Review of Scott Prasser, Rae Wear and John Nethercote (eds), *Corruption and Reform - The Fitzgerald Vision*, Saint Lucia: University of Queensland Press 1990. pp i-xvi; 1-267.

$26.95

BEVAN LAWRENCE*

Corruption and Reform is a collection of 22 articles on the Fitzgerald Inquiry. It is divided into six parts and includes an historical analysis of corruption, an insight into its discovery and an analysis of the Fitzgerald Inquiry's recommendations. It disputes some of the bases of those recommendations and then attempts to steer a path towards public sector reform with a view to preventing a repetition of similar behaviour.

In Part I, Gary Sturgess explores the origins and nature of corruption. He concludes that public corruption is an understandable crime which is highly likely to be endemic in any society. Corruption, he says, is repugnant because it involves a very basic breach of public trust. He supports the need for standing corruption commissions but warns against over-reaction to an element in society which is often present but rarely discovered.

Former and current journalists Grundy, Whitton, Masters and Dickie, all of whom played some role in discovering or reporting corruption which led to or was revealed by the Fitzgerald Inquiry, contribute to Part II. They provide a graphic illustration of the failure of the modern media to effectively expose institutionalised police and government impropriety. They accept that the media failed the people of Queensland, attempt to explain why and then suggest appropriate remedies.

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Central to their argument is a warning that powerful government media organisations can take control of the agenda for news items, especially when those who oppose the government line are short of resources and have less news to feed hungry journalists who need more news, more often - but not necessarily better news.

Phil Dickie, in particular, deals with the need for editorial staff to support and promote investigative journalists who are usually, at best, only tolerated by their superiors. Bruce Grundy provides sound evidence that competition between journalists often prevents the sharing of information which is so essential to any effective attack on institutionalised corruption.

The journalists' solutions include freedom of information legislation, relaxation of the defamation laws and legislation which will protect and encourage those within the public sector to "blow the whistle" on corrupt officials.

At the conclusion of Part II one is left with no comforting feeling that the media will not fail again should the situation arise. Chris Masters in his all too brief description of his investigative work shows some faith in the power of public opinion by concluding: "The next time a government agrees to an inquiry which precipitates its own demise, it will be an even greater miracle than the last."[1]

Part III of the publication analyses the Fitzgerald Inquiry and its recommendations.

Academic Ross Fitzgerald provides a strong case for inquiries to be truly inquisitorial (in distinction to the judicial approach) if they are to go any distance towards uncovering corruption. He warns against restrictive terms of reference and his description of corruption as "a network of relationships and a system of influence"[2] will probably prove prophetic when applied in Western Australia in the months ahead.

Brian Toohey is critical of the lack of definitive findings from the Fitzgerald Inquiry and points to many instances of apparent impropriety which were not followed through. He is pessimistic about future reform without a clear unravelling and understanding of past corruption.

Law Society representative Greg Vickery concerns himself largely with problems of self-incrimination.

1. C Masters "Tackling Corruption - Some Strategies" in S Prasser, R Wear and J Nethercote (eds) *Corruption and Reform - The Fitzgerald Vision* (St Lucia: University of Queensland Press, 1990) 45, 48.
2. R Fitzgerald "Judicial Culture and the Investigation of Corruption: A Comparison of the Gibbs National Hotel Inquiry 1963-64 and the Fitzgerald Inquiry 1987-89", ibid 61, 65.

Academic Scott Prasser provides an interesting assessment of the difficulties in implementing the recommendations of any inquiry, but particularly the Fitzgerald Inquiry with its general proposals, without a guiding light to shepherd the recommendations through Parliament and the Executive.

In Part IV, "Reforming the Police", Nigel Powell, Jill Bolen and Jeff Jarratt attempt to tackle the almost impossible task of providing effective police reform. Jill Bolen guides the reader to an empathy with the problems of police duty. She and Jeff Jarratt struggle with administrative changes and with the need for police duties to become truly based in the community. Nigel Powell, the courageous former Licencing Branch Detective in the Queensland police who originally "blew the whistle" on institutionalised corruption within his organisation points to the futility of structural reform unless the principles of truth and justice are restored to the private code of conduct of all members of society.

Their suggestions for reform provide the most challenging and surely the most confusing material in this collection.

In Part V, "Reforming the System of Government", Michael Jackson echoes the cry of Nigel Powell but seeks to depoliticise the public service and restore the strength of Parliament. Peter Coaldrake appears to accept corruption as the inevitable result of any system which leaves the same political party in power over a long period of time. In his overview he offers no solutions.

