BOOK REVIEWS


This review should begin with a confession. When I learned three or four years ago that Nicola Lacey had been asked to write a semi-authorised biography of H.L.A. Hart, I felt puzzled and somewhat dismayed. Although Lacey had exhibited a high level of intelligence throughout her academic career, she had not exhibited much fondness for analytic philosophy in general or analytic legal philosophy in particular, and she had shown a marked inclination toward schools of thought (such as critical legal studies) that were undeserving of esteem by anyone of her acumen. The choice of her as a biographer for the pre-eminent pioneer of analytic legal philosophy therefore seemed peculiar. Fortunately, however, such apprehension has proved to be groundless. Her biography of the greatest legal philosopher since Jeremy Bentham is worthy of its illustrious subject. It is an excellent, gripping piece of work that sheds valuable light on the life of Hart and the lives of many of his contemporaries.

To be sure, despite the brief indication by Lacey in her prefatory remarks that her “purpose was to write an intellectual biography”, this volume is not really focused on Hart’s writings. She herself indeed immediately adds that she has not attempted to provide “an extended analysis of [Hart’s] scholarly legacy” (p. xxii). Most of her comments on Hart’s ideas are fine as far as they go, but they are clearly secondary to her chief purpose of narrating the details of his turbulent life. The main title of her book is entirely appropriate. Anyone who is curious about the man behind Hart’s brilliant work—and who is happy to look elsewhere for ample treatments of the work itself—will find an abundance of fascinating material in Lacey’s book.

Many pages in A Life of H.L.A. Hart are not only absorbing but also profoundly sad and painful. For example, the superb accounts of the deterioration in the relationship between Hart and Ronald Dworkin are truly dispiriting. A broader source of vexation in Hart’s life, plainly, was his marriage to his wife Jenifer. Though Lacey is not wholly uncritical of Jenifer Hart, she presents a very generous portrayal. However, she is too skilful a biographer to forbear from supplying a mass of information that enables readers to arrive at more censorious judgments. She certainly does not flinch from recounting Jenifer Hart’s promiscuity and self-indulgence. Even less appealing was the moral idiocy displayed by Jenifer Hart in aligning herself with Stalin during the 1930s. She belonged to the Communist Party for several years and evinced few if any compunctions about supporting a vile regime that specialised in mass slaughter and slave labour. With a moral blindness characteristic of many highly privileged intellectuals and pseudo-intellectuals of her era, she has recently shrugged
off her years as one of Stalin’s myrmidons with a glib pronouncement: “Hitler’s march into Austria in March 1938 seemed more important than Bukharin’s execution three days later” (p. 67).

Though Herbert Hart himself never dallied with Communism, he suffered grievously as a result of his wife’s political foolishness. In one of the most wrenching portions of Lacey’s book, we are told of the nervous breakdown undergone by Hart in the aftermath of a distressing incident involving The Sunday Times. In the early 1980s, Jenifer Hart’s Communist past had been broached (albeit rather obliquely) in some prominent publications. In an effort to explain away her past misjudgements by delineating the contexts in which they occurred, Jenifer Hart spoke with rash indiscretion to the press. On the basis of her remarks, The Sunday Times ran an article in July 1983 in which she was identified as a Russian spy. The article insinuated that Herbert Hart may also have been involved in spying for the Soviets. In response, the Harts issued writs for libel and formally demanded a retraction and an apology. In September 1983, the Harts and The Sunday Times reached a settlement under which the newspaper published a terse apology. In the weeks preceding and following the settlement, Herbert Hart’s mental state declined pronouncedly. His psychological deterioration accelerated when his wife engaged in yet another instance of irresponsibility, as she wrote an ill-advised letter anonymously to Princess Anne and then lied about her role in the matter when confronted by Herbert Hart. These events culminated in the admission of Hart in November 1983 to a psychiatric hospital for treatment of his severe depression. He emerged from that institution in mid-December only after undergoing electro-convulsive therapy, to which he attributed his recovery.

Other major sources of unhappiness in Hart’s life were his complicated sexual impulses and his unease about being Jewish. Because Hart gave no hint of these problems in his published work, the disclosure of them is truly surprising for those of us who never knew him personally. Perhaps even more surprising are the doubts he experienced in his later years in the face of some criticisms of his positivist jurisprudential theories. His most severe doubts arose of course in response to Dworkin’s onslaughts, but even some more readily answerable critiques (such as an important essay by Gerald Postema in the mid-1980s) evoked feelings of intellectual consternation in Hart. His anxiety was by no means new, moreover. From the outset of his academic career, he had harboured a gnawing sense of inadequacy in regard to his understanding of the more technical areas of philosophy. That sense of inadequacy, which Lacey conjures up vividly, was baseless but no less powerful for its unfoundedness.

One of the many virtues of Lacey’s book is that it enhances one’s respect for the greatness of Hart’s philosophical work by revealing adroitly the emotional turmoil that Hart underwent in so many of his personal and intellectual endeavours. Immanuel Kant once remarked that nothing straight is ever constructed from the crooked timber of humanity. From the crooked timber of Hart’s life, however, works of genius emerged. Lacey deserves considerable credit for highlighting the magnitude of Hart’s achievements by setting them in the context of his troubled life.

