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BOOK REVIEWS

From Promise to Contract: Towards a Liberal Theory of Contract. By DORI KIMEL. [Oxford: Hart Publishing. 2003. ix, 142, (Bibliography) 3 and (Index) 3 pp. Hardback £30.00. ISBN 1–84113–212–8.]

IN AN INFLUENTIAL book review written in 1982, Joseph Raz criticised the tendency of contract lawyers to assume that contract law is either a matter of enforcing a moral principle of promissory obligation, or a mixture of principles drawn from tort and restitution. The present book, by a former student of Raz, takes up this and a number of other tantalisingly brief observations about contract that have fallen from Professor's Raz's pen. The book develops and defends some of Raz's views, draws out their implications, and occasionally departs from Raz's own conclusions. In this way, the book gives us a richer sense of what Raz's tersely stated views on contract might or might not amount to. In sympathetically examining those views, and in opening up a dialogue around and about them, the author makes a useful contribution.

The opening chapter considers the nature of promises, thereby providing the foundation for the rest of the argument (for this reason it will be my main focus in this review). Fried's account of the basis of promissory obligation is taken as a starting point, and his rather confusing invocation of "trust" and "convention" is criticised. Kimel takes the view that promises do not depend upon conventions when that notion is construed in a technical game-theoretic way; nor, he thinks, does Fried really make much of the idea of "convention" if it is construed more informally as a synonym for social practice. The real key to the nature of promise, Kimel holds, is to be found in Fried's other idea: trust. Trust is not a necessary condition of promising, but promises are normally made in situations where trust is present. Trust supports promise in its instrumental role of facilitating co-operation and reliance; but the value and force of promises is not simply based on this instrumental role, for promises also have an intrinsic value in manifesting and developing the special moral relationship, grounded upon trust, between promisor and promisee.

Kimel tells us that he is concerned with the *normal*, rather than the *necessary*, conditions of promising. The focus is explained by reference to Kimel's "narrowness of aim", which is "to study the relationship between promises and their alleged legal equivalents, contracts": for, he tells us, "it is the practice's normal function and mode of operation which should serve as a basis for its comparison to contract" (p. 7). We may at first be concerned that such an approach will lead to a feast of platitudes. For what we take as the normal conditions for the applicability of a concept is relative to the range of instances that we take genuinely to instantiate the concept. When we seek to understand the relationship between promise and contract we ask ourselves (amongst other things) whether contracts consist of promises made under specific conditions, or whether it is an error to equate them with promises at all (which is not to say, of course, that

contract must therefore be dissolved into tort and restitution). But if our elucidation of promise is to be by reference to the *normal* conditions of promising, and *normality* is to be understood by reference to the range of promises falling outwith the law of contract, the conclusions we will reach seem to be clear from the outset: for it is surely obvious that promises made in non-contractual contexts will *normally* be grounded in different conditions from promises contained in contracts; and it is also more or less obvious where those differences will lie.

However, Kimel's focus upon the normal is not what it seems. For he points out that the abnormal cases (where trust is absent) are logically derivative from, or secondary to, the normal cases (where trust is present) (p. 20). While trust is not present in every case of a genuine promise, it nevertheless seems to form an integral part of our notion of promising, and not just a feature of the most common instances of promising. Kimel's focus upon the "normal" therefore seems to be a concern for the conceptually central, by reference to which other instances must be understood, rather than a simple concern for the quotidian. This seems to reflect a usage that we find also in Raz, whose "normal justification" approach to concepts such as "authority" resembles nothing so much as the notion of "focal instances" that we find in Finnis and other neo-Aristotelian writers. Our author is, however, not always consistent in this matter. Thus, a rather good discussion of the question of whether the promisee must have an interest in the promise is curtailed by the reminder that our author is concerned only with "normal" not "necessary" conditions (p. 25); yet this seems no reason at all for curtailment, if the "normal" is really the conceptually central (or "focal") by reference to which non-central instances must be understood. The evident desire of Razians to avoid a terminology that would highlight their indebtedness to Finnis and the natural law tradition here becomes a source of substantial, and easily avoidable, confusion.

Following Raz's views closely, Kimel tells us that promises are valuable, not only instrumentally, but also in promoting and reinforcing special relationships between individuals. He tells us that, while "trust and respect are among the most fundamental building blocks of personal relationships", they are each of them "a kind of attitude"; and attitudes remain mere potentialities until they are realised in conduct. Promising therefore "is a unique device with which to realise this potential" (p. 29).