Apart from a general agreement that freedom of information legislation and legislation to protect and support "whistle blowers" within the public sector are necessary, along with reform of the defamation laws, all the contributors to Part V provide different and conflicting views of reform within the public sector. Merit based promotion is assessed against seniority based promotion, centralised power against regional control and security of tenure for civil servants against limited contracts. The strengths and weaknesses of each system are assessed and while the diversity of opinion provides the reader with a battery of information, it is not surprising that no clear solutions become apparent.

Perhaps the most entertaining contribution comes from Malcolm Mackerras, who in Part VI, "Reforming the Electoral System", vigorously disputes that Queensland's gerrymander exists, or if it does, that it has led to the National Party's stranglehold on power for so long. Rae Wear concludes that the vote weighting system in Queensland cannot be justified.

The diversity of views in *Corruption and Reform* provide a graphic example of the difficulties of any path to reform. Each contributor does,

however, make that path a little easier by providing a stepping stone as a guide for those in the Australian community who seek to learn from the Queensland path to reform.

With revelations of official misconduct in other states of Australia now reaching the public arena, it is a publication which will undoubtedly be the subject of further critical analysis, particularly by those seeking to improve probity in public life.

Review of Beth Gaze and Melinda Jones, *Law, Liberty and Australian Democracy*, Sydney: Law Book Company 1990. pp v-xxxvi; 1-505. $69.00

MEREDITH WILKIE*

Justice Brandeis of the United States Supreme Court declared in the 1927 case *Whitney v California*:[1]

> Those who won our independence believed that the final end of the state was to make men free to develop their faculties....[2]

It is perhaps stretching matters to suggest that one reason may be Australia's penal origins, but it is at least clear that no such lofty idealism impelled the formation of the Australian state. Nevertheless, if asked, we are likely to claim liberty as one of the cornerstones of our democracy.

Judicial Protection Inadequate

This book documents a litany of apathy and denial that constitutes the sum total of our "respect" for civil liberties. It is an "examination of legal doctrine" and details the failure of the common law and its institutions to redress the gross imbalances within Australian society. These imbalances make a mockery of our ideals of liberty, justice and democracy.

In lieu of constitutionally entrenched individual liberties, fundamental rights depend on judicial activism for their protection in cases where the political process fails to accord them their full value. Judicial activism,

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1. (1927) 274 US 357.
2. Ibid, 374.

however, is rarely witnessed in Australian courts. As Sir Owen Dixon wrote in his 1965 collection *Jesting Pilate: and Other Papers and Addresses*:[3]

> Civil liberties depend with us upon nothing more obligatory than tradition and upon nothing more inflexible than the principles of interpretation and the duty of courts to presume in favour of innocence and against the invasion of personal freedom under colour of authority.[4]

In a mighty undertaking, provocatively achieved by Gaze and Jones, the cases and materials collected here demonstrate the ineffectiveness of the Dixonian approach to the "protection" of civil liberties. Step by step, they build a picture of a democracy in which civil liberties claims are characterised by the courts more often as asserting a moral right, rather than a legal right, and in which parliaments and a complacent populace accord human rights a low priority.

The first case extracted is *McInnis v The Queen*,[5] the 1979 High Court decision which held that there is no right to have legal representation provided in our criminal courts, even when very serious charges are faced. One of the last is *Milirrpum v Nabalco Pty Ltd*,[6] the illogical and revisionist 1971 judgment of the Northern Territory Supreme Court which denied to Australian Aborigines what Maoris and North American Indians had long enjoyed under British common law: a recognition of their original occupation and possession of the land prior to conquest.

Along the way, one finds detailed discussion of many important issues including the harassment of "communist sympathisers" during the 1940s, culminating in the Commonwealth Communist Party Dissolution Act 1950, the 1979 Ridge-Bridge election debacle in the East Kimberley of Western Australia, the Bill of Rights debates and other notorious exercises which we can recognise as the building blocks of modern Australia. The reader and the browser (the index is a pleasure to use) will also find references to the Australia Card, Norm Gallagher, Women Against Rape in War, the Church of Scientology, ASIO, Derryn Hinch, pornography, poverty and parliamentary sovereignty.

