BOOK REVIEWS

The Politics of Law Reform, by STAN ROSS, B.A. (C.U.N.Y.), M.A. (S.F. State), J.D. (Calif.), Senior Lecturer in Law, University of New South Wales. (Penguin Books, Melbourne, 1982), ppi-vii, 1-95. Recommended retail price P/B $9.95. (ISBN 014 022325 8).

The Legal Mystique: The Role of Lawyers in Australian Society, by MICHAEL SEXTON, LL.B., (Melb.), LL.M. (Va.), Barrister of the Supreme Court of New South Wales, Senior Lecturer in Law, University of New South Wales and LAWRENCE W. MAHER, LL.B. (Hons.) (Melb.), LL.M. (A.N.U.), Barrister and Solicitor of the Supreme Court of Victoria. (Angus & Robertson, Sydney, 1982), pp.i-x, 1-196, with Bibliography and Index. Recommended retail price $12.95. (ISBN 0 207 14546 6).

Liberal thinking lawyers have long sought to provide alternative perspectives on the nature of legal ideals and legal practice. The importance of law reform has so often been held out as a central ideal, the neglect of which has led to the law and its practitioners being seen as somewhat narrow-minded, unresponsive and conservative. Both these books are firmly within this liberal legalist tradition with its concern for the policy implications of law and an attempt to reform it so as to make it more relevant to the wider needs of the community. Whilst both books certainly have much to commend them, especially if one adopts the liberal legalist paradigm, these studies also well illustrate the theoretical and intellectual bankruptcy of this tradition. Both fail to clearly articulate the meaning of their basic conceptual tools, such as the nature of "significant law reform" in the case of Ross, or of the ideas of "neutrality" or "legal mystique" in the case of Sexton and Maher. The exhaustion of the liberal legalist paradigm is well illustrated by the failure of Sexton and Maher to take us beyond what they themselves acknowledge to be the far from new legal realist critique which has been with us for half a century. Whilst most academic lawyers would now probably see themselves as influenced by Legal Realism, it should not be surprising if these books were the subject of a collective yawn from their author's academic colleagues.

More fundamentally, however, their failure to transcend the limitations of the Realist critique raises serious questions concerning the intellectual viability of a large sector of Australian legal academic endeavour, which falls into what Campbell and Wiles (1975) have referred to as "the socio-legal studies approach" to the legal system. As one historian of Legal Realism put it, this movement eventually "ran itself into the sand".[1] This was because it was a movement based upon crude empiricism and a lack of any significant body of empirically based theoretical output. Like Pound's sociological jurisprudence, the Realists were ultimately not as far removed from traditional nineteenth century legal scholarship as they might have

imagined.[2] Their focus upon upper courts, judges, and especially upon an internal view of law, was very much within the pre-existing legal positivist tradition. It is no wonder therefore that the studies inspired by the Realists, such as studies of the impact of law and of the so-called gap between the law in action and the law in the books, can be traced back through Roscoe Pound to Eugen Ehrlich and ultimately to the approach of traditional jurisprudence which was based upon the ideal of a gapless system of legal concepts and principles. In reacting to this traditional jurisprudential approach, Realists, and Australian Lawyers such as Sexton and Maher, have largely worked within pre-existing legal conceptual categories which they simply modernise, albeit in a fairly conservative way, as Llewellyn found in drafting the model U.S. Uniform Commercial Code.[3]

It needs however to be remembered that the policy oriented approach of liberal critics such as the Legal Realists, whilst empirically and theoretically sterile has played an important political role in laying the basis for a more systematic approach to the study of law as a social and economic phenomenon.[4] Whilst the Realist message has been an important one, it has now been repeated so often that one might become a little sceptical of those who continue to make this kind of now conventional critique without offering some more original intellectual fare. Rather than simply sketching once again some well known parameters of legal experience, mixed with a strong flavour of "moral functionalism",[5] much like that to be found in some traditional jurisprudence, there is room for a lot more serious critical legal scholarship in Australia than these two tantalizing books provide. One means of charting this more difficult course is available through a closer look at these two studies.

