to say whilst there is only room for direct quotations from two High Court judges. Windeyer J. is permitted a whole sentence (page 150), whilst Barwick C.J. is squeezed out in half a sentence (page 144). Both they and their predecessors have contributed to the subject of natural justice over the years.

The occasional excursions into American law (for example pages 134, 343) are not without interest, but one doubts whether they assist the student greatly. Excursions into Canadian case law might have been more rewarding. The Canadian courts mull over the English decisions in the same way as the Australian courts do whilst the United States ignores all but the earliest English decisions. The Canadian courts even look at Australian decisions. For example, on the subject of *quo warranto* (cursorily dispensed with at page 143), the British Columbian Court of Appeal explained in *R. ex rel. McPhee v. Sargent*[3] why it regarded the High Court decision in *R. v. Macfarlane; Ex parte O'Flanagan and O'Kelly*[4] (referred to on other points at pages 95, 143, 196) as poor law. In fairness to the authors it should be mentioned that there are references to the Canadian decisions (for example page 114) but there is no systematic review of Canadian law to extract what might be relevant, pertinent and enlightening.[5] Perhaps the authors will do this in the two major practitioners' works which are promised in the Preface.

Inevitably those familiar with their own State will cast a critical eye over the occasional error or omission. Western Australians will be

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2 (1969) 43 A.L.J.R. 150.

3 (1967) 64 D.L.R. (2d) 153. The history of *quo warranto* is interesting. Challenging the appointment of a Supreme Court judge (McCawley v. R., [1920] A.C. 691) belongs perhaps to constitutional law but some explanation is needed as to why there have been so many legislative attempts to eliminate it (e.g. s. 155 (1) Local Government Act 1960 (W.A.)).

4 (1923) 32 C.L.R. 518.

5 Inevitably a reviewer has his own ideas on what should be included. The wealth of information contained in Chapter XII on corporations and tribunals might have been extended to cover that uncertain area governed by quasi-public bodies such as law societies. What sort of judicial control is exercised over a stock exchange suspension or a university expulsion? If this area is regarded as being outside administrative law, the reviewer would have preferred to have seen more quotations of the judges rather than the authors' summaries.

quick to point out that no mention is made of their District Courts (page 52); they may also be relieved that the chaotic state of their subsidiary legislation (page 106) is not condemned in the strongest terms. It is a thankless task having to cope with the ramifications of seven major legislatures in a single textbook and the authors have coped admirably.

Some 1,300 cases form the core of this treatise. There are moments when one suspects that the authors have been determined that each case shall get at least one mention. It might have made it a more manageable task to prune this number drastically. Is it necessary on the subject of irrelevant considerations to cite twenty-one cases (eleven English and ten Australian)? Is the student expected to look up all, some or none in the reports? Are they necessary to establish the authority of the statement in the text? The space might have been better used to give factual illustrations of what are and what are not irrelevent considerations. It would make easier reading for a student.

Again, this reviewer had difficulty in being convinced by some of the authors' assertions. For example, on page 101 it is stated that the executive must have power to make delegated legislation because of pressure on parliamentary time. Is this so? Are Australian legislatures so deluged with work that they cannot cope? Are some matters too technical as to be beyond their comprehension? These assessments may be true of England, but this reviewer remains with an open mind as to whether they are true in Australia.

The final chapter on reform does not match the quality of the earlier chapters. Do we need to know the names of those sitting on the law reform committees or commissions (pages 364-365)? It is doubtful whether the authors have established authoritatively where the weaknesses in the law lie; in what aspects the individual is the victim of arbitrary government; where additional protection is required; and, most difficult of all, how the law can be improved. Perhaps the stage has been reached in Australia where a commission on the lines conducted by Mr. Justice McRuer in Ontaria,[6] is needed to establish as a matter of fact in what areas of government the ordinary citizen is at such a disadvantage as to amount to injustice.

Despite the tone of some of the remarks in this review, this is a good textbook. It is readable and accurate. There can be little doubt that it will appeal to students.

D. BROWN

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6 ROYAL COMMISSION OF INQUIRY INTO HUMAN RIGHTS Ontario, 1968.