We may well feel some scepticism about this picture of the role of promise within close personal relationships. With those who are closest to me, I consider it for the most part both unnecessary and inappropriate to make a promise; and the more important the matter under consideration, the less appropriate a promise seems to be. Requests within intimate contexts may serve to communicate needs that might otherwise be overlooked; and promises may serve to acknowledge that those needs or preferences have been noted. But, if a loved one requires a promise from me in relation to some important concern of which they know that I am fully aware, I am more likely to lament the distance and lack of trust that the request evinces than celebrate an opportunity for strengthening our relationship. One might say that this is because certain general background promises are *implicit* in the relationship itself; but this would merely serve to obscure the fact that, if we love and trust one another, we will act out of love and trust, and not from a concern to honour our promises, be they

explicit or implicit. The relationship of promisor and promisee is marked by a degree of trust, but also by some degree of distance which makes promise a dubious vehicle for expressing the trust that we might hope to find in our most important "personal relationships". In close relationships we trust the deep concern of others for our interests, and their sensitivity to our needs and wishes. In the relationship between promisor and promisee, by contrast, trust is a matter of belief in the promisor's willingness to fulfil his moral obligations. This latter type of trust does not require a personal relationship in any normal sense; and reliance upon such trust in the context of personal relationships will undermine rather than express the nature of the relationship. Kimel's undifferentiated talk of "trust" therefore confuses two quite different moral attitudes, thereby misconstruing the relationship between the promissory obligation and the value of close relationships.

Kimel tells us that promises are "normally" made in the framework of ongoing relationships (p. 30). We have already seen that "normally" here seems to mean something like "conceptually central" or "focal", and not just "statistically most frequent". Kimel therefore sets about explaining how the possibility of promises being made between strangers is itself to be explained by the primacy of ongoing relationships structured by trust. His explanation is as follows. When I make a promise to a stranger, I implicitly tell the stranger that I am a trustworthy person. If the promisee takes my promise as a reason to believe that I will perform it, "then in a very limited yet significant sense we are no longer complete strangers". The trust in question is purely "for the matter of the promise and as far as the promise is concerned" (p. 31).

For all I know, promises are statistically most common within "ongoing relationships", but that is not the issue. Once we set on one side the potentially misleading tendencies of the Razian terminology ("normal" rather than "focal") we will see that Kimel needs to establish a certain conceptual primacy for promises made in ongoing relationships, and not just statistical predominance. This, however, his argument fails to do, for it muddles up two different theses. The first is the claim that promises are "normally" made within ongoing relationships because the promises build on existing relationships of trust. (As we have seen, one flaw in this thesis is its conflation of different forms of trust.) To support the first thesis, Kimel must establish the conceptual primacy of ongoing relationships even in relation to promises made between strangers. He does this by means of his second thesis, which holds that promises between strangers bring into existence a special moral bond of trust between promisor and promisee. When we state the argument in this way, however, we can immediately see that it is unsound: the special moral bond created by the promise does nothing to establish the conceptual primacy of promises made within ongoing relationships.

Later chapters emphasise the difference between contract and promise by arguing that contract reduces dependence upon trust. While contract shares certain instrumental functions with promise, it has a different intrinsic value: whereas promises realise and reinforce our personal relationships, contract provides us with a framework for more detached and impersonal co-operation (p. 78). The final chapter develops these ideas in the context of a discussion of both freedom of contract and (more unusually) freedom from contract. In between, Kimel addresses the

question of contractual enforcement and its relationship to J.S. Mill's "harm principle" (Forgive my nitpicking, but it is annoying to find that Mill's name is consistently misspelt: pp. 87, 144).

The main thread of Kimel's argument turns upon the contrast between the embeddedness of promises within ongoing personal relationships grounded in trust, and the relative detachment and impersonality of contractual relations. The contrast, however, is unduly stark: for promises are a relatively detached and impersonal form of co-operation by contrast with the more intimate bonds of love and mutual concern. Since promises are themselves characterised by a degree of impersonality, their value cannot be grounded in the desirability of expressing and reinforcing personal relationships; or, if it can be so grounded, the grounding will not serve to distinguish promises from contracts.

N.E. SIMMONDS

State Liability in Tort: A Comparative Law Study. By DUNCAN FAIRGRIEVE. [Oxford: Oxford University Press. 2003. 1, 284, (Appendix) 39, (Bibliography) 24 and (Index) 6 pp. Hardback £60.00. ISBN 0–19–925805–8.]

WORKING in the field of government liability in tort can give one a sinking feeling. The case law is prodigious and the torrent of reported cases shows no signs of abating. Nonetheless, in this valuable comparative study of French and English law, Fairgrieve navigates this turbulent area adroitly and maintains a commendably even keel. It helps that he sets out with realistic ambitions. He is under no illusions of being able to discover any "holistic solutions", or that his analysis of the French jurisprudence can yield anything more than a potentially helpful "exchange of ideas" and method for "challenging assumptions" (pp. 3 and 269). He adopts a cautious and limited approach to comparative analysis that is primarily descriptive and explanatory. The focus is on functionally similar rules employed in the two domains. In each chapter clear descriptive accounts of selected areas of French and English law are laid side by side, drawing attention to the doctrinal tensions and developments, as well as the various policies that have shaped the law.

The discussion emphasises two central issues in government liability: the role of unlawfulness and the role of causation. But Fairgrieve's functional methodology does not limit him to an analysis of legal rules. Indeed, no explanatory analysis could successfully ignore alterative remedial channels. It is a strength of the book that these are given prominence in a chapter devoted to an overview of their operation (chapter 8). Although these extra-legal remedies are not analysed in anything like the same detail as legal doctrine, there is discussion enough to place the legal rules in their appropriate context. Indeed, one of the most important contrasts between the French and English systems is the absence of a tradition of *ex gratia* payments or ombudsman schemes in France, which helps to account for the broader heads of legal recovery in French law.

