BOOK REVIEWS


The operations of American law schools almost seem to have been devised with an eye toward minimising the likelihood that any good scholarship will emerge therefrom. To the baffled and somewhat contemptuous amusement of people in other disciplines (and other countries), most of the prominent American law journals are edited entirely by students; a large number of the faculty members in American law schools have no training and very little experience in scholarly research; intellectually flimsy humbug such as Critical Race Theory turns up in numerous American law journals, because of the ignorance of most journal editors and many faculty members; professors delegate many of their scholarly tasks and responsibilities to research assistants, while blithely filling their law-journal articles with hordes of footnotes that cite texts which neither they nor their assistants have read; most faculty members seldom or never publish in journals other than American law reviews, and thus they seldom or never receive editorial assessments of their work from adults. In these conditions, so unconducive to top-notch scholarly endeavours, no one should be surprised that myriad writings by legal theorists in the United States are dismal. What is much more surprising is that such a large number of those writings are very good indeed.

Natalie Hull's book covers a notably turbulent and stimulating period of American legal theory. The material which Hull covers is intrinsically fascinating, and her painstaking research has brought to light some especially interesting details. To be sure, her book is a history of institutional and personal manoeuvring much more than of ideas; her accounts of theories and analyses are largely competent but are often extremely superficial. (Her discussion of Wesley Hohfeld's enormously important explications of legal positions, for example, is so laconic and misleading as to be valueless.) Within its confines, however, the book is absorbing and informative.

What emerges most clearly from the book is the sheer despicableness of Roscoe Pound. The impression left on the reader is especially striking because Hull herself is clearly a great admirer of Pound; indeed, she bends over backward to come up with an excuse for nearly every one of his reprehensible actions. None the less, her research discloses many unsavoury aspects of his life. Anyone who has regarded Pound's scholarship as a heap of vaporous verbosity will be glad to know that Pound was no more commendable as a human being than as a theorist. Having supported the Soviet Union in its early years through a Communist-front organisation, he went on to accept a medal from the government of Nazi Germany in 1934. (Oddly, Hull does not mention at all the pro-Nazi utterances in which Pound engaged during the fledgling years of Hitler's regime.) The political wisdom of Pound was matched by his courage, as he time and again declined to back...
up his private sentiments on sundry matters with public pronouncements, and as he flattered the recipients of his letters even while he was criticising them harshly behind their backs. To be sure, some of his many failings—cowardice, stubbornness, duplicity, self-importance, sanctimoniousness—are hardly uncommon. Still, in light of the vast power of patronage and influence which he wielded during his tenure as the Dean of Harvard Law School, his badly flawed character is a cause for dismay. (To the credit of Pound, however, it should be noted that he had the good sense to support strongly the Nationalist government of Chiang Kai-shek in the 1940s against the Chinese Communists. Somewhat disconcertingly, Hull seems to disapprove of the stance taken by Pound on this matter. She is right, nevertheless, to feel that his view of the Nationalist government was unduly rosy; his accurate perception of the monstrousness of the Communists led him to overestimate the virtues of their opponents.)

Though Lon Fuller is discussed only briefly by Hull, his reputation is damaged nearly as much as Pound’s. As Hull recounts, Fuller on a trip to Germany in 1938 eagerly sought to meet with the leading Nazi jurists Hans Frank (who subsequently oversaw the annihilation of Polish Jewry) and Carl Schmitt. In light of this flirtation with Nazism by Fuller, his later writings’ shrill and baseless denunciations of legal positivism for having supposedly facilitated the consolidation of the Third Reich are singularly distasteful—especially because his principal positivist opponents (Hans Kelsen and H.L.A. Hart) were Jewish.

Hull tells the story of Pound, Llewellyn, Hohfeld, Fuller, Jerome Frank, and others in an engaging and exceptionally lucid style (though her American colloquialisms are sometimes jarring and her authorial intrusions into some of her quotations are frequently more irritating than helpful). Her research has been prodigious and fruitful. This review will raise only a couple of general complaints about the book, neither of which is devastating. First, one has to query why somebody so manifestly hostile to philosophy would choose to write a book on jurisprudential theorists. The search for an American jurisprudence announced in the book’s subtitle is presented by Hull as a search for a non-philosophical jurisprudence—a search for a legal theory focused firmly on practical concerns to the virtual exclusion of pure philosophical elucidation. She eagerly seizes on various utterances by Llewellyn that could conceivably be taken to express disdain for philosophy. Some of those utterances, such as a caustic remark about “Philosophical Poetry” quoted on pp. 330–331, are not really dismissals of philosophy at all; but there is little doubt that Llewellyn did sometimes deride philosophical ambitions. Hull at the end of her Introduction quotes a particularly silly passage wherein Llewellyn declared to his Jurisprudence students that he would forswear all words of more than three syllables in order to stay away from “the vocabulary of professional philosophy”, which he regarded as “curiously inept to our purposes” (p. 16). One can only wonder whether any of the students pointed out to Llewellyn that “jurisprudence” contains four syllables. Entirely fitting is it that “jurisprudence” qualifies under Llewellyn’s test as a philosophical word, since philosophical analysis is the principal lifeblood of jurisprudential theorising. Contrary to what Hull presumes, and contrary to what Llewellyn sometimes maintained, the two foremost branches of jurisprudence are legal philosophy and some areas of political philosophy. Jurisprudential analysis, when carried out with appropriate rigour, is an enterprise of interest to professional philosophers at least as much as to people who teach in law schools.
A second general shortcoming in Hull’s book is her undue faith in the reliability of private correspondence—a faith displayed more prominently within her opening methodological discussions than within the actual historical investigations that make up her subsequent chapters. Private correspondence can of course throw invaluable light on public statements and positions; accordingly, no respectable historian would undertake a biography of any person without drawing heavily on the available missives sent by and to that person. None the less, a good historian will not assume that the claims made in private correspondence are invariably more candid and illuminating than stances taken in published writings. Though most people do often reveal much more of themselves to their acquaintances in private communications than to the world in public pronouncements, some people tend to be especially disingenuous in their private communications. Perhaps as a result of feeling confident that no falsehoods will be detected through public scrutiny, or perhaps as a result of tailoring messages to particular recipients, some people stray more boldly from the truth in private missives than they ever would in published writings. Any good historian has to be keenly alert to just such a possibility. Hull in her practice as a historian generally displays such alertness, but her methodological reflections do not. Also to be noted here, finally, is that Hull’s book contains a number of typographical errors and other small lapses. One slip (or one pair of slips) is particularly embarrassing in a book published by the University of Chicago Press—a press associated with a university where Robert Maynard Hutchins famously presided for many years and where the Economics Department has included a bevy of renowned anti-Keynesians. At least twice (pp. 177 and 248), Hutchins is denominated as “John Maynard Hutchins”.

Matthew H. Kramer


One sometimes encounters the observation that the uncritical modern acceptance of human rights sits uneasily with the widespread modern rejection of theories of natural law: after all, it is not entirely obvious how humans can possess rights that are independent of conventions and institutions if there are no binding universal standards that are similarly independent. A less common but perhaps equally provocative suggestion concerns the rejection of natural law theories in an intellectual environment dominated by economics and game theory. Prisoner’s dilemmas and the tragedy of the commons may at first sight seem to be quite remote from the concerns of Aristotle, Aquinas or Grotius. Yet could not such tools of game theory be said to teach us certain permanent truths about the human situation? At the very least they tell us that rational project pursuers will encounter problems that are rooted in the structure of human interaction, and that things will work out very badly for us if we do not appreciate this and adopt appropriate measures to deal with the consequences.

The great theories of natural law were not strange invocations of “a brooding omnipresence in the sky”, but reflections upon those enduring features of the human condition that constrain our endeavours to achieve a tolerable and orderly form of social life. As the reviewer has argued elsewhere,
early modern versions of natural law derived the prescriptive force of natural law from claims about the divine will; but the content of natural law was derived from a set of claims about human nature and circumstance, and the consequent necessity for institutions of government and property. It was precisely this that facilitated the metamorphosis of natural law into utilitarianism (through the intermediary of Hume), for the removal of the theocentric framework removed the basis for any deontology, leaving in place a theory about the consequences for human welfare of certain institutions, or of their absence. Thus, natural law theories can be read in part as a description of the permanent structural features of the human condition, and the measures that must be adopted if individually rational actions are not to have systematically bad effects. Indeed, it is not going too far to say that some modern insights of game theory are sophisticated systematisations of insights already to be found within the older tradition of thought.

Recently, a strong interest in natural law has manifested itself within philosophical and jurisprudential circles. A great deal of valuable work has been published. Much of the work, however, has concentrated on two main projects. In the first place, Aristotelian or Thomist versions of natural law have been mobilised as a basis for the critique of contemporary liberal political theory, or as a superior theoretical foundation for many of the values and institutions that are typically (and, on this view, misguidedly) related to “neutrality between conceptions of the good” rather than to an Aristotelian vision of the polity as seeking to encourage good lives. This project is interesting and important, but it is a source of concern for many who fear that the implications of such neo-Aristotelianism will prove to be not so benign after all. The second project concerns the defence of moral realism (i.e. the claim that there are moral truths independent of mind and convention) and revolves around meta-ethical issues of ontology that will be found by non-philosophers to be esoteric if not incomprehensible. Both projects are inclined to divert attention from the extent to which reflection upon some more or less permanent truths about the human condition can cast a valuable light upon the moral basis for familiar liberal institutions.

Setting on one side the questions of Aristotle versus Rawls, and of Wittgenstein versus Kripke, we can discover genuine insight in some more homely territory.

To indicate the homely character of much natural law theorising, Pufendorf observed that, although the binding force of natural law derives from the divine will, the precepts of natural law might have “manifest utility” even in the absence of such divine will: “they might, to be sure, be observed . . . in view of their utility, like the prescriptions of physicians for the regimen of health” (De Officio Hominis 1.3.10). Somewhat in the spirit of this suggestion, Randy Barnett proposes that natural law should be treated as a “method of analysis” having the form “Given that the nature of human beings and the world in which they live is X, if we want to achieve Y, then we ought to do Z” (p. 12). The prescriptions of natural law are therefore hypothetical rather than categorical, and are no more mysterious than the prescriptions of medicine or structural engineering. Whereas Pufendorf saw the divine will as essential precisely in order to preserve the categorical force of moral demands, Barnett endorses Phillippa Foot’s view that moral imperatives are hypothetical, so that an adequate theory does not need to ground the mysterious categorical force of morality, for no such force exists. Some of the problems that might flow from this view (for example, in the absence of optimistic assumptions about the coincidence of individual and collective
interests, why would individuals have reason to comply with those institutions that serve the collective welfare?) are avoided by maintaining a focus on questions of institutional design rather than individual choice. The result is an interesting, robust and highly accessible book.

Barnett structures his discussion by an analysis of three different problems of the human condition: the problems of knowledge, of interest, and of power. The basic foundations of the theory are established by reference to the problem of knowledge, where Barnett draws heavily upon the work of Hayek, together with Hillel Steiner’s important writings upon the “compossibility” of rights. Following Hayek’s analysis, Barnett argues that (given the basic fact of scarcity of resources) the orderly and effective use of material resources is possible only where actors can make use of knowledge that is available to them as individuals, but which could never be available to central governmental organisations. Following some aspects of Steiner’s analysis, he argues that the solution lies in a system of “compossible” property rights and powers of consensual transfer. The Hayekian “first order” problem of knowledge is then followed up by Barnett’s analysis of a “second-order” problem (concerning the way in which we communicate knowledge of the content of appropriate principles of justice) and a “third-order” problem (concerning the way in which specific action-guiding precepts can be derived from highly general principles of justice). Later parts of the book address the problems raised by the limited altruism of human beings (divided by Barnett into problems of “partiality”, of “incentive”, and of “compliance”) and by the need for political power with its associated dangers. The general theme is that the liberal (or libertarian) version of justice and the rule of law developed in the first (Hayekian) part of the book also provides the best basis for a solution to the various problems of self-interest and of power.