Matthew H. Kramer
This clear and concise book analyses the foundations of public law, seeking to show a united and individual subject. Loughlin’s aim is to refocus the debate over the many forms of sovereignty and, at the very least, to leave the reader questioning some common assumptions about its existence and operation. In this he is very successful: the book is highly readable, detailed and well researched, especially in its treatment of seventeenth-century political theorists. Further, it does not attempt too much: for a short text it deals with a range of approaches and doctrine and yet still closes with a clear and logical single idea of public law. The work defines individually six foundations of the concept of public law—governing, politics, representation, sovereignty, constituent power and rights—and then fits each into the core idea of public law in a concluding chapter consisting of forty numbered paragraphs.

The basic thesis of the book is that public law is an autonomous discipline. Positive law, as understood by lawyers, is only one facet of the activity of government in the modern state. Indeed this is merely the expression of a deeper reality to Loughlin: man cannot be corralled by positive laws alone. Man is a political creature and must be so in order to tame the conflicts inherent in his species. Political management of these conflicts cannot be achieved through morality, which is distinct and separate. The representation of the political will of the people is the state and its existence is dependent upon this variable political base. The sovereign is the representation of the state, and thus of the people; in her public capacity she has sovereign power, including executive discretion; she is above positive law, as that law is but one part of sovereignty. Sovereignty flows from the relationship between sovereign and subject, between state and people. The people have a constituent power to determine their state, and an ultimate right to rebel. This constituent power, expressed through politics and anthropomorphised by representation into a sovereign, is the fount of public law. Understandably, the positivisation of “rights”—their empowerment in charters and express rules—is not welcomed. They are emanations of the sovereign’s will, not transcendental concepts. In sum, public law is partly made up of positive law, but in its entirety it is the result of the prudential managing of politics. Loughlin prefers the term droit politique for this form of prudence.

There is a compelling momentum to this theory. There are also some very impressive individual sections. One of these is a form of Bodin’s paradox of the enabling restriction, a form of limit that also empowers, here the link between political and legal sovereignty. Loughlin applies it thus: since sovereignty is a relational concept, stimulating the relationship increases the output. The sovereign has both forms of sovereignty, but to sustain her power she must couple the two. This yoking may be achieved by a limitation on legal power, which although not binding may actually generate more political sovereignty through trust. This relational concept also means that sovereignty, whether legal or political, has no single ultimate locus. It is what gives the theory its fluid character and enables it to deal accurately with both revolution and stability. Furthermore it places law below the status of the politics that generate it. Finally it is one of the
significant parts of the division between private law and public law, although this distinction is not investigated in detail.

One difficult area in the discussion is how public law is not solely a matter of positive law. Loughlin suggests that legal positivists confuse the picture by an excessively rule-based notion of law (law as the will of the sovereign) and by treating politics as a question of background fact. They thus ignore his relational aspect of politics. Public law’s overriding aim, the maintenance of the state, should not be inherently confined by law. As Loughlin notes this is little comfort to those seeking legal restriction of arbitrary power. Yet he posits that the sovereign will still generally follow the law because it is prudent to do so, neither because of legal compulsion nor because of political force (other than the basic threat of rebellion). The relationship between this notion of prudence, practical reason, or even droit politique and other theories of limiting conventions is not explored. Some comparison with the more commonly encountered notion of the rule of law and perhaps of morality’s relation to prudence would have been helpful at this point in the discussion.

Loughlin’s style is an equal measure of historical analysis and conceptual exploration. This provides a thorough grounding, but there are a few occasions where it may have some limitations. The chapter on a “pure” public law method is introduced historically at some length but yields a little less of an answer than might have been hoped. Most notions in this work are painstakingly explained, but the practical guidance on what exactly is meant by “prudence”, the method the sovereign and judiciary must use to express their authority on the state, is more minimal.

One should read this short book fully aware of its aims. It does not purport to explore all competing theories. To understand Loughlin’s view of the context of his ideas, it is necessary to consult Chapter 8 of his Public Law and Political Theory (1992). One must also bear in mind that for the most part his analysis takes the form of an abstract discussion, and there are few cases or discrete examples used in support. For instance, when referring to the transcendental jurisprudence of Sir John Laws, its judicial expression in Thoburn v. Sunderland City Council [2003] Q.B. 151 is not mentioned at all. The book focuses on British public law, with references mainly to English language authors or translations. It largely bypasses the issue of ultra vires, as it takes the debate to a higher level of abstraction, searching more theoretically for the foundations of legal and political power.

If you have ever had nagging doubts about the prime importance of positive law in public law or have ever wanted a clearer understanding of A. V. Dicey’s relation of the legal to the political, this book will provide an interesting alternative perspective.

MATTHEW DYSON

In this further volume in the series Cambridge Studies in International and Comparative Law, Gerry Simpson explores the ordering of international society through a founding principle, sovereignty. He presents the ambitious thesis that the special privileges claimed by various “great powers” since 1815 neither violate international law nor prove its dependence upon power, but rather that the international constitutional order recognises these differential rights and responsibilities. To talk of special rights and duties is to talk of legal concepts: being a great power is a status, not a material fact. He thus argues that one can discern in international law since (at least) 1815 legalised hegemonies in which the great powers of the day institutionalised their status in a distinctly legal framework. The questions arising are against which entities, and to what extent, they could exercise these rights. Simpson posits that in periods marked by “anti-pluralism” the subjects of such intervention are defined as “uncivilised” or “outlaw” States.

