BOOK REVIEWS


In this interesting and highly readable book, the authors so interpret “legal ethics” as to incorporate all the precepts that guide lawyers in the practice of their profession, whether these are unwritten, or contained in professional codes of conduct or in the law itself. They may be described as professional “virtues” or “values”, and the authors bring them under six broad categories: competence; independence; loyalty to client; maintaining the confidentiality of client secrets; responsibility to the courts and to colleagues; and honourable conduct in professional and personal matters. Most of these form the subjects of separate chapters, and there is an additional chapter on “Fees and Other Issues of Legal Economics”. The book ends with “Concluding Reflections”. It is not, however, until after a substantial introduction and two other chapters, that the reader reaches these specific matters. The book looks at them from a comparative point of view, and so the first chapter provides a historical and wide-ranging sketch of the legal profession in a number of different countries, and the second discusses the roles of judge and lawyer (for the authors’ purposes judges also qualify as members of the legal profession).

One of the characteristics of this book, and one which goes a long way to explain its readability, is the informality of its style—it even contains a number of jokes—and the exposition is much less affected than many others by the qualifications that are so often inserted by legal writers overburdened by fear of inaccuracy. Such an approach is attractive but a little risky. Nuances may be lost, and sometimes a misleading impression may be conveyed. So, for example, the reader is told that in civil law systems the prosecutor is considered part of the judiciary. He may be, as in France, a member of the magistrature, as are also the judges, and this certainly sets prosecutors apart from lawyers in independent practice, but the magistrature itself is divided into two distinct parts: the ministère public whose principal but not exclusive function is the prosecution of offences; and the magistrature assise, the name colloquially given to the judiciary. Again, the statement that the European Union “is evolving into something like a federal system in which its constituent states are subordinate members” may correspond to a certain section of American wishful thinking, but even before the recent referenda many Europeans would have rejected it.

The book does far more than state and compare the ethical rules of different legal systems. It seeks, in large measure successfully, to demonstrate realistically how situations can arise in legal practice that create ethical problems for lawyers, and how different legal systems seek to solve them. Consideration is not limited to questions that may arise in
litigation, but extends to those of “office lawyering”, which raises plenty of
coundrums. What, for example, is the position where one party’s lawyer is
about to agree to a contract clause apparently favourable to his client but
which the other party’s lawyer knows to be legally invalid? Should the
second lawyer inform the first about this, and does it make any difference
that the first lawyer’s client has behaved oppressively in the negotiations?
Discussion of the different “professional virtues” is thorough and the
conclusions are generally acceptable to an English common lawyer, but
occasionally may bring a raised eyebrow. The pride of place given to
Brougham’s overstatement (in connection with his defence of Queen
Caroline) of the duty of an advocate—that qualified in the text—is
apparently better known and appreciated in the US than in this country.

The authors recognise that the transformation of professional ethics
into systematic legal codes is not an unmixed blessing. The moral force
of the rules is weakened and enforcement is shifted from social pressure
through professional colleagues to enforcement by state authority. Such
transformation has probably been inevitable since the great expansion of
the legal professions and the vastly increased complication of the law itself.
Nevertheless, even if something (what?) is gained by making explicit such a
rule as that an advocate must not bribe a witness or put fabricated
documents in evidence, there is no chance that any code can cover every
situation. Is there not a risk, at least in a country where it is accepted that
everything that is not forbidden is permitted, that a casus omissus will lead
to certain unethical conduct being regarded as permitted?

This book will be of considerable assistance to those whose business it
is to inculcate in young lawyers the right reactions to the unforeseen ethical
problems that they will meet in their professional careers—and to the
young and not so young lawyers themselves. But at the end of the day
there is no substitute for the respected and experienced lawyer who can say
with authority to the young lawyer, almost in so many words, “Young
man, we don’t do that”.

The book is beautifully written, except for the politically correct use of
“she” rather than “he” to avoid the unnecessary pedantry of “he or she”.
It is also well produced but for the use of endnotes, all gathered together
at the end of the book and so individually much more difficult to find than
footnotes, any one of which can be seen at a glance to be a mere reference,
or a useful parenthesis that should be read there and then.

J.A. JOLOWICZ

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This is a big and ambitious book. Addressing fundamental issues in public
law, it also engages with a host of questions in political philosophy and is
not afraid to develop a sweeping and original line of argument that
challenges current orthodoxy. The treatment of public law builds on
Brudner’s broadly Hegelian outlook, and the book therefore extends and
deepens his earlier Hegelian treatments of private law. The author displays
considerable courage in tackling such a project. Whilst the sheer scale of
his enterprise will arouse scepticism in many readers, they should not allow that scepticism to obscure the value of the book or the substance of Brudner’s achievement.

Brudner’s object is to produce a theory of the constitutional law of the liberal-democratic polity. He believes that in spite of the significant differences between constitutional regimes there are also important commonalities which are acknowledged in the practice of constitutional judges and jurists who frequently refer to judicial decisions in other jurisdictions when considering the interpretation of law within their own jurisdiction. This shared body of practice has, in Brudner’s opinion, outstripped the conceptions of liberalism available within contemporary philosophical literature. Philosophers such as Rawls and Dworkin have mistaken a part for the whole: an adequate liberalism requires a more differentiated and articulated theory. For example, whereas the recent philosophical literature has tended to give priority to “the right” over “the good”, modern constitutional practice entrenches a concern for valued forms of life in ways that should not be seen as departures from liberalism, but as embodying a deeper understanding of the features that an adequate liberalism should possess.

