BOOK REVIEWS


Political scientists, of whom David Robertson is one, can be of considerable value to lawyers—a value not often enough acknowledged. Legal academics, it might be said, see woods where practitioners see trees; but political scientists are often better than either at seeing the landscape and understanding the ecology of which the wood itself forms a part.

Nevertheless, disparities of approach can create difficulties, and the first difficulty thrown up by Robertson’s volume is one of terminology. By discretion he does not mean what a lawyer means, namely a relatively narrow band of choice occasionally vouchsafed by law in particular situations. He means the entire process of choosing between or among available outcomes. Since his target audience must in large part be lawyers, this might seem an unfortunate initial failure of communication: a conversation to be conducted in two different languages. One can find, for example, in Aharon Barak’s Judicial Discretion a sophisticated and catholic exploration of what discretion means to judges. But Robertson, who understands and acknowledges the dislocation, is justified in sticking to his title, because his thesis is precisely that what is commonly presented as ineluctable and even self-referential logic is as often as not an elective solution driven by a variety of legal and non-legal engines: a product, in other words, of judicial discretion.

There is nothing new about this thesis, which legal realism long ago reduced to a monochrome absurdity. Robertson’s book sets out not to test it but, openly adopting it, to apply it in a small and highly significant field. As science, therefore, it won’t do: it is going inexorably to corroborate itself, and we shall have to continue look elsewhere for the Grand Theory of Adjudication with Empirical Proofs. “What we are insisting on,” says Robertson in his introductory chapter, “is that any case that comes before the House of Lords could be decided either way, and that the judges do fully choose the way it will come out.” Standing alone, this is true but uninteresting. What is interesting is what is admitted into and what is excluded from the process of choice. The House of Lords is potentially a good test-bed because almost all the cases that come to it contain an element of novelty: it is because the received rules may not, or may no longer, fit the facts or—importantly—the merits that leave to appeal is ordinarily given. Rape within marriage is a recent classic example.

Robertson has been able to speak to every one of the Law Lords holding office during his period of study, which is 1993 (taking this to mean the decisions reported in that year). Unlike Alan Paterson, who not only interviewed but extensively quoted most of the Law Lords living when he was writing his 1982 book The Law Lords, Robertson eschews anecdote. Instead he gives us statistics, which show, for example, that Lord Templeman’s presence was very bad news indeed for reluctant taxpayers and that in criminal appeals Lord Bridge’s participation was comparably
bad news for the Crown. The percentage differences look dramatic: it’s only when you remind yourself that Robertson has been working on a total of 29 tax appeals and 33 criminal appeals that you draw back a bit. In any case, each such Law Lord has to carry at least two others with him. One would like to know how; but Robertson can only tell us that he does.

From statistical analyses Robertson moves to a study of what he calls judicial methodology. He goes, for example, through the claim brought by Mrs. Bradley for damages for byssinosis against the insurers of her employer who had meanwhile gone into liquidation and demonstrates how the majority opted for what Lord Templeman, dissenting, showed to be an unnecessarily restrictive interpretation of the Act of 1930 which was supposed to cover people in Mrs. Bradley’s situation. Having seen sick clients of my own robbed by this needless jurisprudence of a little compensation before they died, I am breast high with him on this. But what does it tell us except that the other Law Lords chose literalism against justice?—an odd finding for a realism which tends to allocate outcomes to rather more visceral forms of predilection. A more revealing study might be how insurance companies have historically fared in court in terms of protective doctrine, and why. While Robertson’s narrative accounts of the decisions he is studying and of others allied to them make excellent and well-informed reading, they add up to an argument which the judiciary cannot win. The restrictive decision of the Court of Appeal, denying judicial review of prison governors’ adjudications in King, is overset by the Lords in Leech because to do otherwise would be an affront to their power to intervene. Then comes Hague, denying redress for unlawful imprisonment within a prison term, and Robertson concludes that in prison law, as with immigration, “clear orientations do not exist … [T]he same man, Lord Bridge, is capable of both generous and surprisingly narrow interpretations … More directly … one sees the complete inapplicability of anything shaped to be a general principle, an inability of public law to have more than procedural concerns and rules”. Whether a set of written constitutional groundrules would, as Robertson supposes, change all this may soon be tested by the coming into force of the Human Rights Act. My guess is that change will come rapidly, but also that the next edition of this book will be able to mount much the same critique of the changed landscape.

This perhaps is the problem with realism: it is realistic about the way the judges choose to sail with the wind or tack into it, to make for the horizon or make for port; but it shows no realism about the thing which above all makes them do what they do—the kaleidoscopic variants of fact and merit which keep healthily confounding the predictions and subverting the premises of law. We are not that prescient, nor that clever; and whatever claims we or others make for principles, they are neither universal nor timeless.

This is why I find it disappointing that Robertson has neglected a clue which, by his own account, was repeatedly dropped in his path by the Law Lords he interviewed “they have, in a phrase that cropped up over and over again, a sense of ‘cheating’ … [T]hey used it to describe an inner sense of obligation—‘one tries not to cheat’. It is very inchoate idea, but in itself evidence of just how very free a Law Lord is in exercising his discretion.” Once again the two-headed penny. An aversion to cheating is, I would have thought, neither inchoate nor evidence of unfettered discretion: it suggests an uncomfortable awareness of the tension that can exist between principle and outcome and of the need not to sacrifice the former on the altar of the latter. What it does not suggest is a bunch of power-drunk decision-makers with nothing to restrain them except the occasional piece of unambiguous legislation.

It is a pity, because Robertson is at his best dissecting and examining the logic of the cases he is studying. Frequently enough to be embarrassing the authors of
some of the speeches come off second best. He justifies his conclusion that the Tony Bland case “does not ... show us what it is that a legal answer consists in. It shows us how to construct a legal answer”. But Bland is the apotheosis of faute de mieux adjudication: a decision which Parliament ought to have taken, thrust on a legal system which not very many years ago would have ducked it, and handled—for my money—with creditable openness about its legal and ethical intractabilities. Shooting the pianist in such a situation is always an option; but how would David Robertson have rewritten the score?

STEPHEN SEDLEY


The seventeenth century has, with ample justification, been described as “the century of genius”. It was in that century that some of the most basic assumptions and problems of the modern era were first established and articulated, and this is true of legal thought no less than of science and metaphysics. Some of the figures central to the general intellectual life of the century were lawyers, and their centrality was no accident. The emergence of sovereign European states, in place of the complex overlapping jurisdictions and allegiances of the late medieval world, created a new context to which conceptions of legality and the rule of law had to adapt. The decay of a shared inheritance of religious ideas, and the rise of militant sectarianism, fuelled an anxious search for new foundations for political order without the security provided by an overarching and uncontested framework of belief. Problems that (one way or another) still preoccupy most legal scholars emerged in their modern form during this period.

One might expect legal scholars to celebrate these founding moments in the history of their discipline, and to sustain a thriving industry of scholarship reflecting upon the emergence and development of what has come to be called “modern natural law”. Nor would this be simply a matter of the discipline’s reverential attention to its own past: for the problems internal to the seventeenth-century debates continue to provide some of the activating tensions within legal thought at the end of the twentieth century. Grotius, for example, was not only a founding father of international law, but also an originator of the idea that a legal system might be systematised around the notion of individual rights. His Introduction to the Jurisprudence of Holland has been described by Richard Tuck as “the first reconstruction of an actual legal system in terms of rights rather than laws” and “the true ancestor of all the modern codes which have rights of various kinds at their centre”. Grotius may be one important source for the idea that rights are mutually compatible, and that the law can be viewed as an attempt to realise the ideal situation where rights are fully enjoyed in a non-conflictual realm. Such a view must be contrasted with an older (Aristotelian and scholastic) tradition, that gives priority to the notion of “common good” rather than “rights”, as well as with the Hobbesian view that natural rights are inherently conflicting, so that a society governed by law must be an expression of sovereign power rather than the realisation of an implicit system of rights. Variants of this debate are still at work, not only on the plane of legal philosophy but also in the fine detail of specific doctrinal disagreements (consider, for example, the difference between those judges who are enamoured of “the search for principle”, and those judges who are more concerned to subsume decisions under rules firmly grounded in established authority).
The traditional picture of Grotius and his successors as offering an essentially “secular” version of natural law leaves more than a little to be desired. Indeed, one of the most interesting features of the work of Pufendorf concerns the way in which his adoption of an essentially modern world-view actually increases, rather than decreases, the dependence of his theory upon the divine will. Within an older Aristotelian “teleological” world-view, moral norms might be taken to be implicit within the nature of things, but once this perspective is replaced by a more mechanical vision of the universe, the facts in themselves appear to be devoid of normative significance. Thus Pufendorf tells us that the moral properties of an action result from the divine will: without reference to such a will it would be impossible to discern any moral differences, any more than “a man born blind” could “judge between colours” (Pufendorf, *De Iure Naturae et Gentium* 1.2.6.). Hume’s Is/Ought distinction did not refute this type of natural law theory: Pufendorf would have agreed with Hume that facts alone could entail no prescriptions. What Hume actually did was to remove the divine will from the picture, locating the motivating force of morality in the human breast instead of in the deity. Indeed one of Hume’s most well-known arguments for the dependence of morality upon sentiment appears to be lifted directly from the natural lawyers (I refer to the famous passage beginning “Take any action allowed to be vicious …”, in David Hume, *A Treatise of Human Nature* Book III, Part I, section i.).

If the new theories of natural law were not in any straightforward sense “secular” in character, they did exhibit a desire to work from premises that were not closely tied to highly specific and contentious theological commitments. Paradoxically, this may itself have been in part the consequence of theological commitments specific to Protestantism. Protestant theology emphasised the huge gulf separating man from God, a gulf that was bridgeable only by faith and grace, but not by reason: such a position in itself made the older religious foundations of natural law problematic, and might incline Protestants to seek a foundation for the regulation of human affairs that relied less upon the claim to possess a detailed understanding of the divine intentions. Whatever the motivation behind this development, it clearly sat comfortably with the need to find some shared basis for political order in a Europe torn by religious controversy. Grotius and Pufendorf work from assumptions of a very minimal character: abandoning the Aristotelian claim to understand the human essence and the appropriate prescriptions for the good life, the Protestant natural lawyers deal in the mundane coinage of given human desires and the incontestable requirements of orderly social life. In this way their theories initiate a focus upon actual desire that later comes to fruition in Hume and Bentham; but, at the same time, their theories represent a search for shared and uncontentious ground that is the remote forerunner of present day quests for liberal “neutrality”. In short, many significant strands of modern juridical thought are to be found taking shape in these writers.

A discipline that is content to remain ignorant of its own intellectual inheritance will misunderstand the logic of even those quotidian debates in which it is willing to engage. Moreover, it will forfeit any claim that it might otherwise have had to be taken seriously by scholars elsewhere in the university. The task of grappling with that inheritance is, however, by no means an easy one. The works of Aquinas have been fortunate to find a uniquely gifted interpreter in John Finnis, but the later Protestant tradition has enjoyed no such good luck. Grotius and Pufendorf are not an easy read, and they present tricky interpretative problems for anyone not immersed in seventeenth-century juridical and theological debates. To read these books naïvely, without a cultivated awareness of the debates in which they intervene, is to miss a great deal of their significance and meaning. In such circumstances, the novice needs some guideposts if progress is to be made. Yet, until quite
recently, this was a landscape where the guideposts had been erected by people with little detailed knowledge of the terrain: numerous potted histories of jurisprudence could be found containing grossly inadequate or inaccurate accounts of the theories of Grotius and Pufendorf. For any student who had consulted such nutshells, initial attempts to grapple with the original texts produced a strange sense of disorientation: it takes time to realise that the guidebooks are full of misleading hearsay, and that the features they have led one to expect are nowhere to be found.