When first approached these two books seem to be difficult to compare, stemming mainly from their quite different titles. However, on closer examination this task was far less difficult, illustrating the fact that the titles which authors give to their books often have little substantial relationship to their content or key themes. Whilst the authors of these two books would probably argue that their studies are quite different, the perspective of this somewhat more removed reviewer finds much that is in common between them. Both books share many of the same liberal reformist assumptions, although Ross seems to be most unhappy with these, even if this dissatisfaction is never systematically articulated. For this reason there is a sense of confusion or uncertainty characterising Ross's analysis which often tends to be suppressed beneath the frequent exercises of fairly elementary description of such things as the federal bureaucracy and of politicians and of executive government. There is a certain innocence about all this description which is more in the nature of an introduction to Australian institutions than a study of law reform. This space would have been much better used on further case studies rather than a restatement of what is known by first year political science or legal institutions students. Having said this, it should be pointed out that Ross probably accomplishes more original analysis than is to be found in the far more dogmatic and superficial study by Sexton and Maher. The main difficulty that one has with this second most readable study is that it seeks to skate over a large number of areas whilst resorting to the tags of scholarship discourse such as footnotes and references, never dealing with any topic in sufficient depth to establish its often quite problematic

assumptions. The theme of the "myth of neutrality" which Sexton and Maher see as inherent in legal practice often tends to be lost in quite interesting gossip about such things as "who's who in industrial law"[6] and the careers of various other lawyers. Sometimes these career sketches are dressed-up into "case studies", as in the cases of Kerr, Whitlam, Menzies and Evatt. These are meant to illustrate the vagaries of various pathways to power, although it would have been interesting to know why these were selected for discussion. They certainly do not tell us anything which is new. Ross's so-called "case studies" of law reform at least seem to bring together material that would be new to those outside his fairly close legal services circle; it is doubtful, however, that these case studies really make a great contribution to our understanding of the law reform process, although Ross's study of the history of the Contracts Review Act 1980 (N.S.W.) goes furthest in this direction. More will be said about these shortly.

Whilst law reform and legal change are the main themes conveyed by the title to Ross's book, the same theme is also quite central to the work by Sexton and Maher, although in the latter it tends to be clothed in what we might call the rhetoric of the need for greater balance in the representation of values in the law-making process. Both books convey the impression that their authors perceive law reform as an unquestionable good, especially where these reforms fall into the mysterious category of "significant" law reform. Of course, like so much else in these two books, this is an entirely subjective and value laden category so that it is uncertain as to whether both sets of authors would readily agree as to what this entailed. As students of legal formalism such as Duncan Kennedy have reminded us, any attempt to apply values, standards or policy considerations to the formalistic method is essentially arbitrary. This is a fact which seems to be ignored in these two books, with their insistence upon balancing existing values found in judicial decision making with their own preferred liberal values. A somewhat more fundamental approach to the contradictions of capitalist legal formalism is required.

It seems though that a law reform is only to be considered "significant" if one's values are compatible with it. There is no suggestion that something would be seen as "significant" if it expressed value preferences contrary to one's own, although Sexton and Maher seem to be a little more pragmatic or flexible about this than Ross seems to be. Sexton and Maher, for example, tell us that "... few lawyers in State or federal politics have favoured significant changes to the legal system".[7] Earlier they are at pains to attack opponents of law reform as being elitist and *status quo* oriented.[8] We will return to this briefly.

In contrast, and in a similarly anti-elitist way, Ross distinguishes some other definitions of law reform and suggests his own, which merits quoting as it nicely captures a number of assumptions which lie at the heart of both books. Ross states: "My own definition would be the restructuring of our society by the use of law with the goal of improving the quality of life for all its citizens but especially for those that are disadvantaged under the present system".[9] This he sees as significant law reform which would also seek to eliminate "tensions and conflicts" existing in society. This is a grand vision, even if it is based upon an instrumental view of law and a consensual social goal. This seems to be hopelessly unrealistic for it both assumes that law is somehow separate from society and that conflict can be

eliminated from society, rather than being an essential and inevitable aspect of all social life. There is also a moral functionalism evident in both books in that there is a common quest for greater fairness and efficiency in the law reform or law making process. All of this falls far short of a more adequate understanding of the obstacles to legal change through law such as is evident in recent studies such as those of Allott, Handler and Jenkins,[10] to mention but a few.

Another strong parallel between these two studies is to be found in their attempt to draw upon popular expectations and feelings about the legal process. Unfortunately this is inadequately done in both cases as the bases for statements made concerning popular legal consciousness are rarely elaborated or revealed. This is not to say that the authors are wrong, but that a far better case needs to be made out to support the often made assertion of popular disenchantment with the administration of justice. We need also to ask what the significance of popular disenchantment may be, especially in view of the fact that "public opinion" has always been quite ambivalent when it comes to the nature of law and legal institutions.[11]