In recent decades, political philosophers across a wide front have abandoned philosophy’s traditional quest for unconditional justification in favour of a reconstruction of the values implicit in the public culture of liberal democracy. Thus Rawls tells us that an adequate political liberalism must draw upon “fundamental ideas seen as implicit in the public culture of a democratic society” and he takes that “public culture” to include “the political institutions of a constitutional regime and the public traditions of their interpretation (including those of the judiciary)”. While remaining agnostic on the prospects for the traditional enterprise, Brudner follows Rawls in adopting a concern with purely “relative” justification. His focus upon the values implicit within liberal democracy is not, however, a search for ground that is neutral between different philosophical positions (in the manner of the later Rawls). Rather, Brudner construes the rich and complex development of modern public law as revealing a dialectical relationship between fundamental liberal philosophical outlooks. By examining “the autonomous working of a public reason in principles already lying before us in the mundane practice of constitutional jurisprudence” (p. 11), we can see how Kantian rejections of utilitarianism can be accommodated within a framework that also accommodates the perfectionist critique of Kant.

Reflecting to some extent the general structure of Hegel’s Philosophy of Right, Brudner begins with a consideration of libertarian theories that focus on the rights of individuals atomistically conceived (this parallels Hegel’s discussion of “Abstract Right”). Such libertarian positions form a natural starting point for constitutional theory as, within the family of liberal theories, they embody the most restrictive understanding of the state’s authority. Brudner then seeks to show that when we properly understand the values espoused by the libertarian we see that their conditions of realisation require that we pass beyond the structures of libertarian law and politics. By similar moves of immanent critique and dialectic, he aims to produce a theory that accommodates the insights of liberal egalitarians, communitarians and Aristotelian perfectionists. Rather than following Rawls in the effort to produce a domain of public reason
by an act of abstraction from the content of comprehensive philosophical doctrines, Brudner endeavours to show that the major positions within political philosophy all reflect aspects of the truth, aspects which can only be grasped once we have understood the intellectual relationships intrinsic to the development of juridical and political thought. Understanding the history of constitutional thought enables us to see how an adequate political community will need to articulate diverse aspects of a complete ethical life in the structures of its public law.

When Brudner equates this form of argument with “relative” justification, however, and contrasts it with the notional possibility of an “unconditional” justification sought by traditional philosophy, he may have strayed from the Hegelian path that he generally follows. Hegel certainly grounds his political thought in a metaphysical standpoint, and we may take metaphysics to be the search for knowledge of the unconditioned. Yet Hegel would regard the unconditioned not as that which has no conditions but as that which encompasses its own conditions. Consequently, there is a sense in which the reconstruction of a dialectical relationship between those partial or one-sided moral theories that together make up the fabric of our actual ethical and political life constitutes not a “relative” justification to be contrasted with the traditional enterprise of “unconditional” justification, but rather Hegel’s version of unconditional justification. The abstract possibility of a justification which is “unconditioned” in some other sense would be regarded by Hegel as an illusion which obstructs our reconciliation to the structures of ethical life, and invites an understanding of morality as the discrete and detached outlook of the individual moral agent.

Brudner understandably expresses a desire to draw upon Hegel’s political philosophy “without depending upon the truth of his comprehensive system” (p. viii). Hegel’s comprehensive system, however, is not best viewed as a set of claims detachable from his politics, but (in this context) as an attempt to resolve a difficulty that should be perceived as central to jurisprudential inquiry. Once we have begun to think of morality as a pure expression of individual autonomy, it becomes hard to see how the facts of human practice (including the established institutions of law) can have any intrinsic bearing upon moral right and wrong (here we see the mindset that underpins both legal positivism and analytical jurisprudence). One aspect of Hegel’s project is aimed at reconciling essentially modern conceptions of autonomy with an understanding of morality as necessarily articulated in practice and political community. Moral truth (in common with all other forms of truth) is not to be straightforwardly contrasted with accepted belief, but rather seen as the point where established forms of consciousness no longer need to go beyond themselves (Hegel, Phenomenology of Spirit, para. 80). An understanding of the “necessary progression and interconnection” (para. 79) of such forms of consciousness is integral to adequate knowledge: science “is the whole which, having traversed its content in time and space, has returned into itself” (para. 12). The necessary articulation of morality within the historical structures of a shared ethical life is recognised by Brudner to the extent that he sees political morality as a domain of mutual recognition: but its deeper significance is perhaps overlooked.