Now things have changed, and there is far less excuse for ignorance. There are times when the modern (Cambridge?) history of ideas seems determined to present minor works as the indispensable context for understanding the great classics: in general one wishes to remind them of Oakeshott’s observation that “The masterpiece supplies a standard and a context for the second-rate, which is indeed but a gloss; but the context of the masterpiece itself … can in the nature of things be nothing narrower than the history of political philosophy.” We must readily concede, however, that a willingness to depart from a narrowly restricted canon of great classics has encouraged renewed reflection upon some major figures who have suffered undue neglect, and has provided us with much of the background that is necessary if we are to understand such authors. Into this category fall Grotius, Pufendorf, and other figures of the “modern natural law.” Some excellent books and articles have been written on this phase of intellectual life, and (apart from their other merits) they are of immense value in helping the interested novice come to grips with a complex and still unsettled debate.

This very useful volume collects together, from a variety of journals, many of the most important recent essays on Grotius, Pufendorf and other writers of the period such as Selden, Cumberland, and Leibniz. Later essays cover the period following on from the establishment of “Protestant” natural law theory, and include discussions of Thomasius, Barbeyrac, Vattel, Rousseau, Kant and Smith. The editor (himself a noted authority in this field, and the author of an excellent guide to it: Knud Haakonssen, *Natural Law and Moral Philosophy: from Grotius to the Scottish Enlightenment* (Cambridge 1996)) provides a useful introduction and bibliography.

N.E. SIMMONDS


The discussion of Kelsen’s theory has, within the last 10 or 20 years, reached a critical stage. On the one hand, there is an extensive literature specifically concentrating on Kelsen’s work that is, however, in large parts of a more exegetical character. On the other hand, Kelsen seems to be disappearing from the general legal or even jurisprudential discourse and from the curricula of universities. Besides the factor of fashion this is probably, at least to some extent, due to an apparent obscurity of parts of Kelsen’s theory. This has induced “Kelsonians” to lead a highly technical internal discourse, which in turn prevented “outsiders” from taking part in discussions on Kelsenian ideas. Such a development is surely to be deplored since the originality and depth of his theory are of great value and should therefore be of lasting influence.

*Normativity and Norms,* a collection of essays thoroughly edited by Stanley Paulson and Bonnie Litschewski Paulson, directly addresses this problem. It is
not a book specifically about Kelsen’s thinking. Instead it shows Kelsen to be one weighty voice in a fundamental jurisprudential discourse that was initiated by him. This is the question about what may be called the positive normativity of the law: Is it possible to conceive of legal norms as constituting genuine obligations without necessarily justifying them morally on the basis of a natural law theory? And if so: What does this mean? These questions are of great significance since the alternative to such an understanding is apparently a purely instrumentalistic approach to the law such as is offered—without any discussion—by the economic analysis of law.

Kelsen’s Foreword to the Second Printing of his *Main Problems in the Theory of Public Law* marks the beginning of his classical pure theory of the law. Kelsen there clearly describes his jurisprudential approach “from a legal point of view” that is supposed to be able to explain the autonomy and unity of law as well as its dynamic character. First of all, however, Kelsen wants normatively to comprehend a “norm qua ought-judgement”. It is also in this introduction that he first argues for a neo-Kantian, transcendental method as being adequate for such a theory about the law’s positive normativity. The foreword is thus a very important text, for the understanding of Kelsen’s theory as well as for the problem of normativity, and it is therefore to be appreciated that the Paulsons have now translated it into English and put it at the beginning this collection. It sets the stage for the following discussion.

All the contributions included are thus, directly or indirectly, related to the normativity problem. They were chosen only for criteria of relevance and quality. Thus, we find a couple of already easily accessible articles like Raz’s “Kelsen’s Theory of the Basic Norm”, “The Purity of the Pure Theory” and “Voluntary Obligations and Normative Powers” or Hart’s “Kelsen’s Doctrine of the Unity of Law” and “Kelsen Visited”. These articles had to be included in order firstly to represent the debate within one volume comprehensively and secondly apparently to recall these articles, again. For example, in his “Kelsen Visited”, Hart had most lucidly explained Kelsen’s understanding of doctrinal sentences as normative statements in a “descriptive sense”. With this idea Kelsen aimed at emphasizing the fact that “ought” can be used not only authoritatively but also as an interpretation of an authority’s commands. It then does neither prescribe an obligation nor describe such a prescription. Instead it represents an obligation that is issued authoritatively by someone else. But despite these instructive observations, legal theory still proceeds from the—analytically easy and convenient but none the less not very adequate—assumption that lawyers are either prescribing or describing legal obligations.

It remains an open discussion whether a Kelsenian theory of the law necessarily presupposes a theoretical neo-Kantian basis. Therefore, it is very interesting, indeed, to contrast authors like Raz, Nino and Valdès who try to develop an adequate understanding of the law’s normativity without any such basis to articles exploring the neo-Kantian dimension in Kelsen’s pure theory. For this, many articles had to be translated from German, Spanish or Italian into English. This effort has to be greatly appreciated since it unifies a discussion which had seemed to be falling apart. Part of this unification consists also in the inclusion of important material that was not accessible in Great Britain such as Alf Ross’ “Validity and the Conflict between Legal Positivism and Natural Law”, which is his only answer to Hart’s attack on Ross’ main work *On Law and Justice*.

A dynamic normative system is based on the institutionalization of normative powers. It is, however, an often neglected question how powers can be adequately described and how they are referring to legal obligations. *Normativity and Norms* thus contains a couple of contributions dealing with this problem, of which
MacCormick’s and Dick Ruiter’s are written originally for this volume. The latter especially deserves attention, since, contrary to the usual understanding it describes powers as basic norms being not reducible to other deontic norms. Another interesting original contribution also related to the dynamic normative character of the law is Moreso’s and Navarro’s dense article on “The Reception of Norms, and Open Legal Systems”. Proceeding from a plausible and useful distinction between the applicability and the validity or membership of norms within a legal system, they conceive of received norms as being applicable, but not members in open legal systems. Unfortunately, Moreso and Navarro leave the question unanswered under which conditions received norms can also become members of a legal system. But is the merit of their article that it leads us to asking such a question.

Within this review, it is impossible to give a complete overview of this rich discussion and to relate it to other Kelsenian debates. Fortunately, this is done by Stanley Paulson’s instructive introduction. There, he also explains Kelsen’s different views on these topics, whose change is due to the philosophical development of his theory from an early constructivistic position through his classical neo-Kantian period to a late scepticism. Thus, Paulson’s introduction ideally completes this well chosen collection.

NILS JANSSEN


RAY ABRAHAMS has written a piquantly engaging book about the nature and consequences of vigilantism in a number of societies, with particular attention to Africa, the United States, and the United Kingdom. Abrahams employs a largely narrative style with occasional reflections on broader theoretical points. His material, gained partly from anthropological field work and partly from historical and contemporary texts, is invariably interesting and sometimes gripping.

When the objectionable behavior of certain people is not adequately controlled by the mechanisms of government—either because the behavior in question is not illegal or because the enforcement of the law is slipshod—vigilantism tends to occur as a response. Especially when people find that some disfavoured conduct threatens their everyday security, they will be inclined to discipline malefactors themselves if the state does not carry out its punitive/compensatory role satisfactorily. Vigilantism in its purest form, then, emerges as a reaction to disorderly modes of behaviour that have not been sufficiently deterred or contained by the institutions of public power. Because of the inefficiency or corruption of law-enforcement officials, people take the law into their own hands.

However, as Abrahams repeatedly reveals, vigilantism very seldom occurs in its pure form. Instead, it often serves as a vehicle for political, racial, economic, generational, sexual, or ethnic jockeying. Moreover, the pure and impure forms are not always readily distinguishable, since the participants in the latter are generally disposed to justify their actions with high-sounding pronouncements. (As Ralph Waldo Emerson once wrote: “The louder he talked of his honor, the faster we counted our spoons.”) Policing by ordinary citizens is especially unsettling in situations where the ostensibly ordinary citizens are in fact soldiers and policemen operating extra-legally. Abrahams includes an illuminating chapter on death squads, which are often portrayed by their sponsoring governments as bands of private individuals. Though such squads are ersatz rather than genuine vigilantes,
the menace which they pose is a stark and highly intensified form of the menace that is posed to some degree by virtually all vigilante groups (even in good causes). A number of prominent American cases, not discussed at all by Abrahams, could have been drawn upon to illustrate the complexities of governmental involvement in vigilantism. For example, the lynching of the Jewish factory manager Leo Frank in Georgia in 1915 was possible only because his jailers connived at the forcible removal of him from his prison cell by a group of local thugs. In a broadly similar vein, the murders of the three civil-rights activists Michael Schwerner, Andrew Goodman, and James Chaney in June 1964 were carried out with the eager assistance of a few law-enforcement officials in Mississippi. At the criminal trial that stemmed from the murders, one key issue was whether the numerous non-officials among the defendants could correctly be charged with acting under the color of state law. (The US Supreme Court ultimately held that such a charge was proper.)

As these examples and many of Abrahams’s examples suggest, a lot of the most repugnant instances of vigilantism have emanated from the far right of the political spectrum. Unfortunately, Abrahams devotes much less attention to the myriad unlovely instances of left-wing vigilantism (though his largely sympathetic remarks on Julius Nyerere enable a more sceptical observer—such as the present reviewer—to conclude that the leader of Tanzanian socialism encouraged and manipulated vigilantism for his own power-hungry ends). One would have liked to see Abrahams’s anthropological talents brought to bear on the murderous exploits of the animal-liberation movement, for example. Perhaps even more interesting would be a study of the ways in which the thought-police of political correctness in the USA have hounded and persecuted intellectuals who do not subscribe to leftist dogmas. Through strident protests, physical obstruction and intimidation, and the indiscriminate application of strongly pejorative terms such as “racist”, the storm troopers of political correctness on American campuses have done their utmost to punish faculty members and students who hold views contrary to their own.

Abrahams in his final chapter engages in some jurisprudential reflections. His analysis is interesting and thoughtful, but is somewhat marred by his imperfect command of certain jurisprudential distinctions (and also by his lack of familiarity with recent jurisprudence and his consequent focus on debates that petered out several decades ago). He suggests that the distinction between duty-imposing norms and power-conferring norms can illuminate the relationship between vigilantism and the law, and he maintains that vigilantes violate power-conferring norms in the course of enforcing duty-imposing norms. Such an analysis, though pointing toward an important insight, is confused. Albeit vigilantes’ actions are not grounded on power-conferring norms and are not in compliance with them, those actions do not violate such norms—because only duty-imposing norms can be violated. To be sure, many legal norms that confer powers on some people are accompanied by legal norms that place other people under duties to abstain from purporting to exercise such powers. Nonetheless, if any usurpers do purport to exercise the powers that have been conferred on others, they are violating the duty-imposing norms rather than the power-conferring norms. If those duty-imposing norms did not exist, and if the ostensible exercises of powers did not breach any other duties, then the unauthorized behavior would not be in violation of anything. (It would instead merely fail to produce the legal effects that would be brought about by genuine exercises of the relevant powers.) Hence, Abrahams’s point should have been formulated along the following lines: when vigilantes take the law into their own hands, they not only are frequently in breach of ordinary duties forbidding assault and battery and abduction, but also are quite often in breach of duties forbidding acts that simulate the exercise of certain judicial, executive, or legislative powers.
Writing as an anthropologist rather than as a legal philosopher, Abrahams is not to be condemned severely for his slightly shaky grasp of jural concepts. On the whole, his book is a subtle and instructive exploration of activity on the margins of law-enforcement. Anyone interested in the effectuation of legal norms can profit from his discussions.