Aboriginal disadvantage and dispossession is, as it should be in such a book, a major subject of concern. Although the materials, despite the absence

3. O Dixon *Jesting Pilate: and Other Papers and Addresses* (Melbourne: Law Book Co, 1965).
4. Ibid, 153.
5. (1979) 143 CLR 575.
6. (1971) 17 FLR 141.

of any black voice, are well-chosen, one feels that the authors are uncomfortable here and that the reality described does not quite fit. This is really the fault of some careless commentary. As long as Aborigines are massively over-represented in our prisons and juvenile institutions (at least 50% of detainees in Western Australia are Aborigines), can we really conclude as the authors do, that direct impositions on the civil liberties of Aborigines have been removed?[7] While Aborigines continue to face harassment and violence in confrontations with police throughout the country, from Redfern to Geraldton, can we agree with the authors' statement that racial violence in Australia is now an exceptional occurrence?[8] While Australian law continues to trample Aboriginal law and culture with impunity, is it enough to dismiss the entire "customary law" dilemma by opining that it "seems reasonable" to address the "practical injustice resulting from the clash of established customs ... and the demands of imposed law"[9] merely with a sentencing discretion to discharge without penalty?[10]

Theories of Democracy

To a large extent, the subject matter and structure of the book have been determined by three predominant "theories of democracy", helpfully summarised in Chapter 1. Thus Part Two centres on the theory of "institutional democracy", building a discussion of the so-called "core freedoms": voting rights, the rights of protest and assembly, freedom of speech. These are the "political rights" seen as minimum rights for the functioning of a democracy.

Part Three continues with a broader view of democracy. "Liberal democracy" sees the need for the state to protect the private realm, that of individual rights. Those dealt with here are freedom of religion and belief, press freedom, individual privacy, and the protection of individual lifestyles, "morality" and behaviour.

Finally, Part Four takes up the ideas inherent in social democratic theory which alone is able to take account of inherent inequalities among individuals. Equality becomes a right in itself and here the authors deal not only with anti-discrimination and affirmative action legislation, but also with the threats to democracy represented by poverty and the denial of economic justice.

7. B Gaze and M Jones *Law, Liberty and Australian Democracy* (Sydney: Law Book Co, 1990) 438.
8. Ibid, 457.
9. Ibid, 491.
10. Ibid, 490.

This "framework of civil liberties" offers an innovative and challenging way of presenting the materials here. Unfortunately it means that much is left out. The rights of psychiatric patients, for example, do not rate a mention. The ideal of jury trial, due process, the protection of juvenile offenders in police custody, prisoners' rights - these and other "obvious" candidates for inclusion in a book on civil liberties are not dealt with. Very real technological threats to civil liberties are barely mentioned: electronic surveillance, genetic engineering, artificial conception, data transfer and record linking, for example.

Conflicting Rights

In this concentric or hierarchical analysis of individual rights, the most central and fundamental are said to be political rights. If the principles of liberal democracy are accepted, then individual rights should be added. If social democracy prevails, egalitarian rights are further added. There is a risk in such an analysis that the relationships which have been forged between ideas of rights, the compromises and balances, the ways in which assertions and claims have impacted on each other, will not be fully acknowledged. Yet clearly, in our society there are conflicting rights and, however irritably, they do co-exist. As Louis Henkin wrote in *The Rights of Man Today*:[11]

> [T]he twentieth century has brought ... a marriage, more or less convenient and comfortable, between the emphasis on the individual, his autonomy and liberty, and the emphasis by socialism on the group and on economic and social welfare for all; between the view of government as a threat to liberty, a necessary evil to be resisted and limited, and the view that sees government as a beneficial agency to act vigorously to promote the common welfare.[12]

The nature of this co-existence tends to be skirted here. However, it cannot be avoided altogether, and is most clearly confronted in the discussion of the proscription of racist speech, about which much controversy has flared recently in Western Australia and elsewhere. In a thorough survey of the various arguments for and against proscribing incitement to racial hatred or racial vilification, the authors illustrate the tensions between our traditional ideals of liberty in the form of freedom of speech and our growing awareness of new imperatives in a multicultural society. "Equality", a value furthered by proscriptions on racist speech, is seen to be in conflict with one of our fundamental liberties. Yet isn't there a much more tangled web here: one

11. L Henkin *The Rights of Man Today* (London: Stevens & Sons, 1979).
12. Ibid, 23-24.

perhaps invisible to the eye focussed on the individual but graphically apparent to one which takes in society's full dynamic? Surely equality is itself a necessary prerequisite for the enjoyment of liberty. One wonders, too, how free anyone can be in a society fraught with inequalities.

The clarity of the structure of this book and the breadth of subjects dealt with will surely make it an ideal teaching resource not only in law schools but in political science and sociology courses as well. The cases extracted contribute to a clear insight into the common law's potential as currently practised and the materials on the whole are illuminating. Some of the most thorny and controversial issues in the Australian polity receive full and unflinching attention.

