BOOK REVIEWS


This book is an ambitious and provocative challenge to meritocracy and equality, two foundations of equality theory. In questioning and opposing the prevailing account of what constitutes appropriate employment opportunity, Matt Cavanagh provides a refreshing, and at times disquieting, critique of broader anti-discrimination jurisprudence. His assessment is worth reading, even when it occasions a clenched jaw.

A lengthy introduction sets forth the monograph’s central question as defining what is meant generally by the term “equality of opportunity”, and specifically “what would be the fair way for jobs to be allocated” (p. 5). It then provides an exegesis of the arguments presented in the book’s three parts. Cavanagh concludes that neither meritocracy nor equality is a defensible concept, whereas certain forms of discrimination are justifiable.

Part one (“Meritocracy”) defines meritocracy as the widely held notion that when filling a job opening an employer ought to engage the most qualified individual. Cavanagh opposes this premise by arguing that the notion of meritocracy has a greater interest in efficiency than in fairness. Because expediency cannot justify overriding an employer’s property or autonomy rights, merit alone does not provide a sufficient reason for abrogating an employer’s hiring decision. He further avers that those who believe meritocracy is based in fairness do so for two incorrect reasons. Holding to an erroneous expectation that the labour market normally operates on meritorious grounds leads both to a sense of disappointment when a particular candidate is not hired, as well as to a false conclusion that something unfair has occurred. Furthermore, although meritocracy does entail non-discrimination by preventing employers from overtly discriminating on the basis of race or sex, non-discrimination does not entail meritocracy. Accordingly, Cavanagh rejects the accepted wisdom that employers ought to be compelled to hire the most qualified person.

Turning from meritocracy, Part two (“Equality”) engages the concept of equality as a valid justification for equal workplace opportunity. Cavanagh catagorises the more salient theories offered by egalitarians, most notably G.A. Cohen, Ronald Dworkin, and Thomas Nagel, into three ideals, each of which he rejects. The first theory posits that all individuals in a community are equal shareholders in a common enterprise. Such a notion might hold true in the public arena, for instance as applied to the franchise, but does not translate to the private labour market, where from a practical standpoint it is impossible to provide everyone with an equally decent job. This disjuncture between public and private spheres, Cavanagh maintains, compels egalitarians to shift gears and argue in favour of one or
both of the other two theories. Providing people with either equal assistance or an equal chance to succeed in life, however, merely gives those same individuals the means by which to advance themselves and thereby become relatively unequal in an opposite sense. Although he is not disinclined towards a more limited version of equality, one that would prohibit discrimination on the basis of race and sex, Cavanagh is very much against an idea of equality that wholly equates non-discrimination with equality of opportunity.

In Part three ("Discrimination"), Cavanagh elaborates on the contextual propriety of discrimination, setting out a theory as to what types of discrimination are justifiable. Discrimination is morally wrong when it involves treating individuals with unwarranted contempt. By contrast, he avers that discrimination lacking malice is morally correct. Thus, an employer who genuinely believes that blacks are less capable employees than whites, or who "just doesn’t like them", or who feels "uncomfortable" around them is, according to Cavanagh, expressing a non-judgmental preference that ought not to be interfered with (p. 176). Ethically speaking, such a predilection is of a level to gentlemen preferring blondes to brunettes. Similarly, he maintains that employment policies and practices with discriminatory effects are justifiable so long as their initial goal was not to treat the adversely effected individuals as moral inferiors. Thus, an employment screening procedure that unintentionally excludes blacks or women would, under Cavanagh’s theory, be licit and should be shielded from external intervention.

The brief concluding section ("Conclusions") does not recapitulate the previous arguments, but instead represents that the world, and the philosophical view of the world, is complex, and not always consistent or univocal. Cavanagh ends by explaining that his intended audience is “those private intellectuals, if there are any left out there” (p. 217).

Against Equality of Opportunity raises some worthy points in the first two Parts, especially about the imprecision frequently applied to the definition of equality and to its normative aspirations. As such, that portion of the monograph is a welcome reminder that an ecumenical understanding of equality of opportunity ought not to be taken for granted. Part three, however, is deeply flawed. Unlike the earlier sections which engage existing scholarship, Cavanagh ignores wholesale an entire corpus of equality literature on the different type of stigma and subordination that attaches to members of protected groups, such as black and women, as opposed to brunettes, or other unprotected individuals. Similarly, he seems unaware of studies on the manner in which some proxies used for statistical discrimination, rather than reporting neutral and empirically accurate facts, reinstantiate social prejudice because of the assumptions that underlie their findings. Moreover, he entirely side-steps the question of why a worksite that an individual employer did not establish himself, but which nonetheless precludes the participation of women or people with disabilities because of its design (in not having appropriate toilets or changing facilities), or excludes the employment of blacks by maintaining a pre-existing racially restrictive environment (either by acceding to customer preferences or through reliance on word-of-mouth hiring practices) does not treat those individuals as moral inferiors and with unwarranted contempt. Cavanagh would be well within his rights to disagree with all of these contentions, but at the very least they should
have been acknowledged. The book, and its audience, are the lesser for the privation.

M.A. STEIN


This is a small volume with large ambition. The centrepiece is an argument by a prominent legal academic (Robert C. Post) on how and why to re-conceptualise American anti-discrimination law. His proposal is commented on by four equally august scholars drawn from departments as diverse as African-American studies and philosophy (K. Anthony Appiah), rhetoric and comparative literature (Judith Butler), and law (Thomas C. Grey and Reva B. Siegel, respectively), with Post given a final rejoinder. The complex and thoughtful contributions in this volume provide a welcome addition to the growing discipline examining the intersection of legal doctrine and visual culture, of which the most prominent branch is perhaps that of critical race theory.