MATTHEW H. KRAMER


PRISON LAW by Livingstone and Owen has already established itself as a splendid textbook on prison law. It seems churlish to find two significant criticisms. The first is inevitable: any contemporary criminal justice textbook is certain to be out of date by the time it reaches the bookshop shelves. Since the second edition of this book was published, in early 1999, there have been a number of important developments. The authors were able to mention R. v. Secretary of State for the Home Department, ex p. Stafford ([1998] 3 W.L.R. 372) in their preface, but since then the House of Lords has spoken in other important cases: R. v. Secretary of State for the Home Department, ex p. Simms ([1999] 3 W.L.R. 328) on the right of prisoners to speak with journalists and Commissioner of Police v. Reeves ([1999] 3 W.L.R. 363) on the duty of care owed by police and prisons to those at risk of suicide.

The revision of the Prison Rules (S.I. 1999/728), which came into force on 1 April 1999, must have been even more irritating to the authors than these judicial developments. For example, the numbering of the Rules is entirely new since old Rule 31 and old Rule 32 have been brought up front as statements of general principle. Thus, old Rule 1 (new Rule 3) “purpose of prison training and treatment” is now followed by Rules stressing the importance of outside contacts and aftercare. There are no longer “unallocated” Rules. This means that a third edition of Livingstone and Owen is already due.

The changes to the Rules are not simply limited to the numbering. There are significant changes to the Rules themselves. Thus, Rule 34 contains new powers expressly allowing the Secretary of State to require closed or non-contact visits; to restrict visits and telecommunications; and for governors and officers to listen to, record and log communications. At long last the catch-all “in any way offends against good order and discipline” has been removed from the list of disciplinary offences (now found in rule 51). In comes a new offence: “if he receives any controlled drug, or, without the consent of an officer, any other article, during the course of a visit”. This does not apply to legal visits. There have been some changes to governors’ punishments (Rule 55): a caution cannot now be combined with any other punishment. The total award of cellular confinement following an incident in a prison shall not exceed 14 days; and in a Young Offender Institution 7 days. Interestingly, “the governor shall take into account any guidelines that the Secretary of State may from time to time issue as to the level of punishment that should normally be imposed for a particular offence against discipline”. This requirement on governors to take into account guidelines is reinforced in Prison Service Order No. 3610 on measures to deal with visitors and prisoners who
smuggle drugs through visits (issued on 9.3.99) which gives adjudication guidelines for the offence of possessing an unauthorised drug (e.g. 8–14 additional days, either alone or combined with other punishments). There is a new rule (Rule 73) giving the Secretary of State express power to prohibit certain visitors from visiting a prison, or prisoners in a prison “for such periods of time as he considers necessary”.

Not only is the law in this area moving, but the underlying political and policy priorities constantly shift. Occasionally Livingstone and Owen appear not to acknowledge the extent to which this has happened since the first edition of this book in 1993. Their descriptions of incentives and earned privileges or closed supervision centres, for example, sound surprisingly complacent, especially given their reputations as human rights lawyers (Livingstone as Professor of Human Rights Law at Queen’s University, Belfast and Owen as a Doughty Street practitioner). Thus whilst they do warn that “the operation of the earned privilege scheme has obvious implications for the use of disciplinary powers and threatens to undermine the guarantees against the use of arbitrary power that has been introduced into the formal adjudications system” (p. 166; para. 5.36), they do not adequately explore some of the human rights implications of the scheme in practice: Instruction to Governors 74/1995 is an extraordinary example of wide discretionary rule-making by the executive, having an enormous impact on lives of prisoners. It is very vague: although it mentions review every three months the mechanism for review is not given. Despite the curious statement in the Instruction that “it should be possible to transfer to the same privileges level in a different establishment, but not necessarily to enjoy the same privileges” (p.14), there are clearly different entry points for different establishments, and different privileges available, which many prisoners have found unfair. The authors do raise the relationship of disciplinary punishments to social control in prison (para. 9.67), yet surely this blurry line between punishment and management needs flagging up more consistently. For example, Livingstone and Owen quote, without apparently a blink, the Director of Dispersals’ comments in the Prison Reform Trust’s journal Prison Report (Spring 1998) that the emphasis in closed supervision centres (CSCs) is supposed to be therapeutic rather than punitive. This is the message heard by Turner J. in R. v. Secretary of State for the Home Department, ex p. Mehmet (The Times, 18 February 1999), when he decided that a prisoner allocated to a CSC need not be informed of the nature of the case against him, nor need he be given an opportunity to make representations against it, because allocation to a CSC did not adversely affect the prisoner’s release or necessarily result in harsher conditions. But even Turner J. shows more indignation at the CSCs than do Livingstone and Owen!

When commenting on the fact that governors now “award” extra days rather than ordering loss of remission, Livingstone and Owen state that: “As prisoners no longer stand to lose something on disciplinary convictions it could be argued that natural justice protections are no longer as apposite (courts being generally more willing to require such protections in the case of benefits people lost than those they hoped to get).” However, since the effect of a punishment of extra days is still that a prisoner remains detained beyond the date he legitimately expected to be released the courts appear to take the view that disciplinary adjudications remain subject to judicial review (p. 164; para. 9.15). And so they should! Not only is the use of the word “award” a cruel joke, a governor (more often his deputy) can award up to 42 extra days! The magnitude of this power needs underlining, not glossing over.

This is the second criticism of the book: that it appears over-cautious and non-committal. At times, the book reads as though the authors are explaining or perhaps
justifying the system to the disgruntled prisoner. At others, as though they are trying gently to point out to the Prison Service the management advantages of playing fair: they warn “that perceptions of injustice have the capacity to produce substantial disturbances in prison” (para. 9.69). Indeed. Is it unfair to accuse the authors of understatement: as textbook writers, perhaps they should be cautious? This reviewer does not doubt this book’s credentials as the leading textbook on prison law in this country: it is reliable and authoritative in its coverage (including two hundred pages of appendices). The second edition has usefully expanded on the first edition in certain areas: it now includes separate chapters on health care, security categorisation, transfers of prisoners between and within jurisdictions and on women prisoners (another, perhaps ominous, change to the Prison Rules is that the rule that women prisoners shall be kept entirely separate from male prisoners now states merely that they will “normally” be kept separate). The growth in litigation on different aspects of release from prison led the authors to split their chapter on release into three. There are now separate chapters dedicated to fixed term prisoners, mandatory and discretionary lifers. Roll on the next edition, but may it be more critical.

The changing political agenda, perhaps underplayed by Livingstone and Owen, is the focus of Mike Nash’s Police, Probation and Protecting the Public. Nash traces the political and legislative origins of the current British “public protection” agenda, with its emphasis on the management of risk and dangerousness, highlighting the “blame culture” and the “results culture” which threaten to undermine fundamental values of rights and justice. Nash explores the nature of the word dangerous, noting the “danger of ‘serious’ being conflated into ‘dangerous’” (p. 2). He points out that many of the theoretical and moral issues raised by the original dangerousness debate which flourished 20 years ago have not appeared in the management-led agenda of the 1990s. “This is because the right of the public to be protected, a right demanded of the government, outweighs individual offender’s rights to be treated the same as other citizens” (p. 197). The heart of Nash’s argument is that the state has defined dangerousness in such a way as to make the rights issue a non-starter, and if it can do this for one group of people (child sex offenders), it can do it for others (p. 197). Nash’s book was published long before the Home Office’s Consultation Paper on Managing Dangerous People with Severe Personality Disorder appeared in July 1999, but reading the book with the benefit of the last six months has a chilling effect. The Government is now proposing a special detention order which will not require a criminal conviction and will be issued as a result of civil proceedings (with its lower standard of proof). This proposal, coming as it does hot-foot after the civil Sex Offender Order and the Anti-social Behaviour Order of the Crime and Disorder Act 1998, makes Nash’s warnings all the more relevant and important.

Nash, a former probation officer and now principal lecturer in criminology and criminal justice at the University of Portsmouth, also explores how the public protection agenda has impacted upon the working practices of the police and probation services: although case conferences are now seen as good practice, he points out that the offender is usually not included and that community involvement is limited. He argues that the threshold for a prediction of risk is in danger of being lowered: the pressure is on the professionals not to under-predict risk: “there does not appear to be too much concern expressed if they get it wrong in the sense of over-predicting” (p. 178). Whilst welcoming the Government’s message that funding will follow “evidence based” work which can demonstrate effectiveness, Nash queries whether the linking of funding with effective practice will lead to too rigid and centralised direction of practice.
Nash’s short book reads as an extended essay, a warning to practitioners, politicians and all those who will heed his concerns: a useful reminder for human rights lawyers of the dangers of complacency.

NICOLA PADFIELD


The essence of the modern vision of the Anglo-American criminal trial is that it is adversarial. It is surprising, therefore, that its development as an adversarial system has been subject to so little scrutiny. It is as if it were presumed to have been adversarial from time immemorial. David Cairn’s new book, examining the development of the felony trial during the first half of the 19th century, challenges this presumption, re-evaluating the criminal trial’s historical and philosophical foundations. Cairns contends for the greater recognition of the importance of advocacy and trial practice in legal development, arguing that the advocate, the legislators and judges work interdependently, defining limits and creating new structures and standards in reaction to one another.

Cairns makes three main points. First, he argues that it was not until the middle of the 19th century that adversarialism took hold of the felony trial and that the catalyst for the development was Prisoner’s Counsel Act 1836, which gave defence counsel in felony trials the right to address the jury for the first time. Prior to this, Cairns describes the felony trial as a still largely non-adversarial, judge-led inquiry, in which the defendant remained a chief evidentiary source. This directly contradicts the prevailing view of legal historians such as Langbein, that the felony trial became adversarial in the mid to late 18th century. Cairns’ second argument is that that adversarialism was introduced into the felony trial not as the result of a liberal campaign for the rights of the defendant but as the result of a drive for truth. The PCA 1836 resulted from the Benthamite law reform movement, which above all else required accuracy and certainty from its criminal courts. A fully adversarial contest between equal combatants was seen as the most efficient methodology for investigating the truth, a situation Cairns labels the “paradox of legal representation”: Full legal representation was expected to lead to more rather than fewer convictions. Third, Cairns makes a convincing case for the PCA 1836 as the catalyst for the development of modern concepts of criminal advocacy and ethics, transforming the interventionist judge into a neutral arbiter and encouraging aggressive advocacy on both sides. Cairns explores the series of infamous 1840s cases of overzealous advocacy (such as _R v. Courvoisier_ where defence counsel presented a known false case blaming innocent parties), which sparked massive public debate on the proper limits of defence advocacy. Cairns argues the cases were a direct result of the PCA 1836, showing counsel grappling with their new role and the balance between professional loyalty, in a situation where the client’s very life could be at stake, and wider social responsibilities to truth and justice. The debate sawed between ideals of unbounded loyalty, using “all expedient means” and a more limited, but ambiguous, standard of “all fair means”, until by the end of the 1860s the Bar had reached an accommodation between partisanship and truth. Cairns argues that the public vilification of the Bar that accompanied the earlier debate impacted upon the shape of the future Code of Conduct, raising the necessity for there being a Code, but making the Bar reluctant to create further debate by the delineation of more than minimalist rules.
In his conclusion, Cairns enthusiastically endorses the full adversarial trial’s ability to uncover the truth. Given that the book is largely a review of the debate over whether an adversarial ethos would improve the trial’s accuracy, and the modern debate about partisan advocacy especially, it is somewhat surprising that he does not examine this conclusion more extensively. He challenges adversarialism’s historical provenance, but he treats its efficacy as a foregone conclusion.