The book is densely packed with issues which do not admit of summary. While it is true that some of the central ideas of the book will be familiar to an experienced reader, they are combined into a systematic theory with considerable aplomb and admirable brevity. Some of Barnett’s own proposals are provocative, but they are always presented with a clarity and directness that forces the reader to think hard about a response. This is an enlightening book that succeeds remarkably well in drawing together a good deal of insightful analysis and presenting it in a way that would be fully intelligible even to a complete novice in political philosophy and the philosophy of law. Indeed, anyone seeking an introduction to intelligent and sophisticated legal theory would do well to start here.

N.E. Simmonds


In a black and white photograph on the cover of Professor Perry’s book, a German policeman aims two paces in front of him at the back of a Jewish woman as she tries to bear a clearly heavy child across a barren field. The first page opens with an account of soldiers in El Salvador raping and shooting a young girl while through it all she sung hymns, until the soldiers cut through her neck. The book, Perry explains, grew from a visit he made to El Salvador 10 years ago with friends from a church in Chicago with
which he was then associated: issues “that had been primarily intellectual” and which he had addressed in an earlier book, *Morality, Politics, and Law*, now became “profoundly existential”.

Perry refers to a wide range of contemporary writing by leading human rights lawyers, Anglo-American philosophers and theologians. Writing with integrity and in a careful but informal style, he highlights the major contemporary debates on “the difficult idea of human rights”. Many of his themes are drawn from the work of the American pragmatist philosopher, Richard Rorty, but Perry distances himself from “radical antiuniversalism”: he finds implicit within Rorty’s anti-foundationalist arguments on human rights a recognition that certain social senses and appetites are shared across the human species. In the third of his four essays, *The Relativist Challenge and Related Matters*, Perry argues that “features of humanness” lie beneath all local traditions and that anthropological relativism, however fashionable, is simply not plausible. (Here he relies on arguments made by Martha Nussbaum, united in surprising concert with Noam Chomsky and Pope John Paul II.) He goes on to defend the possibility of transcultural justification or agreement, arguing that the work of revisionist Islamic, Christian and Jewish scholars, the experiences of human rights campaigners, and the very existence of international human rights documents “powerfully and dramatically disconfirm” the impossibility of transcultural agreement on the idea of human rights. He also argues that epistemological relativism relies on two mistaken assumptions: the first that a culture has but one value or set of values (Perry defends a pluralist position), the second that productive moral discourse is impossible between people from different cultures (“we cannot know how far moral discourse can go in resolving particular disagreements . . . until it is tried”). Perry endorses a coherence theory of truth (“successful justification is always coherentist”) but he also argues that people who disagree about the human good understand that they are disagreeing about the same thing. The only sound form of relativism, according to Perry, is cultural relativism (although this can be invoked implausibly or in bad faith).

The most sensible legislative embodiment or specification of a value represented by an international human rights provision (freedom of the press, for example) is “partly” relative to particularities of context and culture. He distinguishes the question of whether a specification fails to give reasonable protection to a particular human right from the question of whether those whose law it is could be brought to agree on its unreasonableness.

In his first essay, *Is the Idea of Human Rights Ineliminably Religious?*, Perry argues that writers like Nussbaum stand mute before the question of why we should treat the good of every human being as an end worth protecting. He suggests that the answer that informs international human rights law is that every human being is sacred. While emphasising that he is not commending religious belief, Perry argues that no secular version of this conviction is intelligible. Why should we not agree, he challenges Rorty, to swap our acquired taste for human rights for a fondness for barbaric violations, and is it not problematic to coerce and kill in the name of nothing but our sentiments, preferences or irony? Perry considers Ronald Dworkin’s position (that we treat others as sacred when we value them as awe-inspiring masterpieces), but argues that to justify the conviction that every human is sacred, Dworkin must refer to “how the world really is”, rather than to the values some of us attach to the world. Nor is the conviction justified from either a universal or contractarian point of view argues Perry: we need to be given reasons to justify adopting a saintly universal, impartial perspective,
and Gauthier’s contractarian model, while it sets out to challenge the proclamation that morality will perish under the will to truth, ends up embracing a Nietzschean conception of justice. While some forms of relativism can be dismissed as implausible or internally incoherent, Perry concludes that the most powerful relativist challenges to the idea of human rights can be met if at all only with religious counterarguments, arguments which take the world as hospitable and meaningful rather than absurd and bereft of meaning.

Perry’s short second essay, *Rights Talk*, argues that “we can take rights seriously (so to speak) without taking rights talk too seriously”. The language of rights, he argues (quoting John Finnis) is a useful but derivative and even dispensable feature of modern discourse, a way of talking about what is just from the viewpoint of one who would be wronged if denied their due. (An endnote mentions the debate about whether it is a basic function of a moral right to protect well-being, autonomy, or both: Perry prefers the latter position but does not elaborate.) Neither international human rights documents nor the moral claims about human rights that shape them are inherently individualistic or absolutist, argues Perry: such critiques are of the particular embodiments of rights, of particular laws that ignore or marginalise human responsibility.

Perry’s fourth and final essay, *Are Human Rights Absolute?*, argues that no moral rights are absolute. John Finnis argues that basic principles or laws of reasonableness limit the ways of legislatively embodying rights (while often leaving open more than one right option). One of Finnis’s laws is an absolute bar on the intentional destruction or damage of basic human goods. Perry suggests that Finnis’s arguments are unpersuasive and that Finnis fails to explain the problem of characterising actions as human rights violations. (Perry gives an example of a loving parent suffocating his child before both are tortured to death: referring neither to debates on euthanasia nor to his position adopted against Rorty, he states it is patent nonsense to say that this parent denies his child is sacred.) Finnis’s absolutes, he argues, are reasonable only to one who believes that divine providence will prevent the heavens from falling: the only secular alternative is provided by a cost-benefit analysis of the relevant circumstances. Perry then suggests that this argument that no moral rights are absolute is “perhaps mainly of theoretical interest: the much more important point is practical, not theoretical: some human rights as international legal rights should be and happily are absolute”. He gives three reasons for this position: that the heavens are negligibly likely to fall as a result of adherence to absolute legal rights; that rendering legal rights conditional would encourage morally unjustifiable violations; that nonderogability will not stop political authorities violating law when necessary, in knowledge that their illegal actions may remain moral.

Much secular moral philosophy, Perry suggests at the end of his first chapter, has been “for a very long time now, a kind of whistling in the dark”. It is almost as though this book marks his loss of heart for the intellectual enterprise on which he has embarked: consigning many of his most sustained discussions to endnotes, his essays interweave wide-ranging but apparently incompatible citations and suggestions of his own, all hanging largely unreconciled in the midst of rhetorically powerful, brutal accounts of almost unspeakable atrocities.

Amanda Hatfield

THOMAS M. FRANCK, who currently is president of the prestigious American Society of International Law, is among the most distinguished contemporary scholars and practitioners of the subject. For this reason alone, this is an important book, the product of Professor Franck's 1993 general course at the Academy of International Law at the Hague.

The author sets out a very American view of international law: The book fairly brims with the best American values—self-confidence, rationalism, faith in progress, and unbounded optimism. Professor Franck has a powerful intellect and a total command of the broad scope of international law. Many will be convinced by his thesis, but many will not be. In any case, this is not a timid undertaking. The author sets out a bold vision of what international law is and what it can become.

The title reflects the author's primary thesis: that international law, because there is no centralised law giver, must satisfy basic human criteria to be accepted by both nations and people. The most important of these criteria is fairness, which, in turn, has two components: legitimacy (see Franck, The Power of Legitimacy Among Nations (1990)) and justice. Legitimacy is a process oriented value; rules are legitimate when they are determinate, coherent, adherent, and maintain "symbolic validation." Justice is a test of substance, and Franck outdoes John Rawls by carrying over Rawls' principle of distributive justice (see Rawls, A Theory of Justice (1971)) to relations between nations. Although, as Franck rightly notes, Rawls himself would disagree.

Having established his thesis that international law must be based upon fairness, the author tests his thesis by applying it in a wide variety of contexts ranging over virtually the whole spectrum of international law. He treats us to a masterful chapter on the role of equity in international law, surely the best ever written on this subject.

In Part II of the book, the author applies his thesis to persons and peoples. The application to persons inspires a discussion of human rights, including the author's controversial thesis that democratic entitlement is an emerging legal obligation (see Franck, The Emerging Right to Democratic Governance, 86 A.J.I.L. 46 (1992)). His view of self-determination is that each case must be considered separately.

In Part III of the book, the author takes up fairness and institutional power. The institutions analysed include the United Nations, especially the Security Council, and the International Court of Justice. Even if one does not accept the author's thesis, these chapters are splendid accounts in themselves.

In Part IV, the author considers the law and institutions of distributive justice. This theme inspires insightful comments on international environmental law and international economic law, the two areas in which the international community has become involved in "redistributive" ventures whereby the "have"s benefit the "have nots" in certain ways.

In summary, the book is a scholarly tour de force, essential reading for anyone interested in international law. Franck plays the role of St. Thomas Aquinas, presenting us with a system of law based upon reason and logic. He makes a very convincing case. There is another side, however, reflected by St. Augustine, that international law may not fit into such a logical
framework, but, rather, will continue to develop in fits and starts in response to crises and out of the self-interested practice of states. In this regard, it is to be remembered that the Medieval era was more Augustinian than Thomistic. More hopefully, however, because of the work of scholars like Professor Franck, reason will prevail.

THOMAS SCHOENBAUM


It is good to welcome this important work back on the road, 22 years after Oceana first published it. It takes the form of an article by article commentary on the Vienna Convention on Diplomatic Relations, 1961, which, with about 180 parties, is as close to universal international law as any other treaty text apart from the United Nations Charter. Many, but not all, of its provisions have been expressly incorporated into United Kingdom law by the Diplomatic Privileges Act 1964. The increase in the number of pages from 305 to 422 together with a smaller type-face means that the new edition is at least a third more compendious than its predecessor.

The author states that the work “is intended principally as a practitioners’ handbook”. By this she is not limiting herself to practitioners within the United Kingdom, although United Kingdom and United States practice predominate, probably because these are the most easily accessible. State immunity as such is not covered so there is no discussion of the rather rickety _renvoi_ which s. 20(1) of the State Immunity Act 1978 makes to the Diplomatic Relations Act 1964, a matter crucial in the _Pinochet_ proceedings which began just after the book was published. The scheme of the work is described by the author as follows: “Each Article or group of Articles is placed in the context of the previous customary international law, the negotiating history is described in so far as it remains illuminating, ambiguities or difficulties of interpretation are analysed, and the subsequent state practice is described.”

Revisiting the Convention after 22 years, the author maintains that it has stabilised the relevant international law, with relatively few bilateral derogations and only limited areas in which reservations have been made. Furthermore, it has been resilient to spasmodic calls for its revision, particularly as regards inviolability of the diplomatic bag and immunity from parking restrictions. In general she finds a high level of state compliance, significant areas of exception being those of freedom of diplomatic movement and travel (Article 26) and free communication for the mission’s official purposes (Article 27), although both are likely to be less troublesome after the change of regimes in eastern Europe.

In discussing the theoretical foundation of diplomatic immunities and privileges, the author makes the interesting point that while the extra-territoriality theory has been substantially relegated to history, the other two bases—functional necessity and the theory that a diplomat represents his state—are still operative, with the latter in particular being relevant in cases where the diplomat’s state is sought to be made responsible before foreign
tribunals which are likely to apply a doctrine of state immunity more restricted than that of diplomatic immunity.

As can be expected, the main increase between the editions has occurred in the area of state practice subsequent to the Convention. In the United Kingdom alone there has been a steady trickle of decided cases on the subject together with substantial published executive practice in the form of replies to parliamentary questions, circulars to the London diplomatic community enjoining compliance with various aspects of the Convention, and a full review of the working of the Convention by the Foreign Affairs Committee of the House of Commons in 1985 following the homicidal shooting from the Libyan mission in London.

The full text of the Convention and its current membership are helpfully set out in appendices. A positive improvement over the first edition is that footnotes now appear on the pages to which they refer and not as end-notes to chapters. In view of the substantial amount of secondary material referred to in the footnotes a separate bibliography would be a welcome addition in any future edition.