Different understandings of morality, and of the relationship between morality and social practice, play a large but subterranean role in
jurisprudence. For the idea of moral judgment as embodying a unique relation between the individual will and a motivationally inert reality within which it moves serves to conceal the way in which reflection upon practices and institutions may provide a source of moral insight, alerting us to dimensions of value that would otherwise be lost to our abstract theorising. Once the possibility of such a form of reflection upon practice has been suppressed, the significance of philosophical inquiry into law’s nature begins to seem obscure: for (we may ask) is not the nature of law better investigated by the historian or the social scientist, rather than the philosopher? The response generally offered to this question consists in the claim that inquiry into law’s nature is an enterprise of “conceptual clarification”. Texts from the older tradition of philosophy of law are then portrayed as normative political arguments conducted within a curious convention that required them to be formulated as theses about the nature of law. In fact, those texts were neither works of conceptual analysis nor complex moral prescriptions presented in a misleading form. They were precisely substantive reflections upon the moral significance of law and the ethical life that it revealed.

N.E. SIMMONDS


The Pharisees in the New Testament are represented as a politico-religious sect distinguished at once by their nitpicking legalism and by their hypocrisy and moral blindness. Their example forces us to confront the law as both a source of moral obligations, and a series of demands which may conflict with such obligations. In this book, Ruth Higgins sets out to explore the relationship between legal and moral obligation through the development of a theory of conscientious obedience to law. Theories of this kind which assume a bounded conception of the polity are, Higgins argues, “no longer tenable” (p. x). She therefore ultimately eschews many of the “core concepts” such as consent, community, fairness and gratitude which have traditionally figured in philosophical discussions of conscientious obedience, in favour of an account grounded in respect for persons (chapter 2). The passages addressing the impact of globalisation upon the political system are among the most valuable in this rewarding and densely written book, by avoiding easy assumptions concerning a right to govern grounded in mutual obligations to preserve common institutions and practices by doing what the law commands. Higgins argues that our moral and political duties “do not trace out the juridical lines of national borders” but instead concern “the causal and moral lines” that define our increasing global interdependence (p. 244).

Traditional efforts at understanding obedience to law have tended to concentrate on the relationship in which the average citizen stands to the wider political community or to the state. Yet in modern multicultural societies it is the “margins of membership [which] are the crucial focus of a moral theory of legal obligation because it is here that law is most
despairingly viewed and most often fails its subjects” (p. 48). It is also in such cases that the idea of “mutual bonds” is weakest: after all, if the law operates pervasively to make me feel like an outsider by failing to protect my interests and constantly frustrating my aims, why should I feel any strong obligation to perpetuate its rules and institutions? A basic problem emerges: the rule of law depends upon the degree to which the corpus of legal rules and standards reflects the moral life of the community to which it applies; but in a culturally diverse society marked by the absence of shared moral perspectives, how can a body of imposed rules be capable of grounding a collective obligation? Higgins suggests that the duty to obey is grounded first and foremost in respect for persons, and only derivatively by respect for law: individuals are entitled to respect in virtue of their intrinsic dignity and capacity to lead worthwhile and morally excellent lives (p. 50); law, by contrast, is worthy of respect only insofar as it promotes the well-being of members of a community, by protecting them from harm and by creating opportunities for the realisation of human capacity (pp. 66–7). Law is thus instrumentally valuable: we “can only respect law’s realised capacity for facilitating good, and not its bare potential” (p. 65). The obligation to obey the law is then “a duty not to damage law’s proper functioning deriving from the duty of respect for persons” (p. 64).

This is an interesting argument. Higgins denies that there is a universal obligation to obey the law, or that all individuals are under identical obligations of obedience. Because law is valuable instrumentally and derivatively, our duty is to respect not the law itself, but rather the coordinating and guiding power of legal rules, and the conceptions of justice which those rules are taken to serve. Our reasons for obedience to law thus revolve around the thesis that legal rules make a decisive contribution to human value “and are therefore contingent on empirical analysis as to whether breach of a law actually damages the functioning of law and thereby undermines respect for persons” (p. 67). Higgins insists that our duty of respect towards persons is not similarly contingent on facts, as our respect here is rooted in human capacity (for living a valuable life) rather than in estimation of the value of a person’s actual life-choices. We might nevertheless wish to ask whether questions of political obligation and legitimacy can be sustained by so abstract an ideal: even if I have an unswerving regard for human life generally, surely my respect for my fellow members of society depends upon my recognition of value in their lives (and not merely the potential for realising it) and upon their similarly valuing me. A system of laws is after all sustained by social practices: if the legal order systematically fosters the interests and potential of others whilst constantly and pervasively frustrating my own development, why should I respect either the law or those persons?

Higgins in fact responds to this point at a later stage in the argument, but her response leaves behind some potentially thorny questions about the assumptions on which her account is based. She points out that “we truly respect persons not when we respect them as the abstract bearers of universal and minimal capacities, but when we attend to them in all their subjective peculiarity, by reference to that which they value in themselves” (p. 71). Whilst I respect X’s potential to form and develop an identity, I may only tolerate his chosen identity. Yet such tolerance is, Higgins admits, subject to limits: “There will come a point where we should not tolerate immoral, hateful identities and the institutional structures which support
them’’ (p. 71). This creates a problem for Higgins’s thesis in the following way. If we value only certain capacities, then our respect for the law is contingent not upon the raw promotion of potentialities flowing from a generic respect for persons, but upon the values and ideals that the law promotes. Higgins insists that respect for law entails the duty “not [to] damage or undermine what is of proven value in realising individuals’ capacity” (p. 67). It is difficult to see how arguments directed towards establishing the actual value of particular laws can avoid placing heavy dependence on the interpretation of legal rules in the light of their purpose and underpinning reasons, in addition to their efficacy: for the realised value of such rules will inevitably depend upon the way in which they are interpreted and applied in the light of the particular facts of each case. But, if that is the case, why should we treat respect for law as something derivative and rooted in mere instrumentalities?