Post’s essay (“Prejudicial Appearances: The Logic of American Antidiscrimination Law”) begins with the claim that the rationale underlying current anti-discrimination law compels the judiciary to formulate remedies that “liberate individuals from the thrall” of socially held stereotypes, when in reality law itself can do no more than “reshape the nature and content” of those conventions (p. 1). According to Post, anti-discrimination provisions are geared towards ameliorating disadvantages that individuals incur when their appearances are associated with inaccurate judgments about their capabilities and moral worth. While disassociation may seem like a laudable goal, wholly diverging personal visible identity from appearance engenders difficulties because the two concepts are linked. Moreover, a legal regime that vitiates their connection for the sake of upholding people’s dignity or worth (as an example, through application of “colour blind” policies) is invariably overreaching. As an alternative, Post advocates for an anti-discrimination theory that would acknowledge its true goal as seeking to change those practices underlying undesirable social convention. Doing so requires society to resist the “dominant perspective” that imagines law “as standing in a neutral space outside of history”, and to instead “recognise how law functions to embody itself in history” (pp. 39, 41).

Appiah (“Stereotypes and the Shaping of Identity”) notes that stereotypes have various manifestations, including statistical, false, and normative ones. Further, accepting Post’s sociological understanding of stereotypes as contributing to the formation of personal identity raises concerns that stereotypes will not only facilitate third parties in excluding certain people, but also act as a disincentive for those individuals to invest in themselves. Because Appiah perceives anti-discrimination law as encompassing ideals of autonomy, dignity, and individualism, he suggests that it focus on the question of “what makes two people or two kinds of
people morally alike” for the purpose of understanding equality theory (p. 57).

Adding to the critique of Post’s conception of stereotypes, Butler (“Appearances Aside”) takes issue with the idea of personal identity expressed through stereotype as being either static or controlling. Butler argues, instead, that an individual can have several personal identities, depending on changing social circumstances, and that each of these selves can contribute to an overall self-identity. Hence, she maintains that law should not endorse social conventions that define and fix personhood.

Grey’s essay (“Cover Blindness”) locates Post’s thesis within “the conventional landscape of American civil rights history, theory, and doctrine” (p. 87). He observes that the first wave of anti-discrimination was directed at overt exclusions based on personal identity characteristics, such as race-based restrictions. By contrast, contemporary civil rights law requires “deliberate strategic intervention into social life” (p. 89). As an instrumentality of change, Grey asserts that law must always be understood contextually as a mechanism that “reinterprets and often redirects the force of the social impulses that drive its content” (95–96).

Modelling her perspective on anti-discrimination law from a socio-historical perspective, Siegel (“Discrimination in the Eyes of the Law: How ‘Color Blindness’ Discourse Disrupts and Rationalises Social Stratification”) focusses on social stratification, a concept that is absent from Post’s essay. Believing that this notion must be understood if any sense is to be made of anti-discrimination law’s central trope of identity-blindness, Siegel provides a detailed account of how social stratification among groups is a result of “the interaction of social structure and social meaning” (p. 100). Next, her essay describes how legal discourse on colour blindness can either diminish or reinforce social stratification, depending on the time and sociohistorical context of the dialogue.

In the concluding section, Post (“Response to Commentators”) reiterates several of his earlier assertions, including the motivating aspiration of analysing anti-discrimination law from an external, sociological, perspective that would reveal how that area of jurisprudence “actually functions” (p. 160).

Providing some astute and interesting insights into anti-discrimination law, Prejudicial Appearances is a brief but illuminating invitation to further explore the ways in which individuals are treated because of their appearance, as well as what law can, and possibly should, do to counteract those effects. If the book has a failing it is in its scope. There are many personal identity characteristics that need not be related to readily discernable characteristics, homosexuality and mental disability to name but two examples, that also subject individuals to unequal treatment

M.A. Stein
This excellent book, the second in the *Oxford Studies in Modern Legal History* Series, is a history of the leading case of *The Mayor, Aldermen and Burgesses of the Borough of Bradford v. Edward Pickles*, decided by the House of Lords in 1895, and its consequences for the common law. *Bradford v. Pickles* stands for the proposition that it is not unlawful in English law for a property owner to exercise his or her rights maliciously and to the detriment of others or the public interest. In English law the act and not the motive of the act determines its legality. The case was a resounding triumph for the inviolability of property rights, and remains pivotal to understanding the attitude of the common law to property rights in land, as well as being significant for particular issues in riparian law and the law of torts.

