# Book Reviews

*Crime and Justice: An Australian Textbook in Criminology* edited by KAYLEEN M HAZLEHURST (Sydney, The Law Book Company, 1996) pp xxiii, 477.

According to its editor, this book is intended to fill the need for 'an Australian criminology textbook which can provide students with specifically Australian data and case studies within the context of international criminological theory.'[1] It fulfils this aim very well. Although it has some deficiencies, which are discussed below, overall the book constitutes a valuable contribution to an area that certainly lacks sufficient sources of a distinctly Australian character.[2]

*Crime and Justice* comprises seventeen chapters, written by authors drawn from a variety of fields of the humanities, which emphasises the interdisciplinary nature of much of this work. However, the editor has managed to keep the discursive framework fairly consistent. The book does not suffer from the awkward juxtapositions of style and approach that accompany many such volumes.

A considerable amount of attention has been given to ensuring that this book is well suited for use by students. The many explanations of aspects of the criminal justice system indicates that those students are not expected to have a background in law. The text is well laid out, and includes a large number of illustrations, figures and tables. Each chapter concludes with a series of points and questions related to the key issues of the chapter. In addition, every chapter (except Chapter 15), is accompanied by a helpful list of references; a feature that will ensure the book constitutes a significant resource for both students and teachers. Another strength is the large number of case studies, drawn from academic studies or current events, which accompany the chapters. The use of sources is necessarily selective, but the various authors generally draw from the most important authors or topics in their respective field. They provide good practical illustrations of the points raised, and will ensure that students are not overwhelmed by detailed information.

The organisation of the book is logical. The first three chapters provide an overview of the nature of criminology, the development of criminological thought, and the main issues that currently occupy the study of crime. The second of these chapters, which covers the history of criminological thought, manages to survey a significant amount of historical material, which is important for an understanding of the development of criminological

[1] K Hazlehurst, *Crime and Justice* (1996) Preface, ix.

[2] There are, however, some useful Australian texts. See, for example, D Chappell & P Wilson (eds), *The Australian Criminal Justice System: The Mid-1990's* (1994). See also R White & F Haines, *Crime and Criminology* (1996). That book provides a useful introduction to criminological thought, particularly from a historical vantage, but lacks the strong Australian perspective of Hazlehurst.

theories. The chapter also manages to avoid falling prey to the long literature reviews, present in many criminological works, that might overburden undergraduate readers. The next section examines individual areas of criminal justice, while chapters five to nine focus on the 'bread and butter' areas, such as crimes against the person, juvenile justice, family violence, drug and alcohol related crime, and property crimes. Chapters ten to thirteen examine the newer areas of computer crime, organised crime, white collar crime, and minority groups (the latter as both victims and offenders). The final section, chapters fourteen to sixteen, examines policing, courts, sentencing, and corrections. The book concludes with a chapter on crime prevention, co-authored by the editor.

The Australian criminal justice system is discussed from two angles. First, a broad summary of the criminal justice system is given in chapter four. Second, many other chapters, such as those on organised crime, sentencing, policing and juvenile justice, include sections designed specifically to explain relevant features of the Australian criminal justice system. Many of the case studies that are liberally placed through almost every chapter are also Australian, and most of the thirty or so tables and graphs scattered through the book contain Australian information. One issue that deserves more attention than it has been given here is the significant level of regional disparity that exists in many areas of the Australian criminal justice system, such as juvenile justice and prisons.

There are also some wider themes that could have received more attention. For example, although the book contains a chapter on violence in the family, in which domestic violence is examined in detail, there is no real engagement with the extensive feminist literature that has invigorated criminology in recent times. Likewise there is no detailed treatment of the relationship between the media and criminological issues. The role of the media warrants attention in an introductory criminology text primarily because of the strong influence it exercises over public opinion in this area. On a deeper level, however, the effect of the increasing presentation of crime by the media through the use of home videos, security cameras and roving news crews presents a significant new dimension to the representation, and study, of crime in society.[3]

In one sense these quibbles arise from the strengths of the book; it covers so much material from such a variety of areas, and does so in such a readable fashion, that a reader is inclined to want more information. For students *Crime and Justice: An Australian Textbook in Criminology* will provide a comprehensive introduction to, and explanation of, this sprawling and ever growing discipline.