The opening chapter of the book develops and defends an essentially Razian conception of legal authority as the theoretical context in which the debate about conscientious obedience takes place. It is, according to this conception, the fact that a command has been issued, and not its content, which grounds a claim of obedience. True obedience to law thus demands that one obeys on the strength of a command and not because one morally agrees with it. Accordingly, it must be possible to identify a legitimate command independently of the values and reasons it may serve. Higgins argues that at least two separate enquiries result. The first relates to the obligation to obey legal directives as peremptory and exclusionary reasons for action, whilst the second enquires whether there are good moral reasons for complying with directives because they are valid law. She concludes that whilst the obligation to obey does not purport to be absolute or final, it does claim to make categorical and universal demands: “All things equal, the obligation to obey expresses universal and categorical demands. All things considered, it will, almost necessarily, lose this universality” (p. 29). Yet if we take seriously the claim (at p. 70) that respect attaches to that which is genuinely valuable, rather than that which is merely valued, we might well wonder whether the idea of “all things equal” is anything more than an empty shell. Except in the case of certain statutory duties, the obligations imposed by legal rules tend to become clearly and fully understood only in the light of the moral dilemmas and conflicts of interest to which the rules apply. If we disagree about what makes life valuable, then we cannot avoid projecting those disagreements on to the content and interpretation of legal rules as well as their “validity”. That being so, the formal obligation to obey legal directives is not a separate kind of obligation from that derived from “good moral reasons”.

Higgins ultimately seems torn between an essentially statist conception of law, and a clearly non-statist notion of conscientious obedience grounded in broader issues of value and respect. Her attempt to combine the two into a single theory of respect for law produces some interesting and complex flights of reasoning, but in the end the result seems strained. There is much of value in this volume for the philosopher trying to understand the nature of the obligation to obey the law within the modern polity. The extended discussions of theorists such as Dworkin, Green, Soper and Rawls in the later chapters are insightful and useful. Higgins manages to produce a fascinating and provoking account of obedience in
what is a fairly limiting methodological framework. The attempt to view
law in a rigidly positivist way throws up a particularly dense set of
problems relating to obligation and authority. (The binding authority of
law was, after all, traditionally rooted in the notion that the common law
is in some sense “our” law, and not merely a set of arbitrarily imposed
injunctions.) It is an inevitable danger of such an approach that it makes
important questions and analytical contrasts seem more clearly defined
than they really are.

SEAN COYLE

The Law of Trusts. By Geraint Thomas and Alastair Hudson (with

This book is intended to be a treatise on the law of trusts to match—one is
tempted to say rival—standard practitioners’ texts such as Lewin
and Underhill and Hayton. What makes it stand out is its unique organisational
structure. In very broad terms, it is divided into two parts, namely a
discussion of general trust law principles (such as the formation of express
trusts, trusts arising from operation of law and trustees’ powers, duties and
liabilities), followed by application of the law to specific areas of trust
practice (such as private client trusts, pension scheme trusts, international
trusts and other commercial trusts). Given its unique structure, it is
inevitable that there are areas where basic trust law principles have to be
repeated in different parts of the book. One clear example is the treatment
of Quistclose trusts in Chapters 9, 26 and 49. Where this occurs, helpful
cross-referencing facilitates quick research. Also facilitating convenient
research is the comprehensive index. There is thus no doubt that this book
will turn out to be a very helpful reference work for practitioners and
academics alike.

As a matter of general legal scholarship, what this book highlights is
the dismal disconnection between how trusts law is taught in the law
school curriculum and how it is typically encountered in practice. Students
are generally taught that the trust is a unique equitable institution dealing
with gratuitous transfers mainly as a means of organising personal or
family wealth. Hence trusts are fundamentally different from contracts.
However, the trusts most commercial practitioners encounter are the
product of bargained-for exchange analogous to contracts, such as in asset
securitisations, pension trusts and unit trusts. Not only is the absolute
majority of wealth in trust held in commercial trusts (as opposed to
personal or family trusts), trusts also frequently play the central part of
commercial transactions (see, for a recent example, Concord Trust v. Law
Debenture Trust Corporation [2005] 2 Lloyd’s Rep. 221). Generally,
however, law students are not exposed to the commercial uses of trusts and
have little understanding of why commercial trusts are frequently chosen as
a commercial vehicle, sometimes in combination with companies and
partnerships. It is perhaps partly because of this that commercial trusts
have sprung up largely in specialist practice areas, without much
connection with traditional Chancery practice. For example, securities
lawyers deal with unit trusts, pension trusts are a specialist area among
employment lawyers, and asset securitisations are the staple of structured finance lawyers. Although perhaps not consciously doing so, this book represents a positive step towards remedying the disparity between trust teaching and trust practice.