Otherwise, this is a convincing argument and fills a significant gap in legal history. It is tightly constructed, although Cairns occasionally sacrifices describing his argument to describing the evidence for it. The book is well-written and enjoyable, characterised by fluidity and, particularly because Cairns tells his story through the great 19th century criminal cases, a strong sense of narrative and pace. At 178 pages, the book is quite short and this is its major drawback. Cairns has opened up an fascinating field of research and this reviewer begrudges him his extensive appendices where he might have continued his discussion. In particular, he might have related his argument more to the wider social context and the interplay of economic factors with the law reform movement. For example, the book largely ignores the Bar’s dire economic straits, exposed by Pue, Duman and Cocks amongst others, with barristers under threat from solicitors seeking rights of audience. Instead, Cairns looks for explanations for ethical developments from within his source materials (advocates’ and Parliamentarians’ speeches), and this means he leans towards their more high-minded explanations, ignoring the possibility of economic motivations. Barristers may have seen themselves as heroes of the underdog, but such an image was also good marketing. Cairns himself suggests a more profitable methodology, using a Foucauldian approach, which might have led to a more integrated, and perhaps more radical, analysis. He does not carry it through, largely, one suspects, because he is unprepared to challenge the value of the adversarial philosophy itself.

In many ways these are unfair criticisms: they attack the author for not completing a project he did not undertake. However, they are also compliments: this is a book that provokes intense interest and continually raises questions. For example, it becomes apparent that the theories and styles of advocacy in the civil trial and the misdemeanour trial (which Cairns posits as the main models for the adversarialisation of the criminal felony trial) are crying out for research.

This is a thought-provoking, well-researched and important book, highly recommended not only to academics but also to practitioners with an interest in the philosophic and historic bases for the role of the advocate and theories of professional responsibility.

EMILY HENDERSON


In 1886, Mrs. Coultas found herself in a buggy astride railway tracks with a train hurtling towards her. Some frantic manoeuvrings by the driver and the gatekeeper at the level-crossing managed to avert a collision. But Mrs. Coultas, terrified by the approaching train, had already fainted into her brother’s arms. She subsequently suffered a miscarriage and “severe nervous shock”. Mrs. Coultas sued the gatekeeper’s employer for negligently inflicted nervous shock. So begins the fascinating, if chequered, history of liability for negligently caused psychiatric injury. It was an inauspicious beginning. The Privy Council denied Mrs. Coultas’ claim on
the grounds that her injury, arising as it did from circumstances that did not involve any physical impact, was too remote to permit recovery in negligence. But larger agendas were also at work. The idea that plaintiffs might recover damages for injuries inflicted through shock alone seriously disconcerted a Privy Council already alert to the growing number of negligence claims against railway companies for physical impact injuries. The legal recognition of nervous shock injuries, it was thought, would leave “a wide field open for imaginary claims” (Victorian Railway Commissioners v. James Coultas and Mary Coultas (1888) 13 A.C. 222 at p. 227).

The law has developed considerably since then. It has come to terms with psychiatric injury occasioned by shock alone, not only in the cases of plaintiffs like Mrs. Coultas who are primary victims, but also in the cases of plaintiffs who are secondary victims of negligently inflicted trauma. Dr. Danuta Mendelson has carefully and systematically documented this evolution with reference to judicial developments in England, Canada and America, as well as Australia. She argues that this field of law has developed in response to modernisation, which has expanded the possibilities for occasioning shock-related injuries (industrialisation and communications in particular), and in response to advances in medical knowledge about the causes and manifestations of mental illness and psychiatric injury. In so doing, Dr. Mendelson has placed the law relating to nervous shock in the wider context of accumulated (and accumulating) medical wisdom. This parallel presentation of the critical developments in medical science and psychiatry gives us a far richer understanding of the law’s development, and will be of particular interest to legal audiences which might not otherwise find the medical literature accessible. Dr. Mendelson’s methodological approach also makes it possible to trace law’s responses (or lack thereof) to advances in medical knowledge, and in this respect is an interesting case study in that larger phenomenon which remains of vital interest to medical lawyers today.

There are two recurring themes in the author’s history that bear special mention. The first concerns law’s attempts to come to terms with the Cartesian divide between mind and body. This sustained a conceptualisation of the mind and body as radically separate aspects of being, and it produced a privileging of physical harm at the expense of mental harm for the purposes of compensation. Thus, Dr. Mendelson asserts that the “jurisprudential consequence” (p.33) of Cartesian thinking was that damage to the body was compensable because it was objectively verifiable and quantifiable, whereas damage to the mind was not. This thinking underwrote the Coultas decision. It was not long, however, before the reasoning in Coultas was criticised. One such criticism alleged that the Privy Council had failed to distinguish between shock-induced injury to the nervous system (which was thought to be organic) and injury to the emotions (which was not). This distinction effectively re-framed the mind/body dualism by bringing certain “nervous shock” injuries within the scope of the physiological, and courts in a range of jurisdictions adopted the distinction. Dr. Mendelson ascribes this, and the successive trend toward recognising shock-induced psychiatric harm, to judicial ambivalence about the mind/body dichotomy and she notes a similar (and prior) ambivalence in the field of medical knowledge. She traces the various routes through which courts became increasingly prepared to acknowledge inter-connections between the “mind” and the “body”.

Dr. Mendelson rightly points out that judicial recognition of the myriad interactions between the mental and physical aspects of being signals a destabilisation of the mind/body dichotomy in this field of law. But Cartesian thinking is remarkably resilient and the author’s analysis also suggests that some of its traces remain. The distinction between the corporeal and the emotional finds its modern incarnation in
the question of where to draw the line between non-compensable grief and sorrow and compensable psychiatric injury. Dr. Mendelson astutely notes that this modern distinction mirrors the old mind/body dichotomy. She signals her dissatisfaction with current explanations for upholding the distinction between emotional harm and psychiatric injury and suggests a re-examination of this distinction.

The second theme that bears special mention is the persistence of the judiciary’s concern to restrict the numbers of plaintiffs who could recover damages for negligently inflicted psychiatric injuries. This first manifested itself in the form of judicial and medical anxieties about “malingers”. These were people who, it was alleged, could take advantage of a permissive legal approach by pretending to have suffered nervous shock. Later, when courts had accepted the substantive possibility that a shock could cause psychiatric injury, the concern to restrict the number of plaintiffs was manifest in the careful circumscription of those who fell within the defendant’s duty of care. This was of particular significance in circumstances where a claimant suffered psychiatric injury by observing or apprehending the harm caused to another as a result of the defendant’s negligence (a second-impact victim). Here again, Dr. Mendelson adroitly charts the incremental erosions of legal distinctions calculated to deny claims, from the requirement that a second-impact victim be personally within the scope of danger at the time of the accident to the current highly refined requirements of relationship and proximity.

Dr. Mendelson shows that this concern to limit the possibilities for recovery has been tempered by improvements in medicine’s diagnostic and prognostic capacities, and its ability to offer convincing explanations for the causes of psychiatric illnesses. This is an important dimension to her history of negligently inflicted nervous shock. But her analysis leaves an abiding impression that there is yet another history lurking within her pages. Since many significant moments in this history seem to have concerned female plaintiffs, we might ask whether gender has also been a significant factor in the law’s development in this field. Dr. Mendelson does not offer any sustained commentary on the significance of gender, but her material suggests that some interesting lines of enquiry could have been pursued. Historically women have been cast as more emotional than men, perhaps more fragile psychologically and, at times, prone to hysteria. Were judicial concerns about being inundated by nervous shock claims influenced by sexist stereotypes? Conversely, could these same cultural forces have dissuaded men who suffered nervous shock from bringing these actions? Was miscarriage especially useful in convincing reticent judges that nervous shock could have concrete physical effects? Is it significant that “mothers” and “dependent wives” enjoyed early recognition as second-impact victims?

Although the answers to these questions await further investigation and analysis, there is no doubt that Dr. Mendelson has made a significant contribution to our understanding of this field of tort law. She has canvassed a vast amount of material to produce a cogent and engaging analysis that moves far beyond the usual range of legal materials. The book is highly recommended to practitioners and scholars of tort and medical law. It will also be of interest to those who wish to better understand the processes through which medical knowledge penetrates law.

CHRISTIN SAVELL

John Fleming, who died in September 1997, was one of the most influential and brilliant legal scholars and writers of the twentieth century. His authority and vision were enhanced by his truly international status: born in Berlin of native German parents, he was educated at Oxford and was called to the Bar in Lincoln’s Inn, then commenced a distinguished academic career first in Australia and, latterly, at the University of California at Berkeley. This excellent collection of essays in honour of John Fleming reflects both his international influence in several legal systems, and also his personal influence as a communicator, teacher and legal problem-solver.

The collection is divided into six sections, with two or three related essays under each heading. Following a warm appreciation of John Fleming by Stephen D. Sugarman, the collection begins with a most topical and well-chosen section on “Human Rights”, with contributions from Lord Bingham and Sir Anthony Mason considering, respectively, the current protection of human rights offered by the law of torts and the interrelation of human rights principles and the rights and interests protected by the law of tort. The section that follows, on “Negligence”, contains an important analysis by Jane Stapleton of the various “factors”, some more convincing than others, offered by common law courts as arguments for and against the imposition of a duty of care. John Fleming would have applauded the precision and sense which pervade this essay, with its emphasis on making explicit the assumptions which lie beneath judicial decisions, and its calm disavowal of bare assertions. As a salutary reminder of the importance of this, and of the topics considered in the first section, we need only recall the recent decision of the European Court of Human Rights casting considerable doubt on the filtering function of the English duty of care.