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[3] An interesting recent feminist example is A Young, *Imagining Crime, Textual Outlaws and Criminal Conversations* (1996). Young has a broader focus on the textual representation of crime, arguing that crime serves as a strong signifier, though she draws heavily on visual representations used in the media.

*Commercial Equity. Fiduciary Relationships.* by John Glover (Butterworths, Australia, 1995) pp v — 3501

Fiduciary obligations are such a familiar part of the legal landscape that it comes as a surprise to discover that most academic scholarship on the principles of fiduciary liability is very recent. Twenty years ago lawyers became acquainted with some of these principles through the various specialities of trusts, company law, agency and partnership. Few claimed expertise in a field as broadly defined as fiduciary law. Paul Finn's book on the subject in 1977 took as its premise the proposition that a coherent body of fiduciary law could be expounded and analysed and that, while some relationships had developed their own doctrinal accretions, the commonalities between the various fiduciary relationships were more important that the differences.[1] Since then practitioners have exploited the plasticity of the fiduciary concept[2] and a small academic cottage industry has devoted its energies to locating the 'essence' of fiduciariness. Even the most diligent scholar is nowadays hard pressed to keep up with the flow of reported case law in this area. Arguments about whether fiduciary principles have a part to play in commercial transactions now seem dated, and the issues are just as likely to concern relationships such as doctor and patient,[3] parent and child,[4] or the relevance of fiduciary analysis to native title disputes[5]. As the subject matter of disputes in which fiduciary arguments are adduced becomes further removed from the established fiduciary categories such as trusteeship or the duties owed by directors to a company, it has become more important than ever to keep steadily in view the central features of fiduciary relationships.

John Glover's book is an excellent guide to the intricacies of modern fiduciary law. The title makes clear that the focus of discussion is commercial equity. This is generously interpreted to include native title disputes but excludes consideration of personal fiduciary relationships. The author's approach to the equity philosopher's question 'who is a fiduciary?' is to reject definition. Definition, of the dictionary kind, tends to oversimplify legal concepts and is unnecessary for the systematic development of the law. Likewise, the author is sceptical of attempts to isolate the 'common properties' of the fiduciary relationship by identifying elements such as 'undertaking', 'reliance' and 'vulnerability'. The author's recommendation is to apply Wittgenstein's notion of family resemblances: phenomena described by a

[1] P Finn, *Fiduciary Obligations* (1977).

[2] The analysis of fiduciary joint venture arguments in the recent Rugby League litigation affords a recent example. Contrast *News Ltd* v *Australian Rugby Football League Ltd* (1996) 135 ALR 33, Burchett J, with the Full Court decision, (1996) 139 ALR 193, 308–24.

[3] *Breen* v *Williams* (1996) 186 CLR 71.

[4] *M (K)* v *M (H)* (1993) 96 DLR (4th) 289; *Secretary, Department of Health and Community Services* v *JWB and SMB* (1992)175 CLR 218, 317; *Bennett* v *Minister of Community Welfare* (1992) 176 CLR 408, 426–7.