In this context, Simpson explores what he conceptualises as three distinct dimensions to sovereign equality: formal equality, legislative equality and existential equality. Of these only formal equality is an “undiluted right”: effectively a principle of standing and treatment before judicial organs. Existential equality is the (sometimes qualified) right to freedom from intervention and the right of a State to order its “internal” society as it sees fit. “Legislative equality” describes the supposed equality of States in law-making processes. These three dimensions interact with two ordering concepts, the interplay in international legal relations between “legalised hegemony” and “anti-pluralism”. Simpson’s point is that the legal content of these three dimensions is historically contingent. What we think of as “sovereignty” in any given era is a juridical concept—the space left after the carve-outs made by the imperatives of legalised hegemony and anti-pluralism. Thus, what we are normally left discussing is juridical sovereignty, an unstable concept but one defined by a constitutional legal process.

The author’s appraisal of contemporary views of the post-Vienna Conference international order, that “[l]egalised hegemony was not just consistent with international organisation; it was international organisation” (p. 122), applies equally to most other epochs he examines. The principal variable is the strength of that hegemony and the scope left to juridical sovereignty. Simpson adroitly contrasts the “strong” version of sovereign equality advocated by Barbosa at the 1907 Hague Conference and the decolonisation-era General Assembly with the muscular interventionism both of the Quadruple Alliance and of NATO in Kosovo. Both the Alliance and NATO claimed to be acting in the name of the era’s universal principles, respectively monarchy and democracy. In each period, the principle cited was assumed to be critical to States’ good internal governance and appropriate external behaviour, and in its absence States were assumed to lose some freedom from great power interference.

By far the author’s most interesting example elucidating his thesis that the conceptions of great powers and outlaw States are legal concepts and
not mere politics is his examination of the revived notion of State criminality. In periods where the legal order sees itself as highly pluralistic, the idea of State criminality is thought to undermine the system’s universality. That is, emphasising individual criminal responsibility creates space for the rehabilitation of “enemy” States and their reintegration into the international community. The author tracks the demise in State crimes’ conceptual respectability from the perceived failure of Versailles, through the Nuremburg trials and into the Charter conception of a pluralistic community of States, a vision of a single, universally inclusive order. However, when this universal standpoint is assumed by particular States (once colonial Europe, now “the democracies”), what follows is a bifurcated legal order. A core grouping of variously “civilised”, “peace-loving” or “law-abiding” States acting in the cause of humanity is contrasted with a periphery of States “outside the universal community, acting in the cause of inhumanity” (pp. x-xi). The consequence of reviving the idea of State criminality is not that outlaw States are relegated to a zone of non-law where they may do as they please, but rather they are denied the protections of sovereign equality and subjected to a “highly regulated sphere of intervention” and subjected to a sophisticated regime of “continual surveillance and occasional disciplinary violence” (p. 314). This is a powerfully apt descriptive model in relation to Libya and Iraq.

The peril of such a project in rapidly-changing times is that it may be overtaken by events. The conclusion manages to discuss intervention in Afghanistan, though not the 2003 invasion of Iraq. In the current climate, some may find the author’s account of Charter self-defence rather condensed. However, Simpson’s insights are still valuable two years later: opponents of a US doctrine of pre-emptive self-defence may be missing a crucial point if arguing that one danger in such a doctrine is its universal adoption. The US is not arguing such a right is universally applicable, it is asserting the right on the basis of its pre- eminent status among great powers. Simpson neatly contrasts the lack of international reaction against (and indeed support for) US intervention in Afghanistan with the widespread hostility in the Asia-Pacific that greeted an Australian attempt to assert a similar doctrine. It is possible to conceive of a hegemonic legal order where such rights are allowed to great, but not middle, powers. Simpson is careful to point out that such a view is explanatory, not normative, and should not be mistaken for an argument in favour of that hegemonic legal order. Indeed, such an approach could be important in distinguishing between the legal implications of intervention in Afghanistan in response to the terrorist attacks of 11 September 2001, and intervention in Iraq to pre-empt an inchoate threat.

Simpson’s aim, to reclaim for legal discussion subjects often appropriated by the political sciences, is an important one. He presents his case with wit and flair, and much of the historical analysis would be of interest to the general reader as well as to international lawyers.

DOUGLAS GUILFOYLE
JOHN HARRIS has long been a staunch supporter of reproductive freedom even where the freedom claimed consists of an expansion of reproductive options beyond what could be achieved through ordinary sexual procreation—including reproductive outcomes in the form of children who are born as a result of present and future technologies of medically-assisted reproduction. This book is concerned with cloning, and offers a restatement and, in parts, some further development and refinement of Harris’s views, as well as a response to his critics.

Harris begins by explaining what is meant by cloning, and by speculating why human reproductive cloning in particular exerts such a hold over both popular and professional imagination. He then sets out to demolish, one by one, the arguments against human reproductive cloning that have been offered in the literature, and in the result defends a liberty to clone human beings for reproductive purposes provided that the procedure is safe, or at least “safe enough” in that we do not have to expect a higher rate of genetic aberration and consequent disability from it than from ordinary sexual reproduction. The final chapter argues the case for a moral duty to pursue research on therapeutic cloning.