Considering the vast amount of black-letter law involved, the authors are particularly successful in bringing to the surface the major legal issues in a clear and systematic manner. Notwithstanding the general excellence of the text, it is perhaps apt to point out some shortcomings in the book. First, the whole section on pension schemes has unfortunately been somewhat overtaken by the enactment of the Pensions Act 2004. Second, the section on tracing suffers from a serious and irremediable terminological defect. Tracing is neither a claim nor a remedy, but simply a process by which a claimant identifies property deriving from his original property. It is a process that helps the claimant to make a claim, be it tortious, restitutionary, personal or proprietary. There is therefore no such thing as a “tracing claim”. However, throughout the book (and especially in Chapter 33) one sees repeated references to a “tracing claim”—and this despite the fact that the authors cite judicial statements by Lord Millett to the effect that tracing is neither a claim nor a remedy (e.g. at p. 1078).

Third, in the same way that tracing is merely a process of identification, so too is “following” (see Foskett v. McKeown [2001] 1 A.C. 102); there is thus no such thing as a “following claim”. However, one sees repeated references in Chapter 33 to “following claims”. At p. 1079, the authors even cite Foskett as supporting their terminological mistake, but there is in fact no reference to a “following claim” in that case. This error risks misleading students and practitioners.

No doubt one might reply that the above is unnecessary pedantry about form; we all understand the substance that the authors are trying to convey. However, words are not just the cosmetic clothing of some underlying concept; they are the operational vehicles of that concept, the visible manifestation of legal characterisation. Confusion of words frequently leads to confusion of thought. One example must suffice: the authors define a “tracing claim” in this way: “The purpose of a claim based on tracing... is to provide the claimant with some right in property, as opposed to merely a personal right against a trustee or some other person” (p. 1072). In other words, the authors’ view is that “[a] tracing claim is necessarily a proprietary claim by which the claimant seeks to establish a right to property” (p. 1113). However, when discussing the defences to a “tracing claim”, the authors list the defence of change of position and cite Lipkin Gorman (a firm) v. Karpnale [1991] 2 A.C. 548 in support (pp. 1073, 1116). But Lipkin Gorman concerned a personal, not a proprietary claim, and so cannot be a “tracing claim” within the authors’ own definition.

Fourth, in the context of commercial trusts, the authors refer to “collaterisation under a bare trust” in this manner: “[A] third party custodian would hold a fund of assets on trusts which were subject to two, alternative conditions precedent: if the counterparty failed to perform its contractual obligations then the property was held on trust for the secured party in an amount sufficient to meet the counterparty’s default, or alternatively the assets were held on trust for the counterparty to the extent that the counterparty did perform its obligations under the contract. As the parties’ exposures one to another altered over time with the movement in
the amounts required to be paid by them under the financial instrument, the custodian would call for further collateral to be posted with it by the counterparty and it would return collateral to the counterparty as its exposure to the secured party fell with the completion of its contractual obligations” (pp. 1553–1554). In other words, the trust obligations in this arrangement are conditioned and limited by the payment obligations to the contractual counterparty. The performance of the contractual payment obligations ipso facto discharges the trust obligations. It follows that this arrangement cannot create a trust proper, but merely a security interest. For “any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt ... must necessarily be regarded as creating a mortgage or charge, as the case may be” (Re Bond Worth [1980] Ch. 228, 248). Ironically, one sees the following statement just a few pages earlier: “The rights of a beneficiary under a trust are not capable of being terminated, in the ordinary course of events, simply by discharge of a debt. Rather, the rights of the beneficiary would continue in existence regardless of the discharge of a debt” (p. 1541). It therefore seems that the authors have become the victim of self-contradiction.

Be that as it may, none of the above comments should be taken as casting doubt on the general excellence and usefulness of this book. This is a massive reference work to which a review of this length cannot do justice. Indeed, the authors ought to be congratulated for successfully setting out the massive amount of black-letter rules in an easily readable manner. It is nevertheless hoped that the authors will take the above points on board when preparing the next edition.

Look Chan Ho


As the title for this book indicates, the author has tackled two areas, namely the nature of equitable doctrines and choice of law, which are each rightly seen as challenging topics in their own right and which are potentially even more difficult when combined. In doing so, he has produced a thorough and insightful overview of a topic that few have taken on before.

Broadly put, the question the book addresses is where the doctrines and remedies of equity fit into choice of law. The question encompasses a wide range of topics. The only three sizeable subjects where equitable principles are important which are left out are land law, insolvency law and the law of express trusts (although at first sight this seems odd in a book about equity, the law of express trusts is governed by the Hague Trust Convention and is already comprehensively covered in many textbooks).

The author’s fundamental premise is that the forum’s principles of equity are no different from the other laws of the forum (whether they originated in the common law or by statute) and are thus subject to the forum’s normal choice of law analysis. The distinction between law and equity is a domestic issue and should, as far as possible, not intrude into
choice of law analysis. This sounds deceptively straightforward, and indeed stated in this way there is little doubt that it must be correct; but his analysis in the first two chapters of the book shows that the courts in various jurisdictions have often failed to follow this apparently simple approach.