GEORGE MARSTON


Gerald Draper was, by any yardstick, a most unusual international lawyer. An academic at what was generally regarded as one of the most progressive universities, he always looked and dressed like the Irish Guards officer he had once been; yet, as Count Jean de Salis writes—in the excellent biographical sketch at the beginning of this volume—he was never one of the establishment pack. His writings, 25 of which are reprinted in Meyer and McCoubrey’s book, display a rigorous and traditional approach to international law; yet he was not at all a traditionalist in the causes which he espoused. Seconded from the Guards to work on investigating and prosecuting war crimes at the end of the Second World War, he saw at first hand the horrors of Auschwitz and Belsen immediately after they were liberated and played a part in the subsequent trials and convictions of the commandants of those camps and a number of their staffs. This experience marked him in more ways than one. For the rest of his life he worked tirelessly to develop, explain and enforce the international law of war, first as a Colonel in what is now the Army Legal Services, where he assisted Sir Hersch Lauterpacht in writing the British Manual of Military Law (still, 40 years after its publication, the best practical exposition of the laws of war), and later as an academic, first at London and then Sussex University. It was as a result of his twin careers as soldier and scholar that he was always known as “Professor Colonel Draper”.

The present volume is a selection of his writings on the laws of war and armed conflict. The book has been skilfully compiled by the editors, who have performed an invaluable service in tracking down several pieces which have not hitherto been published—such as Draper’s trenchant paper on the 1982 Sabra and Chatila massacres in Lebanon—or which are not easily
available elsewhere—such as his Red Cross pamphlet on the background to the Geneva Conventions. Particularly welcome is the publication of Draper's essay on the legal issues surrounding the decision to hand over to the Soviet Union the cossacks who had fought in the German army in the Second World War, along with their families. This essay was published in the paperback edition of Count Tolstoy's book *Victims of Yalta* but is not part of the hardback edition to be found in most libraries. The book is organised into seven chapters, dealing with Christianity and War (a favourite topic of Draper, who was a devout Roman Catholic), the Development of the Law of War, Implementation and Enforcement, Humanitarian Law and Human Rights, War Criminality, Issues of Status (which addresses the difficult question of whether irregular, guerrilla fighters are entitled to prisoner of war status on capture) and Comments on World Events. Each chapter is introduced by a short commentary written by the editors. These introductory comments are well written, interesting and informative.

Any selection of someone's works is likely to give rise to arguments about what the editors have left out. The editors have wisely concentrated on Draper's shorter works—there is, for example, only a short extract from his 1978 Hague lectures—and on works which are not widely available in the mainstream journals on international law. This reviewer wishes, however, that the editors had included a few of Draper's many letters to *The Times*. While it is true that letters to a newspaper date very rapidly and are not normally included in a collection of this kind, Draper's letters on subjects such as the Falklands War and the Lebanon invasion were particularly good examples of his concise and trenchant style. Many of them pose questions which are still of considerable importance and repay study. Nevertheless, the editors are to be congratulated on producing a book which will be a valuable work of reference and a tribute to a remarkable man.

**Christopher Greenwood**


At a time when the obsession with international legal theory is reaching Swiftian proportions, it is a delight to read a text which regards theory not only as having an importance secondary to that of State practice, but also (in the words of Professor Brownlie that Dr. Talmon quotes at the beginning of his study) as standing “like a bank of fog on a still day, between the observer and the contours of the bank which call for investigation”. Those who, like me, marvel constantly at the ability of the theory of recognition to complicate perfectly simple questions will sense immediately that they are in for a treat.

Dr. Talmon has focused on two questions: what are the meanings of recognition in its various forms (de facto, de jure, etc.—distinctions which Dr. Talmon credits to Lord Castlereagh (p. 54))? And what is the effect of recognition on the legal status of governments, and in particular governments in exile? In order to answer these questions he has undertaken a study of State practice of quite exceptional breadth and thoroughness. He has drawn
not merely upon a remarkable range of secondary materials (although Professor Dugard's 1987 study of recognition and the United Nations is, curiously, omitted from the bibliography), but also upon numerous primary sources from around the world, which he has hunted down as far as transcripts of BBC short wave radio broadcasts. This is traditional scholarship of the highest quality, and it is quite astonishing that the prototype of the book should have been submitted as a doctoral thesis as recently as 1995. The primary material is condensed and presented with great skill and clarity, and the book would be regarded as a standard work even if only as a guide to this practice. Few writers on the subject have bothered to examine the practice of States in such meticulous detail. The book, however, also has considerable merit as a work of legal analysis.

In Part I of the book (pp. 21–111), Dr. Talmon analyses the use of the term “recognition” and its variants in State practice. He distinguishes recognition as a judgment on the status of the putative government from recognition as a sign of willingness to enter into more or less formal relations with it. This part of the study is not controversial. Though readers may be surprised at the certainty with which Dr. Talmon sometimes infers legal principles from the vagaries of diplomatic language, the broad lines of the analysis, which concludes that governments have used “recognition” as a synonym for “de jure recognition” (p. 91) and “de facto recognition” as term to signify a general, unparticularised willingness to maintain official relations (p. 85), are well-argued and convincing.

Part II of the study (pp. 115–268) deals with the more interesting and important question of the legal effects of recognition, and explores that question in the context of governments in exile. Successive chapters deal with international representation, jurisdiction, and privileges and immunities, of which the first two are much the most substantial. The bare headings give little idea of the richness of the study. Thus, the chapter on representation (pp. 115–206) examines the position of governments in exile in relation to a number of legal activities. These include: treaty-making, the exercise of rights under a treaty, and the performance of “unilateral acts” (where recognition appears to be necessary for the government in exile to have the capacity to bind the State); diplomatic relations and representation of the State in inter-State forums (where a flexible, and not always consistent, policy is operated, sometimes dealing with entities other than the recognised government); access to and control of State property abroad; and protection of the State’s nationals. There is also a section (pp. 189–191) on the representation of the State in judicial proceedings, although this is tantalisingly brief and does scant justice to the importance of the case of Republic of Somalia v. Woodhouse, which makes its only appearance here and which Dr. Talmon is perhaps too ready to accept as an instance of implied recognition.

The chapter on jurisdiction opens up many neglected issues. The complexity of the question of the right of a government in exile to legislate for its occupied territory, for example, is explored with skill and insight; and the discussion contains much material illuminating the notion of the “sovereignty” of States. There is, perhaps, more to be said on these matters. It would, for instance, be interesting to explore further the implications of cases such as Hesperides Hotels and Adams v. Adams, which approach the question from the other side and examine the standing of insurrectionist “governments”. But that which is done, is done well.

There are three valuable appendices containing, respectively, replies from 15 States to Dr. Talmon’s questionnaire on recognition practice, profiles of
governments in exile from that of Belgium (1914) to that of Qatar (1995), and a list of treaties concluded by governments in exile. The bibliography includes a particularly helpful guide to sources of State practice.

One of the key findings in this study is that, although the recognition of effective governments in situ may properly be regarded as declaratory, the effect of the recognition of ineffectual governments in exile is frequently constitutive, particularly (but not exclusively) in national law. It follows that recognition is a legal act with important legal consequences. International law has been in danger of losing sight of that principle, and regarding recognition as a political matter. Dr. Talmon has clearly demonstrated the falsity of that view and, in bringing discussion of recognition back up to the level of practice, has performed a major service for the international legal community. This is one of the most accomplished monographs that I have read in recent years. It deserves great success.

VAUGHAN LOWE


Apartheid was a legal order. It was introduced and enforced by law and it was ended by law. Unsurprisingly therefore the relationship between law and justice in the apartheid legal order arouses great passion. Several studies in the past have criticised judicial performance during the apartheid years leaving little doubt that the judiciary could have done much more to ameliorate the injustices of apartheid. This book by Professor David Dyzenhaus is the latest in that genre although, it overlooks some of the earlier work. It concentrates on the hearings of the Truth and Reconciliation Commission into the legal system and makes a valuable contribution. Notwithstanding these grave judicial flaws all not blinded by passion will recognise that the formal independence of the judiciary did survive. The judges did not take bribes or instructions from politicians. A trial before the Supreme Court was never a mere formality. This has had important beneficial consequences in the new constitutional order. The President of the Constitutional Court, Chaskalson P., has remarked:

... we will come to appreciate that we owe much to our [old order] judges ... they have somehow ... kept alive the principles of freedom and justice which permeate the [Roman–Dutch] common law ... the notion that freedom and fairness are inherent qualities of the law lives on ... This is an important legacy and one which deserves neither to be diminished nor squandered. (“Law in a Changing Society” (1989 5 South African Journal on Human Rights 293 at 295 cited at p. 20)

That legacy allowed the old order judiciary to be incorporated, largely unchanged, into the new constitutional order. Although supplemented by fresh appointments and by the new constitutional court, the judiciary consists in the main of judges appointed under the old order. Judges which previously served a constitutional order that was universally reviled now serve, just as
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loyally, a constitutional order universally praised as a model. A curious state
of affairs. But a delicate *modus vivendi* was established within the judiciary
whose loyalty to the new democratic order is not in doubt.

The Truth and Reconciliation Commission was established under the new
constitution with the bold and ambitious mandate “to bring to light the
truth about how the edifice of apartheid was sustained . . . [and] to build a
foundation for reconciliation through illumination of truth . . .” (at p. 6).
The desire amongst the victims of apartheid for the illumination of the truth
is inevitably very strong. And the Commission devoted three days to a Legal
Hearing in which evidence was taken into how the legal system was
implicated in apartheid. Professor Dyzenhaus attended this hearing, gave
evidence, and found himself “riveted” (p. xiv) by it. He determined to write
a narrative of the hearing and combine with it moral, political and legal
analysis (*ibid.*). This book is the result.

So this book is first an account of the hearing. Legal academics, Attorneys-
General, human rights activists, practising lawyers, professional organisations
and others all gave evidence. But the judges—the vital element—refused to
give oral evidence although some written submissions were made. “Their
absence”, writes Dyzenhaus, “was the most conspicuous feature” of the
hearing (at p. 30). So it was Hamlet without the Prince.

The judges were much criticised for failing to turn up—and much of that
criticism is supported by Dyzenhaus who dissects and rejects their reasons.
But given the generally confrontational nature of the hearing as well as
doubts over the impartiality of the Commission (see p. 30) the judges’
caution was understandable. Moreover, there seems to have been real fear
that direct judicial involvement—with new order judges slinging mud at old
order judges—might corrode that delicate *modus vivendi* (p. 39).

What is really disappointing is that many judges, including the liberal
retiring Chief Justice Corbett, in their written submissions mount narrow
and uninspired defences of the old order. These ignore—and so make no
reply to—the barrage of serious criticism. Apparently the judges in their
judicial fastness have never given serious thought to the moral and political
consequences of their position. Dyzenhaus is witheringly and effectively
critical of these responses and accuses the judges of dereliction of duty.

Dyzenhaus’s criticism is keyed into his jurisprudential views. These are
expressed in his earlier book *Hard Cases in Wicked Legal Systems* (OUP,
1991). He discerns an inherent relationship between law and justice. Thus
even in a constitutional order with a sovereign parliament, judges who follow
the true intent of the unjust legislature are open to criticism. The judges
swore in their oaths to “administer justice” and that is, says Dyzenhaus, what
they should do and not administer the “ideology of the powerful”. (See at
p. 33–35.)

But the judges in fact swore to “administer justice . . . in accordance with
the law and customs of the Republic of South Africa”. Some of those laws and
customs were grossly unjust. A sovereign Parliament laid down the unjust
rules. An army of civil servants, public prosecutors, policemen and judges
enforced these rules. This phenomenon was surely law. The disappointed
litigant who says: “It may be the law, but it sure isn’t justice” has got it
right. There is no necessary connection between law and justice. Thus the
conundrum of old order judges serving under the new constitutional order
may be resolved. Throughout they applied the law as it was at the time.
Their legal epistemology, and fidelity to law, was untouched by the changes
in the content of the law. This does not resolve the political and moral issues
involved but positivism offers a path to knowledge not relief from moral and political dilemmas.

So to sum up: as promised this book is a passionate account of the Truth and Reconciliation interspersed with much moral, legal and political analysis. But it reveals little startling to those au fait with earlier critical work on the troubled and contested history of the South African judiciary. It raises, but does not in my view satisfactorily resolve, the important question of the extent to which some truth may threaten reconciliation.