Harris maintains that “[c]loning has been part of human reproduction from the very beginning”, and that “the human species has had a long and on the whole happy experience” with it (p. 35). After all, what are monozygotic twins but natural clones? Harris is of course aware that this in and of itself is no defence of human reproductive cloning: that nature does it does not mean that human science should do it too. The point of drawing this parallel between human reproductive cloning and monozygotic twins is not to justify cloning, but to show that humankind has nothing to fear from a small number of people with the same genetic identity. Furthermore, the life experiences of monozygotic twins illustrate that “[g]enetic identity is not an essential component of personal identity nor is it necessary for ‘individuality’” (p. 51). Like monozygotic twins, clones will still be different individuals from those whose genetic identity they share, and capable of experiencing themselves as the architects of their own lives and futures.

Harris’s main argument is that a ban on human reproductive cloning amounts to an unjustifiable restriction of procreative freedom and of the right to found a family. Harris takes for granted that the presumption of liberty applies not only to whether, when and with whom we procreate (things that were always more or less within our control as human beings), but also to how we do it and to whom we create—things for which nature gives human beings a much more limited set of options, in the form of sexual intercourse with a chosen partner, where the genetic lottery decides about the genetic heritage of any child born as a result. In other words, Harris insists that human rights extend to the use of new technologies which expand our powers, options and ability to affect another person’s fate and condition in ways and by means that were previously unknown.

While it initially appears that this assumption might require some argument, on reflection this is not so. Technical advances often change the way in which we exercise our rights and freedoms, and thus broaden the practical scope of these rights. Freedom of movement now extends to moving
around by car or plane, and not just by foot, boat or bike, and may tomorrow encompass flying to Mars in a rocket. Freedom of speech now extends to the distribution of newspapers, television, and internet chat rooms, and not just to speaking at public assemblies and the like. If fundamental rights and freedoms were not capable of protecting new ways of exercising them, their scope of application would shrink over time in that, with the advances of technology, the right in question would only cover some, instead of all, instances of exercising the protected activity. The only way to prevent such a gradual erosion of fundamental rights and freedoms is to expand their range of application along with the changes of technology.

Consequently, Harris is right in saying that the presumption of liberty applies not only to procreative techniques that achieve outcomes which, if circumstances were different, sexual procreation could achieve, but also to the use of techniques which may eventually enable prospective parents to achieve outcomes beyond what is possible by “natural” sexual procreation (for instance, the exchange of single defective genes for non-defective ones in embryos, and the creation of embryos by cloning or by combining genes from more than two existing human beings). Any restriction of this liberty requires a sufficiently weighty reason, and it is in this context that the important aspects in which the new forms of exercising a fundamental right differ from the ones previously known can and must be taken into account.

What counts as “sufficiently weighty” is a function of, on the one hand, the importance of the right concerned, and, on the other hand, the intensity and severity of the proposed restriction. One might be forgiven for thinking that it is at this juncture that the case for a right to clone human beings must falter. Surely, not being able to clone oneself (or another) would only affect marginal ways of exercising one’s reproductive rights? Harris disagrees profoundly. He believes that if a prospective parent were to choose reproductive cloning as her preferred method of procreation, she would not be exercising a liberty which is “trivial or vexatious, or in itself morally dubious or even morally neutral”. Rather, her conduct would be “the expression of or a dimension of something morally significant” (p. 57), namely, her procreative autonomy (which Harris defines, following Ronald Dworkin, as every person’s right to control her own role in procreation unless the state has a compelling reason for denying her that control). Further bolstering his case with the right to found a family (which, as Harris points out, is wider than the right to procreative autonomy in that it extends to the right to found non-conventional families and thereby to form parental links to children not genetically related to the right-holder), Harris argues that “[i]n so far as decisions to reproduce in particular ways or even using particular technologies constitute decisions concerning central issues of value, … the freedom to make them is guaranteed by the constitution … of any democratic society” (p. 62). Because of the importance of the rights involved, Harris suggests that “we should be prepared to accept both some degree of offence and some social disadvantages as the price we should be willing to pay in order to protect freedom of choice in matters of procreation and perhaps this applies to cloning as much as to more straightforward or usual procreative preferences” (p. 59).

Harris also addresses arguments that cloning runs counter to the welfare of any cloned child, either because it involves treating the child as a mere means to an end (as Axel Kahn has argued), or because it denies
the child an “open future” (as suggested by Leon Kass), or because it necessarily makes for bad parents, or for any combination of these reasons. Since identical sets of genes do not preclude the human beings who have them from leading autonomous lives, it can hardly be argued that children created by cloning would not have “open futures”. This also effectively protects them from being instrumentalised to any greater degree than other children by their parents, and makes it unlikely that they can ever be “only” means to some defined parental end. Against Onora O’Neill, Harris also maintains that cloned children can be expected to adapt to ambiguous or confused family relationships which may result from cloning, and that even if one felt confident to predict (which Harris is not) that, given the likely motivations of the parents involved, cloned children might grow up in circumstances of “sub-optimal parenting”, this is not a sufficiently weighty reason to justify a limitation of the right to procreate.

Risks and dangers of this technique, by contrast, might provide sufficiently strong reasons for a continued ban on human reproductive cloning. But, as Harris reminds his readers, there is no good reason to demand that human reproductive cloning is any safer than its “natural” equivalent, which after all “has a death rate of 80% [of fertilised eggs] and an abnormality rate of 3–5% of all live births” (p. 111). What is more, there is good reason to permit even riskier human reproductive cloning for those who could otherwise not have any children genetically related to themselves or their partners.