Having established that equitable doctrines and remedies should be treated like any other legal doctrines within the scheme for choice of law, Yeo proceeds to show how the traditional choice of law rules and approaches will apply. It is in this part of the book that the author’s skills and knowledge as a conflicts lawyer become apparent. In order to decide what law to apply to an issue, an English conflicts lawyer must first attempt the process of characterisation. The author’s description of this process in Chapter 3 is clear and illuminating and would be interesting for conflicts lawyers in any field. Although the author leaves the question of substance versus procedure to Chapter 4, this is really the first and often most important issue for characterisation. The author reminds us that the process of characterisation into procedure and substance must reflect the purpose for which that process is being carried out. Thus matters of procedure, which must be governed by the law of the forum, are matters where the machinery of the court would be adversely affected if another law were to be applied. This approach is narrower than that traditionally taken at common law, but seems to mirror that taken by at least some of the members of the Court of Appeal in the important recent case of Harding v. Wealands [2005] 1 W.L.R. 1539 decided after the book was completed. The author then considers how various equitable doctrines and remedies should be categorised according to that purposive approach. In relation to equitable remedies, he suggests that the court of the forum should simply use the most appropriate order within its remedial arsenal (whether originating with equity or the common law) to give best effect to the substantive right being protected according to its governing law. As to other specific equitable doctrines, constructive trusts, even if considered “remedial” in a particular jurisdiction, can still be substantive rather than procedural, in which case the process of characterisation must be continued to see which law applies. Similarly, tracing is better viewed as being part of the substantive right rather than a procedural remedy. Thus, the doctrine of tracing disappears from view merging into the domestic law applicable to the claim. The remit of the law of the forum is thus very narrow and in most cases the court must then proceed further to characterise the claim.

English law traditionally categorises claims into property (within which there are inter vivos transfers, succession and trusts), obligations (including contract, tort and restitution), family, corporations and insolvency. In the final three substantive chapters of the book the author considers each of these categories and which equitable doctrines may fit into each. Reverting to his fundamental theme, the author again emphasises that once it is realised that the categories of property, contract, tort and restitution are not intended to have their traditional domestic law meaning when applied in a conflict of laws context, it is not difficult to see how those traditional categories can and should include equitable doctrines.

He starts with property rights. Having considered the difficult topic of whether an interest under a trust is a personal or proprietary right, he reminds us that such distinctions should be irrelevant to conflict of laws and thus if the claimant is seeking to assert title to property, whether
equitable or legal, the issue should be categorised as property in choice of law. A similar approach is taken with obligations: if fiduciary duties or a duty of confidence stem from a consensual relationship, then they should be categorised as contractual for the purpose of conflict of laws. More controversially, equitable wrongs should be analysed with torts (and the whole category should more usefully be referred to as “civil wrongs”) rather than separately, since they perform similar functions.

The author also deals, along the way, with some interesting sub-issues in the conflict of laws, in particular concurrence and hybridisation. The former occurs where different ways of formulating a claim or issue can bring it within more than one choice of law category, for example, a personal liability to pay damages for breach of fiduciary duty or a property claim for return of the trust property. Hybridisation occurs where the nature of a claim means that it could reasonably be categorised by different jurisdictions as falling within one of several categories. Neither issue is, of course, unique to equitable doctrines or remedies but his comments on these topics—that are rarely focused on with such clarity—are nonetheless welcome.

An interesting point to realise about this book is that the author’s fundamental premise, that equitable doctrines and remedies should be treated like all other laws for the purposes of the choice of law, could be seen as entirely undermining the need for the book. It has indeed been noted in other contexts that it may no longer make sense to have a book about equitable doctrines and remedies (Birks, (2004) 120 L.Q.R. 344). Nonetheless, for the moment at least, in this newly developing field where the courts still frequently seem confused about the role of the domestic origin of equitable concepts, his analysis provides a useful consideration of where the various equitable doctrines may fit in. This is also an area of increasing practical significance: there has been a recent growth in reported cases on cross-border breaches of fiduciary duties, dishonest assistance and knowing receipt of trust property. The increasing practical importance of the book’s subject matter means that it should be of great interest not only to the academic but also to the practitioner.

However, the book is probably at its least useful in addressing real life examples particularly for the benefit of practitioners. It is a very interesting book to read cover to cover: the analysis is clear and the use of diagrams helpful. The book’s origins as a doctoral thesis may explain this. But if you want an answer to the apparently simple question of, say, what law governs a claim for knowing assistance, it would not be easy to tell you which page to turn to. Furthermore it is not easy to discern the real life relevance of much of the discussion and some practical examples would have been helpful, especially in the early pages. Because of the way the book has been written and its attempt to be comprehensive, some of the most important questions for practitioners are dealt with quite shortly and in a rather piecemeal fashion. That aside, as a largely theoretical analysis it is excellent book on a topic that few have attempted to fathom.

LOUISE MERRETT

The events of 11 September 2001 and the “war on terror” have prompted a re-examination of the adequacy of many rules of international law. The rules that have come under scrutiny relate to various issues, including, to name but a few, the right to self-defence where the “armed attack” is brought by a non-State entity; the right to use force in the absence of clear authorisation by the Security Council; and the right of States to detain without charge or trial persons suspected of being involved in terrorist activities. It is against this background that this collection of essays, which aims to assess whether international law “is well equipped to deal with the resurgence of international terrorism on such a grand scale” (p. vi), has appeared.