The opening three chapters describe the human story and the course of the litigation. They are meticulously researched, although unfortunately there remain scant details of the personal life of the redoubtable Mr. Pickles. Chapters 4 to 7 and the Epilogue move the discussion from the human story of the litigation to more legal and abstract themes. Chapter 4 considers a point of statutory interpretation in the litigation relating to the Corporation’s empowering statute (the Bradford Waterworks Act of 1854), succinctly demonstrating that the interpretation adopted was not literally or grammatically correct but rather reflected the prevailing philosophy of the sanctity of property rights. Chapter 5 considers the legal nature of water and the developing state of the law of England at this time, with competing notions of the rights of a property owner of absolute dominion over percolating water or only a right of reasonable user. *Pickles* was important in establishing that there was no doctrine of abuse of rights in English law, and Chapter 6 considers abuse of rights from a comparative law perspective before turning to the question of why an abuse of rights doctrine did not develop in English law (where the author might have been more explicit in his conclusions). Chapter 7 considers the role of malice (i.e. the intentional infliction of injury) in the law of torts after *Pickles* “slammed the door shut” on any development in English law comparable to the prima facie tort in United States law. The Epilogue affirms the importance of the contextualisation of precedent, and comments on the usefulness of *Pickles* in shedding light on the public/private law divide, and some of the legal implications of (re)privatisation of public utilities, such as water companies. The author writes throughout with a particularly lucid style, and prefers to stimulate the reader’s own reflections than adopt a didactic style, which contributes to the pleasure of this study.

Law is concerned with the regulation of human action but so much of legal reasoning is, in Professor Taggart’s memorable phase, a victim “of the lawyerly ritual of bloodletting, whereby the facts, complexity, contingency, and interest is drained away” (p. 196). The genre of legal writing of the case history can, as this book certainly does, restore the flesh and blood to a leading case and demonstrate, not only that human drama and high legal principles might exist in the same set of facts, but also that the former might also elucidate the latter. However, the human factor is only one of
many dimensions this genre might add to the understanding of a leading case. The blithely ahistorical common law doctrine of precedent ignores that authorities are products of their times. Times change but authorities, particularly those of the House of Lords, continue to bind. Some of the contingencies of the time of *Bradford v. Pickles* referred to in this study include the prevailing *laissez-faire* ideology of the late Victorian period, the underdeveloped state of the science of hydrology, the unsettled state of riparian law in a rapidly industrialising society, and the perennial motif of the personality and politics of particular judges.

The writer of a history of a leading case has the advantages of these human and temporal dimensions usually absent from other forms of legal writing, but the disadvantage, judging from the reviews of other works in this genre, of the need to justify this form of legal literature. “How precisely can our understanding of law be enhanced by a well-documented historical study of a case?” a distinguished reviewer once asked and, while recognising their educational value, nevertheless concluded that “what precisely they illumine is rather elusive” (William Twining “Cannibalism and Legal Literature” (1986) O.J.L.S. 423 at 429, 430; see also Robert F. Gordon “Simpson’s Leading Cases” (1999) Michigan L.R. 2044–2054). It is precisely Professor Taggart’s achievement in this book that he manages to “illumine” so much in the fields of tort and property law. Indeed, notwithstanding the technical complexity of the themes, this reviewer wished that some of his illuminating lines of thought, particularly relating to the public/private law divide, could have been pursued further.

However, if the successful case history must illuminate much more than the factual or human details of the case itself, then this Professor Taggart achieves with distinction. Many case studies, and Professor Taggart’s book is no exception, offer insights into precedent, statutory interpretation, and judicial decision-making generally. There is an underdeveloped potential, as this reviewer has said elsewhere, to use the case study to develop our understanding of the adversary system, and particularly the influence of the rules of evidence, procedure, and the practice of advocacy on judicial decisions or jury verdicts. Case studies are also able, as Professor Taggart well shows, to illuminate the relationship of law and policy, and law and ideology, and reveal something of the impact of the structure of the common law on its content. Nevertheless, there are thousands of leading cases and, as the sceptics have said, we cannot consider each case in all its detail. Professor Taggart’s study convincingly demonstrates that this is a matter for regret rather than apology, for studies such as his, although perhaps a little diffuse or even discomfiting to lawyers who prefer their law straight, not shaken nor stirred with human idiosyncrasy, passing ideological preferences, economic choices, and opportunities forgone, restores a richness to our understanding of legal rules and with that richness a confidence in their legitimacy.

In both his Preface and his Epilogue (pp. xi, and 195 n. 1) Professor Taggart pays tribute to Brian Simpson’s pre-eminence in the field of the history of leading cases. He describes the genre as “doing a Simpson” and wishes he “could do it as well”. It is an error to assume limited purposes or approaches in the study of leading cases, or to associate the genre with its most brilliant exponent. There are many possibilities in the study of leading cases waiting to be explored. There is more than one way to skin a
dead cat or dissect an established authority. Professor Taggart has in fact done something different from a Simpson, and done it very well.

DAVID J.A. CAIRNS


There are many issues relating to criminal theory, but probably the central one is what is the point of it all? At its best, as this book shows, criminal theory can have an explanatory, organisational, critical and predictive function, by providing a framework against which criminal law doctrine can be assessed and, where found wanting, criticised and improved. At its worst criminal theory can engender argument for argument's sake without any constructive benefit and divorced from the reality of the criminal law as it operates in the real world. This tendency too is apparent from parts of this book.

William Wilson's book consists of a collection of essays on a variety of topics which have proved important to contemporary criminal theorists. It starts with introductory chapters which consider the reasons for criminalising wrongdoing (focussing especially on autonomy, welfare and morality) and for punishing wrongdoers. Further essays consider the significance of the distinction between acts and omissions, voluntariness, intention and motive, causation, secondary liability, attempts, the structure of offences and defences.