One of the highlights of the book for this reviewer is the treatment of the role of illegality in French law, which provides English lawyers with a clear dissection of the myths and misleading generalities to be found in

many comparative discussions (pp. 28–35). Fairgrieve points out that it is not strictly true to say that illegality is either a necessary or a sufficient condition for liability. It is not necessary because certain administrative activities—*agissements* or *faits matériels*—cannot be reviewed in an action for excess of power since they cannot be quashed, yet such activities can give rise to liability. He goes on to explain the various debates relating to the question of illegality as a sufficient condition for liability and notes that the illegality-fault equation has only recently been generally accepted.

A pervasive risk in adopting a functional methodology, by which one identifies and analyses rules that achieve functionally similar objectives, is that the explanatory power of the analysis is threatened by a failure to attend to wider institutional factors. The limits of a functional approach are somewhat exposed when Fairgrieve turns to the role of illegality in English law. This issue is inextricably tied up with institutional and procedural factors that are missed by Fairgrieve's focus on substantive doctrine. First, the role of illegality cannot be understood without reference to the development of administrative law itself, in particular in the manner that a high-threshold form of unreasonableness and the *ultra vires* concept were employed respectively as the shield and the sword in the advancement of the field. Second, the role of illegality is wrapped up in the attempt to develop a procedurally discrete administrative law by manipulating the Order 53 procedure. The rejection of *ultra vires* in *X (Minors)* v. *Bedfordshire C.C.* [1995] 2 A.C. 633 was because it seemed to have procedural implications and was ineluctably tied in the mind of the judiciary to the High Court's judicial review jurisdiction. Certainly, there was a good deal of the tail wagging the dog going on here. Strikingly, *O'Reilly* v. *Mackman* [1983] 2 A.C. 237 is not cited by Fairgrieve at all; if nothing else, Lord Denning M.R.'s revealing comments on damages for public law wrongs are therefore overlooked. Fairgrieve praises the rejection of *ultra vires*, even in relation to discretionary decisions. He claims it avoids "problems of delineation" and says it is a "paradox" that *X (Minors)* retained the *Wednesbury* concept as the standard to be applied (pp. 41–51). In this he goes further than the French model, which does distinguish between *agissements* that cannot be subject to an action *pour excès de pouvoir* and which also continues to demand *faute lourde* in many contexts. The approach preferred by Fairgrieve, that the unreasonable exercise of discretion found in a tort action is not *ultra vires* (and may in fact be *intra vires*), seems unprincipled and unsatisfactory. Such a decision is clearly unlawful. Indeed, it might be thought that there is a paradox here, arising from Fairgrieve's separation of public and private actions. What, for example, would happen when a tortious remedy is sought in a judicial review action: can the same decision be *ultra vires* and not *ultra vires* in the same action? The whole problem (as recently argued at [2004] C.L.J. 166) is one that requires attention to the broader horizon. Problems of delimitation relating to the concept of *ultra vires* are pervasive and go to the very foundations of administrative law. As to the *Wednesbury* concept, it is certainly true that the courts have applied it in an unsatisfactory manner, using it as a test of duty not breach, but they need not make such a mess of integrating tort law and administrative law. Indeed, this is shown by Fairgrieve's own admirable analysis of the revival of misfeasance in public office (pp. 87–95).

Leaving aside these differences of opinion (as well as many others), the central theme of the book relates to the influence of restrictive policy

concerns on the development of legal rules. These, Fairgrieve ventures, represent the "most marked similarity" between the two legal regimes (p. 262). The fact that courts are influenced by such concerns is clearly no surprise. But it is the greatest value of Fairgrieve's study that, by piecing together comments made in the conclusions of *Commissaires du Gouvernement*, extra-judicial comments of judges and the influential views of distinguished French commentators, he systematically identifies the pressure points that these policy concerns are most likely to have exploited in French law. So, the concept of *faute lourde* is defended, particularly in the regulatory sphere, on the grounds that wider exposure to liability might induce defensive practices (pp. 115–118). And a protectionist attitude to public funds and a fear of defensive practices underpin resistance to the illegality-fault parity (p. 32). There is also evidence of a judicial unwillingness to second-guess decision-makers in complex and sensitive matters (pp. 114–115). Moreover, in a commendable and original discussion of the frequently overlooked issues of damage and compensation (chapter 7), Fairgrieve finds academics and *Commissaires du Gouvernement* invoking policy concerns against the extension of secondary victim claims (*préjudice par ricochet*) (pp. 228–231) and in the attempts to limit recovery for *pretium affectionis* (pp. 212, 213). He also identifies concerns of this nature as explaining the extremely low amounts of damages awarded in economic loss cases, lost chance cases and in respect of future losses. To complement this research, Fairgrieve explains how, despite the initial appearance of greater liberality, French law is pervaded by mechanisms severely circumscribing the extent of recovery. These differ from those invoked in England, but they serve the same purpose. The requirement of certainty of damage, restrictions on quantum of awards, a tighter conception of causation, and the doctrine of assumption of risk, have all proved effective in this regard. It is unfortunate that sustained analysis of the merits of the policy concerns falls outside the study, especially in relation to the ability of French courts, but not those in England, to award damages proportionate to the authority's contribution to the loss, which has enormous policy implications and widely reverberates in the doctrines of causation and duty.