Living Realities Neglected

By choosing to describe civil liberties principally through cases, often appeal cases, however, the authors have largely forgone the opportunity to document the living realities for the most disadvantaged in our society (and not only Aborigines); those whose civil liberties are no more than aspiration, who have no real access even to the most basic of complaint mechanisms in the case of flagrant abuses of power by the police, the Department of Social Security, State welfare authorities, or other power-wielders in our society. Some of the materials give us an insight into these realities - the findings of the *Toomelah Report*[13] are included, for example. The authors might have considered including some overall national data to avoid giving the impression that the matters dealt with in such materials are isolated instances.

While this is not an analysis of the nature and state of health of Australian democracy as indicated by the operation of the law, an idea of the parameters of democracy in Australia can be gleaned. And it becomes apparent, as the authors conclude, that:

> There is a clear disparity between the implications of the widespread belief in Australian democracy, and the rights and liberties which are valued and protected by law. Australian law does not satisfactorily guarantee any of these; more often than not the abrogation of rights occurs through the legal process.[14]

Such a damning conclusion is nevertheless convincingly supported here.

13. Human Rights and Equal Opportunity Commission - Australia *Report on the Problems and Needs of Aborigines Living on the New South Wales - Queensland Border* (Sydney, 1988).
14. Supra n 7, 493.

Review of Peter Hay, *The Book of Legal Anecdotes*, London: Harrap Books Limited 1989. pp i-xiv; 1-322. $45.00

PAUL GENONI*

It needs to be said about this collection of anecdotes that it is not simply a selection of legal humour. There is of course an array of books dedicated to recording the light-hearted aspects of the courtroom, the chambers and the law office, but the aim of this collection is somewhat more ambitious. Peter Hay attempts to include in this volume a collection of anecdotes of sufficient breadth to represent the richness and variety of the traditions, customs and personalities of the law. This is not to say that humour is ignored. Many pieces have been chosen to illustrate the quaint, the whimsical and the bizarre; but the humour that is contained therein tends to be gentle rather than uproarious. When the humour does prevail it is frequently contained in the language. Hay is clearly an admirer of the English language and the subtle but powerful effects to which it can be put when at the service of the law. Indeed, a number of the selections have obviously been chosen in order to record particular examples of linguistic excellence, be they written or spoken. Hay, however, is more impressed by the subtle prod rather than the savage blow, and his selection prefers innuendo and dexterity over insult and invective.

The anecdotes are collected under ten headings, each of which is further subdivided. The section headings are generally cryptic ("The talk of the town", "Cruel and too usual") but the reader should be able to light upon sections of interest with little difficulty. Most of the anecdotes selected by Hay have been paraphrased in his own somewhat mannered style, but he has also maintained variety by including a number which are quoted directly from their original sources. In general his collection, limited and subjective

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although it necessarily is, works well. Its strengths lie in the variety of temperament and fact that rarely allows the book to become tedious, as collections of this sort can do. Hay's interest is not only in entertaining but also in gently instructing the reader in the ways of the law. This book can be used as a work of reference, but it also draws the reader onward, eager not only for the next joke, but also for the next insight into the often arcane and extraordinary aspects of the profession. The chapters flow into each other almost imperceptibly, and the casual inquiry runs the risk of becoming far more time consuming than expected.

Although Hay declares in the preface that he has no desire to continue what he see as "the sick jokes and the negative image of lawyers",[1] his selection does not shy away completely from recording the shortcomings of lawyers, or the law as it has occasionally been practised. Indeed many of the pleasures of this collection can be drawn from the effective juxtaposition of anecdotes that record in short order the best and the most idealistic, alongside the meanest and most excessive aspects of legal practice. In doing so the book becomes a testimony to the particularly human nature of the law, and serves as a reminder that no matter how daunting or imposing may be the legal edifice itself, it remains a system that is constantly exposed to both the finest and lowest aspects of human nature. Judges, lawyers, barristers, jury members and criminals all make their unique contribution to this collection, and yet more than one of these vignettes reminds the reader that they share enough of nature to make them kin.

Nearly all of the anecdotes are of American and British origin. It is notable that the majority of the stories from America derive from the nineteenth and the present century, while those of British origin tend to be earlier, chosen to illustrate aspects of how things used to be. For Hay, tradition seems to be loosely equivalent to the Old World, whereas modern legal practice and personalities are best represented by the New World. There are therefore numerous references to Frankfurter, Holmes and Darrow, but the reader will search in vain for anecdotes featuring Denning, Scarman or Pollock. It is a weakness of this collection that the editor seems a little too much in thrall of the great personalities of American law. A number of the anecdotes (and not only those collected under the heading "Private Lives") seem chosen for no other purpose than to assure the reader that these imposing figures are just like you and me, except that - well, they aren't just like you and me. That may be

1. P Hay *The Book of Legal Anecdotes* (London: Harrap Books Limited, 1989) xi.

a sound theory in itself, but it can sometimes make lame reading when the point of a particular selection seems only to be a desire to record what nice and humble people these great men really are. And they are invariably men. Although no bias could be imputed to the editor, one is inevitably reminded when reading a collection with the scope of this one, of the extent to which women have been excluded from the practice of the law. Hay includes a short section under the heading "Women and the Law" which records some of the animus women have faced as they made their careers.