Christopher Forsyth


Comparative law is an old and established discipline, but it has had its ups and downs and has served various purposes in the course of its history. From the simple (but, in many cases, rather complex) object of knowing what the law of another country is in order to be able to do deal with its lawyers, business people and inhabitants in general on equal terms; through description and analysis with the purpose of enabling law makers to draft more intelligent legislation, scholars to do more inspired research and teachers to get across the structures of their own domestic laws more succinctly; up to the more lofty aim of creating a common international basis of uniform, or at least harmonised, legislation, for example by means of international conventions, the discipline of comparative law and its literature have appealed to quite different sectors of the legal profession.

But comparative law is a stale and fruitless exercise as long as it is conceived of and practised as a mere description and superficial comparison of provisions, rules and head notes to judgments. It is law in action, the life of the law as it were, which needs to be reported, appreciated and analysed; and it is to this principle that the book to be reviewed is committed. In Volume I of their German Law of Obligations, Basil Markesinis, Werner Lorenz and Gerhard Dannemann deal with the law of contracts and restitution in great detail and true to its spirit, making the subtitle, A Comparative Introduction, appear almost too modest. The work begins with a description of the structure of the German Civil Code and its peculiar technique of codification, which at the time (around the turn of the century) was seen as the apex of drafting but is viewed much more critically a century later. It then proceeds to description and analysis of the German rules governing certain problems such as the formation of contracts—including the ambiguous concept of pre-contractual liability (culpa in contrahendo)—the instruments of judicial control over contracts, such as rules on illegality and immorality, but also the provisions on deficiencies in consent and the control of standard terms, which have burgeoned into a body of judge-made standards of conscionability for such terms. After this, “relaxations to contractual privacy” are dealt with extensively, such as third-party beneficiary contracts and their subsidiary, contracts with protective effect towards third parties. The rules on performance of contracts, its time and place and performance through third parties follow, before the focus moves to the central topic of “irregularities of performance”, in other words breach of
contract due to impossibility, delay or malperformance. Chapter 7, on the
“Principle of Good Faith”, deals in particular with the doctrine of Wegfall
der der Geschäftsgrundlage, which governs the remedies in case of change of
circumstances and hardship for the obligor, while Chapter 8, “Remedies”,
introduces the reader to the general availability of specific performance and
the exceptions to this rule, including the main secondary remedy of
compensatory damages, but also retention rights (the so-called plea of
unperformed contract), set-off and prescription periods. Contributory fault,
which can reduce the amount of damages recoverable, concludes the issues
dealt with in this chapter. The book ends with an extensive and thorough
part on restitution, where the English reader may well find herself both
alienated and attracted at the same time by the rather rigid structure of the
relevant rules on the one hand and the abundance of academic opinions and
wildly diverging court decisions on the other hand. Each chapter is bolstered
up with an annex of well-selected cases which add not only flavour but
substance to the understanding of the rules and theories reported, and with
a short but comprehensive bibliography. A general table of German, English
and American cases, and a table of abbreviations, complete the framework,
while the Appendices, with their extracts from the German Civil Code and
the Standard Contract Terms Act as well as a glossary of German legal
terms, will be helpful for those English readers who may lack access to the
relevant materials. In addition, a rich index facilitates research and access to
matters of special interest.

In his foreword, the former president of the German Bundesgerichtshof,
Professor Walter Odersky, rightly praises the book as “both gripping and
stimulating”, and this was exactly the experience of this reviewer when
reading through, and working with, the treatise under review. The
introduction, for example, not only leads the reader to an intimate
understanding of the development of the German Civil Code and the
technique of codification used by its drafters, but also emphasises the
importance of the Civil Code as a uniform law which brought together
the forty-odd different legal systems on the territory of the newly-founded
German Empire, thereby removing costly impediments to commerce and
legal interaction. One can hardly ignore the parallels to the situation in the
Europe of today, shortly before the next turn of not only a century but a
veritable millennium.

These inferences and conclusions follow not only from the overall picture,
but even more so from the details analysed so aptly and convincingly by the
authors. Again and again, codified norms and judge-made rules, when
stripped of their semantic and doctrinal paraphernalia, reveal the similarity
of issues in both the English and German legal systems, and very often the
convergence of solutions as well. Where the two systems come to different
conclusions, the authors carefully show the historical and other contingencies
which shaped them. A good example is the German principle of abstraction,
which was supposed to immunise transfer of title from its contractual basis
and the validity of the underlying contract, thereby facilitating the stability
of dealings in goods and assets.

Apart from offering a highly reliable account of the state of the German
law of contract and restitution, the authors also give a fascinating review of
the life of the law, in other words its development praeter and frequently
contra the written norms. Whether, in certain situations, contracts are
enforced despite violation of the relevant form requirements (cf. pp. 80 ff.),
or whether remedies not envisaged by the Code were developed (cf. the case
of damages for malperformance, *positive Vertragsverletzung*, covered at pp. 418 ff., whether other constructive devices were invented or derived from fairly spurious sources, as in the case of quasi-contractual duties of care to protect third parties (a device to overcome deficiencies in tort law, *cf*. pp. 276 ff., particularly p. 280 on the comparison with English tort cases), of pre-contractual duties of care (*cf*. pp. 64 ff.), or of the recovery of third-party losses (*Schadensverlagerung*, *cf*. p. 282 and Treitel, (1998) 114 L.Q.R. 527 on the English equivalents) — German law has left far behind the written rules of the Civil Code and has grown not unlike other legal systems based on outdated codifications. Of particular impact in this context were the rules supposedly derived from highly general principles, such as good faith and fair dealing, which — while meant by the drafters of the Code to cover only those *minima* about which *non curat praetor* — have now developed into an Equity-like body of law (*cf*. pp. 510 ff.). The relevant parts of the book make most impressive reading, and this perhaps more so since German rules for the adjustment of contracts in case of hardship have found their way into international instruments such as the Unidroit Principles of International Commercial Contracts.

Readers of the part on “Restitution” (pp. 710–816) may take particular issue with this reviewer’s conviction that there is more convergence of solutions in English and German law than the letter of the rules reveals: Not only are there differences in both the conceptual framework and the details, but the so-called “fragmentation” (*cf*. p. 769) of the German law of restitution by academics who point out the basic functional differences between various types of unjust enrichment claims also seems to run counter to the modern scholarly endeavours in England to develop a uniform principle of unjust enrichment. But, taking up the claim by the authors that a German lawyer will probably find the English system of grounds of unjust enrichment complicated and confusing (p. 770), this reviewer would like to object respectfully by pointing out that it is not so much the result of the cases that might seem confusing (very often, they would have been decided the same way under German law, though not necessarily by reference to the concept of restitution), but, just as in Germany, the scholarly edifices founded on them. If a lesson could be learned from the “maze” of certain areas in the German law of restitution — in particular the treatment of cases where three or more parties are involved (*cf*. pp. 731 ff.) — it should be that concepts and theories which seem to provide for every issue are treacherous, and that the most we can hope for in analysing rules and cases is the discovery and clarification of the values that have guided courts and legislators in their decisions and rule-making, and the often accidental historical factors that influenced and shaped them.

The community of comparatists, and not only they but also practitioners looking for a first-hand and reliable account of German law, owe respect and gratitude to the authors for their great twin treatises on the German Law of Obligations. These volumes belong on the bookshelves of all who, in their legal practice or research, need to look beyond the territory of the Common Law. And in this age of merging economies, this may well be almost everyone in the legal profession.

P. SCHLECHTRIEM

Collections of essays by different authors can sometimes disappoint. The quality of some contributions may not be as high as others. The disparate nature of the material included in such a collection, and the inclusion of differing styles of writing, can detract from its coherence when taken as a whole. The editors of this collection are, therefore, to be congratulated on avoiding the former, and very substantially also the latter, vice. As one would expect of the contributors, each essay is of high quality and fluently written. Furthermore, the editors have so arranged the material that despite the fact that each essay deals discretely with a specific topic, and despite the fact that the collection does not claim to be comprehensive, the reader can at least feel that there is an underlying logical progression in the text. Thus, after an introductory contribution by the editors, the book begins by addressing issues having a largely domestic focus; the evolution of regulatory approaches to pollution control (David Robinson); the interplay between public law and environmental decision making (Tim Jewell); and the question of tort law and environmental risk (Jenny Steel). It then considers two European matters; experience at European level of a right of access to environmental information (Cliona Kimber); and the dynamics, process and instruments of EU environmental policy-making (Han Somsen). It concludes with contributions on international environmental law; the challenges of globalisation (Tony Evans); and international environmental law in evolution (Christine Chinkin).

The editors, furthermore, attempted to enhance the overall coherence of the book by using their own introductory essay to highlight, and to put into context, what they see as the unifying themes which emerge from what follows. This is a valiant attempt and one which does help give shape to the book as a whole. In fact, however, apart from falling within the broad compass of the book’s title, the essays are clearly not written to investigate common themes. Such points of connection as do arise between individual essays seem to arise incidentally and do not pervade the work as a whole. They are, therefore, flavours rather than themes but perhaps no worse for that. They touch on integration within environmental law, diffusion of environmental concerns across ever-wider areas of policy, perceived deficiencies in the traditional “command-and-control” approach to pollution control, questions of effectiveness, and new approaches to environmental protection, to name but a few. Furthermore, one of the engaging—and unifying—features of the collection is its speculative tone. The authors, within their discrete topics, have sought to contribute to the discourse about policy and instruments for environmental protection. They speculate, on an informed and analytical basis, about the future role and impact of law and of other mechanisms, in contributing to that goal. For its many virtues, therefore, this book is a welcome addition to the shelf. That is not to say, of course, that one will necessarily be persuaded by every argument advanced within every essay.

One of the “flavours” of the book derives from an acceptance that, because of the perceived limitations or deficiencies of traditional command-and-control approaches to environmental protection (approaches involving the prohibition by the criminal law of polluting activity, often coupled with licensing systems to authorise otherwise prohibited operations), either novel
approaches to regulation will, or should, evolve; or that legal regulation will be de-emphasised within environmental policy in parallel with the development of new non-legal techniques. The novel regulatory approaches and the non-legal instruments of policy then form the main focus of discussion. This is, of course, fair enough so far as it goes. It reflects, amongst other things, the shift in policy stated in 1993 by the European Community’s Fifth Action Programme on the Environment; the policy discourse in the United States; and the writing of influential scholars in the field of socio-legal studies and law and economics. As a matter of emphasis, however, coverage of command-and-control in this collection is a little unbalanced. This is, perhaps, a minor criticism but one which is worth pursuing since it reflects assumptions that are too often made when environmental policy is discussed. Thus, although several of the essayists accept that command-and-control approaches have achieved successes and will continue to play an important role, such references tend to be in the nature of brief digressions, the central focus being on their perceived deficiencies, the need for other approaches and the role of law in the context of such approaches. It is, of course, natural for writers to focus on novel developments. It is important that they should do so. The fact remains, however, that for all its undoubted deficiencies and limitations, command-and-control, both domestically and in the European context, remains as one of the foundations of environmental protection. After all, the centre-piece of pollution control in the United Kingdom is a classic command-and-control system, namely the integrated pollution control regime introduced by the Environmental Protection Act 1990; and the European Community statute-book continues to feature many important environmental directives of a command-and-control nature. Furthermore, for all their limitations, command-and-control regimes have had undoubted successes some of which, such as the prohibition of DDT in the United States in the 1970s, are mentioned briefly by contributors to this book. Accordingly, although contributors to this collection are right to acknowledge the perceived weaknesses of command-and-control (the “supposed regulatory failures” as the editors themselves describe them) the balance of the book as a whole might have been better if it had included a specific contribution assessing more comprehensively the successes of command-and-control as well as its failures, and investigating the extent and importance of its continuing role.