Unless one is to accept the authors of these two studies as being able to accurately reflect popular sentiments about law, which is highly doubtful partly because of the lack of uniformity in community views, it is necessary to be sociologically more systematic in data collection than these studies seem to be. Ross, for example, tells us that there is "a feeling of social impotence" in Australia. This is followed by criticism of the fact that "...the system [is] accepted" and that "...there is neither the time nor the disposition to reflect on the issues".[12] A few pages later we are told that the public believes that reform is seen to be change for the better[13] although Australians are seen to lack a perspective of the significance of legal change.[14] We are also told that the law has become increasingly significant for all Australians.[15] Evidence for this was evidently revealed to Ross one morning when he was reading his newspaper. The legal stories reported on that day are quite seriously offered as evidence of wide ranging legal changes having occurred in society. Ross also concludes his book in a similar manner by once again turning to his morning newspaper for evidence of "the injustice and unfairness that prevails in our society".[16] He supports this assertion by pointing to a story of a profit made by a developer in selling a building previously owned by a Union. Whilst there is much empirical evidence to support the kinds of statements often made by Ross and this evidence can often be gained from reading newspapers, Ross's approach to data collection to support his assertions is altogether too casual giving the reader the impression that the author regards systematic data collection as a somewhat tiresome and perhaps unnecessary activity.

A similarly naive empiricism is to be found in the work of Sexton and Maher such as in their attempts to reflect popular attitudes. Thus they tell us that to "...a large extent the law is seen as a set of immutable principles that have always and will always exist". They add that the community perceives "...lawyers as the priests who reveal these principles to laymen, always with a remoteness and neutrality".[17] I very much doubt that any but an old-fashioned positivist legal academic would think this. It is certainly far from clear that this is the view of law held by the community at large. Yet, this assertion provides the central justification for this book. It needs

to be recognised that public attitudes to law and lawyers vary considerably depending upon the degree of exposure a person has had to these. Legal experience or involvement of members of the community in the legal system seems to further intensify sceptical attitudes and public cynicism. It is doubtful however whether the general public as such has developed a view at all regarding the nature of legal principles. Where community views have developed these seem to be in terms of "views" such as "lawyers are self interested", "avoid lawyers if possible" and "the law is too complex".[18] Sexton and Maher might have benefited from a somewhat more serious treatment of the nature of public attitudes to law. This however, like their frequent criticisms of law and lawyers for failing to advance the public interest, needs a little more serious sociological evidence than is presented here. One suspects that both books are more concerned to portray a particular value orientation rather than to be distracted by data gathering or theory development as such. Even where there seems to have been some systematic data collection, such as the "interviews" which Ross mentions in his chapter on the judiciary[19] or the "survey" of in-house counsel mentioned by Sexton and Maher,[20] we are told nothing about the nature and extent of this empirical work. This approach looks like mere dabbling with social science methods and would simply not be acceptable in either social science or more orthodox legal writing.

The crude methods used to justify assertions made in both studies confirm the tendency towards amateurism that some have pointed to in the attempts of lawyers to use social science evidence or methods.[21] Reading both books one is frequently surprised to find omissions and approaches which could not be justified. In their preface, Sexton and Maher, for example, tell us that their four page bibliography "lists the major books that are relevant to this subject". Apart from a number of empirical studies that this reviewer has written also, no reference, for example, is made to the 1981 second report on the work of Victorian lawyers by Margaret Hetherton and the Poverty Commission's legal needs survey. Both of these contain important data on the role of lawyers. Also, as use is also made of overseas material, it is surprising that reference was not made to Podmore's study of solicitors in Britain, or recent American studies such as those of Joel Handler and his colleagues, Heinz and Lauman and Zemans and Rosenblum,[22] to mention but a few. Heinz and Lauman's Chicago Bar study is especially relevant as it discussed the notion of "prestige" of legal work in some depth. This is a far more meaningful concept than that of "mystique", and of course can be empirically controlled much more readily than the latter. However, as Sexton and Maher do not have anywhere near the same commitment to empirical enquiry, it is no wonder that they are content to use imprecise concepts. Similarly their so-called "myth of neutrality" is based on a relatively unsystematic and superficial analysis of the attitudes and values of lawyers, especially in regard to barristers and judges. One can compare Sexton and Maher's treatment here to the far more incisive studies by Elizabeth Proust[23] of Melbourne barristers and by Maureen Cain[24] of British judges or barristers.

There is also a fundamental sense in which Sexton and Maher confuse the realities of legal work with what we might refer to as legal ideologies such as those of legalism, formalism and instrumentalism. Ironically, Sexton and Maher show themselves to be captives of these same ideologies, illustrating once again the

dangers of studies of legal institutions which seek to look at these from within these institutions. Whilst these ideologies certainly are an important part of legal reality — seeking to give it the impression of coherence, the legal profession and legal institutions are far from being coherent, as Sexton and Maher seem to suggest when they refer to the "professions' fortress mentality".[25] The fortress metaphor is misleading and cannot be taken too far in view of the considerable fragmentation which exists within legal practice. Sexton and Maher seem however to be well aware of the fact that lawyers are far from being a homogenous group[26] and that one needs to look closely at the various groups in the profession. A more systematic approach to this than that taken by them is to try to categorise lawyers by reference to the kinds of legal work undertaken rather than the traditional focus on the nature of their employment situations. Whilst there are valid organisational reasons for focusing upon barristers, large firm lawyers and government and corporation lawyers, these comprise only small, if prestigious and powerful, sectors of legal professional life.