[5] *Mabo* v *The State of Queensland (No 2)* (1992) 175 CLR 1, 199–205.

word may have no one thing in common, but they may be related to each other by a number of similarities or relationships.[6]

The arguments against definition of the fiduciary, or the search for its 'common properties', are well taken. Furthermore, the notion of 'family resemblances' certainly helps to undermine the 'commitment to definiteness'[7] to which lawyers are addicted when they try to make sense of the concepts they use. The identification of resemblances and characteristics will inevitably be open-ended and provisional. The author is well aware that 'alternative resemblances' can be constructed. For example, distributorship agreements are discussed under the heading of 'undertaking' and partnerships under the title 'reliance'. The headings could just as easily have been transposed. The reader must keep in mind that the method is not intended to be an exercise in logic: Wittgenstein's own entreaty to those exploring resemblances was 'don't think, but look!'. The habit of thinking is so deeply ingrained in lawyers that many may be incapable of applying a technique which calls for a visual approach to classification. Sensitively applied, the 'family resemblances' approach has its place in legal scholarship as a heuristic device. It is a method of explaining concepts, not applying them. It may, however, be a little too precious to supplant the traditional legal modus operandi of argument by analogy.

Two other points on the 'family resemblances' methodology. First, although, as the author convincingly demonstrates, no simple single informing idea underlies fiduciary relationships, courts have not abandoned the search for a 'common property' which might explain equity's intervention. In the recent decision of *Breen* v *Williams*[8] the High Court has argued backwards from fiduciary obligations to fiduciary relationships: relationships are fiduciary to the extent that one party occupies a position of conflict of interest or has an opportunity for making a profit at the expense of the other party. The 'common property' for the Court, uniting doctors and company directors as fiduciaries, is the fact that both (though doctors more rarely) may find themselves in a position of conflict of interest[9]. The High Court's objective is to prevent a bifurcation of personal fiduciary relationships, where liability is functionally tortious, from commercial relationships, governed by established principles of accounting for gains. The common element linking fiduciary relationships is not some undeveloped notion of 'undertaking' or 'reliance' but the finding that an individual is placed in a position of conflict of interest. An important consequence of the High Court decision is to show that the abstract question 'who is a fiduciary?' is the wrong question to ask. The real issue in any case is to ascertain the scope of a fiduciary obligation, if any, and whether the obligation has been broken.

Secondly, potential readers who have no taste for linguistic philosophy, or who prefer some other theoretical framework should not be deterred from

[6] L Wittgenstein, *Preliminary Studies for the Philosophical Investigations Generally known as 'The Blue and Brown Books'* (1969) 17–19.
[7] R E Fogelin, *Wittgenstein* (2nd ed, 1987) 138.
[8] (1996) 186 CLR 71.
[9] Id 305–6.

reading this book. Analysis of family resemblances covers only a few pages. It supplies the organisational structure of chapter three (existence of a fiduciary relationship) but elsewhere it gives way to a more traditional examination of the equitable rules. Other methodologies are only lightly touched upon. For example, a substantial literature now exists on whether fiduciary obligations can be characterised as a form of default 'hypothetical contract', saving parties the transaction costs of negotiating fiduciary duties as express terms in their agreements.[10] The law and economics literature on this issue is not canvassed, although some of the analysis, especially of contract terms, unconsciously echoes the themes of the debate on default rules.

The coverage of the commercial fiduciary context is extremely thorough. The level of discussion of corporate law issues is outstanding and pp 127–134 contains the best short account of the corporate opportunity doctrine this reviewer has read. Other highlights include lucid analyses of syndicated loan agreements and the fiduciary aspects of commercial agency relationships. Chapter five on 'Breach of Fiduciary Duty' provides a carefully structured account of the rules proscribing conflicts of interest and profit making. The discrete application of each rule, as well as areas of overlap, are clearly explained. Commercial lawyers are increasingly being required to consider the interaction of statute and equitable principle. At various points relevant *Corporations Act* provisions are deftly woven into the discussion of fiduciary doctrine and remedies.

Paul Finn's 'Fiduciary Obligations' contained a brief overview of the principles of undue influence and breach of confidence. John Glover does the same. The overview could perhaps be justified in 1977 when the boundaries between fiduciary principles, undue influence and the equitable principles of confidential information were less clearly drawn, and the fiduciary label was used indiscriminately as a synonym for relationships protected in equity. It seems less justifiable now. Notwithstanding some recent instances of doctrinal cross-fertilisation,[11] to discuss undue influence, with its special rules relating to burden of proof and more limited remedial regime, as a fiduciary relationship serves only to confuse. The chapter on confidential information does little more than skim the surface of a large subject that is rapidly losing touch with its equitable origins.