Indeed, throughout the text, this collection manages (like the scholar it honours) to combine the examination of broad general principles and policies, drawing on several legal categories and systems to see problems in their grand context, whilst at the same time exploring those same problems with a sharp eye for individual detail and nuance. For example, witness Lord Cooke’s stimulating essay on the imposition of negligence liability for damming employment references, an area once exclusively the privileged province of the rules of defamation. It explores in detail the background and reception, in England, Australia and New Zealand, of the House of Lords’ decision in Spring v. Guardian Assurance, and offers a perceptive assessment of their Lordships reasoning. In addition, the essay presents the problem in (for this reviewer at least) a new and illuminating context: namely, as part of a trend towards recognising ongoing contractual duties of good faith owed by employers to employees. The same skilful “zoom-lens” technique is seen in the next section of the collection, “Theoretical Perspectives”, in which Gary T. Schwartz provides a thought provoking examination of strict liability in the context of recent (contrasting) decisions on Rylands v. Fletcher in England and Australia. His wide ranging discussion of the role and theoretical justification for tortious strict liability, the history of the tort and its modern role, is all the more powerful for being woven amongst a detailed re-examination of the precise facts of Rylands itself. Once again, this reviewer learnt a good deal by being forced to confront the real Rylands v. Fletcher: a dispute between adjoining tenants of a common landlord, with much of the argument concerning implied covenants in the defendants’ lease (not a million miles away from recent decisions dealing with the role of nuisance in the landlord and tenant context) and with a negligent independent contractor in the equation for good measure.
Further examples of the pleasures to be enjoyed in this collection are found in the final two sections. Under the heading “Product Liability”, Stephen D. Sugarman writes with great panache and humanity about the role of tort in the “smoking war” in the United States, played out in the “real” world of big business, politics, advertising and human addiction. Any law teacher looking for a text to cajole shuffling undergraduates into realising that there is more to liability for defective products than snails and difficult statutes, should grab this fascinating essay without hesitation. Then, in the last section, on “Delivering Compensation”, André Tunc offers a thought-provoking account of the French move to no-fault liability for traffic accidents, reminding us that even a no-fault system must confront interpretative and causal issues (for example, the French system which excludes “drivers” from the no-fault regime must decide whether someone who has left their vehicle when they are hit falls within the definition). Likewise, Harold Luntz writes cogently about the knotty problem of collateral benefits received by tort victims from sources other than the tortfeasor. This essay considers the Australian and English regimes in detail, examining the theoretical, practical and political problems recently tackled by the English Law Commission: once more, a reminder of the fascinating issues so often disregarded as “lesser” problems of quantum.

For this reviewer, the only section which seemed a little out of context was the section entitled “A European Perspective”. That is not to say that the material under that heading was any less worthy—indeed, if anything the concern is that articles as significant as Hein Kötz’s exploration of a possible European Civil Code, and the role of good faith in European versus English contractual systems, may simply be missed, tucked away in a collection otherwise geared to John Fleming’s principal subject and jurisdictions. Comparative scholars interested in European contract issues could be forgiven for overlooking this collection on a bookshelf, whilst, for the interested amateur comparative lawyer with corresponding language skills (like this reviewer), a related gripe is that the European essays contain, in places, considerable chunks of text in French and German, without English translation in the footnotes.

Overall, however, this is a small criticism of a thoroughly scholarly and absorbing collection. It is good value—more comprehensive than many other collections of similar price—and can be recommended as a worthy tribute to “the doyen of tort writers”.

JANET O’SULLIVAN


The projected series *Principles of European Tort Law* starts off with these three volumes, the fruits of one of those little groups of scholars, often very distinguished
scholars, who are currently getting together here and there throughout Western Europe to discuss aspects of private law with a view to discovering features common to the different systems and producing, if possible, a synthesis acceptable to them all, and perhaps even (though this is little discussed) to countries in Eastern Europe. This particular group burgeoned in Tilburg, North Brabant, and has now relocated to Vienna, leadership passing from Jan Spier to Helmut Koziol, who deal with the law of the Netherlands and Austria, endowed respectively with one of the newest codes and one of the oldest. Some of the contributions are in French or German, which is no bad thing since those in English are not always perfectly comprehensible. Britain was fortunate to be represented by Horton Rogers; Geneviève Viney, with characteristic elegance, explains the law of France and Christian von Bar represents the German voice, oddly absent from the volume of Wrongfulness.

The Wrongfulness volume is the least satisfactory. The notion of wrongfulness, as opposed to fault, is entirely absent in France and Belgium, and was indeed introduced in other jurisdictions, led by Germany, in order to limit the unduly extensive Gallic liability for whatever harm was simply due to fault. According to the South African Neethling the difference is that (a) wrongfulness relates to boni mores, negligence to the bonus paterfamilias; (b) wrongfulness qualifies the act, negligence the actor; (c) wrongfulness is determined on the basis of actual facts, negligence on the basis of probabilities. Jan Spier notes that in the Netherlands “neither courts nor practitioners seem to care” about the distinction, a fact he finds “amazing”, while Pierre Widmer, who has masterminded a major redraft of the Swiss law of obligations, admits with less surprise that the difference between the Erfolgsunrechtlehre and the Verhaltensunrechtlehre “is more one of philosophical and dogmatical perspectives than of effective practical importance.” It is perhaps odd to have devoted a book to a concept which cannot usefully figure in any eventual common law of tort, as is inferable from the editor’s conclusion that while “The reports show that ‘wrongfulness’ plays a decisive role in establishing liability under the law of every country … ‘wrongfulness’ has quite different meanings under the respective legal systems.”

The requirement that the harm must be done iniuria as well as culpa is designed to restrict liability for culpa alone, but there are many other possible means of curtailing the scope of liability and they form the meat of the much more interesting first volume. Particularly enlightening is what Geneviève Viney has to say of France. While the doctrine is apparently implacably opposed to any limitations, whether monetary or not, she states that nevertheless “les tribunaux parviennent, de façon indirecte, à limiter très efficacement les indemnisations”. The methods of the lower courts are not only indirect but “quasi-occultes”: they use their uncontrolled power of fixing the damages and profit from the lax control exercised over their findings on causality. Belgium apparently (but only apparently) holds firm to the extensive doctrine of the equivalence of conditions, rejecting both the teleological constraint of the Schutznorm (such as is found in our law relating to breach of statutory duty and is actually enacted in the Netherlands in Art. 6:163 NBW) and the equally useful notion of adequacy of cause, both of which are used in German-speaking lands. In the light of these findings it becomes clear that our notion of the “duty of care” is really quite useful, not a fifth wheel on the carriage, as Buckland said, but a brake, and a necessary one, more open than the French habit of surreptitiously putting a foot on the ground while keeping one’s head in the air.

The second volume consists of solutions, system by system, to eight hypothetical problems, most of which involve harm which is purely economic rather than physical or moral and some of which seem to have altered in the course of work. Of one of them the editor concludes that “The claim is … likely to be dismissed in England, Italy, Portugal and the United States, but met in Austria, Belgium, Greece,
the Netherlands, Sweden and Switzerland, while the situation is rather uncertain in Germany and France.” This hardly betokens the existence of any latent uniformity or augurs well for its introduction. The lack of uniformity would be even more apparent if the book covered fatal accidents, traffic accidents, the dignitary torts and the liability of public officials and bodies, but since even in the heartland of tort law it is unimaginable that England would abandon the concept of duty of care or France adopt it, it seems evident that the present enterprise is in practice a voie sans issue. Still, who ever said that international cooperation should be productive as well as fun?

Tony Weir


Although some judges have recently toyed with the introduction of the remedial constructive trust into English law, it has not yet been recognised here. For us the constructive trust is an institution, which is recognised by operation of law in certain identifiable circumstances with the result that the defendant holds property on trust from the date of the circumstance which gives rise to it and is subject to trustee-like obligations. We seem to need the security of rules and principles rather than flounder in the vague discretion which is inherent in the notion of the remedial constructive trust. Other countries, however, do things differently, most notably Canada, Australia and New Zealand where the remedial constructive trust is explicitly recognised to varying degrees. In this book Wright analyses the law on the constructive trust in these jurisdictions as well as England, in an attempt to identify what exactly the remedial constructive trust is. Although the main focus of the book is on the Antipodes, it is of relevance to the English lawyer both because it provides a framework to enable us to analyse the nature of our constructive trust and to consider whether we should adopt the remedial constructive trust in this country.

At the heart of Wright’s thesis are two basic arguments. The first is that the notion of “remedial” in the remedial constructive trust means that the operation of the trust is determined by reference to discretion rather than rules. The second argument is that the remedial constructive trust encompasses two separate principles. One is what he calls the “obligation continuum”. This determines whether the defendant is liable to the claimant. The other principle is the “remedial continuum”. This determines what remedy is appropriate to vindicate the claimant’s rights. This distinction may be obvious, but making it in the context of the constructive trust means that the nature of the trust is more clearly identified. For example, the focus on the remedial aspects of the trust once an obligation has been identified means that, even in English law, the remedial constructive trust is recognised. For example, it has been recognised that, where the defendant has received property in which the claimant has an equitable proprietary interest, then the court need not recognise that this property is held on constructive trust for the claimant, but may instead award the claimant an equitable lien (see in particular Lord Napier v. Hunter [1993] A.C. 713). Although this decision is purportedly made by reference to principle rather than unfettered discretion, there is clearly a discretionary element since the court has regard to the circumstances of the case to determine whether a constructive trust should be recognised.

It is as regards the obligation continuum that most difficulty arises, however. In Canada and Australia the obligation which tends to trigger the possibility of a
remedial constructive trust being recognised is unconscionability. In England, however, the constructive trust will tend to be recognised where the defendant has obtained property which belonged to the claimant in equity (and not unjust enrichment as Wright sometimes suggests). But this proprietary basis is not as certain as it first appears. As Wright argues, the notion of equitable property is open to manipulation, as illustrated by the decision of the Privy Council in Attorney-General for Hong Kong v. Reid ([1994] 1 A.C. 324) where a constructive trust was recognised over property which had never belonged to the claimant. Also, after the decision of Lord Browne-Wilkinson in Westdeutsche Landesbank Girozentrale v. Islington L.B.C. ([1996] A.C. 669) it is clear that the underlying test for the recognition of an institutional constructive trust is whether the defendant has acted unconscionably. This uncertainty has been aggravated by the recent assertion of the Court of Appeal that the constructive trust will only be recognised where the defendant acted “dishonestly”: Satnam Ltd. v. Dunlop Heywood Ltd. ([1999] 3 All E.R. 652, 671). It follows that the apparent certainty of the institutional constructive trust is misconceived and, even as regards the obligation question, the court has some discretion as to whether or not the constructive trust should be recognised.

But, although the constructive trust which is recognised in England can be considered to have remedial aspects since there is a great deal of judicial discretion at play, it cannot yet be characterised as a full-blown remedial constructive trust. This is primarily because the judges do not purport to exercise any discretion when determining whether a constructive trust should be recognised. But should we reject our notion of the constructive trust arising by operation of law and move towards an even more discretionary approach? Wright suggests that we should but he does not think that the choice is simply between the institutional and the remedial constructive trust. He considers that there is a third way, namely that we should recognise a composite constructive trust. Essentially what this means is that the decision to recognise a constructive trust should be much more flexible, but that judicial discretion should not be unconstrained. Wright identifies six categories of factor which should assist in determining whether this composite constructive trust should be recognised, namely “obligation-based”, “conduct-based”, “result-based”, “claim-based”, administration of justice and general policy factors.

For the English lawyer this is the most difficult aspect of the book. Do we really want to leave the apparent certainty of the institutional constructive trust and go down this more flexible road? This is surely too big a jump, but perhaps the pass has already been sold by Lord Browne-Wilkinson’s emphasis on unconscionability. If we are looking for unconscionability we need to find some means of identifying it and these vague factors may be what we need. Or, perhaps, we need to start drawing clearer distinctions between the contexts in which the constructive trust arises. For example, surely the operation of the constructive trust in the commercial context and the family context are sufficiently distinct that different approaches can be adopted. We probably have reached that point already with the development of the so-called “intentional constructive trust”. Greater flexibility is surely more appropriate in the family than it is in the commercial context, although sometimes the line between the two contexts may be difficult to draw.

Wright’s thesis is thought-provoking and much of it is attractive. However the style and structure of his book constitute an obstacle to clear exposition. The analysis of the law is laboured, with extensive quotations from judgments and much repetition. The author tends to describe cases without synthesising the decisions and gives the reader little help in identifying the progression of his argument.