It might be wished that the collection had included a greater representation of anecdotes from sources other than America and Britain. There is a small selection of material from other common law countries, and an even smaller selection drawn from Medieval European and classical sources, but they are too few to impinge upon the overwhelming Anglo-American flavour of the collection. The Australian reader will find only a handful of stories originating from this country. Some indication of the greater variety that a broader range of sources might have introduced into the collection is given by the inclusion of a story from Malta (unfortunately too long to paraphrase here) which records what is surely one of the most bizarre miscarriages of justice ever inflicted.

The reader might also have cause to lament the lack of detail given about the sources of the anecdotes in this volume. Many read like classics, and it would have been appropriate to have recorded their precise origin for the benefit of future researchers, or for those who are inclined to read these stories in their original context. A good bibliography has been included, but there is no reference to the origins of particular stories. In this regard this collection compares poorly to *The Oxford Book of Legal Anecdotes*,[2] wherein sources are recorded meticulously.

Another minor quibble is with the apparent lack of research that has been put into the presentation of some of the material. In one of the few Australian selections, for example, Sir Edward Holroyd of the Victorian Supreme Court is identified as "Australian Chief Justice Holroyd".[3] This may be satisfactory in the context of the anecdote, but it appears to be rather odd and inadequate when rendered as an entry in the index of personal names as "Holroyd, Australian Chief Justice".[4] Clearly no attempt has been made to verify a form

2. M Gilbert (ed) *The Oxford Book of Legal Anecdotes* (Oxford: Oxford University Press, 1986).
3. Supra n 1, 152.
4. Ibid, 317.

of the Judge's name which would render it consistent with that of "Holmes, Oliver Wendell", by which it is preceded in the index. Holroyd is only one of many treated in this cursory manner, which could have been corrected with a comparatively small amount of effort.

Nevertheless, despite some small misgivings this book will serve a useful purpose. It strikes a balance between the entertaining and the informative, and between the amusing and the educative. It can be usefully read by both those with legal training and the layperson. It makes excellent bedside reading and those anxious to enliven a forthcoming after-dinner speech could do worse than to look here. It should also be mentioned that this is a handsomely presented volume. The design is both elegant and functional, arranged in a way that is suitable to both the reader and the browser.

One of the rewards of reviewing a book of this type is the opportunity to reproduce a favoured selection. Many personal favourites are disqualified due to their length, but the following is not only suitably succinct, it also serves to give a feel of the flavour of this fine collection.

> Justice Van Brunt of the appellate court once interrupted a young lawyer in the middle of his long quotations from authorities: "I suggest that you get down to the merits of your own case."
>
> "Presently, Your Honour, presently," the young lawyer responded, but he continued to expound the law earnestly as he saw it.
>
> "Let me suggest to you," Justice Van Brunt interrupted him again, "that you get down to the merits of your case, and take for granted that the court is familiar with the elementary principles of law."
>
> "No, Your Honour," dissented the sincere young man, "that was a mistake I made when I argued this case in lower court."[5]

5. Ibid, 152.

Review of Fay Gale, Rebecca Bailey-Harris and Joy Wundersitz, *Aboriginal Youth and the Criminal Justice System: the Injustice of Justice?*, Cambridge: Cambridge University Press 1990. pp 1-156. $35.00

GREG McINTYRE*

As stated in the preface to the book, this work records a study of Aboriginal youth and how the criminal process has treated them. Statistics from the Juvenile Court and Aid Panels are used to test various hypotheses about Aboriginal juvenile crime and to seek to explain some disturbing figures.

The primary purpose of the study was to respond to a request by Aboriginal community leaders that the researchers find out "why our kids are always in trouble".

Because the statistics in South Australia (unlike some other States) include a differentiation on the basis of race it was not difficult to confirm the observable conclusion that "Aboriginal youth is over-represented at every level of the juvenile justice system...."[1] The statistics showed that at each point in the system where discretion operates, young Aborigines are significantly more likely than other young persons to receive the most severe outcomes.