This reviewer came away from the book with the feeling that he had learnt something new on almost every page. Only in two areas was there a sense that short measure had been given. The first of these concerns attempted

[10] F H Easterbrook & D R Fischel, 'Contract and Fiduciary Duty' 36 (1993) *Journal of Law & Economics* 425; J H Langbein, 'The Contratarian Basis of the Law of Trusts' 105 (1995) *Yale L J* 625; T Frankel 'Fiduciary Duties as Default Rules' 75 (1995) *Oregon Law Review* 1209; A J Duggan 'Is Equity Efficient?' 1996, unpublished. Apart from Easterbrook and Fischel, all these articles have appeared since the publication of *Fiduciary Relationships.*

[11] Brennan CJ in *Breen* v *Williams* (1996) 186 CLR 71, 82 treats relationships of ascendancy or influence as a 'source' of fiduciary obligations; cf *Louth* v *Diprose* (1992) 175 CLR 621, 630 Brennan J, where nineteenth century undue influence cases on gifts made by a woman to her fiancee were held to be 'analogous' to gifts made by a lover to the reluctant recipient of his affections for the purposes of the equitable rules against unconscientious dealings.

contractual exclusions of fiduciary obligations. Exculpation clauses are often found in trust and other fiduciary documents. The author doubts the efficacy of such clauses, but their prevalence suggests that the matter is not so simple. Can a distinction be drawn between exclusions of duty in established fiduciary relationships, such as trust and partnership, and exclusions in alleged 'factual' fiduciary relationships where the very existence of such a clause may negative a finding that the relationship is fiduciary? The borderline between excluding a duty and delimiting the scope of a duty is very fine, as it is in contract, and may require closer consideration. Some recent developments, for example an English Law Commission Working Paper and Report,[12] have not been picked up, as well as case law which illustrates the unfolding of the exclusion/
delimitation dialectic.[13]

The other area where there was a sense of expectations not having been realised concerns the treatment of the law of restitution. Here the blame can be assigned to the Preface which foreshadows an analysis of why, in the words of the author, 'the existing law cannot be adequately explained by restitutionary doctrine'. Few pages are in fact devoted to issues of unjust enrichment and in those pages the author does not engage at length with restitutionary arguments. He recognises only unjust enrichment by subtraction and dismisses the category of restitution of wrongs very curtly as bearing 'all the hallmarks of a sophistry'.[14] Similarly, the views of restitution writers, such as Professor Birks, on proprietary remedies are oversimplified. In the case of Professor Birks, arguments are developed by reference to his book *Introduction to the Law of Restitution* and ignore his later thoughts on the subject. A review is not a suitable place to engage in sustained debate on the role of unjust enrichment in fiduciary law. Suffice it to say that the arguments fail to do full justice to a difficult area of restitution scholarship.

In other respects, the book is hard to fault. Eyebrows will be raised when the author makes mention of the 'equitable' rule against remoteness of vesting and the 'equity' of change of position. Many good arguments can be advanced for refusing to recognise contributory negligence principles in fiduciary law, but the existence of statutory contribution regimes cannot be one of them. Proscriptive fiduciary orthodoxy is said to be threatened by decisions of the *lower* Canadian courts, thereby ignoring the significant Canadian Supreme Court contribution to this state of affairs. The book may not sell well in Scotland as reference is made throughout to the 'United Kingdom' law of fiduciaries. There seems no very good reason why Scottish law, with its very

[12] English Law Commission, *Fiduciary Duties and Regulatory Rules*, Consultation Paper No 124 (1992). See now English Law Commission No 236, *Fiduciary Duties and Regulatory Rules* (1995).

[13] *Kelly* v *Cooper* [1993] AC 205 criticised F M B Reynolds, 'Fiduciary Duties of Estates Agents' [1994] *Journal of Business Law*, 147–9.