Certain common themes emerge from the different chapters. For example, Wilson has a general tendency to seek an expansion of the criminal law by the identification of more specific offences. In some situations this argument is well made. For example, the creation of new endangerment offences is convincingly suggested by Wilson as a method of resolving doctrinal problems in a way which is theoretically acceptable. In other areas the argument is less convincing. For example, his suggestion of the need for offences of intentional procuring of harm seems unnecessary when the law of accessorial liability is essentially doctrinally coherent, despite his assertions to the contrary. A further theme is Wilson's belief that one of the main functions of the criminal law is communication of norms of behaviour, although he does not consider whether such a function is effective or even realistic.

*Central Issues in Criminal Theory* is most useful when it is approached as a reader, consisting of summaries of the works of criminal law theorists. The key arguments and theories of many contemporary theorists on both sides of the Atlantic are carefully distilled. But although Wilson is prepared to reject certain theories, he appears reluctant to introduce his own ideas. This is unfortunate because it is clear from his previous writings that he has much of significance to say about the impact of criminal theory on criminal doctrine. Each essay in this book tends to lack any coherent argument and Wilson prefers instead to restate various, often conflicting, theories. It would have been useful, for this reader at least, if there had been an attempt to pull the various threads together by concluding sections in each chapter and a more coherent attempt at identifying key themes.
Certain aspects of the book seem under-worked and could have benefited from closer attention to detail, amplification of analysis, especially by clearer explanation of the facts and ratios of cases, and clearer expression of meaning.

Judged as a reader there are certain essays and parts of essays which are especially useful, namely those which consider the distinction between acts and omissions (although he is less convincing at identifying why there should be liability for omissions in certain exceptional cases), the nature of involuntariness, different interpretations of intention and the function of defences, especially the significance of justification and excuse. Wilson is also adept at choosing interesting and thought-provoking hypothetical problems and examples, often sporting, to illustrate many of the key issues. But the book needs to be more than this.

The book is affected by a number of weaknesses, many of which affect the nature of criminal theory generally. There is a tendency to focus on theory in the abstract, divorced from the reality of the criminal justice system as a whole. So when considering the nature of rules, the need to communicate their ambit clearly to juries through judicial direction is typically ignored. The function of the trier of fact generally as a mechanism for applying specific offences to particular factual contexts is also not specifically considered, with Wilson appearing to prefer, in some circumstances at least, that the definition of key concepts and specific offences themselves should be context-dependent. But this would cause massive definitional difficulties and surely result in unnecessary complexity.

The fact that issues of responsibility are considered at the stage of mitigation of sentence is often ignored as well, particularly relevant to the significance of withdrawal as a potential defence. There is a further tendency to criticise criminal law doctrine for not providing rational answers, but without the theorist providing any solutions. Even when solutions are tentatively suggested Wilson takes the easy option by not providing details. So, for example, he suggests that Parliament should formally legislate for crimes of omission and advocates different offences of intentional procuring to reflect different degrees of causal influence, but he does not engage with the massive difficulties of drafting which this would entail. He also calls for a rewriting of the map of inchoate offences without explaining how this could be accomplished, or even why. Finally, there is a tendency to treat theory as leading logically and coherent to a rational and morally defensible solution, whereas the reality of the criminal law is that it is sometimes, inevitably, pragmatic and policy-driven, especially in the sphere of defences.

These criticisms of this book in particular, and the state of criminal theory in general, should not be taken to deny the importance of theory in challenging the assumptions of criminal law doctrine. Indeed this book succeeds in asking the difficult questions which demand a careful and considered response from the perspective of criminal law doctrine. But theory for its own sake is ultimately sterile, just as the study of criminal law doctrine as a list of rules is only of limited value to our understanding of the criminal justice system. It is only where theory is brought to bear on doctrine that its true value is apparent and it is only by careful consideration of doctrine that answers to key theoretical questions can be
GRAHAM VIRGO

*Rights, Duties and the Body. Law and Ethics of the Maternal-Fetal Conflict.*


After a period of increasing judicial willingness to compel competent women to undergo caesarian sections and other medical treatment on behalf of their fetuses against their will, US and English courts have in recent years forcefully reasserted the competent pregnant woman’s right to refuse any kind of medical intervention aimed at benefiting the fetus. But for many people, this cannot be the end of the matter. Unhappy with the notion that a woman’s rights to bodily integrity and self-determination should trump fetal interests even in the face of fetal death or serious and avoidable injury to the fetus and hence the child who is subsequently born, they question whether—as a society committed to the protection of life and the prevention of serious harm—we can really justify not stepping in where a pregnant woman’s choice means that the fetus, whom she has decided to carry to term, will be born with severe and avoidable handicaps, or allow a pregnant woman’s refusal to heed sound medical advice to cause the death of an unborn child at the point of birth.

Rosamund Scott seeks to provide that very justification. Her argument proceeds along three separate but interrelated strands. First, Scott looks at the moral rationale behind a pregnant woman’s right to refuse treatment on behalf of her fetus. She argues that this right is grounded in our appreciation of the values of self-determination and bodily integrity. The right to refuse medical treatment enables us reflectively to make significant personal choices pertaining to our bodies and the future course of our lives. Allowing a person to make these choices is inherently a good thing, even if the outcome of the choice will detrimentally affect others.

Given the fetus’s location inside the womb, treating the fetus necessarily involves some degree of interference with the bodily integrity and self-determination of the mother-to-be. Provided that her refusal of treatment reflects the values which lead us to endorse patient autonomy, that decision has intrinsic moral value and deserves our respect irrespective of its consequences for the fetus.