The concluding chapter addresses cloning for therapeutic, not reproductive, purposes. Harris thinks that, given the great medical promise of finding a supply for matching tissues, there is a moral duty to pursue such research, even if it means producing and “sacrificing” early embryos in the course of it. In this regard, he is certainly right to point out the moral inconsistency of many existing national and international policy choices. But his comparison with “what is regarded as acceptable and ethical with respect to normal sexual reproduction” (to “use up” embryos never carried to term), and concurrent argument based on “waste avoidance”—both apparently designed to detach the case for using embryos for research from the debate about the moral status of the human embryo—are unlikely to win over many new supporters to his cause.

Given the strong political movement for a worldwide ban on research into human cloning, Harris’s plea “for the emergence of ‘bioethical thinking’ as opposed to the empty rhetoric which invokes resonant principles with no conceivable or coherent application to the problem at hand” (p. 50), and his insistence that “[w]e need to remind ourselves of the human benefits that stem from research and the human costs of not pursuing research” (p. 18) certainly come at the right time. Whether one agrees or disagrees with Harris’s arguments, this is a wonderful book. The arguments for and against human cloning are presented and confronted in a straightforward and unassuming, yet never in an over-simplifying or distorted, manner. Clear, accessible and entertaining, this book makes excellent teaching and thinking material—and, perhaps unique in a serious bioethic work of this nature, is enjoyable reading not just for philosophers.

ANTJE PEDAIN
On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695–1775). By RONAN DEAVERY.

Today it seems that copyright is permanently under siege by those who question its continued relevance in the digital environment. In the context of contemporary debates, Ronan Deazley's meticulously researched book on the history of copyright law during a crucial eighty-year period in the eighteenth century comes as a valuable contribution to these discussions and to the tradition of copyright historiography in general. Deazley sets out to challenge the orthodox views that copyright developed organically and progressively during the eighteenth century, from a right exercised by publishers to a right exercised by authors. In particular, he examines the birth and growth of the myth that copyright once existed at common law but was displaced by the Statute of Anne. Through this examination he uncovers a wealth of new material and addresses issues left untouched by the existing histories.

In the first chapter, Deazley reveals the interplay between freedom of the press and the book trade in the years following the lapse of the Licensing Act in 1695, during which successive attempts to reinstitute censorship were rejected by the House of Commons. Interestingly, he highlights the roles of Edward Clarke, John Locke and Daniel Defoe in discourse on the subject. The second chapter then deals with the events leading up to the passing of the Statute of Anne, looking in particular at the pamphlets produced by the booksellers, as well as Defoe's essays in the press, and the Bill's progress through Parliament. Deazley argues that, contrary to the influential statement of L.R. Patterson that the Act was merely a trade-regulation statute designed to curb the booksellers' monopoly, the central aim of the Act was to ensure the continued production of books. He thus describes the Statute of Anne as "striking a culturally significant societal bargain, a trade-off involving, not the bookseller and censorial state, but the author, the bookseller and the reading public" (p. 46).

Chapter 3 then addresses a frequently overlooked period of copyright law: the cases brought by booksellers before the courts of Chancery up to the 1730s. It considers the cases brought by patent owners against those whom they considered to be infringing their patents, and then examines other cases in which booksellers sought and were granted Chancery injunctions. These cases were to become significant later in the century when they were employed by counsel to provide authority for the existence of common law copyright in Millar v. Taylor and Donaldson v. Becket, and Deazley's extended discussion is therefore of considerable value. In chapter 4, Deazley turns to attempts of the booksellers in the 1730s to convince Parliament to grant legislation that would strengthen their rights in books. Deazley's research in this area goes well beyond previous accounts of this interlude in copyright history, and he identifies a previously unacknowledged possible cause for the booksellers' retreat from legislative drafting to the court of Chancery, the case of Baller v. Watson, in which the plaintiff booksellers were awarded both a perpetual injunction and an account of profits.
In the following chapters, Deazley moves to the subject anticipated by the previous chapters: the cases in which it was argued that copyright was a perpetual right at common law. Chapter 5(1) looks at the first cases brought in Scotland by London booksellers against their piratical Scottish counterparts in the 1740s and 1750s. Chapter 5(2) then deals with the cases brought in the English courts in the 1750s and 1760s. Chapter 6 breaks from the chronology of case law and examines the arguments both for and against regarding copyright as a property right at common law that were advanced in the pamphlet literature of the time. Here Deazley also examines in more detail some of the arguments that were made by counsel in the cases. In Chapter 7, Deazley describes the career of Alexander Donaldson and his early appearances as defendant against the London booksellers. He then moves to the case of *Millar v. Taylor*, which represented a victory, albeit temporary, for the booksellers in their quest to establish a perpetual common law copyright.

Chapter 8 represents the culmination of Deazley’s presentation of copyright law in this period, the case of *Donaldson v. Becket*. Like many legal commentators before him, Deazley examines the case in detail and this is justified for two reasons. First, when placed in the context of the appeals procedure of the House of Lords, he is able to establish Donaldson as a hitherto unacknowledged example of a case which their Lordships decided against the advice of the judges. Second, he points out that those commentators who have previously identified mistakes in recording the responses of the judges to the questions asked of them by the House have themselves made errors of interpretation, and in so doing he sets the historical record straight. For Deazley, the main significance of their Lordships’ rejection of the judges’ opinions is to provide further evidence for his contention that the central purpose of the Statute of Anne was the encouragement of learning and continued production of useful books. However, he points out it was also relevant in the creation of the common law copyright myth, since numerous commentators fundamentally misunderstood the decision in Donaldson, believing that it was the opinions of the judges that decided the case rather than the vote of the House of Lords.