[14] To be fair, the author's approach reflects the High Court's qualified recognition of unjust enrichment. The notion of unjust enrichment by subtraction is well established, but the Court has so far failed to recognise a category of restitution for wrongs, or to accept that a fiduciary's liability to account is based on a wrongs-based conception of unjust enrichment: *Warman* v *Dwyer* (1995) 182 CLR 544, 561; cf *Dart Industries Inc* v *Decor Corp* (1993) 179 CLR 101, 110–11.

different traditions of equity, should share guilt by association with the more egregious English decisions.

*Fiduciary Relationships* is for the most part clearly written, although the style is occasionally allusive. The balance between exposition and argument is well sustained. The practitioner will find a wealth of material on almost every conceivable fiduciary issue and while the law teacher will find argument and analysis to stir up even the most apathetic class. The author remarks of critics of the Privy Council decision in *Attorney General for Hong Kong* v *Reid*[15] that they take 'a rather nineteenth century view of what equity can do'. *Fiduciary Relationships* provides a vigorous, opinionated, perceptive and scholarly analysis of the achievements of late twentieth century fiduciary law.

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*Poverty Law and Social Change: The Story of the Fitzroy Legal Service* by JOHN CHESTERMAN (Melbourne, Melbourne University Press, 1996) pp 196 plus appendices, end-notes, bibliography and index.

Fitzroy Legal Service (FLS) is Australia's oldest non-Aboriginal legal service. It was established in 1972 with a radical agenda: to provide free legal advice to those too poor to afford a lawyer and to seek to challenge existing oppressive legal regimes and rules (or to practise 'preventative law'). It predated legal aid and inspired what was to become a loose network of legal services all around Australia. It has been involved in many important test cases and law reform projects. And it is now the subject of a book by John Chesterman, based on his PhD thesis, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service.*

My position as reader of Chesterman's book was as a Melbourne lawyer without personal experience of FLS or the social forces of the early 1970s which shaped it, but with a good knowledge of the Melbourne legal profession and some of its 'big names'. I read the book out of interest in the FLS, rather than for research purposes, and it may be that readers from different positions or with different aims will find the book more or less engaging and useful than I did. My response to the book was a mixed one: on the one hand, the documenting of the climate of change within the legal profession at the time of the Whitlam government's election (I was five at the time) was fascinating, as was the discussion of the philosophy underpinning FLS and its struggle to adhere to its initial aims (about which more below). On the other hand, I found the discussion somewhat divorced from the personalities of those involved in establishing and running the FLS. While Chesterman clearly undertook extensive interviews, many of which are quoted from in the book, there is little discussion or characterisation of the people quoted. In this sense, I found the book a little less enjoyable than it might have been and in some sense less insightful, as an understanding of the people involved would have added to an

[15] [1994] AC 324.

assessment of their perspective on the FLS. Another absence which reduced the appeal of the book for me was the relative scarcity of discussion of cases run by FLS — there were some, but these merely whet the appetite.

*Poverty Law and Social Change* is divided into seven main chapters: Law and the New Left, Community Politics, The Rise of Legal Aid, A Medium of Change, Keeping Watch, Into the Nineties, and Legal Culture in Blue Jeans? This break down gives some idea of the way in which the various aspects of FLS' history are divided up, but also follows, on the whole, a chronological approach, with the exception of the discussion about legal aid, which is integral to the story of FLS and constantly recurs throughout the book. The first chapter places FLS in its historical context with particular emphasis on the influence of the new social movements conveniently collected under the term 'New Left'. Thus we begin with a consideration of the interactions between the anti-war movement, the women's movement, welfare and youth organisations and those concerned about access to the law (or rather the lack thereof). Chesterman connects FLS' origins squarely to these sites of anti-establishment activity and the 'protest culture' that emerged on and off campuses in the late 1960s and early 1970s. Most interesting in this section is the discussion of FLS' philosophy of challenging the traditional legal system, rather than simply working within it: FLS, he observes, 'sought to differentiate itself entirely from private legal offices'.[1] This was manifested in a number of ways apart from the simple lack of fees: its dingy offices in the basement of the Fitzroy town hall; the casual dress of the lawyers who volunteered there; and, more substantively, the involvement of 'non-lawyer' volunteers in advice so as to deal with problems holistically rather than in the traditionally compartmentalised fashion of the law.