Furthermore, just as the successes and virtues of command-and-control are not fully explored, the deficiencies and weaknesses of novel approaches, especially non-legal approaches, are not fully considered. If command-and-control has had success in limited cases (e.g. in tackling gross pollution) where are the comparable successes for the new approaches? At a theoretical level, and in some cases in reality, many of them (tradeable permits to pollute, green taxation, environmental audit, environmental labelling, civil liability for contaminated land, harnessing “people power” by providing rights of access to environmental information, environmental impact assessment) have been around for some time, so what is their record of success? For those not yet implemented (at least in the United Kingdom or Europe) what are the characteristics which impede their implementation? An essay systematically considering these issues would have been a welcome addition. It would have been particularly useful because hints scattered throughout the collection do suggest that the new approaches may indeed have significant deficiencies of their own. Thus, for example, Kimber’s conclusions express concern as to the effectiveness and value of the European
right to access to environmental information in achieving its proclaimed goals. Similarly, new approaches toward “responsive” regulation, “informal regulation” and self-regulation raise important questions of legitimacy, democracy and accountability which remain to be resolved, as acknowledged in the contributions of Jewell and of Robinson. Thus, if the debate is to be shaped by “the new approach” agenda, the latter itself needs to be subjected to close and comprehensive critical scrutiny. This, in turn, requires consideration of the values (including the non-environmental values) and the ideology which inform policy.

In fact, as the editors explain, the current approach to regulation in environmental protection reflects the philosophic or ideological factors which have recently shaped public approaches to regulation generally. The prevailing climate is shaped by a view, whether described as Reaganomics, Thatcherism or neo-liberalism, that regulation is bad (or at least expensive and inefficient) and that market forces are good (or at least unavoidable and salutary). Unfortunately some of the essays in this collection do seem implicitly to assume that the ideological context of environmental protection is static and that the current general approach to regulation will continue to prevail. This should not, however, be assumed. Environmental policy was not always cast in the shadow of neo-liberalism and the ideology underlying regulation, including environmental regulation, will no doubt change again in the future. This in itself is a good thing, if only because neo-liberal approaches tend to minimise the role of law and lawyers whilst elevating the influence of economists and sociologists. This is not to detract from the valuable contributions which can be made by the latter disciplines. It is, however, to affirm that the concepts and values in which lawyers are trained, and the lawyer’s experience of the real-life situations in which policy operates, have an important contribution to make if policy is to be successfully framed and implemented. Indeed, the very questions of legitimacy and accountability which arise from some of the new approaches will have to be resolved in the context of law and call as much for the input of lawyers as of the other participants in the policy discourse. That is, of course, itself another reason to welcome the contribution made by this book, notwithstanding the criticism of emphasis made above. One might also remark that the legal context within which even non-legal approaches will have to operate might indeed involve systems of command-and-control. As Jewell, for example, points out without such a system even a “tradeable permit” approach would not work. No one would buy a permit to pollute unless unauthorised pollution were efficiently prohibited. It appears, therefore, that rumours of the death of command-and-control may have been greatly exaggerated; or perhaps: “Command-and-control is dead! Long live command-and-control!”

PETER KUNZLIK

Commercial Law in the Next Millennium. The Forty-ninth Hamlyn Lectures.

PROFESSOR Roy Goode’s unrivalled experience of English commercial law—as practitioner, teacher and author—has given him a unique insight into the subject and a mastery of its extensive jurisprudence and practical working.
It was no small challenge, therefore, for him to undertake to survey the field of commercial law as a whole and look towards its future development in the space of four Hamlyn lectures which, in print, make up just over a hundred pages. The boundaries of our uncodified commercial law are so indeterminate and its sources (“drawing on the law of contract, tort, property, equity and trusts, and on public law; indeed, on all the streams of law” (p. xv)) are so varied that simply to attempt an overview of the law alone would be a daunting task in itself; but in these lectures Professor Goode looks as well at history, economics and accountancy; at international, comparative and European Community law; at the self-regulatory codes of the City; and, of course, at commercial practice. He manages both to convey his admiration for the proven capacity of the business world and the commercial courts to adapt to change and find workable solutions for new problems, and also at the same time to stress that the challenges currently facing the law are unprecedented and not to be underestimated: these include technological change, the increasing internationalisation of business, “dematerialisation” (electronic methods superseding the use of documents) and “abstraction” (securitisation and similar techniques which remove ownership away from property in tangible form), and so on—not forgetting also the impact of the European Monetary Union.

It might be thought that a survey so comprehensive in its conception would leave little scope for comment on points of detail, but this is not so. On virtually every page Professor Goode gives us his latest view on some controversial point or another, sometimes sticking to his guns in the face of judicial opposition (Re Charge Card Services Ltd. [1987] Ch. 150 (p. 69)), at others acknowledging a change of view or seeing merit in an opposing argument. He takes the opportunity to restate some of his more strongly held opinions: that reform along the lines of Art. 9 of the US Commercial Code is overdue (pp. 63–66), that the floating charge has outlived its usefulness (p. 68), and that self-regulation cannot be expected to work in the face of the overwhelming influence of competition and market forces (p. 48).

He disapproves of some recent court rulings on grounds of principle (Charge Card: Att.-Gen. for Hong Kong v. Reid [1994] 1 A.C. 324 (pp. 22, 80)), and condemns others as being out of touch with the needs or assumptions of the world of commerce (Boardman v. Phipps [1967] 2 A.C. 96 (p. 20); the British Eagle case [1975] 1 W.L.R. 758 (p. 83) and, perhaps particularly, Hazell v. Hammersmith L.B.C. [1992] 2 A.C. 1 (pp. 53–57)). He sees little place in the commercial context for judicial intervention based on concepts of unconscionability or good faith (pp. 18–19). He deplores the failure of English contract law to deal adequately with a number of issues of importance in the mercantile world: agreements to negotiate; suspension of performance; change of circumstances falling short of total frustration (pp. 33–38). But his strongest criticisms are directed at the legislators who have consistently shied away from tackling a reform which is overdue, or who have chosen to have the UK remain aloof rather than join the world’s other trading nations as party to some of the many important international conventions (to which, paradoxically, our own lawyers have often made important contributions). Not unnaturally for a commercial lawyer, he believes in the virtues of substance as opposed to form, warns of the danger of allowing paternalism to stultify risk, and encourages us to accept business failure as a fact of entrepreneurial life. On the other hand, he does not defend market freedom without qualification: “The freedom of the market is not readily reconcilable with the integrity of the market. The effecting of
such a reconciliation is, perhaps, the greatest challenge confronting modern commercial law” (p. 32).

For the reader, however, the main message that comes across is one of enthusiasm, confidence and optimism. Enthusiasm for the subject in which he has played so important a role for many years, confidence in the resourcefulness of those in business to adopt new techniques and cope with new challenges, and optimism that their professional advisers and our judges (despite the indifference of the legislators) will continue to see to it that the law of this country serves their needs.

In sum, here we have the accumulated wisdom of the greater part of a professional lifetime condensed into an evening’s reading; but the impact of this profoundly thoughtful book persists for a very long time after it has been put down.

L.S. Sealy


This compact volume from Hart Publishing inadvertently carries within it a splendid advertisement for the author. In any balloon debate where accountants were involved, wrote a gleeful scribbler in the Financial Times a couple of years ago, he would be regarded unanimously as the prime candidate for speedy ejection. We lawyers, of course, know better—or, at least, we are more tactful. The essays by Andrew Burrows reproduced here, all concerned with various aspects of contract, tort and unjust enrichment, are a pleasure to peruse, and a distinct cut above the usual lacklustre collection of past triumphs now beyond their sell-by date. Without exception they are both topical and relevant (the more elderly ones have been brought up to date where necessary); together they form a readable, scholarly and eclectic mixture of exposition and polemic, of speculation and analysis.

Some of what appears will be familiar to most readers; for example, Professor Burrows’s well-known attack on the idea of free acceptance as a ground of restitution, which resurfaces here as Chapter 4. Others, while again not new, are nevertheless very welcome because they come from otherwise recondite sources to which not all have access, such as the University of Queensland Law Journal (Chapter 3, a very decent gentle introduction to the Anglo-Australian law of restitution as it was in 1995) or the Edinburgh Law Review (Chapter 7, dealing with the Law Commission’s thoughts on contractual remedies). Yet other pieces are entirely new: witness Chapter 1 on the contract-tort division, and Chapter 6 “in defence of tort” (i.e., in answer to Professor Atiyah’s elegant juridical reactionary chic). Elsewhere will be found a defence of the idea of contract as an analytically separate source of legal obligation (Chapter 1); a fascinating projection of possible future developments in the law of restitution (Chapter 5), and a thoughtful and informative summary of Law Commission thinking on a number of disparate topics such as limitation (for the benefit of the rare reader who does not know this, Professor Burrows is of course a Law Commissioner). But all of this is clear, comprehensible and—at least to those in the know—highly enjoyable. The whole thing, in other words, is an extremely useful collection of studies for anyone writing on the subject to keep beside his keyboard.
Reviewers have an inveterate practice of homing in on particular points that interest them: and this one makes no apology for doing precisely that. If there is one thing that marks out this book, it is remarkably pro-plaintiff. Damages for mental distress should be easier to claim in contract; factitious bars on recovery for psychiatric illness should be lifted; and so on. This background continuo becomes particularly obvious in Chapter 6, involving (as already said) a powerful attempt to relieve tort from Professor Atiyah’s recent root-and-branch assault on it in *The Damages Lottery*. Professor Burrows’s reasoning in favour of keeping—and extending—the present liabilities runs essentially thus. First, whereas (he says) we are rightly expected to take the risk of being injured by pure accident, things are not the same where somebody culpably injures us: here, there is a “basic morality or justice” that requires the injurer to compensate (or at least procure that compensation be paid). Second, the present system of fault liability not only satisfies this basic morality but also strengthens the idea of individual responsibility. And further, abolishing tort in one area could merely throw up worse anomalies elsewhere than those we already have. In particular, it may be all very well to abolish personal injury claims as outmoded, inefficient, etc.: but if we were then left with a system that compensated for lesion to things in circumstances where bodily injuries went unrequited, this might itself seem to involve us in some curious priorities. Now, this is stirring stuff: but I must still confess to a feeling that a good deal more is required to rehabilitate negligence. One point is easily made. The tort of negligence, it will be remembered, on principle requires even the momentarily inadvertent to compensate—or to take steps to see compensated—every penny of the victim’s (foreseeable) loss. Does “basic morality or justice” really require such disproportionate reparation, except in a personal injury lawyer’s mind? I doubt it. As for individual responsibility, it is worth remembering that in personal injury cases all victims are human, but most defendants are corporate. Except in the realm of pure theory, does the potential liability of the ratepayers’ insurers (or, conceivably, the ratepayers themselves) for the negligence of a Birmingham bus-driver really conduce to a feeling of individual responsibility in anyone? Some might well feel unconvinced. And when it comes to potential anomalies between persons and property, there is a straightforward answer: although Professor Atiyah is concerned largely with personal injury, his arguments actually apply *a fortiori* to liability for property damage. To be consistent, it must go. Nor would there be much reason to mourn it: we can and do insure our cars, houses and commercial premises, including when we think *W* the income we derive from them (witness consequential loss policies) much more easily than we cover our own earning power. Indeed, the same probably goes for most claims for economic loss, at least outside the range of professional negligence claims by clients against those they employ. No one, after all, has to rely on information which they did not themselves ask for or commission: if they choose to do so, Atiyah would surely say that they did this at their own risk. The attack on negligence as a ground for compensation, in other words, is just beginning; indeed, this may well be one of the substantial arguments we face in the future.

But enough of criticism, before it turns into carping. There can be no doubt whatever that this is a splendid little book. I enjoyed it, and anyone but the most curmudgeonly can be expected to do likewise.

Andrew Tettenborn

In the last few years there has been a steady stream of books in English about the legal systems of continental European countries. So far Italy has been comparatively neglected. This book is a first step towards remedying that neglect and is to be warmly welcomed.

The book is intended for English law students who are going to spend a year in an Italian law faculty. It is not designed to teach them Italian law—they will be taught that when they get there. It is designed to give them the background in Roman law and European legal history which they would not otherwise have but which will help them to understand Italian law when they begin to study it. It is also designed to warn common lawyers of areas in which they will have problems because Italian lawyers do not think, or reason, in the same way as we do. It follows that anyone looking for substantive rules of Italian law will normally have to look further, but the book will make it easier for him to find them and easier to understand them when he has done so.

The author begins with a potted history of Roman law (but there are far too many errors on page 3) and of the civilian tradition in general, and there are frequent references back to it throughout the book, which places special emphasis on private law. He also manages to cover constitutional and administrative law, the legal professions, civil procedure, and criminal law and procedure, all in less than 300 pages. Inevitably the picture is painted with a very broad brush, but it gives a good impression of a tradition that is very different from our own.