Nevertheless, this book is important to English lawyers in that it provides a basis for reassessing the constructive trust that we have; to make us realise that we already have elements of the remedial constructive trust. It should also provoke us
to think whether we should go further towards the recognition of such a trust. But we must not rush into recognising the remedial constructive trust. The way forward is, as Wright advocates, cautious development, but undoubtedly over the next decade the institutional constructive trust will increasingly be interpreted in such a way as to emphasise its remedial aspects.

Graham Virgo


To what extent do computers require a new legal regime? Or to what extent can they be accommodated within existing notions without undue strain? It is much too early to tell, not least because the technology itself is still evolving. As it is, lawyers have barely come to terms with computers themselves, and yet are now having to grapple with the uses of wide-area networks—that is, with computers as a new medium of global communication, and not simply as number-crunchers and databases. *Law and the Internet* comprises a number of essays on various legal aspects of the new networking technology.

For some topics, computer networks are simply one more example for the application of relatively settled rules, but on others something more far-reaching is required. Opinions will, of course, differ on which category particular issues fall into. In the former category fall several of the essays in this interesting collection. Eden considers present and likely future attempts to tax Internet usage, stressing the need for tax co-ordination across state borders. MacKenzie surveys the possibilities and problems of establishing legal web sites. Waelde considers the law of trade marks and domain names, asking whether there is any legal redress against those who secure a misleading or deceptive designation for their website. Gale considers the impact of the Internet on evidence and procedural rules. And two essays focus on contractual issues: Davies considers issues of contract formation where the parties are communicating via the Internet, and Lloyd considers authentication of messages by the use of digital signatures. In all these areas, it is not obvious that the existing technology requires fundamental revision of old concepts, and while this might well be the case in the future, it seems best to wait until we can discern the shape of the future technology before we seek to regulate it. So it is no criticism of Waelde’s essay that the current system of domain names is unlikely to survive long, given the current proliferation of users and of websites; and it is hard to guess the shape of the law that will be necessary to regulate whatever takes its place. Again, it is difficult to believe that electronic commerce will be very significant without major revision in arrangements for mail—bluntly, it is much too easy to forge e-mail—and no doubt whatever rules emerge for contracting electronically will reflect the technology as at the date when a satisfactory solution emerges. Lloyd’s essay is thus perhaps a surer guide to the future than Davies’, though neither’s claim can be very sure.

In other areas, it is more obvious that a fundamental innovation has been made, or at the very least a sharp finger is pointed at an unsolved problem which has now become all the more serious. The law of copyright has been dealt many blows by
modern technology, and by photocopying and desk-top publishing as much as by the Internet. MacQueen’s survey shows how the current law is severely tested by the ease with which material may be distributed world-wide. Again, both Edwards’ essay on defamation and Bonnington’s account of the spread of news prejudicing trials show how the Internet has changed the rules of the game. A world where every computer user has the power to spread their thoughts and observations worldwide to interested audiences is a very different one from the pre-Internet world. It is not obvious that much can be done to control electronic publishing of this sort, or that what little can be done should be done. Equally, control of pornography (Cullen, Akdeniz) raises difficult issues.

Overall, therefore, this very competently-written and readable collection gives good coverage of current legal issues relating to the Internet. There are some omissions; it was surprising, for example, given the title allocated to the collection, to find only passing references to government proposals for surveillance of Internet messages. There is also a certain amount of repetition of the basics, given that there is not only an excellent introductory essay by Terrett, but also that each of the essays is free-standing and so may contain its own introduction; but that is not altogether bad.

Susskind’s *The Future of Law*, while also containing a certain amount of introductory material, is a very different sort of book. Susskind’s thesis is that the use of IT will not simply make lawyer’s lives easier or more productive, but will actually change the nature of legal practice. Where a lawyer now gives advice to single individuals, the lawyer of the future will in future transmit advice to many; where lawyers now reactively give advice only when asked, in future they will actively seek out those who need it; where lawyers now help to resolve disputes when they happen, lawyers of the future will act to pre-empt disputes.

As with many predictions of the future, Susskind’s are really only a reflection of the immediate past. The circumstances of the 1980s, where pressures which had little to do with computers increasingly drove many commercial lawyers from their established areas of work and forced them to look more broadly for possible clients, are writ large by Susskind as the way of the future. Perhaps this will turn out to be correct; and perhaps the 1980s have finally seen the end of the more leisurely and conservative development that has characterised the legal professions for nearly the whole of their history. It is however a little hard to see this as a model for the entire legal profession. Susskind’s experience is as a commercial lawyer, and it shows. Criminal lawyers do not have to chase potential clients in the same way, not least because the police have already done this part of the work for them. It is quite unnecessary for lawyers to seek out their clients or accommodate themselves to their needs in the same way. Client pressure for alternative modes of dispute resolution is also of quite a different order.

As for technical possibilities, Susskind’s picture is of course rather over-optimistic as a description of the technology as it now is. Computers are excellent tools for the dissemination and reproduction of legal texts, but there is so much more to legal practice than that. If it is true that we are within sight of a world where the entire corpus of legal materials is available to any computer user, it is also true that most of those users will have no use for it, or comprehension of its meaning. Access to information does not necessarily imply the ability to use it, as many candidates in open-book examinations will attest. Many of Susskind’s predictions, then, presuppose the development of machines which are not merely much more powerful than anything available today, but which actually begin to show some glimmerings of artificial intelligence. Yet if computers became as clever as Susskind imagines they will, then much else would change too. Is it really, indeed, safe to predict the continued existence of laws in any recognisable
form, in such a world? Left to their own devices, perhaps the lawyers would
develop in the way Susskind predicts; but, of a certainty, they would not be left
alone, and perhaps the theory that all societies have “law-jobs”, which someone or
other must do, will be tested to its limits.

STEVE HEDLEY

1760–1911_. By BRAD SHERMAN and LIONEL BENTLY. [Cambridge: Cambridge
£40.00 net. ISBN 0–521–56363–1.]

It is a common theme of contemporary commentators that the digital revolution
and an explosion of developments in modern technology have posed unique chal-
enges for intellectual property law to which it is not equipped to respond. This is
often combined with a sense that the past is therefore irrelevant, and that the legal
concepts, ideas and institutions that make up this area of law have become outdated
and obsolete. Bently and Sherman’s book is openly “written against this way of
thinking”. Their case is that “many aspects of modern intellectual property law can
only be understood through the lens of the past”, and that even the most radical of
accounts remains indebted to the tradition from which they are trying to escape. It
is certainly true that past technological developments (for instance, steam printing,
the photocopier, the twin-deck tape recorder) have been met with prophecies of
doom for the legal and commercial structures that surround them. It is yet to be
shown that current challenges are so utterly different in nature that the existing
framework must be demolished.

Bently and Sherman restrict themselves to two interrelated themes. Firstly, they
consider the nature of intangible property in law, and the problems and solutions
that have resulted. Secondly, they aim to explain why it was that intellectual prop-
erty came to take on its current form, with its familiar subdivisions of patents,
copyright, designs and trade marks. Although this is a challenging task, the authors
are admirably frank about their aims and their limits. Their arguments are support-
ed with detailed accounts from the history of all categories of intellectual property.
Admittedly these are not comprehensive accounts of each area, but the reader is
offered a careful and thoughtful presentation of contemporary arguments,
helpfully footnoted to allow further exploration of areas of personal interest. The
historical accounts are used to support the wider themes and arguments, outlined at
the beginning.

Reviewing the familiar ground of the 18th century copyright cases _Donaldson
v. Beckett_ and _Millar v. Taylor_, it is shown how the importance and status of
“mental labour” gradually emerges. The apparent “problem” of treating the non-
physical labour represented by literary works as legal property was extensively
debated. Although by the latter part of the century the intangible had been widely
accepted as a legitimate subject matter for property protection, it is argued that we
would be wrong to assume that the difficulties associated with such a decision had
been resolved. Bently and Sherman prefer to view the literary property debate as
an example of the law working through a set of problems that arose and continue
to arise in its dealings with intellectual property. This viewpoint frames their
discussion of the nature of intangible property, another perennial problem.

Serjeant Talfourd, who attempted to consolidate and reform copyright law in the
1840s, ran into considerable opposition from various quarters. His more radical
opponents steadily refused to acknowledge any justification for differentiating
between patent protection and copyright. In its extreme form, this stance led to Parliamentary discussion of the relative merits of Wordsworth’s poetry and the steam engine. The radicals, predictably, thought that the steam engine won without real contest, and thus would have limited the term of copyright protection in line with the term of patents. Talford, an author and literary critic as well as a Member of Parliament and a lawyer, found the unwillingness to acknowledge the intangible nature of literary property intensely frustrating, but it was a point of view he felt obliged to counter.

Bently and Sherman explore the use of the language of creativity in pre-modern intellectual property law, and note that it was not limited to literary property; all areas of law that granted property rights in mental labour share a concern with creativity. They give an interesting account of the “mentality of intangible property”, and the legal difficulties this gave rise to. One particular problem is the definition of infringement, the authors arguing that the nature of intellectual property law changed fundamentally once it was accepted that it was necessary to protect against non-identical copies. The law thus moves from the concrete to the abstract, to “the shadowy ephemeral world of essence of the creation”. The argument is an extremely tempting one, applied as it is here to patents, designs and literary property. It should not, of course, be carried too far: the reader is legitimately warned against using this way of thinking as a template of the model of creation used in law. However, this “single gesture” is characterised as setting intellectual property law on a course from which it has been unable to escape. This course is traced from pre-modern law, to the emergence of modern law, with its emphasis on public rather than private control, and the first moves towards abstract and forward looking modes of organisation. A crystallisation of the categories of intellectual property law is evident in the 1850s, and the bifurcation into industrial property and copyright law was sustained for a brief period only, before a return to relative autonomy.

Throughout this book it would be easy to multiply examples of alternative models and pressures on intellectual property law, but this would be to miss the point. Bently and Sherman take a wide legal perspective and offer helpful readings and insights, although always acknowledging the fluidity of the themes and concepts they address. It is an ambitious project, persuasively executed. They make a convincing case for their argument that a sensitive appraisal and understanding of past narratives is essential if—as we must—we are to create the new narratives needed to meet new demands.

Catherine Seville


Dr Liu’s book will mark a new era in the study of ancient Chinese legal history. With a remarkable vision of synthesis, Dr Liu proposes an original, and singularly powerful tool of analysis for studying the laws of Eastern Zhou, Qin and Han (770 BC-220 AD): namely, the disintegration of zu. Archaeologists, oracle bone and bronze inscription scholars all agree that the most important organisational unit of Shang society (c. 1600–1027 BC) was zu: an agnatic family group of varying size and importance which could, on the average, mobilise about 100 male warriors. How this quasi-autonomous military unit (each zu was living separately and independently in a walled town, had its own chief and its own customary rules)
gradually lost its significance after *Shang* was conquered by *Zhou*, is convincingly demonstrated with wide-ranging sources. We may briefly recount Dr. Liu’s thesis here. To consolidate and stabilise their military conquests, the ruling *zu* of *Zhou* adopted the policy of entrusting to their agnatic family members the governorships of various areas which fell under the *Zhou* hegemony. This arrangement (known as the *zongfa* feudalism) entailed the relocation and cohabitation of many different *zu* groups. For the newly organised population of *Zhou*, therefore, the fragmented and *zu*-centred customary rules soon became inadequate and obsolete. The importance of *zu* organisation waned and individual family, *jia*, emerged as the basic organisational unit of society.