Taking account of the various ways that liability is restricted in France, and the supplementary methods for obtaining compensation available in England, Fairgrieve concludes that differences in outcomes are not all that great. Furthermore, he draws attention to a liberalising trend in both systems. There is, I suggest, an additional lesson to be drawn from Fairgrieve's scholarly voyage through French and English law. It is surely a great credit to the English system that people who want to know the policy concerns that influence English courts are not required to forage in restricted access libraries, rely on extra-judicial comments or resort to the inferences of commentators. They can simply go and look in the law reports. On this basis, there must be some difficulty in accepting Fairgrieve's final section, in which he suggests that English courts could learn methods for effectively controlling liability from their French counterparts and, presumably, hiding their motives.

TOM HICKMAN

Trusts and Equity. By GARY WATT. [Oxford: Oxford University Press. 2003. xxxviii, 523, and (Index) 25 pp. Paperback £24.99. ISBN 0–19–870061–X.]

THERE are a large number of books on the law of trusts and equity, many of which are well-established. It might be thought that there is no room for another text on these subjects. But Gary Watt's excellent textbook is a welcome addition to the fold.

The book adopts a fairly traditional approach to the subject, but one which successfully provides both a detailed exposition of the complexities of trust law, as well as consideration of the wider application of equitable principles. The book starts with a useful and thorough introduction to the foundations of equity and the trust, with particular emphasis on their historical origins. There is also an important chapter which places the trust in context, a matter which is of crucial importance to an appreciation of the developing role of the trust today in a variety of forms and contexts, including employment, commerce, tax and insolvency, as well as international trusts. Part II is concerned with the creation and recognition of trusts, which examines the usual suspects of the creation of the express trust, the constitution of trusts and resulting and constructive trusts. This Part also includes two chapters on public policy and the creation of trusts, which deal with formality, perpetuity, illegality and, somewhat incongruously, charity. Part III is concerned with the regulation of trusts, which encompasses "flexibility of benefit", namely the different ways in which benefits under a trust can be varied, fiduciary duties, the nature of trusteeship, investment and breach of trust. The final part is concerned with trusts and third parties, encompassing the recovery of trust property and the personal liability of strangers to the trust.

All of this is very much what would be expected in a book of this type, although at times the role of equity is not developed quite in the way it could have been, particularly as regards the exposition of equitable remedies, other than the remedy of account. There is very little on the injunction, for example. At the start of the book Watt identifies four perspectives to his analysis of the law, perspectives which are singularly useful to the study of equity and trusts: precedent, principle, policy and pragmatism. At various stages Watt uses these different perspectives to explain why judges may have reached the decision they did in particular cases. In a field where the reason for a decision is quite often not obvious, this approach is highly beneficial to determine what is going on beneath the surface of the judgment.

Watt's approach to his subject is essentially conservative, exhibiting respect both for what equity has done and can still do and for the hallowed institution of the trust. So, for example, he adopts a restrictive interpretation of the notion of unconscionability, confining its operation to where there has been "an abuse of legal rights and powers". This is a breath of fresh air in the light of the recent insidious march of "unconscionability" in English law as a panacea for all ills, regardless of whether or not there has been an abuse of any rights at law. Indeed, Watt's most trenchant criticism is aimed at those judges who have resorted to unconscionability without any obvious idea of what they mean by it. In the light of this it is unfortunate that Watt appears to prefer unconscionability to unjust enrichment as the principle underpinning restitutionary claims.

What sets this book apart from many of its competitors is the clarity of the exposition of the law for the student in particular. This is an author who, from the first page, grabs the reader by the hand to lead him or her through the thickets of the law. Watt's enthusiasm for his subject is communicated throughout the book so that a student who comes to the subject expecting it to be dry and irrelevant will soon realise that there is much more to it, both as regards intellectual challenges and real importance to resolving a wide variety of problems. Indeed, this is a book with some rather good jokes, useful insights, and some interesting historical asides, which engages interest and makes the book highly readable. Some sections indeed are a model of clarity and careful exposition, notably the section on illegality and the chapter on investment.

There are, however, certain aspects of the book which are less successful. For example, the author's clarity of exposition is not so obvious in the chapter on constructive trusts. This is partly due to the complicated nature of the law, which has developed in a piecemeal and largely incoherent fashion. But perhaps greater attention could have been given to imposing a more coherent structure in his treatment, whilst also reflecting the inconsistencies in the law. For example, he distinguishes between two categories of constructive trust, one real and the other not, and states that in the latter category fall the liability of a stranger for dishonest assistance and, surprisingly, the constructive trust imposed on bribes. But liability for dishonest assistance has nothing to do with the trust at all, and surely a bribed fiduciary holds the bribe on a *real* constructive trust. His exposition of the resulting trust is more convincing, although more radical than might be expected from his approach generally, since he considers that the resulting trust should arise "in the absence of the transferee's contrary entitlement or obligation". This smacks of Birks's recent reformulation of the law of unjust enrichment as involving "absence of basis". But if Watt's treatment is right then the resulting trust has a much wider reach than is traditionally thought to be the case, a reach which is contrary to his general view in favour of a restrictive interpretation of the trust, because of the proprietary implications of such recognition.