The volume consists of nineteen chapters and is divided into four parts. Part I brings together essays dealing with the central question of the alleged inadequacy of international law. In his contribution, Pierre-Marie Dupuy tackles the issue of whether responsibility for attacks such as those that took place on September 11 can be attributed to States. Traditionally, the acts of non-State entities only give rise to State responsibility where the groups are under the State’s “effective control”, or if the acts are subsequently adopted by the State. Dupuy suggests, however, that State responsibility might also be triggered “because that State may be harbouring terrorist groups” (p. 8). Silvia Borelli’s chapter (one of two she has contributed to this collection) provides a thorough consideration and evaluation of the United States’ refusal to accord Guantanamo Bay detainees the protection of the Geneva Conventions. She demonstrates that the view of the United States is erroneous and points out that the concept of “unlawful combatant” cannot be found anywhere in the Geneva Conventions or the Additional Protocols. In any event, Borelli argues that the detainees are protected by human rights instruments binding on the US. Even though the Supreme Court’s decision in Rasul v. Bush may have shifted the focus of debate to US constitutional law, this discussion nonetheless serves as a valuable reminder of the sophistry that led to Guantanamo Bay being described by the English Court of Appeal as a “legal black hole”.

Part II includes contributions that consider the global, regional and national responses to terrorism. Bardo Fassbender’s chapter considers the role of the UN Security Council faced with international terrorism. Although he, along with other authors, criticises aspects of the United States’ response to the terrorist attacks, including its asserted right to pre-emptive self-defence, the contributions in the volume do not descend to an artless exercise in finger-pointing; indeed, the desire to produce a balanced volume is evidenced by the inclusion of Ruth Wedgwood’s chapter detailing the nature of the threat facing the international community.

Much scholarly discussion has considered the question whether there is an accepted definition of “terrorism”, and this issue is taken up in Part III. Antonio Cassese notes that the claim that there is no accepted definition is based on the unresolved debates that took place in the UN, and the position of developing countries that actions of so-called “freedom fighters” cannot be regarded as terrorist activities. Cassese nonetheless
argues that a universally accepted definition of terrorism can be traced from the abortive 1937 Terrorism Convention and that any disagreement merely centres on the existence of an exception to that definition, namely whether the actions of national liberation movements should be considered as terrorist acts. For his part, Dupuy agrees that there is a working definition of terrorism, but Robert Kolb is not convinced, given that agreement has only been reached in conventions that seek to suppress specific acts of terrorism.

Part IV considers old and new challenges for international law enforcement mechanisms, and includes chapters on fighting the financing of terrorism by freezing the assets of international terrorist organisations, increasing judicial and regulatory cooperation, and the use of internet technologies. Richard Garnett and Paul Clarke’s chapter addresses the types of attacks which may be launched on computer systems from the territory of another State, and examines whether State responsibility might arise for the damage caused by terrorist hackers. Garnett and Clarke assert that “in a situation where there have been repeated instances of hostile computer activity emanating from a State’s territory directed against another State, it seems reasonable to presume that the host State had knowledge of such attacks and so should incur responsibility” (p. 479).

The authors go on to suggest that some computer network attacks might be considered a breach of the prohibition on the use of force, or at least a breach of the obligation of non-intervention in the internal affairs of another State. The first two of these propositions do not withstand rigorous scrutiny, but they nonetheless highlight the inadequacies of international law in the face of cyberterrorist activities. Finally, in an excellent and wide-ranging concluding chapter, Andrea Bianchi reminds States that international law is not a menu from which they can “pick-and-choose” as it suits them, and that achieving consent is the most effective way of implementing international rules.

Ensuring some measure of consistency in a volume that contains so many separate contributions (of which it has only been possible to mention several in this review) is not a straightforward task, and this collection is not immune from such problems. For example, Luigi Condorelli and Yasmin Naqvi’s examination of the continuing relevance of the Geneva Conventions, at just 12 pages, looks a little brief when contrasted with the 54 pages of Robert Kolb’s essay on the exercise of criminal jurisdiction over international terrorists. One peccadillo that this reviewer cannot overlook is the delightfully Freudian typographical error in Eyal Benvenisti’s contribution, where he refers to Lord Diplock’s description of certain measures pertaining to “national security” as the sole responsibility of the executive government and as such “non-justifiable” (p. 317; cf. Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374, 412). But such minor reservations do not detract from the value of this absorbing tome. It is a timely and welcome addition to the literature, and will serve to stimulate and inform debate on issues that are likely to remain of central importance to the international community in the coming years.

CHESTER BROWN

Many corporate shareholders have the distinct feeling that something is picking their pockets—and that something is not Adam Smith’s “invisible hand”. Such shareholders should invest in a copy of Pay Without Performance. Executive compensation is the black hole of corporate governance and Professors Bebchuk and Fried contribute significantly to understanding the agency problems that compensation practices reveal. Their book reviews and builds upon previous academic work, masterfully combining scholarly rigour with general audience appeal.