Having thus set the stage, Dr Liu re-examines the Confucian theory of *li* (law as well as morality; earlier generations of Sinologists attempted to translate it into “etiquette”). By reinterpreting the *Zhou li* (rules of sacrificial rituals and court rites observed by the ruling *zu* of Western *Zhou*, c. 1027–771 BC), Confucius (c. 555–c. 479 BC) injected a new meaning to *li*. Shifting the focus from *zu* (family group) to *jia* (individual family), Confucius re-located *li* firmly on the family ethics of *xiao* (filial reverence) and *ti* (fraternal affection). As these family ethics have a universal appeal, Confucius’ re-worked version of *li* could claim a validity which transcends the particularity of individual *zu* organisation. The re-working of *Zhou li* into the “natural” *li* was consummated through a conflation of family ethics (*xiao, ti*) and political morality (*zhong*: the right attitude for the ruled to adopt towards the ruler). According to Confucius, one should revere one’s ruler as one should revere one’s father. Also, one should respect and observe one’s proper place in one’s dealings outside the household just as one should do the same within the household. Domestic virtues and political virtues were thus synchronised: the pacemaker, or the overarching principle holding together the Confucian system of law, public morality and private ethics is *ren* (compassionate benevolence).

Now, one cannot help but make a couple of comparisons, which will bring out as much contrast as similarity between Chinese and European legal histories. The importance of household (*familia*) and its head (*pater familias*) in Roman law is relatively well-known. But we know much less about *gens*. That it was a family group with considerable religious significance, we can say without risking too much. Some traces also remain which may suggest its military significance in the remote past. In other words, *zu* and *gens* may have some parallel features. But in its original meaning, *gens* was a *patrician* family group. Not all Roman families could belong to a *gens*. According to Mommsen and Marquart, in the last years of the Republican Rome, there were about 14 *gentes*. Oracle bone and bronze inscription scholars have so far identified about 200 totemic emblems from *Shang* period. Although it is generally accepted that each *zu* identified itself with a totemic emblem, more recent research seems to indicate that not all of the emblems can be associated with *zu* organisation. This would mean that the number of *zu* must be smaller than the number of totemic emblems so far identified. Depending on the size of *Shang* society, it can be envisaged, at least as a hypothesis, that not every family in *Shang* period could belong to a *zu* organisation. This may open up (or, rather, re-open) an area of research which has suffered most from the cold-war mentality: the law of personal status in ancient China. After a fascinating account of early punishments (*xing*) appearing in divination and other records preserved in oracle bone and bronze inscription materials, Dr Liu concludes that during *Shang* period, gentler punishments (scolding or ceremonial humiliation) were applied to the members of the same *zu* and that relatively harsh punishments (leg-cutting, head-cutting, for example) were applied to “the people of other *zu* [captured enemies]”. It may, however, just as well be possible that those who did not belong to a *zu* did not necessarily belong to another *zu*. Some of the materials which Dr Liu
considers as relevant to the inter-\textit{zu} relationships may in fact hold a key to an understanding of the divisions between patricians/plebeians and free-men/slaves in \textit{Shang} society.

Another comparison can be made, which is between \textit{Zhou} feudalism and medieval European feudalism. In an age of rapid social change and upheaval, Confucius provided the theoretical foundation for transforming the \textit{zongfa} feudal arrangement of \textit{Zhou} into a comprehensive and generalised system of law, morality and political philosophy which could function as the new organising principle for the changed society. His originality lies in imbuing the private morality (family ethics of \textit{xiao} and \textit{ti}) with a public significance (family loyalty became the basis of the political loyalty, \textit{zhong}). In 802 AD, the emperor Charlemagne attempted to reinforce the efficaciousness of the oath of fealty (\textit{sacramentum fidelitatis}) by insisting that all his subjects (free males of certain age) must swear that they ought to be faithful to the emperor as \textit{a man ought to be to his lord (sicut per dicitum debet esse homo dominino suo)}. No doubt, the oath of fealty where subjects had to swear their political loyalty to the ruler, was certainly in existence well before Charlemagne. But frequent rebellions and armed conflicts where insurgents were mobilised through the network of private loyalty (vassalic relationships) seriously undermined the importance of the oath of fealty (public, political loyalty). Charlemagne attempted to overcome this problem through politicising the private loyalty. According to the new formula of oath, one should be faithful to one's ruler as \textit{a vassal should be faithful to his lord}. Private, contractual loyalty was thus conflated with the public, political loyalty. The "bond of fidelity" accordingly became the unshakeable foundation of the medieval European law, morality and political philosophy. The fidelity which binds the parties to a promise—an actual (private) consent of the parties or the supposed (political) consent or the transcendental (religious) consent—has been ceaselessly and tirelessly exalted by a long list of writers throughout European history. The ancient Chinese, it seems to me, were not terribly impressed by the bond of fidelity. \textit{Zhou} feudalism was not based on the bond of promise. It relied entirely on blood-ties among the agnatic family members. Confucius did not challenge the supreme importance of blood-tie. Rather, he found a universal application for it. Patrilineal ancestors, as they are the roots of the agnatic family structure, were understandably given an exalted and quasi-religious status by Confucian scholars.

We know, however, that Confucius and his disciples were not successful initially. The death of Confucius roughly coincided with the start of what is known as the Warring States period (475–221 BC). This was a period when the family-ties branching out from the ruling house of \textit{Zhou} could no longer provide the organising principle of the Chinese world. Instead, various states entered into covenants (\textit{meng}) as a \textit{modus vivendi} in an age of extreme uncertainty and shifting alliances. Dr Liu offers a fresh reappraisal of the institution of covenant (chapter 5). Unearthing the ceremonial details of the covenant, Dr Liu demonstrates that the contractual device was nevertheless rooted in the tradition of blood-ties. By smearing the sacrificial animal's blood around their lips or face, the parties to a covenant forged an artificial blood-tie, without which the contractual tie could claim no binding force.

In the latter half of his book (chapters 6–8), Dr Liu studies the laws of \textit{Qin} and \textit{Han} (221 BC–220 AD). Dr Liu's critical mind and rigorous historical method are at full swing here. A number of long-standing "commonplaces" of Chinese legal history are dissipated or seriously challenged. To name but a few: (a) Ever since \textit{Shang} period, Chinese penal law had five punishments (tattooing, nose-cutting, leg-cutting, castration, and head-cutting) which were uniformly applicable to all people. (b) Laws of \textit{Qin} (which unified China in 221 BC but collapsed in less than
two decades) were based on *Fa jing*, a sketchy treatise on law attributed to Li Kui (of Warring States period). (c) *Qin* penal law was particularly harsh. (d) Laws of *Han* (206 BC–220 AD) originated from *Juizhang Lü* (statutes in nine sections) allegedly compiled by Xiao He, the Chancellor to the emperor Wu (141–88 BC) of *Han*. (e) Chinese law underwent “Confucianisation” during *Han*.

Making full use of *Qin* bamboo strips excavated from Shuihudi area (Hubei province) in 1975 and relying in part on the outline contents of *Han* legal documents excavated in 1985 from a tomb at Zhangjiashan (also in Hubei province), Dr Liu challenges powerfully and convincingly a number of theses repeatedly upheld by great names in the study of Chinese legal history such as Liang Qichao, Chü T’ung-tsu, Anthony Hulsewé and Derk Bodde. Refuting, point by point, Professor Chü’s influential thesis about the Confucianisation of *Han* laws, Dr Liu puts forward an argument that the penal and administrative laws of *Han* maintained a great deal of continuity with *Qin* laws, which were based on the ideas of the Legalist School. The influence of Confucian theory of natural *li*, according to Dr Liu, was probably limited to the customary laws of the local people. The allegedly “Confucian” features appearing in the post-*Han* imperial written codes can be explained as the official recognition of the basic undercurrents of Chinese moral values which had been in existence well before Confucius was born. Confucius merely endorsed and made use of some of those basic moral values.

Dr Liu’s book will add the much-needed “depth” to the study of Chinese legal history. After his book, it is perhaps no longer possible to hold on to the “flat” vision where the legal development spanning over a millennium in ancient China is reduced to a series of dialectic exchanges between the Confucian School and the Legalist School supposedly taking place in a timeless Empire where law and punishments were, from the very beginning, uniformly applied throughout. Dr Liu’s challenge of Professor Chü’s “Confucianisation” thesis must not be regarded as an attempt to side with the Legalist School. It is, I think, an attempt to demonstrate the inadequacy of the two-dimensional, dualistic (Legalist/Confucian) approach to the study of early history of Chinese law. It is, I think, a most fruitful attempt to situate the source materials—both long known and newly discovered—in their proper historical context, the disintegration of *zu*, thus opening up a wholly new horizon of meanings for these sources. Those who read Chinese may be interested in having Yu Rong-gen, *Rujia Fa Sixiang Tonglun* (A general survey of the legal thought of the Confucian School) Guangxi People’s Press (1992) alongside Dr Liu’s book as they offer remarkable and illuminating contrasts both in their conclusions and in their methodology.

Keechang Kim

*Insolvency in Private International Law: National and International Approaches.*


Professor Fletcher has produced a much-needed and timely book on insolvency in private international law. International insolvency is increasingly complicated and immensely topical. Recent years have given us the collapse of the Maxwell empire, BCCI and Polly Peck among others and all have given rise to difficult but fascinating issues relating to the winding up of such multinational enterprises. The English courts have been involved in a myriad of ways, either as the major focus of the insolvency proceedings or in assisting foreign courts to collect in assets or provide information from individuals concerned in events leading up to the
insolvency. The clash of cultures and local rules coming from differing public policies of the various legal systems gives rise to some of the most complex problems facing a private international lawyer. For providing a path through the jungle of international insolvency and bringing clarity to thinking about the subject, Professor Fletcher is to be greatly congratulated.

The book covers both the insolvency of individuals and of companies. It commences with a useful summary of the various theories and principles of international insolvency. Then the first half of the work deals with the English rules, with comparison to some other common law jurisdictions such as Australia, Canada and the United States. It includes the increasingly important rules under which English judicial assistance for foreign insolvencies can be given. The second half looks at international regulation of insolvency: the Latin American and Scandinavian Treaties and Conventions, the largely unratified Istanbul Convention, and the UNCITRAL Model Law on Cross-Border Insolvency. In the case of the latter two, this is largely a theoretical investigation as these initiatives have yet to bear fruit in real changes to national law. However, what the work demonstrates is the vital need for further movement towards international co-operation in these matters. Professor Fletcher ultimately concludes that the UNCITRAL Model Law strategy is the most likely way forward. That regime does not seek to impose a comprehensive solution to issues of jurisdiction, recognition of foreign orders or choice of law but to create minimum conditions which will allow the development of workable solutions to the problems of international insolvency. Undoubtedly and unashamedly, Professor Fletcher is an internationalist. He is willing to accept a loss of sovereignty and even lesser rights to recovery of domestic creditors (which can occur from a total acceptance of a foreign regime of insolvency by the English courts) in favour of the greater good of all. There is a price to be paid for this admirable internationalism, however. Those who contract with an international enterprise may well wish to be able to know what effect an insolvency might have on their contractual rights so that they can protect their position. It will not be enough for their advisors to refer to English law rules. Nor will the rules of the law chosen to govern the contract be determinative (which under an internationalist regime may be overridden by insolvency rules in more circumstances than at present). What will be necessary will be to determine which are the courts most likely to conduct the primary insolvency, of itself no easy task. Then that court’s approach to any insolvency must be understood and the local court’s reaction to it. This is a more complicated process than the traditional English view which it is possible to describe as somewhat chauvinistic. The English court adopts an approach that English court orders have total international effect while at the same time denying recognition to foreign court’s orders in insolvency. For example a foreign insolvency order discharging the debt will not be given effect when the applicable law of the contract was English law (Gibbs v. La Société Industrielle et Commerciale des Métaux (1890) 25 Q.B.D. 399). However, that does mean that with an English law contract one can be pretty sure of being able to enforce it in England. One must also face the possibility that an insolvent debtor might be able to manipulate the position such that a more favourable (to the insolvent) regime might apply. Nevertheless, Professor Fletcher makes a convincing case that the benefits from an internationalist approach outweigh the possible disadvantage to individuals. He puts touching faith in the judiciary to develop the law in this area and to retain a controlling discretion if any treaty or Model Law is adopted (p.371). There is evidence, particularly with regard to judicial assistance, that this faith is not misplaced. However, a salutary blow to internationalism was dealt in the Re BCCI (No. 10) ([1996] 4 All E.R. 796) to remind us all of the force of national public policy.
This is a marvellous book. Professor Fletcher writes clearly about a difficult subject and there is a great deal of material here. It is sadly priced firmly in the practitioner market, beyond the reach of all but the most dedicated individuals. However anyone who is interested in this fascinating area of private international law, whether practitioner or academic, cannot really afford to be without it on their shelves.