Apart from legal services, industrial and academic lawyers, there are many more other lawyers, comprising the bulk of the profession, who are virtually ignored in this study. This reflects the "top down" and highly formalised view that Sexton and Maher take of the profession, despite their professed interest in discussing the "main roles of lawyers in Australian society".[27] If one is to make remarks regarding the profession as a whole, as Sexton and Maher seek to do, it would have been better to adopt more exhaustive work and client based categories by which to discuss lawyer roles.[28] This would lead to a focus upon such more general categories, which cross-cut those used by Sexton and Maher, such as property lawyers, litigation lawyers, commercial lawyers and generalists,[29] categories which emerged from large scale surveys of the legal profession in both New South Wales and Victoria.[30] This approach may however be seen as being somewhat too radical.

It is clear that Sexton and Maher have a highly selective and stereotyped view of the legal system and, despite frequent criticism of it, seem to have a perverse reverence for it. For example, whilst they are critical of the use of judges in royal commissions of inquiry, they urge that we pay greater attention to the role of judges in court-room decision making. Unfortunately most of their examples come from the relatively low caseload upper courts rather than the lower courts, drawing once again on the top-down lawyers' view of the importance of courts. Also, Sexton and Maher are overly influenced by the myth that adversariness characterises dispute processing in our courts. The high rates of conviction and of pleas of guilty in the lower and intermediate courts call into question the existence of any real adversariness.[31]

They also tell us that as judges have a law-making function this needs to be more widely recognised because of the supposed prevalence in the community of the view that judges merely apply neutral principles.[32] This is once again a criticism of the so-called upper court myth pioneered by the legal realists. Because of the supposed commitment of judges to "the vice-grip of legal logic", courts are said to choose "...to come down on the side of traditional authoritarian values rather than a more modern libertarian position".[33] Whilst this may be true, Sexton and Maher's case for this is hardly convincing. Evidence for this is based upon two prisoner rights

cases and a conscientious objection to conscription case. These cases are used to illustrate the excessive caution of judges in their decision making and the fact that judicial decision-making is far from being neutral.[34] Whilst Sexton and Maher realise the difficulties of trying to make judicial selection more broadly based, such as the tendencies to blandness and conservatism resulting from alternatives such as the use of judicial nominating commissions,[35] they urge judges to take the initiative in ensuring that the laws that Parliaments have left them to make and apply "be humane and just".[36] Most would of course agree with this sentiment although it is far from being clear exactly what meaning the authors intend to give it. However, Sexton and Maher seem to be quite uncertain as to what exactly it is that courts do in society. This seems in part to be based upon a somewhat over optimistic view of what can be achieved through law or the courts. This is well illustrated in their suggested solution to the problem of court delay, namely, the provision of more political influence to judges and the removal of bureaucratic hurdles confronting court reformers. This judge-oriented view of delay is an extremely limited one and not surprisingly accords with the views that many conservative judges have of the phenomenon themselves. Whilst this view enhances judicial power, it is a somewhat simplistic assessment of delay which tends to be a legal cultural artefact as well as being a product of negotiating strategies and costing mechanisms within the litigation process.[37] Judges can have little influence over these factors.

This problem of imprecision lies at the heart of the book and is especially evident in the persistent theme in Sexton and Maher's analysis that there needs to be greater "balance" between legal and non-legal values in judicial decision-making. Debates over the issue of balance seem to be notorious for their propensity to lead to dogmatism. It is all very well and good to rail against the lack of balance, but Sexton and Maher offer no real methods of more effectively balancing legal and non-legal values and actually rightly reject reforms such as judicial nominating commissions which some have seen as an answer to this problem.[38]

There seems in fact to be little balance in Sexton and Maher's very call for more balance. Is this because, as they themselves point out, "lawyers have the disadvantage of a discipline that positively discourages objective inquiry"[39] and hence a "balanced" approach to problem solving. This is altogether too pessimistic a view, based upon an observance of lawyers rhetoric rather than the reality of their work. As already noted, Sexton and Maher seem to accept law reform as an unqualified good.[40] They also reject the wearing of wigs as having nothing to be said for it.[41] The same degree of unjustified certainty is evident in their attitudes to fusion,[42] the merits of public regulation of the legal profession[43] and the arguments for and against fixed fee scales.[44] Fusion cannot be discussed without reference to the size and diversity of legal practice situations existing in a jurisdiction at any one time. It is therefore quite unrealistic to suggest that South Australian and Western Australian professions "combine the best of both worlds", without reference to the small size of the profession in those states. However, as even Sexton and Maher recognise, the divisions within the profession in those states are becoming more formal and rigid.[45] There is no evidence to suggest that legislation attempting to fuse the profession will be able to overcome informal pressures against it. In any case, it can be argued that formal fusion would be irrelevant to changing the nature of the

division of labour and costing practices in the profession. This however, is another matter.