In addition to the different way in which FLS sought to practise law, Chesterman notes that 'there was a lofty and at times analytically tenuous hope that FLS would be able to facilitate change in society, that it would be a grass roots organisation that could engage people to work actively to alter their society'.[2] FLS was not simply about delivering a service to individuals, but also about seeking to change the law and society, through grassroots community activism. This dual purpose model posed some problems, however, as there was often a tension between the ideal of providing free legal advice to those who cannot afford it, which might achieve 'justice' in a particular case, and the broader aim of critiquing the system itself. The former, as Tony Lawson put it in one of Chesterman's interviews, involves at least some degree of 'propping up' the system which the latter is seeking to dismantle. Nonetheless, as the chapters 'A Medium of Change' and 'Keeping Watch' demonstrate, the task was not impossible, and FLS very quickly became a respected commentator on poverty law/access to justice issues. It also ran a number of test cases which to some extent crossed the line between individual representation and the goal of changing the legal system, such as *Green* v *Daniels*[3] (a case concerning school leavers' access to unemployment benefits)

[1] J Chesterman, *Poverty Law and Social Change: The Story of the Fitzroy Legal Service* (1996) 33.
[2] Ibid.
[3] (1977) 13 ALR 1.

and, more recently, cases against the Victoria Police over the Tasty Raid (a raid on a lesbian and gay nightclub).

FLS has been particularly vocal throughout its life about two areas of the law: the development of legal aid and the monitoring of police behaviour. The development of legal aid, and FLS' role in it, is given particular emphasis throughout the book as well as being the subject of an entire chapter. Under Whitlam and Murphy, FLS participated in the debates leading up to the introduction of a federal legal aid scheme and was the direct recipient of legal aid funding. Later, when legal aid was handed back to the States under the Liberal Fraser government, FLS' ability to employ paid legal staff was in part dependant upon receipt of legal aid funding for particular cases run through the FLS case-work practice. This put FLS in, at times, an awkward position when it came to critiquing the institution of legal aid.

Chesterman also documents FLS' continual scrutiny of police behaviour and its attempts to bring some degree of accountability to police violence and harassment. FLS' tactics here ranged from the running of cases against the police such as the case concerning the Tasty Raid and other cases involving harassment of gay men by police, to the establishment of Alphaline, a telephone advice service for young people detained by police. FLS even recorded a song designed to inform young people of their rights — 'No Comment' — but mainstream radio stations refused to play it as it was considered 'too political'. FLS has also been vocal in criticising police brutality and shootings in Victoria. None of these activities endeared the FLS to the Victoria Police, which at one point called for a government review of FLS' funding.

Receipt of government funding, Chesterman notes, was itself the subject of considerable debate within FLS, as it is for many anti-establishment organisations. Would the receipt of funding alter the nature of FLS from a radical organisation to a merely reformist, mainstream organisation unable to effectively critique government activity? Chesterman concludes that receipt of government funding did affect FLS, which is no doubt correct, but the various activities described in the book indicate that the funding issue did not prevent FLS from being a vocal critic of government, and particularly the police. Chesterman concludes that:

> FLS is now just one of many community legal centres and it no longer provides the radical critique of the legal system that it once did. . . . The story of Fitzroy Legal Service suggests that the law and those who administer it still tend to favour some people over others, but that an energetic and broad approach to social change can yield tangible results.[4]

Overall, the book is well worth reading for both historical reasons and contemporary inspiration.

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[4] Chesterman, op cit 196.