There is much here to whet the appetite: an account of the Italian experience of proportional representation (pp. 57–60) which might encourage its advocates in this country to think harder; a brief reference to the Italian experience of “sleaze” (pp. 119–120) which is thought-provoking. But the author is at his best when he starts with a succinct account of an English legal institution and then goes on to explain how and why the Italian approach is different. Chapter 15 on the law of torts is an excellent example. The reader will not learn much substantive law: he will not find the Italian equivalent of Donoghue v. Stephenson (indeed he will not find any Italian cases at all: the relevant one here concerns mouldy biscuits instead of decomposed snails) or occupiers’ liability or any other specific rule, but he will appreciate the distinction between the long list of English torts and the basic principle of liability in Italian law.

The book has no maps or diagrams or tables. It would be useful, particularly in a book of this kind, if there were maps of administrative regions or appeal court districts, diagrams of court structure, and a table of dates. And there are some oddities: for example, the assertion that causa, which in modern law is a noun, in classical Latin was a preposition. “As a preposition, it was placed after the noun or phrase it governed to explain why something was being done” (p. 238). Nevertheless for anyone who is thinking of studying Italian law this would be a helpful book to read before he starts.

David Pugsley
This work is the second instalment of what should be a valuable series of contextual based works from Mansfield Press on the law of restitution. Such publications are important first, because they allow for more detail to be discussed on a particular topic than is possible in general texts on restitution and second, they continue to test the limits of the general theory of unjust enrichment with the result of either reinforcing the theory or refining it. The chapters in this book had their origin in papers delivered at the 1997 SPTL Restitution Seminar and it is not possible in this review to do much more than bring the contents of the book to the attention of readers.

In Chapter 1, Justice D.H. van Zyl discusses the restitutionary rights of a bank against a payee where the bank pays out on a forged or countermanded cheque. In addition to discussing the important English cases such as *Price v. Neal* ((1762) 3 Burr. 1354; 97 E.R. 871) and *Barclays Bank Ltd. v. W.J. Simms Son & Cooke (Southern) Ltd.* ([1980] QB 677), this chapter includes an analysis of the South African position. In Chapter 2, Charles Mitchell addresses the issue of whether an injured party should be allowed to accumulate recoveries from two or more others who are legally liable and, if not, whether they should share the burden or whether one of them should bear the whole burden. These questions arise in contribution proceedings and when a defendant argues that account should be taken of a collateral benefit received by the plaintiff. In the banking context this issue will arise, for example, where a customer has a right to have his or her account reinstated but is at the same time insured against the loss.

No book bearing the title of this work would be complete without some discussion of the undue influence and misrepresentation litigation that has consumed banks in recent years. The following three chapters address this issue. In Chapter 3, Janet O’Sullivan takes a detailed look at the *O’Brien* decision and the cases following it, with particular emphasis on the issues of notice, manifest disadvantage, what amounts to “reasonable steps” which a bank should take to avoid being fixed with notice, relief and the application of the *O’Brien* principles to cases of misrepresentation. This is followed up with a detailed commentary in Chapter 4 by Graham Virgo. In the third *O’Brien* instalment, Chapter 5, Kit Barker discusses the problem thrown up by the later decision in *Barclays Bank Plc v. Boulter* ([1997] 2 All E.R. 1002), namely, whether the claimant or the bank bears the onus to prove or disprove notice.

Chapters 6 (Gabriel Moss and Felicity Toube) and 7 (Nick Segal) are dedicated to dealing with the restitutionary aspects of the Court of Appeal’s decision in *Macmillan Inc. v. Bishopsgate Investment Trust Plc.* ([1996] 1 W.L.R. 387 (C.A.), [1995] 1 W.L.R. 978 (Millett J.)), namely, what conflict rules apply to restitutionary claims and to what extent does restitution have a role to play in the protection of subsisting property rights. In Chapter 8, Lionel Smith looks at when and whether it is necessary to trace through the payments system when the case involves a payment by electronic funds transfer. In Chapter 9, Michael Tugendhat investigates the modern law of liability for knowing assistance. This chapter explores the extent to which the equitable rules in this area can be assimilated with the common law avenues for making a party liable for assisting in a misdirection. In Chapter 10, Michael Bryan takes a scholarly look at the defence of ministerial receipt in
the context of the right of a payer to recover monies from a bank when those monies have been wrongly paid to the bank to be credited to the account of a third party.

Finally, in Chapter 11, the whole book is admirably summed up and concluded by Peter Birks. In fact the reader would be well advised to read each chapter and then turn to Chapter 11 to read Professor Birks's remarks. Professor Birks's chapter brings home the importance of developments in restitution for bankers both in respect of their potential liability and potential claims. The position of banks depends to a large extent on the answers given to questions raised in this text. It is hoped that this book finds its way into the legal departments of banks and of their external advisers so that some substantive feedback and discussion can take place between restitution scholars and banking specialists. This is no small task, for although those chipping away at the coal face of restitution can see the potential and problems for bankers in the day-to-day advising of banks, the law of restitution forms only a part of the litigation practice with most energies being put into general banking and insolvency, consumer credit and corporate compliance, loan and security documentation, and employment, privacy and property law. This list could no doubt spark a long discussion on the extent to which the expression "banking law" holds any real meaning today. Be that as it may, this book is another important addition to restitution literature and will no doubt be appreciated by those interested in the field.

G.J. Tolhurst


The year 1997 marked the centenary of the ruling of the House of Lords in company law's most celebrated case, Salomon v. A. Salomon & Co. Ltd. [1897] A.C. 22; and events of various kinds were held in a number of jurisdictions to commemorate the occasion. This book contains a collection of the papers presented at a symposium organised by the Research Centre for Business Law at the University of Auckland, which attracted contributors from Australia, the United Kingdom and the United States as well as from academics and practitioners in New Zealand.

Salomon is generally regarded as the leading decision which established, or at least confirmed, the principle of the separate corporate personality of the incorporated company. But this was not the real point at issue—indeed, no one concerned at any stage in the case would ever have questioned that principle or sought to cast doubt upon it. The true significance of Salomon is that the principle was upheld (or, to put it another way, the veil of incorporation was not lifted), and the privilege of limited liability accorded, when on the facts of the case ownership and control of the corporate entity were entirely in the hands of Salomon himself: a triumph of form over substance. This paved the way for the legislative recognition of the private company (and, ultimately, the single-member company) and the proliferation of group companies (including wholly-owned subsidiaries) which are a significant feature of business organisation today. The papers contributed to the symposium reflect upon these aspects of the Salomon legacy.

David Goddard, a Wellington practitioner, writes on "Limited Recourse
and its Limits”, in a stimulating piece which could well serve students as an
introduction to the world’s law-and-economics literature in the field of
company law. He is uncompromisingly partisan in his views: Salomon was
“clearly right”; upholding the principle of limited liability even in “hard”
cases is efficient in economic terms; the recent erosion of this doctrine by
legislative measures imposing personal liability on directors for insolvent
trading and (in New Zealand) giving the courts discretionary powers to
ignore the separate identities of companies within corporate groups “goes far
beyond what is necessary or desirable” (p. 64).

Robert Austin’s contribution focuses on groups. He, too, has little sympathy
for creditors—particularly commercial creditors—who burn their fingers
when the entity with which they have chosen to contract turns out to be less
substantial than they had supposed. There are, he points out, many reasons
(including good business reasons) why a group structure should take the
form that it does, and outside commentators “can all too readily assume,
unfairly, that it has been set up to defeat creditors or regulators, or for some
equally unmeritorious reason” (p. 74). He, too, shares the view that to
interfere with the liability rules for corporate groups “is a delicate enterprise”:
limited liability is an important encouragement for entrepreneurial activity in
the corporate group, where managers may be reluctant to expose shareholders’
unds in the parent entity to risky new business ventures (p. 89). He favours
giving the courts some discretionary powers along the lines of the New
Zealand provisions, but with specific legislative protection where responsible
financial segregation of the subsidiary can be demonstrated.

Dan Prentice provides a contribution, largely from an English perspective,
examining the ways in which the pool of assets available to unsecured
creditors in a liquidation may be enlarged by having recourse to the personal
claims against other creditors (e.g. by the avoidance of preferences), the
company’s shareholders and directors, and associated companies. The
antipodean audience were no doubt interested to hear about the experience
of the UK insolvency reforms of 1985–86 since their enactment, with the
benefit of Professor Prentice’s critical commentary. His conclusion (p. 125) is
that section 214 of the Insolvency Act 1986 (imposing personal liability on
directors for wrongful trading) “is the right start”, but that its application to
corporate groups is unsatisfactory—a view rather more hawkish than that of
the two earlier speakers.

The contribution of Joanna Gray, another visiting speaker from England,
deals with the regulatory aspects of business, and in particular company law,
in the late twentieth century. Mr. Salomon’s company “had no need of a
technical compliance director to keep the company on the right side of
health and safety, environmental, product standard, packeting and marketing
legislation and regulation, and thus avoid the swingeing penal and quasi-
penal sanctions that often attach to contraventions of such regulatory
strictures” (p. 149). “Officer liability” and “accessory liability” provisions in
the legislation may put company directors and controllers at risk of being
exposed to both civil and criminal liability in a wide-ranging number of
situations; and, conversely, a company is nowadays often made liable under
a criminal or regulatory provision for the acts of its officers or employees. At
common law also, similar issues arise when it is sought to ascribe the
attributes of an individual, such as notice, knowledge or guilt, to a company
with which he is connected. Ms Gray commends the judges for
“demonstrating a greater sensitivity and surer feel for the way statutory
regulatory controls actually impact upon the corporate organisation”
Jennifer Hill's paper looks at the changes in the nature and role of the typical shareholder in the century since *Salomon* was decided. Mr. Salomon was an individual in hands-on control of the corporate business which he had personally built up; in contrast, today's shareholder may be one of a dispersed and marginalised group of investors, an institution such as a pension fund, or the parent of a wholly-owned subsidiary. She explores the legal implications of the shifts in the perceptions of the shareholder and his role in the division of powers between board and general meeting and in patterns of corporate governance which have accompanied these changes during the period. More significantly, the fact that in Australia the leading institutional shareholders are superannuation funds "beyond which . . . lies the majority of a country's working population" leads to the conclusion that many of the decisions once entrusted to a company's shareholders have come eventually to be appropriated by government itself, through the control which is exercised in this sphere.

Ian Ramsay's piece focuses on the balance that has to be struck in the company context between laws which are essentially enabling and those which are regulatory or mandatory, the law as interpreted in *Salomon* being a prime example of the former. After an introductory exploration of the key issues in this debate, he investigates a number of examples drawn from Australian practice and evaluates the costs and benefits of particular mandatory rules.

In a final essay, Louis Lowenstein of Columbia University draws attention to the important role played by good financial accounting and the extensive disclosure obligations required by Anglo-American legal regimes, as a "powerful tool for enhancing corporate survival and efficiency" (p. 279).

The papers collected in this volume are all weighty pieces, fully researched, informative and thought-provoking. In his wildest dreams, Mr. Salomon could never have contemplated such immortality.

L.S. Sealy
certainly produces this result—this has been evidenced at Cambridge since the introduction four years ago of studio sessions in which lecturers and undergraduates have discussed some of the themes treated in this volume on the basis of previously distributed source materials. However, a note of caution needs to be sounded. Land Law is a “core” subject and so discussion of themes of this kind must not be allowed to replace, or even to predominate over, consideration of and training in the basic principles of land law. Such a lack of understanding of these principles can seriously prejudice undergraduates in their subsequent studies of other property law subjects such as trusts, conveyancing and landlord and tenant, where such discursive themes are generally not available. It can also prejudice career opportunities, something which may be illustrated by the fact that a significant number of those who have recently been recruited by the professions have learnt their land law not in the course of any undergraduate law degree but on a C.P.E. course. The editors’ observation that this volume is intended to be used alongside a traditional textbook therefore requires strong reiteration.