Similarly, there is much evidence from the general literature on the public regulation of business activity that it is often no more, and perhaps less effective, than self-regulation, particularly where the industry is well organised, vocal and politically influential. The case for the public regulation of the profession therefore needs to take note of the fact that the history of public regulation has been the history of failure and that more often than not public regulation, like self-regulation, tends to be more symbolic than real. Finally, it needs to be noted that the abolition of fee scales may well increase the costs of legal services rather than reduce these as liberal critics like Sexton and Maher seem to believe. We need to know a lot more about the market for legal services in Australia as well as the political economy of legal practice before we can make predictions that legislative reforms such as the above will have any effect.[46] This is especially important if, as Sexton and Maher tell us, the "territorial imperative" is so strong within the profession. This, however, should not be surprising as monopolistic practices are at the very core of defining what it is to be a profession. Whilst these cannot be strongly defended they are also essential to the preservation of lawyers as a profession. Short of abolishing lawyers as such, it is a liberal illusion to believe that the undesirable practices which are selected for criticism can be readily changed, as Sexton and Maher optimistically seem to expect. It is more important to seek to hold the legal system to its ideals rather than merely to attack their mythical qualities. In the final analysis, they see the need for more lawyers, despite attempts to delegalise certain kinds of dispute processing. If this is true, then there is clearly considerable need for far more extensive and systematic analysis of the role of lawyers than is present here.

There is a similar need for more extensive and systematic analyses of the polytics of law reform. Whilst Ross does point out in his preface that his book "was never intended as a definitive study" he goes on to tell us that he nevertheless seeks to illustrate "the processes that take place in order to achieve law reform".[47] In one sense Ross does provide us with some useful information in this regard, if only to bring together descriptions of the legal machinery of law reform. This however falls far short of providing more than an elementary starting point for the theoretical study of this area. His "case studies" of law reform do little to add to our understanding of the kinds of forces at work in the law reform process. Case studies are usually regarded as providing the core of any socio-legal analysis. Yet, Ross's case studies are theoretically hollow and do little to contribute to our understanding of the law reform process. Two of these so-called case studies seem to be decidedly self-indulgent and the reader is left wondering how exactly the 1980 National Conference on Rape and the Australian Legal Workers Group are studies of law reforms. It is curious that Ross did not decide to undertake a case study of a state or federal law reform commission reform proposal, telling us that this was beyond the scope of his book.[48] Instead, he chose to look at the New South Wales Contracts Review Act of 1980. This is odd, as the preceding two and a half chapters dealt with the federal bureaucracy, federal politicians and the Australian Law Reform Commission. These have little to do with this New South Wales case study. Whilst this case study is the best part of the book, only twenty pages are devoted to it and no theoretical

conclusions are drawn. One wonders why the book was necessary when most of that which is at all original here could be presented in twenty pages, even if these are completely descriptive.

Ross's failure to look systematically at the process of law reform by reference to case studies drawn from the work of law reform commissions leads to a very abstract approach to this process. We are instead presented with a catalogue of law reform agencies. This very limited approach does not prevent Ross from offering us a number of generalisations about law reform processes. For example, in his chapter on law reform bodies, Ross explains "why recommendations for significant change have not been implemented". This he attributes to the fact that these recommendations are seen to "present a threat to established interests and/or either for ideological or political reasons the government of the day has not been really committed to the changes".[49] Whilst this may well be true, Ross's study falls far short of showing that this in fact is so. Earlier, he was far less certain of the precise role of pressure groups in the law making process.[50] More detailed case studies could well have clarified this issue considerably.[51]

The failure to provide even one comprehensive view of the law reform process is the most disappointing aspect of this book. Whilst recognising the central role of the bureaucracy in the implementation of proposed law reforms,[52] any study of the process of reform is incomplete without considerable attention being directed to the post-enactment stage. Bardach's *Implementation Game*, for example, provides us with many illustrations of why this is probably the single most important phase of the law reform process. Yet, this issue barely rates a mention despite the obvious fact that the mere enactment of a "significant" law reform may well have little or no effect or may have consequences quite different from those intended by law reformers. Law reform enactments may well be little more than pyrrhic victories.