One of the most important propositions proffered and examined by the study is that the initial decision whether to arrest or summons a child has a cumulatively detrimental effect on how the child will subsequently be dealt with as the child progresses through various stages in the system.

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1. F Gale, R Bailey-Harris and J Wundersitz *Aboriginal Youth and the Criminal Justice System: the Injustice of Justice?* (Cambridge: Cambridge University Press, 1990) 3.

The authors seek to test the theory that Aboriginal youth, comprising a visible minority who are socially and economically disadvantaged, suffer a racial bias in the discretionary decision making process which forms an essential part of the system.

The authors also set out to provide an alternative to the general community assumption that Aboriginals as a group are more "criminal" in tendency and to search for reasons behind the degree of Aboriginal over-representation in the criminal justice system.

The study finds:

> [T]hat the initial arrest decision, the facts of being unemployed and living in a household other than a nuclear family crucially influence those decisions taken by agents of the juvenile justice process - are not race-specific. But they are features far more common to young Aborigines than to other children.[2]

The authors conclude that the welfare/justice model, being based on Western middle-class concepts, may work well for middle-class youth, but it does not benefit Aboriginal families who are poor and do not have middle-class values or lifestyles, and it is not reasonable to thus assume that they are more "criminal".

The work is divided into eight chapters which essentially comment on the figures and tables contained within the chapters and the statistical study which is tabularised in detail in 19 Appendices.

The first chapter, "Blacks and the Law", reviews related empirical studies in Australia, the United States and Britain and points to the unmet need for a better understanding of the reasons for Aboriginal over-representation in the legal system.

Chapter 1 explains the reason for choosing South Australia for the case study, which is essentially the discrimination and comprehensiveness of its crime statistics.

The authors also point out the limitations of the study in this chapter. The statistics studied are not a reflection of the quantity of crime in the community but rather its "clean-up" rate. As the authors suggest:

> [C]ertain sub-groups within the community may be apprehended more often, not because they actually commit more offences, but because they are more visible and receive much greater attention from law-enforcement agents.[3]

2. Ibid, 124.
3. Ibid, 17.

The authors on this subject depart from statistical analysis (because of the lack of available statistics) and refer to:

> [A] wealth of anecdotal material to suggest that Aboriginal youths are more likely to be targeted by police for apprehension, and ... numerous stories of what seem to be blatant discrimination operating against these young people at this initial contact point.[4]

This topic is explored in Chapter 5 and is the weak link in an otherwise statistically supported argument, which is most likely to be attacked by those who may wish to disagree with the authors' conclusions.

Chapter 2 summarises by reference to United States, British and Scottish models, how a separate system has developed in South Australia for dealing with juveniles. This system involves blending due process with diversionary schemes in an attempt to pursue the objectives of rehabilitation and deterrence of the individual.

Chapter 3 pursues the thesis that the legislative change and other social engineering outlined in Chapter 2 have been ineffective to improve the treatment of Aboriginal juveniles within the legal system. The authors argue that the net has been widened by replacing informal cautions with Aid Panels and Screening Panels. Support cited for this view comes from the presentation of figures showing a marked upward trend in the gross number of appearances of juveniles before Courts and Aid Panels between 1947 and 1986. The analysis would be more convincing if it was compared with overall population figures, which must account for a significant amount of the increase in crime statistics.

However, the thesis is supported by a clear indication in the statistics that there was a drop in appearances between 1976 and 1979 and a sharp increase from 1979 when Screening Panels were introduced as a means of determining whether cases should be diverted from the Children's Court to a Children's Aid Panel.

An interesting comparison is drawn with other ethnic groups to test the assumption that high visibility or cultural distinctiveness brings youths to the notice of the agents of the system, resulting in a representation in the system disproportionate to their proportion in the population.

While there was some minor over-representation for arrest of youths born in the United Kingdom (1.0%), Greece (1.5%) and "Other Europeans"

4. Ibid, 17.

(1.2%), those under-represented were Italians (-1.3%), White Australians (-1.3%) and Asians (-5.5%); and Aboriginal Australians were grossly over-represented (19.1%). Similar trends were apparent at the stages of apprehension, court referral and detention, with a pronounced jump for Aboriginal Australians, between apprehension (6.5%) and the decision to arrest (19.1%). As the authors note, Aborigines start off in a worse position at the point of entry to the system and "their relative position deteriorates dramatically as they move through its subsequent stages".[5]

The comparison of statistics for different regions throws up some aberrations between areas of similar population and social conditions which the authors suggest can only be explained by the more efficient functioning of the welfare system or the size of the police force. The authors courageously assert that "[m]any Aboriginal workers feel that the mere presence of police provokes a reaction from Aboriginal youth which in turn results in their arrest".[6] However, in Chapter 4 the authors, after an analysis of the statistics, conclude that:

> [R]egional variations in the legal profile of the Aboriginal young offender are not sufficiently marked to furnish even the beginnings of an adequate explanation for the dramatic regional differences in the treatment of Aborigines by the juvenile justice system.[7]

Chapter 3 makes the significant point, supported by statistics, that of those individuals recorded in the criminal justice system, each Aboriginal youth appeared an average of three times in the system, thus exaggerating the statistics of appearances for Aborigines compared to non-Aborigines (73.4% of whom were apprehended only once).