The biggest difficulty facing Watt in the exposition of the law is the incorporation of cases and scholarship on the law of restitution and unjust enrichment. Watt adopts a largely sceptical approach to the restitutionary project, and, in the light of the nature of some of the recent debate about restitution and equity, who can blame him? The reason for his concern is a sense that the "bold new scientific approach" of restitution might be "inappropriately enriched at the expense of equity and the trust". But this misses the point. There is no competition between restitution and equity in general, and unjust enrichment and equity in particular, for restitution is inherent within equity. Indeed, on a number of occasions Watt acknowledges as much, especially as regards restitutionary proprietary claims, where his analysis would have been even clearer had he not been misled by the unjust enrichment red herring. His unfounded concern arises from his equation of restitution and unjust enrichment. But when they are separated it is then much easier to identify restitutionary responses within equity without any need to rely on unjust enrichment, particularly as regards the recovery of trust property and the equitable remedy of account. Unjust enrichment can indeed have a role within equity, but this is much more limited than Watt fears.

These concerns apart, this is a superb student text on the law of equity and trusts.

GRAHAM VIRGO

Developing Key Privacy Rights: The Impact of the Human Rights Act 1998. Edited by MADELEINE COLVIN. [Oxford: Hart Publishing. 2002. x, 198 pp. Paperback £17.00 ISBN 1–84113–168–7.]

As MADELEINE COLVIN sets out in her introduction, this collection of essays examines the right to privacy and its relationship with freedom of expression in a number of jurisdictions. In particular, the book looks at privacy and freedom of expression in France, Germany, Canada, New Zealand, Australia and the European Convention of Human Rights. The aim of the collection is "to provide comparative material that may be helpful to UK courts" when determining "whether and to what extent ... to create a new horizontal right of privacy" (p. 2). *Developing Key Privacy Rights* succeeds in this aim: the book clearly demonstrates the value of looking beyond English cases for solutions to difficult privacy issues.

The essays begin with Jemima Stratford's discussion of the protection of privacy and freedom of expression in the European Convention of Human Rights. Stratford begins this discussion with an outline of the positive and negative privacy obligations imposed by Article 8, noting as she does so the broad and sometimes incoherent nature of the Convention privacy right. She then outlines the freedom of expression protections in Article 10, highlighting in particular the persuasive argument that access to information (which she argues is dealt with only partially by Article 8) could easily be included within the right "to receive ... information and ideas without interference by public authority" in Article 10. She concludes the chapter with a discussion of the relationship between privacy and freedom of expression in the European jurisprudence; however, despite her clear exposition of the relevant cases, one is left with the impression that the European Court of Human Rights has not really grappled with this difficult issue and that Stratford had limited material with which to work.

In the second chapter, Catherine Dupré examines the protection of privacy and freedom of expression in French law. Her essay provides an interesting and accessible summary of the French jurisprudence and serves as a useful reminder that the protection of privacy is highly developed on the Continent. Indeed, particularly when combined with Dupré's concern that the law might be weighted too heavily in favour of free speech, the willing acceptance in France of the extensive privacy protections described in this chapter suggests that fears about the introduction of much weaker privacy protections in England may well prove to be unfounded.

Similar observations could be made about Rosalind English's discussion of the German law in chapter 3. English highlights the sophisticated treatment of both privacy and freedom of expression in German law: her discussion reveals a carefully balanced privacy right and a willingness on the part of German courts to deconstruct the relationship between privacy and freedom of expression through the use of concepts such as proportionality. Consistently with the book's aim of encouraging the use of

comparative materials, English concludes her chapter with a list of references to German case law and commentaries in translation.

Chapter 4 examines the protection of privacy and freedom of expression in Canada. Marguerite Russell sets out clearly the different ways privacy has been conceptualised and protected in the constitutional, legislative and common law context and, particularly usefully for this reader, provides brief explanations of the Canadian federal and judicial systems where appropriate. Russell also introduces an interesting feminist perspective to the privacy material and discusses the Supreme Court's detailed analysis of the relationship between privacy and freedom of expression.

In chapter 5, Rosemary Tobin examines the protection of privacy in New Zealand looking particularly at the operation of common law and legislative and media self-regulatory measures. Her discussion of the developing privacy tort is particularly useful: similarities between the common law in England and New Zealand make the two countries ripe for comparison. Also useful is Tobin's criticism that the New Zealand courts pay insufficient attention to the right to freedom of expression enshrined in the New Zealand Bill of Rights Act 1990 (a failure recognised and remedied in the recent Court of Appeal decision of *Hoskings* v. *Runting* (N.Z.C.A. 101/03, 25 March 2004)). However, despite the overall clarity of Tobin's discussion, there is perhaps some doubt about her claim that "[a]n analysis of the cases discloses essentially two forms of the tort, public disclosure of private facts and intentional intrusion into the plaintiff's solitude" (p. 145). Although support for a specific intrusion action might be implicit in the cases, only the "public disclosure of private facts" tort has been expressly adopted by the New Zealand courts.