It would have been useful if Ross had explored the nature of bureaucratic power and involvement in law reform. Strong freedom of information legislation is seen as the best way to make the bureaucracy accountable to the public.[53] Quite apart from whether the bureaucracy could ever be accountable to the public, rather than to the government of the day, Ross seems to ignore the fact that freedom of information legislation is also susceptible to bureaucratic implementation games. In any event, despite all these attacks on bureaucracy, it is ironic that in his only real case study of a law reform, Ross points out that public servants played a central role in pushing along the Contracts Review Bill,[54] This is surprising after all the preceding attacks upon the propensity of bureaucrats to obstruct significant law reforms. Ross goes on to conclude his chapter on the role of bureaucracy with another of his many curious *non-sequitur's* when he baldly states that a "...reform-oriented bureaucracy could develop if the community were properly educated as to the benefits of a socialist society".[55] Thus, whilst community legal education is seen to be most desirable, it is far from clear that this will have the consequences which Ross somewhat naively expects of it. This is evident from the fact that one of the most obvious consequences of community legal education, when it succeeds in being more than mere propaganda, is the creation of public cynicism regarding legal institutions. This is not the stuff which law reform achievements are made of.

Like Sexton and Maher, Ross also devotes considerable attention to the role of

judges and their narrow value orientations. Ross argues that the "courts have not been an avenue for achieving significant law reform".[56] Both books in looking at the social backgrounds of judges attribute the reluctance of judges to foster major law reform initiatives to the effects of background influences upon them. It needs however to be stressed that regardless of background, judges are also very much influenced by the role which they perform, which is inherently conservative and establishment oriented. There is an extensive literature which highlights the fact that judges are integrally implicated in the administration of the state and in the legitimation of statute law.[57] Whilst it is obvious that judges also make law, as well as sharing the values of politicians of the day, this is because they are so much a part of the fabric of government itself, despite their relative autonomy.

Ross points out that the High Court is "our most political court"[58] so that it is necessary to obtain more information on the values of judges.[59] Quite apart from the fact that most appeal court cases do not involve any fundamental value conflict upon the part of judges, it is far from clear that judicial values are readily discernible, stable or major causal factors in explaining judicial decision-making. More than two decades of jurimetrics research has been less than convincing in this regard. Having said this, one cannot but agree with Ross[60] that there is considerable room for systematic studies of Australian appellate courts and the increasing routinisation of their decision-making activity. Ross concludes his discussion of the High Court by suggesting that it is "...politically impossible to reconstitute the Court so that it adopts an approach to the law that more accurately reflects social, political and economic values of those seeking significant social change".[61] This is not intended to assert that the Court will never facilitate social change, for Ross acknowledges that "incremental social reforms"[62] will sometimes flow from its decisions. However, it is far from clear what "approach to the law" Ross specifically has in mind, so that it is not surprising if judges do not enthusiastically embrace the prospect of "significant social change". The essential vagueness and hollowness of Ross's assertions do not seem to provide a firm basis for social change.

In his final chapter, Ross seeks to offer us what he refers to as "a theory of reform".[63] Once again this falls far short of the expectations one might have regarding the nature and process of theory development and bears little relationship to the preceding ten chapters. He begins with another of his unqualified sweeping assertions when he tells us that "...a *genuine* reformist government will be seeking significant changes while a conservative one will be usually enacting legislative modifications that are essentially cosmetic and symbolic. A conservative government will usually either maintain the status quo or further exacerbate inequalities or both".[64] Quite apart from the difficulty of establishing what a "*genuine* reformist government" would be like, it is clear that all governments use law reform in symbolic and in instrumental ways. Whilst writers such as Edelman and Gusfield[65] have shown us the importance of symbolic explanations of law reform, these are rarely sufficient by themselves and may well only constitute emergent qualities of legislation.[66]