PIPPA ROGERSON


VANESSA EDWARDS’ book, EC Company Law, traces the development and adoption of company law and securities directives proposed by the European Commission since the 1960s. It begins with an overview of the company law harmonization programme followed by a detailed chapter-by-chapter account of the company law directives that have been adopted. The next section of the book is devoted to securities regulation directives and to Community law on establishment and mutual recognition of companies. Finally, after a brief review of miscellaneous draft legislation, the author sets out her conclusion and outlook for the future. The book has a UK slant in the sense that issues arising from the UK’s implementation of European measures are singled out for particular consideration but there are also selective references to other member states’ implementation experiences especially where these have resulted in cases before the ECJ.

This book has many admirable features. The author clearly has an impressive knowledge and understanding of a large subject but she wears her learning lightly. As a result, the book is both a gold mine of useful information and a pleasure to read. The tone is confident, clear and authoritative. Ample footnotes evidence extensive reading in UK and foreign sources. Particularly illuminating are the insights she provides on the background and discussions leading up to the adoption of particular measures. A good example of this is the way she teases out the tensions and disagreements that lay behind the bald and lame recital in the Public Offers Directive that an agreed definition of the key concept of an offer to the public has “proved impossible to furnish” (pp.273–275). The evolution of Community provisions from the domestic company laws of member states is carefully traced. The approach is more expository than critical, particularly with regard to the underlying goals of regulation. Whilst Edwards acknowledges problems in the company law harmonization programme, her response—that these are perhaps inevitable consequences of the practical constraints fettering an ambitious programme (p.13)—might have been developed further. In the field of securities directives the author’s appraisal is largely confined to noting how the ambitious aim of creating a uniform and all-encompassing regulatory framework has given way to the more realistically achievable goal of putting in place a “latticework” (p. 233) of minimum requirements; the “familiar litany” (p. 267) of justifications for aiming to achieve investor protection through positive law are mentioned but attract little comment.

Edwards supports the view that to the extent that UK company lawyers are aware of European law, they may focus disproportionately on its negative aspects (pp. 411–412). It is timely to make claims about UK lawyers’ negativism towards European law given that the inhibiting effect of the Second Company Law Directive features prominently in the ongoing general review of company law
launched by the government in 1998. Whilst the view that the Second Directive requirements on maintenance of capital prevent radical modernisation and simplification of domestic law can be portrayed as negativism, a counterview is that this is not carping just for the sake of it. Rather, if the goal of root and branch reform is to be achieved, then all existing requirements should be up for review and nothing, whether it has a European or a purely domestic origin, should be immune from this process. Since some of the most troublesome aspects of the Second Directive were (as Edwards notes (p.51)) based on existing English law, this questioning approach seems especially appropriate. Current thinking about the reform of company law rightly proceeds on the basis of avoiding excessive regulation. In the area of creditor protection (mentioned in the Second Directive and recognised in domestic law as a reason for capital maintenance requirements in company law) it is clear than the interplay between the role of contract and company law is important. A good case can be made for favouring contract as a primary tool for achieving protecting creditors' interests and for limiting company law's role in this regard. Where existing law strikes a different balance that should either be changed or justified.

Mention of possible changes to directives leads inexorably on to the issue of petrification. Edwards is dubious about concerns that other commentators have expressed on this point and suggests that experience does not appear to support the proposition that directives are resistant to evolution (p. 11). However, although she refers to a number of directives that have been changed, this is a point in the book where a little more detail on would have been welcome, not only on the reform mechanisms and processes but also on the underlying considerations supporting the author’s optimistic assessment. Edwards acknowledges that, overall, the company law harmonization programme has proceeded slowly and she justifies this with sensible and convincing arguments about the difficulties of bringing together different national legal regimes, attitudes and practices (pp. 11–14). In principle amending existing Community legislation on which, by definition, there has been agreement in the past should be an easier task. However, it is hard not to wonder whether factors that explain slow progress on new initiatives might not also act, perhaps in some diluted way, as a brake on reform of existing Community law.

A related general point made by Edwards is that even though the bulk of the relevant domestic legislation now gives effect to directives, company lawyers in the UK “frequently give the impression, however, of a Nelson-like blindness to European influences” (p.411). It is debatable whether academics and practitioners are really as euro-insensitive as Edwards asserts; certainly it is hard to imagine that anyone with an interest in the regulation of public offers and listing of securities, for instance, could nowadays fail to be aware of the European dimension. Yet, to the extent that it is true and reflects knowledge gaps about just how pervasive the European influence has become, the publication of this book should help to improve this position. This is a stimulating and useful book and it deserves a wide audience.

EILIS FERRAN


At the Reformation, Henry VIII prohibited the teaching of Canon Law in the Universities: a prohibition which technically remains in force to this day. However,
the ecclesiastical courts of the Church of England retained their jurisdiction over matrimonial and testamentary causes well into the nineteenth century. This, and the work of such great modern canonists as Tristram, Dibdin and Garth Moore, ensured the survival of the Canon Law and its distinct traditions well into the twentieth century.

In the middle years of the twentieth century it began to look as though the Canon Law might yet wither on the vine; but in recent years there has been a remarkable revival of interest in the discipline. It is taught in the universities once again, an LL. M. course in Canon Law having been established in Cardiff in 1992. Since then, four new major works on Canon Law have been published, together with the second edition of an old classic. The Ecclesiastical Law Society, founded in 1987, now numbers some 500 members and publishes a learned journal thrice yearly. One of the leading lights in this renaissance, if not its causus causans, is the Right Reverend Eric Kemp, Bishop of Chichester. 1999 sees the twenty-fifth anniversary of his consecration, and this volume of essays has been compiled in his honour to mark the occasion. It is indicative of the ecumenical nature of the Canon Law revival that it was a Roman Catholic priest and canonist, Father Robert Ombres, who first suggested this work; and the editorial team also reflects this ecumenism, Ombres’ co-editors being Dr. Norman Doe (course director of the Cardiff LL. M. and author of two major works on Anglican Canon Law, who has modestly described himself in print as “a mere organist of the Church in Wales”) and Mark Hill (barrister, Deputy Chancellor—i.e. ecclesiastical judge—of the Anglican Diocese of Winchester, and author of the first text book of the modern renaissance).

The book contains twelve essays, whose themes and authors well reflect the great diversity of both the subject itself, and the backgrounds of those who take an interest in it. The essays divide thematically into three groups: four on the history of the Canon Law; four on the interface between Canon Law and theology; and four which address substantive issues in contemporary Canon Law. As for the authors, according to the biographical notes appended to the book, four of them occupy university chairs; five are ordained (two, including a Bishop, in the Church of England; one in the Church in Wales; and two in the Roman Catholic church); three are ecclesiastical judges; two are Queen’s Counsel; and between them they admit to eight doctorates (but can probably muster a few more).

Of the historical essays, the first two are very much “historians’ history”, comprising a discussion of the contribution of the first two Norman Archbishops of Canterbury to the development and systematisation of the Canon Law, and an historiographical analysis of Lyndwood’s Provinciale and the reasons for its silence on what Maitland termed “the momentous controversy of the age”. We are then treated by Professor Helmholz to a masterly demonstration that, as a matter of historical record, the decision in Middleton v. Crofts ((1736), 2 Atk. 650) was a novel departure based on eighteenth century attitudes and not (as it purports to be) a simple restatement of the legal status of the canons of 1603 as it had always been. The fourth essay traces the history of the draft revised canons of 1551–3, which never attained any legal status, and describes how subsequent generations’ understanding (and misunderstanding) of their history and status helped the divorce reformers of the mid-nineteenth century to achieve the same degree of legal and moral laxity as would have obtained if the draft canons had become law.

In the theological essays, Robert Ombres argues that Canon Law can not, and must not, be seen as immutable; for this would tend to make it an obstacle to ecumenical reconciliation. But if legislators and administrators see their Canon Law as provisional and flexible—a trend more apparent in the Code of the Eastern Churches than of the Latin church—then it is able to facilitate, and even drive, convergence and ultimately reconciliation between churches. Christopher Hill
examines the nature of episcopacy in Church of England and Roman Catholic ecclesiology, and the part played by Eric Kemp in ecumenical dialogues as those churches have explored the possibility of finding a common understanding. Chancellor Bursell examines the question whether a ius liturgicum survived in the Church of England following the Act of Uniformity 1662 and whether, if it did, it survives to this day. In doing so, he concentrates on the legal basis for services of consecration which, although not provided for in the Book of Common Prayer, continued to be performed after 1662 as before. The final essay in this section reviews developments over the last sixteen centuries in relationships between church and state, identifies some of the current tensions (especially for national, as opposed to confessional, protestant churches) and casts a wary eye to the future.

In the final four essays, Norman Doe examines a subject which will be familiar to all who have studied Canon Law at Cardiff: the ever-growing corpus of ecclesiastical quasi-legislation and the difficulties for the lawyer in identifying its status and legal effect. Mark Hill considers the extent to which the ecclesiastical courts of the Church of England may be subject to judicial review. David Harte discusses the vexed question of religious education and worship in schools, identifying a few challenges for the future. Finally, Chancellor McClean surveys the different approaches to church-state relationships which exist within the European Union, and discusses some of the issues which arise.

Overall this is an impressive book which this reviewer enjoyed immensely; but the question has to be asked, who is it for? Bishop Kemp, obviously—but he has already been presented with his copy. Canonists, too—but the Ecclesiastical Law Society knew in advance of its publication, which was only made possible by the subscription of some 167 individuals (the vast majority of them ELS members) and 16 institutions. So we may conclude that most of the canonists who desire a copy already have one. However, it is more difficult to see who else will wish to buy it. It is most emphatically not (and never set out to be) an introduction to Canon Law or a general vademecum—although such works do exist. Many of the contributors assume some familiarity with basic Canon Law concepts—not to mention its rich and (to the non-canonist) bewildering vocabulary. The legal historian may well find the first four essays of sufficient interest to justify the purchase of a copy for them alone. This apart, the book may be recommended to those who wish to obtain a flavour of the Canon Law and an insight into the diversity of its subject matter—but those who are looking for a basic reference work on Canon Law should look elsewhere.

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