The final chapter in the collection looks at privacy and free speech in Australian law. As its author David Lindsay acknowledges, Australia is the only jurisdiction discussed in the book with no bill of rights and, he might have added, no expressly recognised right of privacy. However, Lindsay's discussion of the piecemeal privacy protection provided by other actions (particularly the law of defamation) highlights techniques which are novel even to those familiar with the pre-Human Rights Act jurisprudence in England. His explanation of Australia's implied constitutional right to freedom of expression (and its relationship with the unarticulated privacy rights) is also most illuminating.

Developing Key Privacy Rights is therefore a wide-ranging, accessible and interesting book. Each of the essays provides a clear overview of privacy protection in the jurisdiction in question and, collectively, they cover a variety of different approaches to privacy issues. The book would be a useful starting point for anyone with a general interest in comparative privacy law or for those seeking an introduction to privacy principles in the jurisdictions covered. It is perhaps surprising that no chapter on American law was included (especially since most of the contributors referred to it in their essays) and minor editing errors detract slightly from its overall presentation, but the book is a most useful one and should succeed in its aim of encouraging awareness of comparative privacy material.

NICOLE MOREHAM

The Origins of Adversary Criminal Trial. By JOHN H. LANGBEIN. [Oxford: Oxford University Press. 2003. xxii, 343 and (Index) 11 pp. Hardback £30.00. ISBN 0–19–925888–0.]

OVER the past 25 years, John Langbein's groundbreaking work has helped transform our understanding of eighteenth century English criminal trial procedure. This book brings together much of his previous work and contains a substantial amount of new material to flesh out his central thesis that the arrival of defence counsel in the felony trial in the 1730s brought about a transition from an informal trial, which took the form of an altercation between the victim and the accused, to an adversary procedure dominated by lawyers and rules of evidence. What comes through in this book more clearly than in any of his previous articles is that Langbein views this development as a mistake, a wrong move in Anglo-American legal history that has left us with a modern system of trial that is truth-defeating in its effect. This firmly-held conviction defines Langbein's approach and attitude towards his subject. He contends that adversary procedure gives an unfair advantage to those who can afford good lawyers (the "wealth effect") and that the partisan mode of procedure leads to the suppression or distortion of evidence which frequently prevents the truth from emerging (the "combat effect").

The book is divided into five chapters. The first describes the principal features of the early modern criminal trial before the arrival of the lawyers. Langbein calls this the "accused speaks" trial, as proceedings took the form of an essentially spontaneous altercation between the victim and the accused. Chapters two and three look at how concerns about the reliability of prosecution evidence induced the legislature to allow defence counsel in cases of treason in 1696 and then, crucially, judges to admit defence counsel to ordinary felony trials in the 1730s. The same concern about unreliable and improper prosecution practices underpinned the judicial creation of a law of evidence. Chapter 4 traces the development of rules relating to character, hearsay, confessional and accomplice evidence in meticulous detail and suggests that whilst judges may have introduced the rules, it was lawyers who were best able to exploit them once established. Chapter 5 outlines the principal features of the adversary trial that emerged at the end of the eighteenth century: the accused was silenced, both judge and jury were reduced to largely passive roles, whilst the lawyers, especially defence counsel, developed increasingly combative cross-examination techniques—all of which, according to Langbein, led to a truth deficit.

Langbein's extensive knowledge of the sources and the rigour of his analysis allow him to plot the detailed chronology of these changes with great assurance. The methodical exposition of the emerging rules of evidence and the exploration of how fears about the dangers of perjured prosecution testimony from accomplices or reward seekers induced judges to admit defence counsel into the felony trial are particularly valuable. The relationship between pre-trial procedures and the trial itself is investigated fully, Langbein highlighting some interesting under-explored areas, notably the role of solicitors in pre-trial proceedings. Although many of these arguments are not new, this book consolidates and expands numerous important themes that Langbein has done so much to develop in an exceptionally clear and systematic way. It will be essential reading for anybody who wishes to understand the procedural dynamic that

underpinned the changing face of the eighteenth century English criminal trial.

Langbein's overwhelming concern is both to identify and criticise the emergence of adversary procedure, yet this approach creates two related problems. First, it leads Langbein to disregard or under-emphasise other aspects of the criminal trial which did not survive or which were non-adversarial. He asserts that by the end of the eighteenth century the altercation trial had given way to the adversary trial (p. 253), yet many of the features of the old mode of trial persisted long into the nineteenth century. The discretion that continued to be exercised by prosecutors, jurors and judges was at the heart of the extensive public debate over criminal law reform that took place in the first half of the nineteenth century. Defence lawyers were not permitted to address the jury directly until 1836 and, whilst their numbers did increase, in 1900 they still only appeared in a minority of trials. Langbein does refer to these nineteenth century developments, but they appear as a kind of postscript. These later developments deserve more attention than Langbein is willing to bestow.