The volume commences with a lengthy introduction in which its editors review the contents of its 21 chapters in far more detail than is possible in a review of this length, whose comments have necessarily had to be somewhat selective. These chapters have been arranged around a series of five themes, which necessarily overlap to a very considerable extent. While many of the chapters contain valuable novel insights into their subject matter, an understandable consequence of the volume’s stated objectives is that much of its contents consist of reviews of existing material; this has the considerable merit of directing the interested reader on to sources of further study. Equally inevitably, many of the chapters cite authorities from a number of different jurisdictions, often without specific distinction, While this is highly desirable in a work of this kind, it would be helpful, particularly in books aimed at undergraduates, if it could become general practice to include, as part of the citation of each authority, the court and the jurisdiction in question, details which are not always readily identifiable, even by experts, merely from the reference to the relevant law report. It would also be helpful for undergraduate readers (and perhaps others) if the more obscure words and phrases in languages other than English could be translated.

The first theme, *The Idea of Property in Land*, is also the title of the first of the two chapters allocated to it. Kevin Gray and Susan Francis Gray make a stimulating review of the oscillating ways in which the law considers property as a fact, as a right, and as a responsibility. Because it challenges the perception of land law as a sterile and technical subject, this topic should certainly be incorporated into every Land Law course. Some of the same material is reviewed from the specific viewpoint of the 1925 property legislation in Susan Bright’s interesting chapter, entitled *Of Estates and Interests: A Tale of Ownership and Property Rights*, which despite the fact that it is actually allocated to the fifth theme, can fruitfully be read alongside Professor and Mrs. Gray’s chapter. The other Chapter actually allocated to the first theme, *Critical Land Law* by Gregory Alexander, summarises the main contributions of Critical Legal Studies scholarship in the United States of America in the field of land law, providing an overview of the various ways in which what the author describes as “the myth of absolute property rights” in American culture might be modified in the light of international developments.

The second theme, *Land Law in History*, has been allocated chapters by Joshua Getzler on *Roman Ideas of Landownership*, by Stuart Anderson on
The 1925 Property Legislation: Setting Contexts, by Alain Pottage on Evidencing Ownership, and by Charles Harpum on The Law Commission and the Reform of Land Law. The first three of these chapters consist of detailed reviews of their subject matter which are of considerable historical interest. However, it is somewhat questionable whether the inclusion of chapters dealing with the historical orientation of modern land law meets the stated objective of giving Land Law contemporary interest in a wider context. Mr. Harpum’s chapter is, on the other hand, of considerable relevance since it not only gives fascinating insights into the way in which the Law Commission actually works but also illustrates the extent to which the enactment of the reforms shown by its consultation processes to be generally regarded as desirable can be frustrated by the quirks of Parliamentary procedure.

The third theme, Land Law and Citizenship, has been allocated six chapters. The first three, by Lisa Whitehouse on The Home-Owner: Citizen or Consumer?, by Anne Bottomley on Women and Trust(s): Portraying the Family in the Gallery of Law and by Kate Green on Citizens and Squatters: Under the Surfaces of Land Law revisit familiar territory from unfamiliar perspectives and are certainly worthy of study alongside the existing published works. The last three, by David Cowan and Julian Fionda on Homelessness, by Shaunnagh Dorsett on Land Law and Dispossession: Indigenous Rights to Land in Australia, and by Michael Robertson on Land and Post-Apartheid Reconstruction in South Africa deal with what are essentially issues of social policy which, although an integral part of land ownership, remain at the margins of English Land Law.

The same is true, although to a considerably lesser extent, of the subject matter of the chapters allocated to the Fourth Theme, Policy Issues in Land Law. These are by John Dewar on Land, Law and the Family Home, by Christopher Bright and Susan Bright on Europe, the Nation State and Land, by David Clarke on Occupying Cheek by Jowl. Property Issues Arising from Communal Living, by Michael Cardwell on Land and Agricultural Production and by Denzil Millichip on Real Property and its Regulation: The Community-Rights Rationale for Town Planning. As is only to be expected from the identity of their authors, these chapters are of uniform and unquestionable quality. However, in the light of the editors’ expressed intention that their volume should contain a chapter relevant to most topics covered in a conventional Land Law syllabus, the role of these particular chapters is not obvious.

The final four chapters have been allocated to the fifth theme, Doctrinal Issues in Land Law. In addition to the chapter by Susan Bright to which reference has already been made, two chapters have been included on formalities. In Informally Created Interests in Land, Graham Battersby reviews the way in which the law legitimates the originally unlawful and permits informal arrangements to create proprietary interests in land. In Taking Formalities Seriously, Patricia Critchley considers the principles which could be used to evaluate decision-making about formality. The contrasting approaches of these two chapters constitute exactly the type of further reading which enables familiar problems to be illuminated. Finally, in Before We Begin: Five Keys to Land Law, Peter Birks suggests that Land Law has five keys, all of which “have to be turned together”. These keys, all of which are conditioned by a pervasive theme “Facilitation”, which “might be said to be the string on which the five keys hang”, are denominated by the one-word tags “Time, Space, Reality, Duality and Formality”. It is somewhat surprising to find Professor Birks analysing the nature of Land Law within a coherent
all-embracing formula since he has previously expressed doubts as to whether this area of the law is actually susceptible of such doctrinal analysis. Any analysis by him, no matter how unexpected, obviously deserves serious consideration. Nevertheless, it is not immediately obvious that undergraduates will actually benefit from having to master yet another classification of Land Law in addition to the statutory and common law classifications which they already find more than sufficiently difficult.

The editors of this volume embarked on a highly ambitious project and have in some ways over-achieved. Both they and the contributing authors are to be congratulated for their very considerable efforts. However, their volume may prove to be of greater utility to those readers who have already mastered the intricacies of Land Law than to those who have yet to do so.

A.J. Oakley


The aim of this book is to map out the legitimate boundaries for trade mark protection, in the context of present UK and European trade mark legislation. It is founded on the interesting proposition that trade marks differ from other intellectual property. While copyright and patents are creatures of the law, trade marks were a creation of the marketplace which only later came to acquire legal protection. The question is how extensive should this protection be?

To answer this question, Pickering first examines the nature and extent of trade mark use in the marketplace. He concludes that registered trade marks have strayed far from their original function as indicators of origin and that they now, more often, differentiate the products to which they are applied from those of competing products. In the process, they have become assets in their own right, integral to the process of branding. They embody and convey a wide variety of “congenial messages” to the consumer, which, by extension, may be applied to products beyond those for which their reputations were acquired. Pickering argues that it is legitimate for the law to recognise this commercial significance of trade marks, and offer it protection.

But do trade marks also perform an economically beneficial function which justifies legal protection? He concludes that they do. Pickering founds his analysis on that of the Chicago school of economics. He assumes that social welfare is best promoted by a free and competitive market. Trade mark protection plays an integral role in ensuring optimal resource allocation by providing consumers with a reliable and cost efficient way of learning about products, encouraging producers to market goods of a consistent quality, and providing them with an economic incentive to invest in their marks. While successful branding also promotes product differentiation, which may raise barriers to market entry, this drawback is outweighed by the costs of not providing trade mark protection.

If the economic benefits of trade mark protection appear irresistible, the final question is what are the interests that should guide English trade mark law and to what extent does the law succeed in protecting them? Pickering
argues that given market realities and the wider social interest in a free and competitive market, it is right that producers' interests should be at the centre of trade mark protection. In particular, trade mark law should recognise the producers' interest in protecting the wider integrity of their marks: that is their commercial significance which goes beyond their role as indicators of source. He describes free-riding by a competitor on a mark's reputation as a "species of unfair competition" which the present trade mark regime is rightfully designed to prevent. He therefore approves of recent European decisions such as Sabel BV v. Puma AG Rudolf Dassler Sport ([1998] R.P.C. 199), which have recognised the wider role of trade marks, for example, by interpreting the concept of confusion to extend beyond mere confusion as to source.

None the less, Pickering is also concerned to draw the boundaries of legitimate trade mark protection. He is unconvinced that it should extend to merchandising, since in this context marks may be used decoratively rather than as indicators of source or quality. He believes that a general law of unfair competition might be a more appropriate means of protecting trade dress in general; and that the recent European Directive should supersede the Trade Marks Act 1994 in regulating comparative advertising.

This is a lively and intelligent book. By drawing from a wide range of sources, including legal texts, case law, marketing studies, economic theory and histories of trade marks, most notably that of F.I. Schecter, he places trade marks and the relevant law within a broad perspective and offers a refreshingly nuanced account of the subject. None the less, its underlying assumption, that the legal protection offered to trade marks should simply reflect their actual role in the market place and (currently fashionable) economic theory, may be questioned.

The Trade Marks Act 1994 was framed at a moment when free-market economics dominated political thinking. Integral to its logic is that there is no conflict between the interests of consumers and producers, and that the interests of both constitute the public interest. A number of provisions in the Trade Marks Act 1938, intended to protect the public interest, were swept away by the new legislation. These included constraints on the licensing of marks, which were intended to ensure that they did not become deceptive. Instead, it was now assumed that the proprietors' own self interest in maintaining the purity of their marks would provide sufficient public protection. Similarly, before the 1994 Act, the British courts, in trade marks cases, consistently recognised a wider public interest which did not necessarily coincide with market realities. Hence, there was the decision in YORK Trade Mark ([1984] R.P.C. 231), that even if a mark was in practice functioning as a trade mark, it should not be given protection in law.

Furthermore, for much of the past century, the public interest was not necessarily understood by the courts (or indeed by successive governments) to be synonymous with the free market or the public as merely a collection of consumers. So the English courts have frequently been concerned to limit what they have described as "monopolies" over words and shapes, acquired by "wealthy traders" at the expense of the wider public, which importantly has included less powerful producers (for example, in British Sugar Plc. v. James Robertson & Sons Ltd. [1996] R.P.C. 281). It is certainly the case that the new Act and the decisions of the European court have undermined the English court's ability to balance these diverse interests. And here perhaps lies the crux of the problem both with Pickering's book and the new trade mark regime. Pickering is right to say that the 1994 Act has the producers'
interests at its centre (although which Trade Marks Act has not?). But he is on less firm ground when he chides the English judges for their apparent tardiness in recognising the present commercial significance of trade marks, which he sees as evidenced by their attempts to limit legal protection primarily to trade marks’ use as indicators of origin. The fact is that not all producers have the same interests. Armed with decisions like Sabel, wealthy brand holders seem most likely to benefit from greater infringement protection, perhaps at the expense of less powerful producers.

Traditionally, the English courts have sought to negotiate the potentially conflicting interests of those parties (including the wider public) which have a stake in trade mark protection. Conflicts remain. New ones will develop. For instance, with the increasing market power of retailers over producers, it is likely that even proprietors of major brands might themselves begin to doubt the wisdom of the free market assumptions of the new trade mark regime. If this is the case, then the more balanced approach of the English courts to trade mark law may well be vindicated.

**Jennifer Davis**


A gratifying sign of the revival of interest in penal theory in this country has been the appearance of several recent volumes of thoughtful essays on the subject. The present volume, *Philosophy of Criminal Law*, is the latest of these. The book’s topic is the “general part” of the criminal law—namely, that part which supplies general principles of liability and of exculpation, designed to apply to the various specific offences defined in the remaining “special part”. Continental (especially German) criminal law is characterised by an extensive general part, and several English-language criminal law scholars have been advocating the adoption of such an approach here.

Developing the general part has been thought to call for a legal and ethical analysis of the main bases of criminal liability: of conduct and culpability requirements, and of justification and excuse. Elaborating a general part in this fashion has, however, come under challenge. One set of questions come from “critical” penal theorists, who suggest that the criminal law is not and cannot become a system that is coherently structured by rational norms; that it is the site of political and social conflicts which such purported norms merely conceal. Another set of questions concerns whether “rationality” should be equated (as advocates of a general part traditionallly have assumed) with principles of a high degree of generality.

Douglas Husak’s essay in this collection addresses the supposed “act” requirement of the general part. Several contemporary criminal law theorists, most notably Michael Moore, contend that criminal liability must be for an act. Husak argues instead for a “control requirement”, according to which the defendant may be criminally answerable for states of affairs (whether acts, omissions, or statutes) over which he had a reasonable degree of control. This, he argues, comports better with the actual structure of criminal law—which sometimes punishes omissions (such as failure to pay a tax) or statuses (such as an illegal alien’s being “found present” in the country). A control requirement also is also better supportable on grounds of fairness.
Since punishment connotes censure, it may justly be imposed only for conduct for which the person is at fault; and fault presupposes a reasonable opportunity for avoidance of the conduct. A person thus might reasonably be held to blame for an omission or a status that was in his control; but even acts should not give rise to criminal liability if the person could not reasonably have avoided committing them.