Second, Scott analyses the extent of the moral obligations a pregnant woman undertakes towards her fetus and/or her future child. In this regard, she argues that “a fetus is of moral interest because of what it is becoming” more than because of what it is: thus fetal interests deserving of protection can be recognised to the extent that they are interests of a future child (“the child that will be born”) or of a viable fetus, *i.e.* a fetus who is already capable of being born alive. Such a fetus potentially has a moral claim against its mother for its protection, and moreover its welfare is of legitimate concern to the State.

Recognition of these interests leads Scott to what she dubs “the intersection between maternal rights and duties”: Are fetal interests capable...
of morally de-validating the maternal interest in making the treatment choice? Not necessarily, is Scott’s answer. In an argument to which she returns when she discusses the maternal-fetal conflict from the perspectives of tort and rescue law, she maintains that we have to draw a distinction between “duties of general conduct” and “duties owed through the body”. Fetal interests as the basis of a moral claim upon the mother frequently raise the spectre of the latter. Unlike duties pertaining to a woman’s general conduct during pregnancy (for instance, to drive carefully or not to take drugs), a “duty owed through the body” clashes forcefully with the pregnant woman’s most fundamental and deeply personal interests and rights.

It is for this reason that Scott concludes that, morally, the pregnant woman does not owe her unborn child a duty to allow physical invasions into her body which are incompatible with the way in which she defines herself and her place in the world—her religion or Weltanschauung—or with the kind and degree of physical suffering she is prepared to put herself through for the supposed benefit of her future child. However, Scott also concludes that treatment refusals for trivial reasons—like a mere wish to avoid an abdominal scar resulting from a caesarian section or a refusal to swallow a side-effect-free pill which would be highly beneficial to fetal health—are morally unjustified.

Uniting the two strands of her argument from rights and duties, Scott arrives at what is essentially a quasi-procedural duty upon the pregnant woman to make a responsible choice. No more, no less is what she owes her fetus “qua fetus” and “qua future child”.

The distinction between “duties of general conduct” and “duties owed through the body” is also relevant for the third strand of Scott’s argument, which is based on the moral cost of attempting legally to enforce a moral duty owed by the pregnant woman to her fetus. In essence, Scott argues that the law recoils from enforcing “duties owed through the body” even where they can be shown to exist because of the invasion of liberty and bodily integrity which such enforcement entails: forcing a pill down somebody’s throat or strapping them to an operating table and subjecting them to major surgery against their will is barbaric, whatever the potential benefit to another. Thus the extreme nature of the only means available for the enforcement of such duties means that their enforcement raises new and separate legal issues under human rights law: as far as “duties owed through the body” are concerned, the identification of a moral duty does not even prima facie provide a moral justification for its legal enforcement. Therefore, even where a woman refuses treatment for what appears to be a trivial reason, a law which subjects her to legal enforcement of her moral duty towards the fetus is morally indefensible.

By contrast, with regard to duties of general conduct, the position of the woman initially appears no different from that of a third party. This suggests that the imposition of legal duties not to harm the fetus through her general conduct or lifestyle choices is practically feasible and morally just. But once we look more closely at the situation we see that the position of the pregnant woman is in fact characterised by particular burdens: Whereas the ordinary potential tortfeasor can retreat from the presence of potential tort victims and do things “on his own”, a pregnant woman can never be alone in the relevant sense: she cannot avoid the presence of her unborn child. Consequently, while conduct duties do not
raise the particularly unappealing spectre of forced bodily invasions and do not usually protect conduct that is inherently of value to the pregnant woman, it may still be inappropriate to hold her to what in her case amounts to a duty to act reasonably at all times, when others are merely subject to a duty to act reasonably in their interaction with third parties. For Scott, the irreducible “social context of pregnancy” makes the imposition of tortious liability on the pregnant woman for harm suffered by her fetus, which manifests itself in the born child, unfair.

For independent back-up and confirmation of her analysis, Scott turns to the underlying rationales of the law concerning abortion, tort and rescue. In the result, Scott maintains that the only way in which public authority can legitimately strive to protect the interests of the fetus both “qua fetus” and “qua future child” is with and not against the pregnant woman, by helping her to make a responsible choice. In that regard, the States role will be limited to providing a framework for counselling and discussion, with attempts at persuasion being permissible to the extent that a woman’s initial decision to refuse treatment appears to others not to be based on a serious reason.

For the German constitutional lawyer, Scott’s procedural solution to the legal regulation of the maternal-fetal conflict—which she distills from faint traces in the 1992 Casey decision of the US Supreme Court—rings a bell with the “co-operative model of fetal protection” endorsed by the German Federal Constitutional Court in its 1993 Abortion Law decision. Scott’s carefully constructed moral argument demonstrates that far from reflecting a murky compromise, a “procedural solution” of the maternal-fetal conflict can be the result of a principled and coherent ethical stance.

On a personal note, this reviewer did not always find this book an easy read. The sentences are long and at times hard to follow, and the extensive cross-referencing, summarising and foreshadowing of arguments—while extremely useful for those who want to read up on a particular issue only—interrupts the flow of the text for those who read the whole book. Yet this reviewer can unreservedly recommend the book for the quality of its ethical reasoning and the soundness of its arguments. It avoids the fallacies so often encountered when lawyers stray into the province of ethicists—the all too easy equation of the existence of a moral duty with a justification for the legal enforcement of such a duty, a buffet-type approach to moral theory and a tendency to fall back on constitutional law arguments “from authority” as part of the moral argument. One slight weakness is perhaps that the distinction between the fetus “qua fetus” and “the child who is not yet but will be born”, so carefully drawn at the beginning, seems to have little importance for Scott’s argument outside her analysis of tort law, except to indicate the existence of a fetal interest even before viability. It appears to me that this distinction could have even greater significance for the weight to be accorded to the fetal interest even before viability. It appears to me that this distinction could have even greater significance for the weight to be accorded to the fetal interest even before viability. It appears to me that this distinction could have even greater significance for the weight to be accorded to the fetal interest even before viability.