Chapter 5 begins by reciting anecdotal material which is summarised by the authors as "obviously inadequate to prove that police systematically discriminate against Aboriginal youth"[8] and which, in the view of this reviewer, does more to detract from the work than add to its otherwise significant contribution to social knowledge in this area.

In the balance of Chapter 5, a very interesting part of the study is outlined in which socio-economically and residentially matched non-Aboriginal and Aboriginal groups were compared. Aborigines fared badly in arrest rates until they were also matched as to criminal histories.

5. Ibid, 34.
6. Ibid, 40.
7. Ibid, 55.
8. Ibid, 68.

The authors seem overly keen to hang onto their hypotheses while conceding that their statistical analyses do not support them. For instance, in the summary to Chapter 5 they state:

> [S]tatistical analysis indicated that these high arrest rates could be attributed only minimally to the operation of racial bias....
>
> Whilst charge profiles seem to provide a justification for arrest patterns, ... the observed variations in charge patterns may indicate police discrimination at the pre-arrest stage. Although this cannot be ascertained from official data, the case study material presented in the first part of this chapter throws some light on the issue. What on the surface seems a valid police response to a particular person's behaviour may actually conceal discriminatory practices.[9]

In Chapters 6 and 7 the authors present their findings on the effects of Screening Panels, Children's Aid Panels and Courts and the overall conclusion is presented in Chapter 8:

> It could therefore be argued that it is not the judge's decision regarding penalties which is critical, but the Screening Panel's decision to refer an offender to the Children's Court in the first place. In turn, that referral decision is predicated on the police decision to arrest rather than report a child.[10]

As the authors comment, "[t]his may explain the apparent failure of the Aboriginal Legal Rights Movement to exert much positive effect on Children's Court outcomes".[11] They point out that access to legal representation is the one area where Aborigines are advantaged in comparison to other youth, but not effectively so because it comes too late in the legal process.

This is an important treatise for policy makers in the area of juvenile justice to read, digest and internalise as a compelling argument for rethinking where the system is heading.

Stylistically the book works reasonably well. The style of writing is significantly subordinate to the content in a work of this kind, and the difficulties of presenting what is primarily a statistical analysis in a readable form are considerable. On first reading I found it somewhat repetitive, with an introduction and a concluding chapter together with an internal conclusion or summary to the five central chapters. However, on the closer analysis required to complete this review I gained some help from that structure and so would concede that it may prove beneficial to those who will no doubt utilise this text for educational purposes, whether as teachers or students.

9. Ibid, 78.
10. Ibid, 121.
11. Ibid, 122.

Review of Simon Lee, *The Cost of Free Speech*, London: Faber and Faber 1990. pp i-x; 1-149 $14.99

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The right to free speech is one of the core tenets of classical liberalism. Enshrined in all of the seminal manifestos of that philosophical tradition, freedom of expression remains a belief fundamental to the day-to-day functioning of Western democracies. Like all such deeply seated ideas, however, it has the potential to assume the status of an article of faith, and thus to be accorded a priority which far outweighs its real significance.

It is this possibility which Simon Lee attempts to address in this book. His principal thesis is that the old catch-cries are at least partly anachronistic. They were formulated in a century far removed from our own in which both the social climate and the available media of expression were vastly different from those of today. Lee thus considers that the rationale behind an inalienable right to liberty of expression, not to mention its importance to the modern world, needs to be radically reassessed in order to fit current needs and conditions. Clearly, part of this task of reassessment falls to the legislators and judges who must cast the values of today's society in the form of law. According to Lee, it is essential that we all recognise that free speech "plays different roles, through different media, in a world of different values".[1]

The argument commences at the locus classicus of the extreme free speech position, namely the statement attributed to Voltaire: "I disapprove of what you say but I will defend to the death your right to say it." Lee closely scrutinises this resounding declaration and questions its appropriateness to modern circumstances. He doubts whether or not anyone really would defend

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1. S Lee *The Cost of Free Speech* (London: Faber and Faber, 1990) 19.

to the death another's right to speak, particularly if the speaker was saying something with which the would-be defender does not agree.

