This volume provides a range of views on the High Court's decision. Not all are as helpful as one might have hoped, but it is a start and intellectually critical analysis of judicial reasoning is always to be welcomed.

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# Review of John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, Chichester: Barry Rose Law Publishers Ltd, 1992. pp i-xiii, 1-238. $128.00.

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The content of student textbooks and casebooks dealing with the Criminal Law has changed radically over the past 20 years. Before then it was standard practice for such books to give a detailed historical account of the development of the major crimes and also of criminal procedure.

But more recently this historical perspective has gradually been phased out so that modern textbooks and casebooks on the Criminal Law deal more or less exclusively with the law as it now stands. This anti-historical bias is also mirrored in the way that criminal law is taught to undergraduates at universities and colleges. The result is that many students now emerge from law school with no knowledge of who Coke, Hale, Stephen, Macaulay, Livingston and Griffith were. Nor have they any conception of how the leading crimes, like murder and treason, evolved, fascinating though the story is.

The same fate has been suffered by the principal institutions of the criminal law, like the court of criminal appeal and the jury. Modern textbooks tend to deal exclusively with the current structure and role of these institutions whilst their history is ignored. Thus few students today would realise that it took the best part of 100 years of strenuous political agitation in order to establish a proper system of appeals in criminal cases. And probably none would be aware that in the late eighteenth century the average length of a jury trial was five minutes and that juries frequently heard cases in batches (often seven or eight at a time) before retiring to consider their verdicts on all of them. Over the past two decades facts like these have been gradually expunged from textbooks and lecture courses on the Criminal Law with the result that students now graduate from law school with no knowledge of them.

A new book by John Hostettler, *The Politics of Criminal Law Reform in the Nineteenth Century*, if given to students as introductory or background reading, could do much to redress this lamentable absence of historical training. It is true that the book focuses primarily on reforms to procedure and substantive criminal law in

England over the period in question. But most of the English reforms were also adopted in Australia and the book could therefore be read profitably by students in both jurisdictions.

The book is divided into three parts. The first, "Crime and Punishment", begins by giving short pen-portraits of the leading criminal law jurists of the seventeenth and eighteenth centuries (Coke, Hale, etc) before turning to the influence on nineteenth century legal reforms of Bentham and Beccaria. The opposition of these scholars to the death penalty was taken up by two leading politicians, Sir Samuel Romilly and Lord John Russell, who between them succeeded in persuading Parliament to reduce the number of crimes for which death was the mandatory penalty from over 160 (in 1810) to little more than a handful in the space of some 30 years. As Hostettler points out, this abolitionist trend was strongly supported by the rising middle classes, not out of squeamishness or sentimentality, but for the sound, practical reason that the extreme harshness of punishments meted out by the courts in the early nineteenth century actually caused citizens to shy away from bringing prosecutions in minor cases and likewise made juries exceedingly reluctant to convict. Middle class support for the huge reduction in the use of the death penalty was therefore motivated primarily by a desire to see an increase in the prosecution and conviction rate of offenders, rather than the reverse.

The first part of the book also traces the long, uphill battle which had to be fought in the mid-nineteenth century in order to give defendants in criminal cases a right to be represented by counsel — a battle which was vigorously opposed by the Bench and the Bar for many years on various specious grounds, though the Bar finally recanted once it became clear that the introduction of a right to counsel for defendants would potentially mean more work, and therefore more money, for its members. As Hostettler points out, the introduction of defence counsel in criminal trials eventually eroded the authority of the judge and laid the foundations of the modern adversary system which operates in England and Australia today.

The second part of the book, "Substantive Law", traces the history of crimes as diverse as treason, homicide and theft and then goes on to explain and evaluate the work of the Criminal Law Commissioners (1845-1854) which resulted in the publication of the first comprehensive digest of English criminal law. Though the Commissioners' attempts to persuade Parliament to introduce a criminal code based on that digest ultimately failed, their reports are nonetheless significant in that they represent the first concerted attempt by a government appointed commission to bring order and logic to this branch of the law.

The third part of the book, "Codification", is in many ways the most interesting. It touches on Macaulay's Indian Penal Code, Livingston's Louisiana Criminal Code and then deals, at greatest length, with the attempts, first by the Criminal Law Commissioners and later by Sir James Fitzjames Stephen, to draft a criminal code for England. Stephen's code, as is well known, was never adopted by the British Parliament for use in that country, though it did form the basis of the codes now operating in New Zealand, Queensland and Western Australia. As Hostettler sees it, the British ruling class of the nineteenth century clearly favoured codification for the colonies (believing that this would facilitate control from London), but resolutely opposed the introduction of a criminal code in England on the basis that abolition of the "flexible" common law would simply hamstring the judges in their ability to

control the troublesome working classes.

In the penultimate chapter, Hostettler explains how the most senior British judges, particularly Lord Chancellor Cranworth and Chief Justice Cockburn, whilst seeming to support (in public) the introduction of a criminal code in England, in fact worked behind the scenes to sabotage the whole project. Hostettler takes the view that this judicial opposition to codification was largely mendacious and self-interested. But he overlooks the fact that the drafting of the proposed criminal codes of 1854 and 1878 was seriously defective, and that those jurisdictions which did adopt Stephen's 1878 code (with modifications), like Western Australia and Queensland, have not fared any better than those jurisdictions, like Victoria, New South Wales and England, which opted to stick with the common law.

One flaw in the book is that it lacks structure and organisation and in places it suffers from poor proof-reading. For example, part of a chapter headed "Provocation" drifts off into an irrelevant discussion of the felony-murder rule (pp 100–102), whilst another heading, "New Trials", contains a seemingly irrelevant excursus into the use of grand juries and the framing of indictments (pp 156–159). Another problem, possibly, is that the author appears to adopt an inconsistent approach in his attitude towards codification. Thus, whilst the nineteenth century judges are lambasted for their opposition to codification in chapter 12, the final chapter of the book reveals that Hostettler himself, far from being an ardent supporter of codification, is in fact a die-hard common lawyer. Nevertheless, these are small criticisms which do not take away from the overall quality of the book. It is high time that students, both in Australia and England, were re-introduced to the historical foundations of the criminal law. Hostettler's book would provide an excellent starting point for any student interested in undertaking a little historical research into this branch of the law.

GEORGE SYROTA

## Review of Jonathan L Charney & Lewis M Alexander (eds), *International Maritime Boundaries*, Dordrecht: Martinus Nijhoff, 1993. 2 vols; pp i-xlvi, 1-2138. HC $1 240.

This study consists of an introduction and three parts. The first part, entitled "Global Analysis", contains nine chapters on general considerations including Politics, the Legal Regime, Economics, Islands, Baselines and Technical Considerations.

The second part consists of "Regional Analyses" in ten chapters. The first two parts together cover approximately one sixth of the study. The third part, by far the largest, consists of the texts of the boundary agreements and decisions. Each text is