Husak’s essay shows the continuing usefulness of examining the structure of the criminal law and of applying to it the methods of analytic moral philosophy. And his approach is unapologetically general: he is urging that criminal liability ordinarily should be eschewed where control is absent. Part of the power of this analysis, however, is its modesty: Husak is not necessarily urging an elaborate general structure for criminal offences: how his control requirement may be met might vary with the type of criminal liability involved.

John Gardner, in his essay, contends that the criminal law can be rational without relying on comprehensively-formulated principles. The identification of rationality with general principle, he argues, stems from a Kantian conception of morality as calling for universalisable norms, and a Humean conception of well-being as something essentially passive—as involving pleasant feelings, experiences, etc. Excluded from such a morality are active conceptions of a good life, according to which well-being consists in the wholehearted and successful pursuit of worthwhile activities. In such a conception, what is good or bad about an activity may not consist in any generalised characteristic of the rational will, but rather in particular features of that activity. A defensible and decent criminal law, Gardner concludes, might be one which has only a modest general part, and adopts liability requirements that vary with the subject at hand. The fairness of such a system depends on the substantive contents of those requirements, not on their generality.

However, there may be other, more pragmatic reasons for a criminal law’s having an extensive general part. One possible reason, in this reviewer’s opinion, is that drafting a general part provides an opportunity to establish important principles of justice which otherwise may be disregarded. The German Penal Code, in its general part, contains principles of this kind: in, for example, its provisions on excusing necessity (section 35) and on the excusability of “unavoidable” ignorance of law (section 17). English law, with its less formal structure, might still have included comparable safeguards in various portions of its special part. But it has not done so. The doctrine of excusing necessity remains underdeveloped, and doctrines of excusable ignorance of law hardly exist at all. Various reasons for this state of affairs might be cited, including the strongly consequentialist and utilitarian traditions of English law. But a possibly important reason is that, without a general part, no real focal point has been provided for considering the need for such provisions. Putting provisions on excusing necessity or ignorance of law in the general part emphasises their importance as requirements of fairness. It also permits these (admittedly controversial) provisions to be established definitively, rather than having to be re-debated for every kind of criminal liability that comes under discussion. I suspect that had the Germans omitted these provisions from their Code’s general part, they would have been lacking entirely.

Antony Duff undertakes a sceptical examination of “critical” theorists’ claims about the supposedly contradictory character of the criminal law. He uses as an example the substantive criminal law’s restrictions on invoking the
defendant’s motives. The criminal law, critical theorists assert, claims to administer deserved punishment for offenders. An offender’s deserts, however, depends in part on his motives. But as many offenders commit crimes out of need, admitting motives could compromise the law’s functions in helping preserve the social order. A “contradiction” thus emerges between the law’s pretence to administer justice and its actual system-maintaining functions.

Duff disposes of such arguments nicely. There are admittedly tensions between the criminal law’s crime-preventative functions and its mission of administering justice to individual defendants. Such tensions are not easily resolved, and attempted compromises may be unstable. None of this, however, demonstrates the irrationality or contradictory character of the system; but merely that the criminal law, as other human institutions, involves competing desiderata.

Alan Norrie, himself a critical theorist, attempts in his essay to resolve one of the apparent antinomies of the criminal law: that between an assumedly free and responsible agent who may justly be blamed for his actions, and his more restricted actual agency in a conflictual and unjust society. His suggestion, drawing on the social constructionist psychology of Rom Harre, is that of a self that is generated out of social interactions and yet is capable of organising and reflecting on its own experience. Such a conception, he suggests, helps resolve the apparent inconsistency between an “ideal” rational self and the actual social environments in which choice occurs. The perspective would allow room for the basic retributivist tenet that persons are capable of a degree choice and thus may be held answerable for those choices, and yet give more realistic recognition to the actual social contexts involved.

While “critical” theorists make much of the importance of concrete social and historical contexts, their own writing tends to abstraction. A refreshing change is provided by a fifth essay in the collection, by Nicola Lacey: here, an actual historical analysis of changing ideas about the general part is provided. Of particular interest is her discussion of the work of three major proponents of codifying the criminal law: Blackstone, Stephen and Glanville Williams. She describes how these authors’ varying approaches to codification reflect their differing political aims and moral assumptions. An important lesson to be drawn from this essay, and from this admirable volume generally, is that the structure (and degree of extensiveness) of a general part is not a matter of simple “rationality”, but of what kind of criminal law—with what moral and political presuppositions—we wish to have.

Andrew von Hirsch


Children’s rights are a popular topic of discussion among family lawyers. They have been the subject of United Nations Conventions, international treaties and much learned writing. They have even occasionally been mentioned by the judiciary. Children’s Rights and the Developing Law is the first textbook specifically designed to provide a complete coverage of the present law on children’s rights from an English and Welsh perspective. This is a formidable task, as Jane Fortin herself recognises when she states “the
difficulties presented by attempts to interpret the law within a framework of children's rights cannot be underestimated” (p. 483).

There are perhaps three particular difficulties that face someone engaging upon such an enterprise. The first is in formulating the boundaries of children's rights. Some may fear that by simply making very wide claims as to what rights children can demand the entire law relating to children could be presented in terms of rights. Jane Fortin is to be commended in not throwing the net of children's rights too broadly. In fact her claims for rights are tempered by moderation and realism—too much so for many advocates of children's rights no doubt. For example she accepts that there are good arguments for granting an unmarried father automatic parental responsibility for his children but doubts that these arguments can be couched in terms of children's rights. On the other hand the book demonstrates the potential scope of the concept of children's rights. The book is not limited to those arenas traditionally considered by writers on children's rights such as corporal punishment or medical decision-making, but also examines such rights as education; health; protection from abuse; to know and be brought up by one's parents; contact with parents; and rights for children in the criminal justice system. Such a broad sweep of analysis reveals to Fortin the limitations of a case-based legal system in that it fails to articulate a coherent approach to child rights. Indeed there seem to be some areas (such as medical decisions) where the courts have had ample opportunity through the cases before them to develop a coherent approach to children's rights, but there are other areas where there has been little or no caselaw through which the courts can articulate a position. This has led to a patchy development of the law on children's rights. Although the scope of the book is wide, some topics are not covered in as much detail as might be expected. The financial rights of children are of enormous practical importance, and the question of who has primary financial responsibility for children is a complex and intriguing one. It is surprising that this is not discussed in greater detail—a mere 10 pages deal with the topic. Although the Child Support Act is discussed there is very little coverage of children's rights to their parents' estates under the Inheritance (Provision for Family and Dependants) Act 1975 or the financial order available against parents in favour of children under the Matrimonial Causes Act 1973 and Children Act 1989.

The second difficulty in writing a text specifically based on children's rights is that it may provide a skewed vision of the law. To examine children's rights without considering the rights and interests of parents and other family members may provide only half the picture. This issue is of particular significance given the emphasis on the rights of adults in the European Convention on Human Rights and now the Human Rights Act 1998. Fortin is aware of the potential clash and makes the point that children's rights can be used to promote the rights of parents, but she does not address the central theoretical issue of how to balance the interests and rights of parents and children.

The third difficulty is the vagueness that surrounds the concept of rights. The book opens with an accessible introductory chapter on the theoretical issues surrounding children's rights which will be particularly useful for students seeking a clear path through the jurisprudential material on children's rights. Unfortunately the chapter does not consider in detail what might be thought to be the crucial issue: what is a right? Although this is understandable as the book is not purporting to be a jurisprudential treatise it does lead to difficulties throughout the book. There is a danger in
assuming that children's rights are all one kind of creature and the book does not sufficiently distinguish between rights children have as human beings; those rights they have as children; and those rights that children as a group may be able to claim against society. There is also the important issue of upon whom any corresponding duties lie. Although in the main part of the book Fortin always makes it clear against whom a particular right might be claimed it would have been useful to have a general discussion of this at a theoretical level in Chapter one. It might also have been interesting if a little more attention could have been paid to the question of whether any of the rights a child has might lead to corresponding duties that a child then owes to her parents or to society. Fortin does briefly mention children's duties in suggesting that schools should teach children their responsibilities as citizens, but this could have been developed further.

One particular strength of this book is the emphasis Fortin places on the right of a child to be consulted and involved in decision-making processes. This provides a sensible middle path between those who believe children should not have the power to make decisions concerning their lives and those who think children's autonomy should be protected and that their decisions should be respected.

Publishers and lexicographers will be interested to note that this book is “web-linked”. A codeword revealed in the preface allows access to a web page which will provide updating of information and recent cases. This reviewer was unable to access this page—it may be that it is not yet in operation, or more likely it reflects his technological ineptitude.

This book is a highly valuable enterprise. It provides a clear-headed and realistic attempt to appreciate both the strength and limitations of the concept of children's rights. The fact that the book throws up so many unanswered questions demonstrates the usefulness of the book and the need for much further thought if children's rights are to move securely from the arena of political rhetoric to substantive law.

Jonathan Herring


If one had to select a particular event that symbolised the key characteristics of the contemporary criminal justice system in Scotland, it could easily be a moment of high drama—for instance the opening of the notorious “cages” in Inverness Prison, or the transformation of Jimmy Boyle through the operations of the Barlinnie Special Unit in Glasgow prison, but it ought to be the more mundane passing of the 1968 Social Work (Scotland) Act. This Act introduced profound changes in both the adult and juvenile systems in Scotland which remain in place and help distinguish the Scottish system as a whole from systems elsewhere. The 1968 Act abolished a separate probation service and, in particular, established the unique Scottish Children's Hearings system. Moreover, the Act handed administrative responsibility for both to local authority social work departments. This system then is widely seen as a hallmark of a genuine “welfare approach” to young offenders—placing the best interests of the child above all other factors, and ensuring that issues
which are the province of criminal justice agencies elsewhere, became the “property” of social work.

This edited collection of essays represents an attempt to understand whether or not the penal philosophy of the Kilbrandon Committee which was set up in 1964 to examine problems of the then juvenile justice system has withstood the test of time. A second key theme to the book is whether the Children (Scotland) Act of 1995, represents a consolidation or a transformation of the approach adopted by the Kilbrandon Committee. The essence of the Kilbrandon idea was that crime and delinquency ought not to be seen narrowly as violations of the criminal law, but in the broader context of the social and psychological problems which are part of growing up. The reforms of the 1995 Act are clearly a product of various concerns about child-care provision and practice (including events relating to the Fife and Orkney Inquiries) and concerns about juvenile crime in the United Kingdom, as well as from the international rights agenda in Europe and the United Nations.

The book is divided into two main sections: the first section revolves around the foundations and development of the Kilbrandon idea—including an essay on recommendations for reform in the early 1990s and an essay on the 1995 Children (Scotland) Act itself. Significantly, the 1995 Act contains provisions which allow the Hearings system to place the principle of public protection above that of the best interests of the child in cases where the child presents a significant risk to the public, though whether this presents a major challenge to the Kilbrandon idea is open to debate. It is clear from essays within the book that the principle of public protection has always been an implicit element of the system, particularly with regard to the use of secure care as a disposal.

The second section contains a series of essays which offer reflections on the Children's Hearings System including: families and other resources (reviewing the theory, policy and practice of the unique partnership between social work services and the children's hearings system) in a context of ever-diminishing resources, the changing focus of social work, steps towards a national Reporter Service, and, importantly, the relationship between panels and hearings. The section also includes an excellent account of research carried out on Children's Hearings and related matters, whilst the final essay by Stewart Asquith asks some searching questions about Children's Hearings in an international context where a “populist punitiveness” gathers momentum.

In this searching review of the Hearings System the general conclusion seems to be that the Kilbrandon idea is likely to remain the driving force for the foreseeable future. Indeed, it remains a brave experiment in decriminalisation in a broad context in which there is increasing emphasis on punitive measures. This is not to suggest that the system is perfect, as the essays reveal, but as long as the crime rate in Scotland remains lower than that in England and Wales, it must surely be seen as just as efficient as punishing young offenders. I think that the editors have done an excellent job in putting together this volume. It is a very important book which deserves wide reading amongst lawyers, criminologists and social policy-makers alike.

LORAINE GELSTHORPE