Ross goes on to tell us that an "accurate theoretical framework must have a world view",[67] although space precluded him from showing us how this applied to law

reform. Similarly, his quote from Marx and Engels at the beginning of his chapter stresses the importance of an historical perspective. Once again this perspective receives little or no attention in Ross's analysis. He is however most concerned with the representation of minorities and the oppressed in the law reform process because of the fact that "...significant law reform that threatens the position of those [middle-aged, middle to upper-middle class white males] running the system will generally be opposed".[68] Thus, for example, we are told that the involvement of women in law reform will lead to the system being "dramatically modified by their approach".[69] I for one, remain unconvinced that significant law reform will follow simply from a change in the sex, race, age or class of law reformers. In his last ten pages, Ross goes on to discover the work of Balbus, Thompson and Mathiesen, being most influenced by the latter's useful concept of "the unfinished". This seems to provide the basis for his theory of law reform which in essence asserts that "...there is a need for those seeking law reform to be prepared to shift their position".[70] This however does not take us very far and is little more than a pragmatic formula or technique for political action rather than a theory explaining the process of law reform. Whilst Ross urges that we seek to combine theory and practice,[71] this is very difficult to do if no real theory as such is offered so that one seems to be left with a fairly vague prescription for action. Unlike Sexton and Maher, Ross does however at least recognise the need for theory and the complexity that the evolution of this involves. It is to be hoped that future Australian studies will seek to take us beyond these two useful if somewhat limited studies. There are clearly many lessons to be learned from them.

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FOOTNOTES

1 J. H. Schlegel, "American Legal Realism and Empirical Social Science: From The Yale Experience" (1979) 28 *Buffalo L. Rev.* 459, 459.
2 A. Hunt, *The Sociological Movement in Law* (1978) 37-59.
3 G. Gilmore, *The Ages of American Law* (1977) 83-86.
4 D. Black and M. Mileski (eds) *The Social Organisation of Law* (1973) 2.
5 See J. Hagan, "The Legislation of Crime and Delinquency: A Review of Theory, Method, and Research" (1980) 14 *Law and Soc. Rev.* 603.
6 M. Sexton and L. W. Maher, *The Legal Mystique: The Role of Lawyers in Australian Society* (1982) 127.
7 *Id.*, 154.
8 *Id.*, 7-8.
9 S. Ross, *The Politics of Law Reform* (1982) 6.
10 A. Allott, *The Limits of Law* (1980); J. Handler, *Social Movements and the Legal System* (1978); J. Jenkins, *Social Order and the Limits of Law* (1980). See also R. T. Nimmer, *The Nature of System Change: Reform Impact in the Criminal Courts* (1978); R. Tomasic, (ed) *Legislation and Society in Australia* (1980).
11 See generally R. Tomasic, *Law, Lawyers and the Community* (1976). See also R. Tomasic and C. Bullard, "Lawyers and Legal Culture in Australia" (1979) 7 *Int. J. Soc. Law* 417; R. Tomasic, "Cynicism and Ambivalence Towards Law and Legal Institutions in Australia", Paper presented at Law in a Cynical Society Conference, Winnipeg (1982).

12 S. Ross, note 9 *supra*, 2.
13 *Id.*, 6.
14 *Id.*, 4.
15 *Id.*, 3.
16 *Id.*, 257.
17 M. Sexton and L. W. Maher, note 6 *supra*, 2.
18 These three attitudes or perspectives were respectively the three most important value orientations or attitudinal sets to emerge from a factor analysis of the attitudes to law of a New South Wales community sample. Note 7 *supra*.
19 S. Ross, note 9 *supra*, 185.
20 M. Sexton and L. W. Maher, note 6 *supra*, 84.
21 L. M. Friedman and S. Macaulay (eds), *Law and the Behavioural Sciences* (1977).
22 J. F. Handler, E. J. Hollingsworth and H. S. Erlanger, *Lawyers and the Pursuit of Legal Rights* (1978); F. K. Zemans and V. G. Rosenblum, *The Making of a Public Profession* (1981); J. Heinz and E. Lauman *Chicago Lawyers: The Professions of the Bar* (1981). See also D. Podmore, *Solicitors and the Wider Community* (1980).
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25 M. Sexton and L. W. Maher, note 6 *supra*, 167.
26 *Id.*, 91.
27 *Id.*, Preface.
28 This has been done in other global or wide-ranging studies of the legal profession such as in Heinz and Lauman's study of the Chicago Bar, note 22 *supra*, and in M. Hetherton's *Victoria's Lawyers: The Second Report of a Research Project on Lawyers in the Community* (1981) esp. 210-219.
29 See generally R. Tomasic, *Typifying Lawyers: A Sociological Study of the Legal Profession in New South Wales* (Ph.D. thesis, University of New South Wales) (1979).
30 M. Hetherton, note 13 *supra*, and R. Tomasic, note 14 *supra*.
31 See generally D. McBarnet, *Conviction: Law, the State and the Construction of Justice* (1982). See also a review of this book (1982) 15 *Australian and New Zealand Journal of Criminology* 190-192. See also L. Friedman and R. V. Percival, "A Tale of Two Courts: Litigation in Alameda and San Benito Counties" (1976) 10 *Law and Society Review* 267-301; R. A. Kagan, B. Cartwright, L. Friedman and S. Wheeler, "The Business of State Supreme Courts, 1870-1970" (1977) 30 *Stanford Law Review* 121-156, and R. A. Kagan, B. Cartwright, L. Friedman and S. Wheeler, "The Evolution of State Supreme Courts" (1978) 76 *Michigan Law Review* 961-1005.
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33 *Id.*, 69-70.
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35 *Id.*, 50.
36 *Id.*, 74.
37 J. Crossman, H. Kritzer, K. Bumiller and S. McDougal, "Measuring the Pace of Civil Litigation in Federal and State Trial Courts" (1981) 65 *Judicature* 86-113.
38 J. Basten, "Judicial Accountability: A Proposal for a Judicial Commission" (1980) 52 *Australian Quarterly* 468-485. See however J. Crawford, *Australian Courts of Law* (1982) 53; R. A. Watson and R. G. Downing, *The Politics of the Bench and the Bar: Judicial Selection under the Missouri Non-Partisan Court Plan* (1969); J. P. Mackenzie, "Of Judges and A.B.A." in, R. Nader and M. Green (eds), *Verdicts on Lawyers* (1976). See also generally J. B. Crossman, *Lawyers and Judges: The A.B.A. and the Politics of Judicial Selection* (1965) and E. E. Slotnick, "The U.S. Circuit Judge Nominating Commission (1979) 1 *Law and Policy Quarterly* 465-496.
39 M. Sexton and L. W. Maher, note 6 *supra*, 154.
40 *Id.*, 115.
41 *Id.*, 22.
42 *Id.*, 30-33.
43 *Id.*, 156, 174.
44 *Id.*, 29.
45 *Id.*, 33.
46 See however R. L. Abel, "Toward a Political Economy of Lawyers" (1981) *Wisconsin Law Review* 1117-1187; R. Luckham, "The Political Economy of Legal Professions: Toward a Framework for Comparison" in, C. J. Dias, *et al*, (eds), *Lawyers in the Third World* (1981) 287-336; S. Colvin, *et*