Deazley’s examination of the origins of copyright law addresses a lacuna in the existing histories, which have tended to skim over the period immediately following the passing of the Statute of Anne in order to rush straight to the landmark cases of *Millar v. Taylor* and *Donaldson v. Becket*. A small criticism can be made of the book’s structure, which is needlessly idiosyncratic. Chapter 5 is divided into two sub-chapters, there is a mini-chapter without a number, and many chapters are preceded by epigraphs of uncertain relevance. Moreover, the use of tables to describe the voting patterns of the judges in *Donaldson v. Becket* is distracting. The combined effect is to mar the flow of an otherwise engagingly written book. These points notwithstanding, Deazley expounds a thought-provoking analysis of copyright in the eighteenth century. He has produced a fascinating and informative book, which will prove valuable to all those interested in the history of copyright law.

Isabella Alexander
MANUSCRIPTS of readings from the Inns of Court are difficult sources for legal historians. The language is always technical, often in abbreviated law French, with frequent palaeographical challenges. Many readings only survive in incomplete form. McGlynn has admirably surmounted these difficulties to write an informative, detailed and careful history of a complex area of law.

Her work situates the readings on Prerogativa Regis in the larger legal discourse of the time by demonstrating how the readings responded to external legal events and by noting and describing the interplay between readings and significant contemporary cases. McGlynn also offers many important observations concerning the way readings functioned within the Inns. Newer readings built on prior readings on the same topic within the Inns’ learning exercises. These practices of continuity in the Inns raise interesting questions of the nature of the common law itself and of contemporary aspects of legal authorship. Two readers in two different Inns in the same year could reach widely divergent interpretations of the same text. McGlynn rightly notes that these differences might not only reflect political positioning but also reveal true disagreement about the nature of the text being addressed. If Prerogativa Regis were a statute, certain interpretive consequences followed. If it were not, other meanings were more appropriate within the common law tradition.

The introductory chapter addresses the relationship between feudalism, land, fiscal politics and the royal prerogative. Limiting her study to the first three chapters of the statute, McGlynn focuses on how the readers dealt with the wardship of the land of the king’s tenants-in-chief who died with an underage heir, the marriage of heirs in the king’s custody, and the primer seisin of lands held by the king’s tenant at death. Although McGlynn accurately summarises the statute, the book unfortunately does not include the applicable text of Prerogativa Regis, but this hardly detracts from the work as a whole.

Chapter One, “The Early Readings”, addresses two anonymous fifteenth-century readings and describes the content of their arguments in great detail. One reading dates from the mid-fifteenth century, and the other, attributed to Edward Grantham, follows the pivotal Skrene’s Case of 1475. McGlynn provides the political context of the readings during this period. Both Henry VII’s chamber administration of finances and his increased enforcement of feudal rights led to increased professional interest in the royal prerogative. For McGlynn, these developments were more than attempts to raise revenue: “it appears that the king was using his undisputed feudal rights as a method of acquiring and keeping control of his subjects” (p. 67).

The next two chapters, “Expansion and Debate”, and “Frowyk and Constable on Primer Seisin”, analyse the serjeant’s reading of Thomas Frowyk (Inner Temple, 1495) and that of Robert Constable (Lincoln’s Inn, 1495). McGlynn notes that both readers addressed the question of whether Prerogativa Regis was a statute or not (p. 78). The answer to this question had implications for the scope of the prerogative. Constable concluded that
Prerogativa Regis was a statute and therefore could be expanded to encompass new royal rights within the equity of the statute. Frowyk, by contrast, rejected the idea that the text was a statute and did not permit expansion of the royal prerogative. McGlynn uses Stonor’s Case, discussed in the Exchequer Chamber in 1497, as a contemporary example of how the readers’ learning and methods surfaced in the daily, complex life of late fifteenth-century land law. As McGlynn accurately observes, “[t]he complexity of the readings can seem somewhat intimidating, but it is simply indicative of the complexity of land relationships in early Tudor England” (p. 149). In the context of primer seisin, Frowyk and Constable also took up the procedural aspects of asserting and expanding the prerogative, because Henry was “innovating in his exploitation of procedure” (p. 140). It appears that Frowyk’s reading became a foundational text for readers on Prerogativa Regis. According to McGlynn, John Port’s reading in 1507 made substantial use of Frowyk’s text, as did several subsequent readers.

Chapter Four, “Spelman, Yorke, and the Campaign against Uses”, addresses the readings presented in the reign of Henry VIII. McGlynn places John Spelman’s reading (Gray’s Inn, 1521) in the context of royal concerns for “financial retrenchment rather than political manipulation” (p. 166). McGlynn notes the strong influence of Frowyk’s reading and the lesser influence of Constable’s reading in Spelman’s work. Expanding on the work of the earlier readings, Spelman, and later Roger Yorke (Gray’s Inn, 1531), addressed the relationship of uses to the statute. These readers can be viewed as grappling with this important development as it relates to the prerogative, and McGlynn skilfully leads us across the familiar history of uses: the statutes of 1484 and 1490, Henry VIII’s demands for his feudal rights, Dacre’s Case, the Statute of Uses and the Statute of Wills.