However, this is not to detract from the quality of the book as a whole: it has made this reviewer, for one, a staunch defender of its
practical proposals and deserves to be recognised as the authoritative book on its topic.


Doctors and lawyers sharply disagree with one another when it comes to tortious liability for medical negligence. For doctors, the law is fundamentally wrong because it fails to see the fundamental difference in the moral landscape between claims against doctors and other types of defendant. Whereas motorists, employers and industrialists cause damage in the pursuit of their selfish ends, doctors usually cause it when the try to help: so by suing a doctor, you are “biting the hand that saves you”. So most doctors would agree with Frank Dobson who as Minister for Health said that “the proper place for lawyers in hospitals is on the operating table”. Lawyers, by contrast, tend to say that the law of tort unfairly singles doctors out for preferential treatment. The \textit{Bolam} test of negligence enables them to set their own standards of behaviour, and indeed to set them low; learner doctors, unlike learner drivers, are (at least on one view) judged more leniently than experienced ones; and the normal rules on causation are regularly fiddled in their favour, to let them off liability in cases where by their negligence they increase the risk of harm, or reduce the chance of eventual recovery.

Alan Merry is a practising cardiac anaesthetist from New Zealand, whose research has focussed on reducing medical error. Alexander McCall Smith—as well as being a well-known novelist—is a distinguished medical lawyer at the University of Edinburgh. In this collaborative book they apply a wealth of legal, medical, psychological and sociological learning to examine in depth what the legal concept of “negligence” really means in the medical context, and how far it can be properly equated with blame—and to examine more briefly the related questions of how far liability for negligence operates to maintain acceptable standards of care, and to satisfy the needs of injured patients. The result is an exceptionally illuminating book.

The first seven chapters set out the case that much of the behaviour that the law is prepared to castigate as negligent in doctors is not really blameworthy in any meaningful sense of the word.

Thus in the first place, the law treats as negligent not only deliberate violations of the rules of safe behaviour, but also slips and lapses that are due to momentary losses of attention. Citing a number of studies, they show that in every sphere of life, even experienced and normally careful professionals are forgetful occasionally, even where their own safety is concerned: of which they give the gruesome example of the experienced pilot who walked into the still-revolving propeller of his ‘plane. “It is not possible to avoid slips and lapses by choice, by good intention, by strict regulation combined with draconian punishment, or by the risk of harm inherent in a dangerous situation; the remedy has to be sought elsewhere, notably in the way systems are designed”. Second, when things go wrong
during operations, this is often because the operation requires a feat of extreme skill, in which the surgeon must inevitably get it wrong occasionally (just as even a professional golfer occasionally hits the ball into the rough). If the surgeon, being exceptionally skillful, normally manages to do it right, there is a tendency to hold him negligent on the day that—unusually but inescapably—he does it wrong. Third, errors by individual doctors (including some violations) are often really the result of bad systems; where this is the case, it may be proper to blame those who are responsible for the system—but not the individual doctor or surgeon who was unlucky enough to be caught up in it. A feature of the system in many or most hospitals that is endemic, and which Merry and McCall Smith believe to be responsible for many medical mishaps, is that doctors—and particularly junior doctors—are expected to work enormously long hours, so that they end up making errors because they are too tired. Doctors who make mistakes in such circumstances are not guilty of the sort of callous disregard for others’ safety that we usually equate with blame—in fact they are showing extraordinary dedication. “Improved safety”, the authors say, “may depend on a cultural change which results in individuals being willing to admit when they are too tired or too ill to work”.

If all this leads the law of tort to blame the blameless, the tendency is accentuated by two other matters. The first is that, despite the well-known saying that the law requires not the hindsight of a fool but the foresight of a reasonable man, a respectable body of psychological research strongly suggests that “once we know what happened, we are much readier to state that such an outcome was predictable”. This tendency is accentuated by “outcome bias”: the worse the consequence, the more there is a tendency to believe that somebody must be to blame for it. From these human tendencies there is no reason to suppose that judges are immune. The second matter is the role of expert witnesses. Lawyers tend to assume that this works to the benefit of doctors, by enabling them to produce as so-called experts incompetents whose abysmal standards enable defendant doctors to satisfy the Bolam test by establishing that their alleged negligence is accepted as proper practice by a section of the medical profession. In fact the problem is in truth the opposite. Expert witnesses tend to be top performers at the peak of the profession, whose views of what can reasonably be achieved are sometimes counsels of perfection.

Having convincingly established that the current law of negligence treats as negligent much behaviour that is really free from blame, the authors conclude that “If the standard ceases to represent the level that can in reality be expected of the reasonable person, then it could be argued that the moral underpinning of negligence liability has been lost”.