This is illustrated by placing the discussion in the context of the much-publicised controversy caused by Salman Rushdie's novel *The Satanic Verses*. Lee suggests that, in reality, the people who most vociferously condemned the Muslim reaction to the book were doing so precisely *because* they sympathised with Rushdie's position and not *despite* any disagreement with him. This suggests that most people will ultimately decline to support those who are exercising their purportedly absolute right to free speech in a disagreeable way.

This distinction between the possession of a right and the way it is exercised is crucial to Lee's argument. He holds that rights strictly so understood cannot be adhered to independently of the other "values which give life a meaning".[2] To illustrate this he notes that, while one may have a legal right to tell a child that Father Christmas does not exist, it would nevertheless be wrong to do so. As such, the right to free speech is to be considered as merely one of many competing moral imperatives. It must be constantly balanced against the other considerations encountered in real circumstances, a point he considers lost on the extreme proponents of freedom of expression.

It is here that the pun inherent in the book's title is brought to the reader's attention. The point is rather obvious: words can prove costly. Salman Rushdie would not need to be reminded of this, but it must, according to Lee, be reiterated to the more extreme exponents of an absolutist concept of free speech. If loose lips do indeed sink ships, then it is necessary to weigh precisely the costs and benefits of freedom of expression. While this proposition may appear trite to some, Lee considers it to be lost on others, and thus that it requires a book to explore its implications.

Indeed the proposition is trite in the abstract. But one of the strengths of the book is that the author devotes considerable space to examining the free speech issue in the context of real and celebrated situations. Part II of *The Cost of Free Speech* is comprised of five chapters which respectively examine how the principle of freedom of expression interacts with the specific problems of libellous journalism, pornography, desecration of the flag, official secrets and incitement to racial hatred. Part IV deals at length with the law of blasphemy in the context of the Rushdie affair, and Part V addresses the questions raised by the British House Secretary's 1988 order to broadcasters

2. Ibid, 66.

to cease displaying the direct speech of persons representing groups associated with terrorism. Of the many solutions posed over the years to these, most are legal in nature. While they may all be symptoms of more fundamental societal flaws such as racism and sexism, inevitably the initial response is, how can we legislate to solve this?

That is why *The Cost of Free Speech* is immediately relevant to the legal community. The dilemmas Lee dissects in his book are encountered in the courts and legislatures every day. Sometimes they are resolved by an established common law rule, such as is the case in relation to public interest privilege. But, just as frequently, they require innovation on the part of law makers, who must keep the often conflicting requirements of freedom of expression and the well-being of society constantly in mind when drafting legislation or making case law. The recent controversy over proposed legislation dealing with incitement to racial hatred has brought the perils inherent in this undertaking to the attention of those involved in the law reform process in Western Australia.

Lee concludes that these sorts of tasks are first and foremost balancing acts. This is made plain in the philosophical heart of the book, Part III. Here he casts the real conflict as that between classical liberal rights-based theories of morality, and utilitarian models of political organization. In Chapter Eleven he dismisses both and settles on a third way, namely John Rawls' notion of a "reflective equilibrium". This equilibrium is reached by constantly testing moral intuitions against a unified philosophical theory, and vice versa. Thus a constructive dialogue can be conducted between potentially irreconcilable values, one of which is freedom of expression.

The book is at its weakest in this chapter. While Lee's argument is at all times coherent and plausible, in the end it is unconvincing. Whether or not rights-based notions of free speech have become part of "liberal dogma", they and their more communitarian bedfellows cannot be disposed of conclusively in seven brief pages, even by the most incisive of minds. Lee constantly calls for a strong conceptual base from which to argue about free speech, but in the end settles for a dialectical model which smacks of pragmatic moral relativism.

That aside, *The Cost of Free Speech* is well worth reading, particularly by those who are entrusted with the job of grappling with the issues it raises in a legislative and judicial context. Little over one hundred pages long, and written in a simple and fluent style, the book achieves the modest objectives it sets itself. It is, in the end, a cry for clear thinking in an area of human endeavour bedevilled by prejudice and knee-jerk reactions. The issues it

addresses raise their heads frequently in every Western democracy, including Australia. As at the time of writing, the Commonwealth Government is proposing to pass a law banning political advertising. Regardless of the merits of this proposal, the legal community, as one of the few groups possessing an intimate knowledge of the workings of the political process, should be taking an active role in the debate which has ensued. Reading *The Cost of Free Speech* will, by itself, leave one adequately equipped for such a task.

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