McGlynn begins Chapter Five, “The Edwardian Readers and Beyond”, with the observation that the Statutes of Uses and Wills answered many of the legal controversies surrounding Prerogativa Regis. She sets these later readings against the distribution of formerly monastic lands and the establishment of the Court of Augmentations and the Court of Wards. George Willoughby’s reading (Inner Temple, 1549) is “largely a recapitulation of Frowyk” (p. 222) and there appears to be no surviving manuscript of William Staunford’s reading (Gray’s Inn, 1551). From the mid-sixteenth century, McGlynn sees the readings on the royal prerogative giving way to treatises on the subject such as Staunford’s Exposition of the King’s Prerogative (dedicated in 1548, published 1567) and even Ley’s Learned Treatise concerning Wards and Liveries (published 1642, but the product of his work during the first half of the seventeenth century in the Court of Wards). McGlynn views James Morice’s reading (Middle Temple, 1578) as part of this treatise tradition and as a work that “demonstrates the shift in the prerogative from the feudal to the constitutional” (p. 235). The shift was not only in form from reading to treatise, but also in professional interest away from Prerogativa Regis: “Readings on the Statutes of Uses and Wills were a more appropriate and innovative method of dealing with the changes of recent years than another treatment of the time-worn Prerogativa Regis” (p. 245).

Only in the conclusion of the book does McGlynn suggest that the readers’ choice of Prerogativa Regis and their setting of the bounds of the royal prerogative might have been influenced by personal, and perhaps
careerist, factors (p. 247). More on the personal motivations of these readers would have been a welcome addition to the work. Similarly, her observation that readings on the Statutes of Uses and Wills came to replace readings on *Prerogativa Regis* indicates that this work, as strong as it is individually, is but a part of a much larger narrative on feudalism, land, and royal revenues. McGlynn, however, has made an important contribution to this larger enterprise and to English legal history as a whole.

M.C. Mirow


The scrutiny of proposed mergers by the European Commission is big business. Recent changes to the operation of the system (Regulation 139/2004/EC—the EC Merger Regulation or “ECMR”) have received significant attention but more generally there is a clear need for careful appreciation of exactly when the Commission is authorised under EC law to scrutinise a proposed merger. This appreciation depends upon a wide range of factors, including the operation of company law, the assessment and allocation of turnover and issues of EC competence and jurisdiction under international law. Morten Broberg’s book focuses upon delimiting this Community dimension of mergers but does not seek to address the substantive assessment of such mergers once they fall within the Commission’s jurisdiction.

The EC merger control system operates upon the basis of identifying structural change in the undertakings involved (so as to amount to a “concentration” that is potentially subject to scrutiny) and then testing for quantitative characteristics that show a sufficient effect at Community level to justify Community control. At the same time these tests must be sufficiently certain in their application to be readily applicable to real-world situations. After a brief but careful introduction to the area in Chapter 1, Broberg moves in Chapter 2 to consider what count as the “undertakings concerned” to which the thresholds for turnover are to be applied. This can be a tricky issue when applied to the creation of joint ventures, groups of undertakings (when the acquisition made is of only part of an undertaking) and where acquisitions are staggered over a period of time. This topic is discussed at some length and according to a careful structure that illuminates the underlying ideas and applies them in analysing (and, where appropriate, criticising) the practice of the Commission. It would, however, have been helpful to have had a fuller explanation of the choices made concerning respectively a move from joint to sole control and reductions of increases in the number of parents of a joint venture. Broberg favours the approach of apportioning the turnover of a joint venture equally between the undertakings that control it (applying the principle of ECMR, Article 5(5)), which would mean including only half of the turnover of the joint venture in the threshold calculations. This (quite rightly) rejects the Commission’s decision to include the whole of the joint
venture’s turnover in the assessment, which results in an expansion of the Commission’s jurisdiction where this makes the difference between crossing the threshold and falling short of it. But an explanation is needed of why the alternative option (to apportion the joint venture’s turnover in accordance with the size of the share in the joint venture that is to be acquired or divested) is not a better reflection of the change of economic power effected by the transaction.

Chapter 3 proceeds to discuss the difficult question of how to identify the “group(s)” of the undertaking(s) concerned: when calculating the turnover, it is the group that counts; yet the notion of a “group” is not defined by the ECMR. Instead, we must fall back upon notions of “control” and Broberg provides a useful discussion of how to apply both the formalistic (Article 5(4)(b)) and substantive (Article 3(3)) notions of control used by the ECMR, as well as the consequences of these notions for which undertakings then belong to the group for the purposes of assessing turnover. From this, the discussion moves in Chapter 4 to the application of the basic rules for determining turnover. One key element in this analysis is whether or not sales within a group are to be included in the calculation. On the face of it, this question is straightforward: “the inclusion of turnover derived from sales between the different members of the group will amount to little more than double-counting” (p. 156) and so such turnover is excluded by the ECMR: Article 5(1). Yet should sales between the undertakings concerned also be excluded: e.g., if company A makes sales of €250 million to company B and then A seeks to acquire B, should the €250 million be included in the calculation of turnover or not? Broberg takes the (tentative) view that they should be excluded on the basis that this “better reflects the economic power after the concentration” (p. 158). Put another way, the question being asked is at what point in time it should be determined whether or not the sales are inter- or intra-group. Merger control is not an “ex post evaluation”, but more precisely is an ex ante evaluation of the likely situation ex post (i.e., after the proposed transaction would have taken place). If the merger control regime is to have sufficient certainty to allow its application in real-world situations, such timing questions must be given greater clarity.