In the remaining three chapters, the authors set out their ideas on how the law and practice in this area might be improved. “The difficulty”, they explain, “is that there are actually three elements which need to be considered in response to accidental injury: compensation, accountability (ensuring safer practice) and, where appropriate, punishment”. The present law is at once inefficient in distributing resources and providing compensation to those who need it, largely ineffective in raising and maintaining standards of medical care, and for some doctors so stressful that it actually renders them less effective in their work.
To ensure safer practice, the authors favour a system under which medical professionals are routinely required to report not just incidents that cause damage, but “near misses” too: a system that is now currently being implemented in the United Kingdom through the National Patient Safety Agency.

For compensation, the authors favour a “no fault” scheme. The New Zealand “no fault” compensation scheme ran notoriously into trouble, from which tort lawyers in the United Kingdom tend to conclude that such schemes can never work. The authors believe that difficulties with the New Zealand scheme were caused by a combination of bad management and political interference—and remind us that both Sweden and Finland have schemes that seem to work quite well.

Unlike many advocates of “no fault” schemes, Merry and McCall Smith believe that in the common law world, negligence actions against doctors do have their proper place—and should in principle be retained even if a “no fault” scheme were introduced. However, this is on condition that the concept of negligence is redefined to equate more closely with behaviour that can fairly be seen to attract blame. With this in mind, they draw up a hierarchy of five levels of conduct that causes damage. First there is simple causation, with no failure to in any sense to do what ought to have been done. Second, there is fault, in the sense of failure to do what ought to have been done in the circumstances; this includes momentary slips and lapses, which even normally careful people will inevitably make. Third, there is fault in the sense of the intentional violation of a known rule; for example, the anaesthetist who, in breach of normal good practice, leaves the patient unattended to make a telephone-call. Fourth there is subjective recklessness; where the doctor both knows that his or her behaviour is in breach of the rules, and—unlike the hypothetical anaesthetist—actually foresees what the result might be. Fifthly and most exceptionally, there is harm that is intentionally caused. In categories three to five, blame may properly be attached: but in their view, not in category two, any more than in category one.

This is a ground-breaking and important book. For medical lawyers, it is obviously interesting because it makes a convincing case “that tort-based compensation is an unreliable and inefficient means of compensating injured patients, may often produce unjust results, has placed undue and unproductive pressure on doctors, and has not turned out to be particularly effective in improving safety”. But it has a wider importance, because of the critical analysis to which it subjects the legal concept of negligence. It is a book that every reflective tort lawyer ought to read.

J.R. Spencer


Nicola Notaro undertakes a task of impressive dimensions in this book published recently by Cameron May. The publication is presented as a revised version of the author’s doctoral thesis, submitted at the University
of London. The body of the work consists of a broad and up-to-date survey and critique of decisions made within the dispute resolution systems of the EC and the WTO in the field of “trade and environment”.

Notaro begins by providing tidy overviews of the development of relevant institutions and of the treaty provisions respectively applying within the EC and the WTO in relation to “trade and environment”. In later sections of the book the author’s tone becomes increasingly open and direct, as he puts forward a range of opinions on the decisions made in the disputes under discussion. His interest in the tensions implicit in deregulation of trade, specifically those connected with environmental policies, energises the book throughout.

Notaro’s decision to focus his research on the judgments and reports emerging from the EC and the WTO is a logical one. There are now highly developed adjudicatory mechanisms operating within both these international legal subsystems, and an increasingly complex body of substantive law exists in both the EC and the WTO in the area of “trade and environment”. The book is dedicated largely to a study of how this law has been applied and interpreted in the series of cases discussed. For example, the author looks at ways in which the concept of necessity is applied as a factor justifying adoption of environmental protection measures in the context of free trade. As the book makes clear, the significance of “case-law” in the field of “trade and environment” in the EC and the WTO is considerable. This is due largely to the approach to their task adopted by Members of the European Court of Justice and of the WTO Appellate Body, and can itself be seen as the most radical aspect of “judicial approaches” to trade and environment.

Several features of the author’s final analysis, found towards the end of relevant sections of the book, and of the book itself, call for remark. The author raises a number of intriguing points. Procedural aspects of “judicial approaches” to “trade and environment” that he brings to our attention include: the format of WTO reports, the reception of amicus curiae briefs, the allocation of the burden of proof, the consultation of experts and the referral of cases back to tribunals of first instance. Much work remains to be done on these topics. For example, the role of the precautionary principle will need to be analysed closely. The precautionary principle may be applied between international actors as a matter of law to require those wishing to conduct dangerous activities to demonstrate their safety before proceeding. This reviewer suggests however that such a requirement can be considered to impose only an “administrative” burden of proof on an international actor, and does not automatically impose an “adjudicative” burden of proof in the context of adversarial third party dispute resolution procedures. There is ample room to contend that the author’s view that the precautionary principle may directly affect the allocation of a burden of proof in proceedings before an international tribunal is premature.

Finally, it should be noted that the editors of this book seem to have done no great service to the author, whose first language is not English. The text is poorly set out in long and dense paragraphs. Greater effort should have been expended in ensuring that grammar, spelling and punctuation were correct, and errors were eliminated. Concerns also remain about the most helpful way to present doctoral research, and the extent to which substantial rewriting may be necessary before publication. The amplitude of the research reflected in Notaro’s publication remains
impressive, nevertheless, and the book will offer engaging reading for some of those who are researching the cases on which it comments.