The second problematic feature of Langbein's approach is his obvious dislike for modern adversary procedure. This pervades every aspect of the book and often prevents balanced historical judgment. For example, Henry Brougham's assertion during the Queen Caroline affair that the barrister's sole duty was to his client is dismissed as "self-serving prattle" (p. 309), whilst the leading Old Bailey practitioner of the 1780s, William Garrow, is condemned as a "trickster" (p. 332). Although there was contemporary criticism of Garrow and his fellow lawyers, it is difficult to avoid the conclusion that Langbein's views stem from his own opinions on the shortcomings of modern day adversary procedure. Indeed, Langbein questions why contemporaries were not able to see these flaws. He asks why the drafters of the 1696 Treason Act were blind to the problems of combat justice (p. 103), whilst the early nineteenth century treatise writers' faith in the technique of cross-examination is, for Langbein, a source of puzzlement (p. 246). Unfortunately, this present-mindedness has the effect of distorting a picture of the eighteenth century trial which is otherwise extremely valuable for its detail and insight.

PHIL HANDLER

Comparative Consumer Insolvency Regimes—A Canadian Perspective. By JACOB ZIEGEL. [Oxford and Oregon: Hart Publishing. 2003. xxviii, 168 and (Bibliography and Index) 15 pp. Hardback £35.00. IBSN 1–84113–272–1.]

Consumer Bankruptcy in Global Perspective. Edited by JOHANNA NIEMI-KIESILÄINEN, IAIN RAMSAY and WILLIAM C. WHITFORD. [Oxford and Oregon: Hart Publishing. 2003. x, 360 and (Index) 8 pp. Hardback £55.00. IBSN 1–84113–358–2.]

WE ARE much indebted to Hart Publishing. So far as I am aware, no books dealing with consumer insolvency have previously been published in this country, and we now have two, launched in the same month. And they are in many respects complementary, even to the point of having cross-

references to each other, as well as being especially timely, in view of the reforms to the law of bankruptcy in England and Wales effected by the Enterprise Act 2002—designed particularly to deal with the problems of consumer bankruptcies—which became operative on 1 April 2004.

The rapid worldwide expansion in the volume of consumer debt in the past two or three decades is astonishing: to take just one example, in Germany it rose from 15 billion ECU in 1970 to 200 billion in 1998. Moreover, the character of much of this debt has also changed, from mainly secured transactions (home mortgage and hire-purchase) to unsecured (typically credit-card) lending. Inevitably, many individuals become over-indebted. In some cases this can be put down to inexperience or irresponsibility, but in many others it can be due to some supervening event such as unemployment, illness, divorce or accident. The credit industry, for its part, must accept its share of the blame: we are all familiar with its saturation advertising and seductive "no-deposit", "interest-free" promotions.

Historically, individual debtors received scant sympathy from the law: in early periods the option of bankruptcy, leading to a release from the burden of debt, was not available except to those engaged in trade, and even then could not be invoked on the debtor's own initiative. For the rest of the community, prison was the likely sanction, as continues to be the case in some countries even today.

The two books are a rich source of comparative study extending over a wide range of jurisdictions. In *Ziegel*, an esteemed specialist in the field surveys the position in Canada, the United States, Australia, England and Wales, Scotland, Scandinavia and other western European countries. This is a report originally produced for Industry Canada in 2000 in preparation for a programme of amendments to Canada's insolvency legislation, which has been updated for the purpose of the present publication. Although the work of one hand, it draws on correspondence with experts in many countries, as well as personal visits, and cites extensively from the published literature and statistics. The other volume, in contrast, is a collection of essays contributed by 23 authors, looking at 11 jurisdictions including some from Asia and South America. *Ziegel* has very much a Canadian focus and is primarily concerned with the topical debate on reforms to Canadian law, drawing considerably on similar issues in the United States. The book of essays, although ranging more widely and starting from different standpoints, nevertheless explores very much the same questions, since the pressure for change to the established law is virtually universal.

The problems associated with consumer bankruptcy may be common to all western jurisdictions, but the approaches and suggested solutions vary widely. At one end of the spectrum we have the United States, with its emphasis on early release and a fresh start for the debtor, which is reflected to a greater or lesser degree in other common law countries and is at the heart of the philosophy underlying the Enterprise Act reforms in this country. Against such a background, it is not surprising that there are sometimes advocates pressing for a stricter regime which would impose a degree of discipline on debtors. At the other extreme, countries such as France and Germany follow an approach which Professor Ziegel describes as "moralistic" and "puritanical", imposing on debtors repayment plans which may last for up to ten years—a daunting "treadmill". Other

countries, particularly those in Scandinavia, place much emphasis on obligatory debt counselling, while elsewhere the focus is shifted towards prevention, in the sense of making it harder for people to obtain credit in the first place. And in every regime there is concern over the question of expense, and who is to pay—the individual or the state—coupled with the related issues of administration: is the task to fall on the courts and lawyers, on public officials and advisers, or on voluntary advice bureaux?