Chapter 5 provides analysis of the geographic allocation of turnover, an oft-neglected area of significant practical importance. Broberg’s careful linking of the location where competition takes place to the turnover generated brings useful insights, especially to thorny areas like telecommunications, the internet and international transport. His discussion of the internet in this context is particularly interesting: the possibility it provides of anonymous transactions can make the sensible allocation of turnover virtually impossible, since even attempts to use proxies (such as the bank from which payment was made) can often be a poor indicator of the place where a particular service was actually provided.

After a useful discussion of the application of the ECMR’s jurisdictional rules to the financial sector in Chapter 6, the impact of the EEA Agreement upon this field is given welcome treatment in Chapter 7. In practice, it seems that few difficulties have arisen thus far in the application of the EEA regime or in co-operation between the EFTA Surveillance Authority and the Commission; nevertheless, as Broberg shows (pp. 234–244), the retention of what are (for merger control purposes) effectively two separate jurisdictional areas (the EC and the EFTA) has the
potential to create cases where a deal has neither a Community nor an EFTA dimension. This could lead national authorities to scrutinise a deal with a significant EEA dimension. Further, there is no requirement for the EFTA Surveillance Authority to follow the decisions of the Commission: this could cause difficulties, especially given the short time limits applicable to merger control decision-making. The question of forum shopping is considered in Chapter 8 and Broberg sets out the options, possibilities and difficulties well, drawing upon questionnaire evidence gathered from practitioners in the field. This reviewer would have welcomed a more extensive use of diagrams throughout this chapter, which would have facilitated understanding of the multiple alternative fact scenarios under discussion.

After the weighty materials considered in pursuit of an appreciation of the Community dimension that triggers the Commission’s jurisdiction to scrutinise mergers, it might seem ironic that Chapter 9 is entitled “The Real Community Dimension”. Nevertheless, the activity that the Commission seeks to undertake must be one which properly falls within the scope of the EC Treaty; this relates both to the external limit of the ECMR vis-à-vis non-EC Member States (an issue often discussed under the heading of “extraterritorial jurisdiction”) and to the application of the ECMR within the EC (relating to whether EC or national control is the more appropriate, which is often seen as a question of “subsidiarity”). On the former issue, the difficult Gencor case (Case T-102/96 Gencor Ltd. v. Commission [1999] E.C.R. II-753) is discussed: Broberg criticises the Court of First Instance for too readily accepting the utility of the “implementation” approach to jurisdiction—indeed, including mere sales within the Community has the potential to operate even more widely than the effects doctrine in conferring jurisdiction—while arguing that it is inherently unsuited to analysing situations of structural (rather than behavioural) danger to competition. Equally, the Court is defended in the structure of its analysis: Broberg asserts that its admittedly rather vague approach amounts to an assessment of the EC’s prescriptive jurisdiction in the light of both the implementation criterion and the “effects” doctrine. Thus, having found the implementation criterion to be fulfilled by mere sales within the Community, the Court’s analysis of the effects doctrine should be treated as obiter (although as a strong indication that, were the question to be decisive in a future case, the effects doctrine would be adopted by the EC as well). Whether or not this is a satisfactory rationalisation of the case is open to debate (compare, e.g., Slot (2001) 38 C.M.L.Rev. 1573) and clarification of the position by the Community judicature would certainly be helpful. So far as the subsidiarity point is concerned, Broberg suggests that the turnover thresholds leave no discretion to the Commission in their application and so cannot be subject to the general EC law principles of subsidiarity and proportionality. This creates the possibility that “the turnover thresholds may catch transactions that arguably fall outside the scope of the Treaty” (p. 283), since once the thresholds are met then Commission scrutiny occurs, even if the deal in question is best dealt with at Member State level or if the costs of notification and assessment are out of proportion to the likelihood of dangers being posed to competition in the EC.

Broberg’s study concludes with a number of recommendations on how to improve the fit between the “real” Community dimension of mergers
and the jurisdictional criteria in the ECMR: in particular, *de minimis* thresholds based upon the size of the transaction could be applied to weed out cases currently receiving scrutiny unnecessarily; more fundamentally, the whole basis of assessment could be shifted from thresholds based upon the size of the undertakings concerned to analysis of the size of the transaction itself (which would incorporate the *de minimis* idea automatically). His concluding prescription is that “if the intention is to achieve a true level playing field, the road ahead must be the harmonisation of the Member States’ competition rules regarding concentrations” (p. 297). This proposal may well be best analysed in the light of the workability of the new EC system relating to the application of Articles 81 and 82 EC, which has empowered national courts and authorities to apply the EC rules and has established an information and co-operation network between national authorities. This system is in its early stages and, while it was not premised upon such harmonisation of national laws, much harmonisation has occurred as a result of Member States’ adaptation of their own regimes to dovetail better with EC law. Lessons learnt from this experience could provide valuable information for taking merger regulation forward in the years to come. Either way, Broberg’s volume provides a clear and well-researched starting point for the analysis of key issues of EC-level jurisdiction to conduct merger scrutiny and is worthy of careful attention in the light of the recently-reformed EC regime.

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