CAROLINE FOSTER


It is claimed that up to $1.5 trillion is laundered annually in the world. Whether or not this figure is accurate, “enough influential people behave as though there is a significant problem” (p. 6). The result has been a raft of legislation at international, regional and domestic levels as money laundering has moved from the margins to the centre in the war against drugs, the war against organised crime and, now, the war against terrorism (p. 1). Yet, despite this current focus on money laundering, there is still a dearth of scholarly analysis of the legal responses to money laundering and the financing of crime. Alldridge’s new book goes a long way to addressing this lacuna by providing a thorough and critical exploration of the rapidly developing criminal and civil law in England and Wales relating to the proceeds of crime and monies intended to finance crime, introduced through a discussion of international and European developments in this area.

The book succeeds in all three of its aims: it provides “a criminal law emergence study”, it critically examines “the supposed rationales for the legal responses to proceeds of crime … at a time when money laundering has come to be blamed for many of the evils of the world”, and it conducts “a human rights audit of the current state of the law of confiscation and forfeiture” in England and Wales (p. v). The introductory chapters have a predominately socio-legal perspective, followed by a chapter examining forfeiture, confiscation and criminalisation in the context of criminal law theory. The bulk of the remaining chapters provide a doctrinal discussion of the current law focussing on its implications for human rights, with frequent references both to the theoretical and to the socio-legal observations made earlier.

The first chapter describes the phenomenon of money laundering, critically examines various attempts to quantify the amounts laundered globally, and traces the development of legal responses to it from a socio-legal standpoint. This is the “criminal law emergence study” (p. v). It also examines, for example, the rhetoric that is employed in the debates, the notions of moral panics, and the interests of the various actors (politicians, law enforcement personnel and other criminal justice professionals and academic observers) who are shaping policy and law in this area, particularly in the post September 11 environment (pp. 16–23). Chapter one ends with a brief introduction to the concept of the harm in money laundering (p. 27), which leads into chapter two’s examination of the predominant economic arguments used to justify counter-money laundering action (pp. 29–43). The critical analysis in this chapter is especially to be welcomed given the frequent and uncritical repetitions of the claim, often without further elaboration, that money laundering and inflows of “dirty”
money generally cause harm to the economic markets in which they are present.

Following these broad socio-legal introductory chapters, the book switches to criminal law theory to explore the justifications proffered in English law for forfeiture, confiscation and criminalisation (pp. 45–69) and provide a short and useful historical account of these forfeiture and confiscation provisions (pp. 71–88). It then turns back to the international arena, before beginning the detailed examination of the English law relating to money laundering. The international chapter contains an overview of the major international instruments currently in force that contain provisions designed to deal with proceeds of crime (pp. 89–97), the relevant European Union law and co-operative measures, including the expansion of Europol (pp. 97–104), and the work of the most significant international organisations operating in this area: the Financial Action Task Force (pp. 104–106), the International Monetary Fund and the World Bank (p. 104) and the Basle Committee on Banking Supervision (p. 106).

The later chapters contain a detailed examination of the current body of law in England and Wales relating to illicit finances, both the proceeds of crime and funds intended to be used to finance future criminal activity. Here the author combines his doctrinal and theoretical perspectives and discusses forfeiture (pp. 109–122), confiscation (pp. 123–166), confiscation without a preceding conviction, so-called “civil recovery” (pp. 223–248), and the offence of laundering (pp. 181–211), with reference both to the relevant criminal law theory introduced earlier and to the human rights implications of each legal mechanism. The final chapter examines the obligations on financial institutions, lawyers and others to, amongst other things, report suspicious transactions to the authorities (pp. 225–273).

It is impossible here to give an overview of all of the areas covered by this book of almost 300 pages. However, Alldridge’s discussion in the context of “civil recovery” of the increasingly important role of taxation in the legal armoury against the proceeds of crime, is worthy of note. The chapter on civil recovery examines the powers of the new Asset Recovery Agency, which combines the traditionally separate powers of criminal law enforcement with those of tax inspectors. Here Alldridge demonstrates the significant human rights implications of this example of “joined-up government” (p. 246), as the powers of taxation authorities in many respects far exceed those of law enforcement (pp. 247–253). In this section, the author voices sentiments that echo throughout his book; that each innovative government strategy to combat illicit finances must be carefully examined, that “each join requires a separate and sufficient justification …[and, that if] the traditionally accepted categories are to be abolished this should be done consciously” (pp. 247–248).

Two criticisms of the book both concern chapter five, entitled “The International Dimension”. First, this international chapter separates the preceding theoretical and historical accounts of the English law of forfeiture, confiscation and criminalisation from the detailed examination of the current English law when it would seem more user-friendly if the English law sections of the book could be read together. Similarly, the international chapter would seem to flow more naturally directly from the introductory chapters that are global in perspective and discuss, amongst other things, matters relating to the international financial system. Second, it is unfortunate that the international chapter does not include a
discussion of the UN Convention Against Transnational Organised Crime (2000). This convention, which will enter into force on 29 September 2003, will significantly expand the scope of the international counter-money laundering provisions. It is also regrettable that this chapter does not include a brief description of the International Convention for the Suppression of the Financing of Terrorism (1999), which came into force on the 10 April 2002, or the terrorist financing provisions of UN Security Council Resolution 1373 (2001), especially given the author’s later examination of the English law relating to the “Acquisition and Deployment of Money for Terrorism” (pp. 215–221).

These points do not, however, overshadow the quality of the content of the book and do not detract from its value to both students and practitioners in this rapidly developing field of law. This book’s impressive breadth, detailed analysis and questioning style are refreshing and are warmly welcomed.

Rachel Barnes