These well-researched and informative books make most interesting reading and are to be commended to general as well as specialist readers. The debate even extends to considering whether student loans should be treated as a special category of debts, outside the normal bankruptcy regime (*Ziegel*, p. 161)!

LEN SEALY

United States Hegemony and the Foundations of International Law. Edited by MICHAEL BYERS and GEORG NOLTE [Cambridge: Cambridge University Press. 2003. xvii, 550 and (Index) 17pp. Hardback £65.00. ISBN 0–521–81949–0.]

THE LAST FEW YEARS have seen a dramatic increase in the publication of European works examining the position of the United States in the global system. Clearly, the nature and extent of US power and its impact on the rest of the world have become a major preoccupation of, and focal point for, European public international lawyers and political scientists. Since the emergence of particular scholastic priorities and inquiries is rarely accidental, the question of why this type of scholarship is being produced is an interesting one. Why now and, perhaps more interestingly, why now in Europe?

United States Hegemony and the Foundations of International Law can be located in this contemporary strain of European scholarship on the impact of the sole superpower on the international system. Inspired by Wilhelm G. Grewe's *Epochen der Völkerrechtsgeschichte* (1984), in which he argued that the international legal system had been shaped by successive hegemons, the book seeks to examine "whether, and how, the current predominance of the United States is leading to foundational change in the international legal system" (p. 3). In addition to an introduction and conclusion by the respective editors, the book contains six principal chapters written by twelve scholars of international law and international relations, addressing the following key areas or concepts of international law: international community, sovereign equality, the use of force, customary international law, the law of treaties, and compliance. Each chapter consists of two articles and is complemented by short commentaries from senior scholars, whose purpose it is "to expose a healthy complexity of viewpoints and insights, leaving ample room for further analysis and debate" (p. xvi). This objective is clearly achieved, and the commentaries, which frequently offer critical perspectives on the main contributions and raise further questions, emerge as one of the strongest features of the volume.

In addressing the question of the impact of American predominance on the international legal system, the different contributors offer a variety of

viewpoints. Steven Ratner, for example, rejects the notion that "the sole superpower status of the United States creates some unique relationship that changes the foundations of international law" and insists that "when the power, interests, values, and views of international law held by the full panoply of actors in the international system are considered, it becomes clear that these actors exhibit similar ambiguities and tensions in their relationship with the international community" (p. 107). Other contributors believe that particular US actions, such as its refusal to sign and ratify important treaties, its preference for domestic instruments over international law, its unilateral use of force, and its conditional support of international law and international institutions are inconsistent with and have undermined important principles of international law. Nevertheless, they hesitate to declare US actions tantamount to accomplishing something as complex as foundational change. Many share Professor Nolte's concluding remark on the matter: "Do not jump to conclusions! It is too early to tell!" (p. 491). More optimistic authors highlight the complex identity of the US which makes it deeply ambivalent to its hegemonic status, and point to features of the international legal system which undermine hegemonic influence (pp. 290, 291).

While there is no question that this book is an important work, there are some criticisms that can be levelled against it. Many of these are admittedly addressed in Professor Nolte's excellent conclusion, but because this is done briefly and only at the end of the book, the reader is left with the impression that it is a case of "too little too late".

First, although the title of the book refers to "US hegemony", only a few contributors actually define these two terms and there is no sense that they are used consistently throughout the volume. Professor Lowe rightly points out that "[t]he United States is not a monolithic structure. Different branches, and different levels, of US government have different interests, and act differently" (p. 477). Another problem is that, perhaps because of the stated purpose and scope of the book, most contributors seem to be committed to a state-centric understanding of hegemony. They treat hegemony as an attribute of states and the possibility that non-state actors may also pursue hegemonic projects is not sufficiently explored. Furthermore, although both the plurality of powerful actors in the international arena and the existence of major European and other North Atlantic powers that frequently act in concert with America are acknowledged (p. 185), hegemony is primarily discussed as an *American* attribute and potential threat to the international legal system. It is left to Professor Koskenniemi to highlight in his short but thought-provoking commentary the problem of "overlook[ing] the ambivalent, neurotic, and often hypocritical politics of hegemony from which *Europeans* often articulate their criticism of the American Empire" (p. 92).

Second, it is very clear that this book, for all its attempts to create "a diversity in perspective, background, and thinking" (p. xvi), is Euro-centric and forms part of an ongoing trans-Atlantic debate. While this may not be problematic for some commentators, readers from the Third World are likely to view sentences like the following one with a certain measure of bemusement: "If the European Union gains influence through the process of enlargement ..., it may serve as an increasingly powerful 'anti-hegemonic' counterbalance, whatever the tendencies of the United States itself" (p. 295). Clearly this book is as much about Europe as it is about

the US. It exemplifies the European search for a coherent identity and self-image, a search that has, arguably since the days of the *Mayflower*, in part proceeded on the basis of a dialectic relationship between the United States and Europe.

Despite the above criticisms, this is a well-written, provocative and insightful work that achieves its objective in presenting a variety of viewpoints on the impact of a predominant superpower on the international legal system. It is an essential read for anyone who is interested in the operation of power in international law.

M.N. KAAPANDA