al, The Market for Legal Services; Paraprofessionals and Specialists (1978); M. S. Larson, *The Rise of Professionalism; A Sociological Analysis* (1977).

47 S. Ross, note 9 *supra*, vii.
48 *Id.*, 55.
49 *Id.*, 65.
50 *Id.*, 41.
51 Some Australian models of this include the following: A Hopkins, *Crime, Law and Business: The Sociological Sources of Australian Monopoly Law* (1978), as well as the case studies by Kondos, Armstrong, Ozdowski and Baker in, R. Tomasic, (ed), *Law in Society: Legislation and Society in Australia* (1979). A number of other useful studies of the law making process include those by W. G. Carson, "Symbolic and Instrumental Dimensions of Early Factory Legislation: A Case Study in the Social Origins of Criminal Law" in, R. Hood, (ed), *Crime, Criminology and Public Policy* (1974); W. Chambliss, "On Lawmaking" (1979) 6 *British Journal of Law and Society* 149-171; P. Bierne, *Fair Rent and Legal Fiction: Housing and Rent Legislation in a Capitalist Society* (1977); N. Cunningham, *Pollution, Social Interest and the Law* (1974); E. P. Thompson, *Whigs and Hunters: The Origins of the Black Acts* (1975).
52 S. Ross, note 9 *supra*, 97.
53 *Id.*, 133.
54 *Id.*, 157.
55 *Id.*, 133.
56 *Id.*, 205.
57 See for example D. Adamany, "Legitimacy, Realigning Elections and the Supreme Court" in, S. Goldman and A. Sarat, (eds), *American Court Systems: Readings in Judicial Process and Behaviour* (1978); R. A. Dahl, "Decision-Making in a Democracy; The Supreme Court as a National Policy Maker" (1957) 6 *Journal of Public Law* 279-295; J. H. Choper, *Judicial Review and the National Political Process* (1980); J. A. G. Griffith, *The Politics of the Judiciary* (1977); D. L. Horowitz, *The Courts and Social Policy* (1977).
58 S. Ross, note 9 *supra*, 208.
59 *Id.*, 210.
60 *Ibid.*
61 *Id.*, 237.
62 *Ibid.*
63 *Id.*, 245.
64 *Id.*, 240.
65 M. Edelman, *The Symbolic Uses of Politics* (1964); M. Edelman, *Political Language: Words That Succeed and Policies That Fail* (1977); J. Gusfield, *Symbolic Crusade* (1963).
66 W. G. Carson, note 51 *supra*.
67 S. Ross, note 9 *supra*, 241-242.
68 *Id.*, 242.
69 *Id.*, 244.
70 *Id.*, 254.
71 *Id.*, 256.