Retreat from Injustice: Human Rights in Australian Law by Nick O'Neill and Robin Handley (The Federation Press, Leichhardt, 1994) pages i-xxviii, 1-498, index 499-508. Price $55.00 (soft cover). ISBN 1 86 287 1213.

Retreat from Injustice (the title is taken from Justice Deane's comments in *Gerhardy v Brown*[1] at a time when even a strategic withdrawal proved impossible) is a valuable, though not flawless, new addition to a growing literature on human rights in Australia. This ambitious and well-stocked survey of the human rights system has been undertaken by two writers who have had substantial experience in the field both as practitioners and academics. Nick O'Neill, the senior author, is the Acting President of the Guardianship Board of NSW and has taught at the University of Technology, Sydney while Robin Handley, now a Senior Lecturer at the University of Wollongong, has practised law in England and Australia.

This combined experience has influenced the book to the extent that it could be termed the first black-letter volume on human rights ever published in Australia. The information contained within its 500 pages is quite staggering. There are references to every conceivable item of legislation or case law relevant to human rights in Australia. As a resource it may well prove to be peerless. Certainly one would have no hesitation in recommending it to practitioners eager to acquire a technical expertise in a number of issues which are impinging on private practice to an increasing extent. Students and teachers, too, will find it a useful and practical guide to the workings of Australian law in this expanding area.

There are twenty five chapters divided according to subject matter rather than theme or method of implementation. The emphasis of the text is unquestionably the domestic environment in which human rights issues are played out rather than the broader international implications. This is a book about human rights *in* Australia so there is no discussion of Australian foreign policy and relations or the role of Australia in enforcing human rights elsewhere or the debate about cultural relativism in Asia. Instead the focus is the legislative, constitutional and judicial protection of human rights in this country.

O'Neill and Handley have chosen to devote a large chunk of the book to two important areas, those of freedom of speech and the rights of Aborigines and Torres Strait Islanders. This has the effect of making the sections on these topics very comprehensive but it also produces something of an imbalance overall. Indeed the book's principle defects are its rather cursory treatment of the philosophy of human rights and the absence of any discussion of the political and economic factors which determine the social conditions in which

[1] (1985) 159 CLR 70, 149.

human rights may or may not be realised.[2]

Before elaborating on some of these criticisms, it is worth noting that the research and expertise on display here are impressive. The case law on human rights has never been better explained and described. Many of the chapters are revelations of thoroughness and industry. In particular, the chapters on freedom of assembly and association are splendid while contempt and defamation are given the sort of attention that is rarely afforded these topics in human rights discussions. The authors should be congratulated on their ability to range across statute and common law that might otherwise have been neglected. There is also a willingness to investigate and analyse possible legal restrictions on human rights in Australia even if these laws are rarely employed by the State. Thus we have a discussion of the various impediments to freedom of assembly in Australia from criminal trespass to obstruction of police officers to 'watching and besetting'. This is a useful antidote to the view that human rights law simply involves the study of a series of legislative and constitutional *protections*.

Four chapters are devoted to the Aborigines and Torres Strait Islanders and this allows the authors to consider the often neglected aspects of the encounter between Anglo-Australian law and the indigenous peoples of Australia. There are sections on the application of civil laws to the Aborigines and also a chapter on Aboriginal heritage protection. However, the history section is weak and there are insufficient Aboriginal voices and perspectives used in the four chapters. The section on self-determination simply fails to raise many of the complexities and problems associated with this right and comes across as maddeningly complacent. No connection is made between sovereignty and self-determination and, while this may well reflect the Federal Government's position that self-determination merely involves greater consultation and self-management, it does not reflect the views of many Aboriginal groups. There could also have been greater recognition of the fact that Aboriginal Australia is a rich and diverse group of nations with different needs, lifestyles and claims.

Perhaps the major criticism I would make of the text is its failure to engage with broader theoretical and social issues. The small introductory chapter entitled 'Natural Law and Human Rights' is a rehearsal of the familiar story of human rights theory from the Greeks to the Universal Declaration on Human Rights. There is a strong liberal bias reflected in these pages which omit reference to non-Western traditions of rights[3] and lacks any discussion of Marxist or socialist approaches to the idea of human rights.[4] Karl Marx is given one paragraph while the Magna Carta is discussed over some three pages.[5]

More seriously, there is no reference to the rich and controversial debate

[2] Eg, there are no chapters on economic rights such as the right to housing.

[3] See, eg, The Final Act of the International Conference on Human Rights, Teheran, 1968, UN doc A/Conf 32/41.

[4] Karl Marx showed how constitutionally entrenched rights could not lead to emancipation from social exploitation in Karl Marx, 'On the Jewish Question' in Lucio Colletti (ed), *Early Writings* (1975).

[5] Nick O'Neill and Robin Handley, *Retreat From Injustice* (1994) 2-5, 10.

raging about the nature and meaning of rights in recent feminist[6] and critical legal studies literature nor is there an attempt to describe other currents in post-modern thought. The quite extensive list of further reading for this chapter gives the impression that the philosophy of human rights ceased to be of interest after about 1985. Works by Patricia Williams, Catharine MacKinnon, Mark Tushnet and Allan Hutchinson have elaborated on the problem of rights from a critical perspective and, in the case of Williams, the possibility of recuperating the rights project in the face of these critiques.[7]

This failure to consider philosophical developments has wider implications for the book. One of the underlying assumptions the authors make is that constitutional entrenchment of rights is necessarily a welcome development. So the recent judicial activism of the High Court is praised throughout and the authors set out to 'expose weaknesses in the Australian legal system which can properly be remedied only by a Bill of Rights.'[8] The potential of entrenched constitutional bills of rights to *retard* human rights promotion is the subject of a vast literature in Canada and the United States. Critical theorists and constitutional lawyers have lamented the failings of the Canadian Charter and the American Bill of Rights to deliver social justice. These scholars have pointed to the problems of undemocratic judicial elitism and the possibility of conservative interpretations of rights working against powerless groups within society.[9] None of these critiques are considered in *Retreat From Injustice* which occasionally reads like a retreat from theory.[10]

In spite of these defects, this book is likely to become a close companion for those whose work touches on the field of human rights. This expanding group will find much to praise in the pages of *Retreat From Injustice*.

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6 Eg, no reference is made to the controversial public/private debate.

7 See Patricia Williams, *The Alchemy of Race and Rights* (1991); Catharine MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (1987); Mark Tushnet, 'An Essay on Rights' (1984) 62 *Texas Law Review* 1363; Allan Hutchinson, *Dweller on the Threshold: Critical Essays on Modern Legal Thought* (1988).

8 O'Neill and Handley, above n 5, vi.

9 See, eg, Michael Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (1989); Joel Bakan, 'Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)' (1991) 70 *Canadian Bar Review* 307.

10 A further example of this occurs in the discussion of freedom of expression which lacks any reference to the insights of Noam Chomsky and Edward Herman in the United States and Paul Chadwick in Australia. See Edward Herman and Noam Chomsky, *Manufacturing Consent: The Political Economy of the Mass Media* (1988); Paul Chadwick, *Media Mates: Carving Up Australia's Media* (1988). Also, one never gets a sense of the political implications of free expression jurisprudence, eg how was it that both the plaintiffs and defendants in *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106 were able to argue in favour of free expression?

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