The nub of their argument is this: the “official view” (as they call it) of executive compensation is bunk. That “official view” claims executive compensation is set by arm’s length negotiation: senior managers on one side, company directors on the other. Non-executive external directors can be trusted to safeguard shareholders’ interests, and will draw upon the advice of independent professionals including compensation experts. Although executive compensation may seem high (as do the pay cheques of elite athletes and Hollywood stars), shareholders can rest assured that it is the fiercely competitive market for scarce top managerial talent that has pushed salary levels skyward.

The reality, write Bebchuk and Fried, is poles removed from this “official view”. Executive compensation is settled not by arm’s length negotiation but through a rigged process where powerful managers dominate pliant boards and extract economic “rents” at the expense of the corporation’s shareholders. Executive pay-setting is not a triumph of healthy capitalism, but a sad story of cronyism, camouflage and captive consultants. Nor is this managerial power story confined to corporations with widely-dispersed share ownership. “Rent extraction”, the authors warn, “may well take place, even if to a reduced extent, in companies where the presence of blockholders or institutional investors makes managers relatively less powerful” (p. 86).

Bebchuk and Fried do not suggest that managerial power is the sole determinant of managerial pay. Thus, they are able to answer critics who find examples of high pay in contexts where managerial power seems equivocal. But if managerial power is not the entire story, it surely accounts for the greater part of the plot. Evidence abounds that managerial power, not arm’s length negotiation, explains executive compensation. High pay itself is suspect. But the clincher they find in the artful detachment of executive compensation from meaningful performance standards, even in the case of equity-based compensation such as stock option plans. Such schemes typically do not correct for the effects of positive general market movements. A rising tide lifts all boats, and the cagey captain of industry is rewarded for riding the crest of every convenient wave, even if his firm’s performance relative to its competitors is actually sub-par. And if markets tumble? Not to worry. Executives are rarely blamed for falling markets. Their out-of-the-money options have routinely been re-priced (lowering the performance bar), a practice not wholly ended despite Financial Accounting Standards Board rules requiring re-priced options to be expensed.

The curious use of options concerns Bebchuk and Fried especially.
They well understand the theoretical justification for executive stock options, which provide an antidote to the excessive risk aversion that might otherwise hobble managers whose human capital is ineluctably linked to the survival of their corporate employer. But that rationale cannot explain corporate America’s actual option-granting practices. Why, for example, do we not observe considerable differences between the structure of companies’ compensation packages—differences reflecting the unique risk characteristics of each firm? Why, instead, do we observe remarkable uniformity across a range of firms of different sizes and profiles? And, why, if creating proper “incentives” is the goal of equity-based compensation, are executives typically permitted to unwind their equity “incentives” early and easily—again with little variation between radically different firms?

“Outrage constraint” was the term Bebchuk and Fried had earlier coined to describe one potential brake on runaway executive compensation: a constraint based on fears of outraging shareholders, or perhaps the public generally. The authors review that work, but note that outrage constraint is, at best, an imprecise tool, and may well motivate directors to direct their ingenuity toward hiding the true level of their pay (by stuffing cash into post-retirement benefits, say) rather than towards improving the financial performance of their corporate employers.

It is a sceptical picture of contemporary corporate culture, and one which, they argue, recent US corporate governance reforms are not likely to ameliorate, since many key reforms reflect practices already in place at the very companies plagued by compensation excesses. Yet the book is not merely a lament. The authors tackle the issue of more closely aligning directors’ incentives with those of shareholders. Their wish is to improve directors’ accountability by making directors genuinely “dependent” upon shareholders. They would, for example, endorse the Securities and Exchange Commission’s controversial proposed rule to permit shareholders in certain circumstances to place directorial nominees directly on the “ballot”. Indeed, they consider the director nomination proposal too small a step, and argue further for corporate law rules that would end the obstacle to shareholder democracy posed by staggered boards by requiring directors to be re-elected annually en bloc.

They would favour, too, a legislated end to US managers’ power to reincorporate in another US state and amend the corporate charter. Here the book joins a lengthy “race to the bottom”/“race to the top” academic literature spurred by Delaware’s unique position in America’s corporate law competitive federalism. Bebchuk and Fried are sceptical of “race to the top” claims (dare I dub them “Dela-wary”?) and accordingly doubt that preserving managers’ unfettered discretion to reincorporate is likely to result in anything but manager-friendly decisions. Their prescription is to increase shareholder voice by improving transparency, and rid executives of their unchallenged power positions. As for concerns critics have voiced about possible dangers of increased shareholder democracy, Bebchuk and Fried dismiss these as incoherent, irrelevant, or more than outweighed by the prospect of increased shareholder-value creation.

Impressive in scholarship, impeccable in timing, and accessible in style, this book deserves the attention of academics, policy makers and long-suffering investors.

Christopher C. Nicholls

In the constitutional structure of the European Union, economic activities and matters relating to foreign policy and security are generally addressed in fundamentally distinct ways. Economic activities such as trade fall under the first pillar—the legal order of the supranational Community—whereas foreign policy and security are addressed through the intergovernmental structure of the second pillar, established pursuant to Title V of the Treaty on European Union. However, far from being distinctly separate issues, economics, foreign policy and security are increasingly recognised as being interrelated. This book explores these linked concepts through the lens of the constitutional organisation of the EU and examines the overlapping relationship between the first and second pillars. It focuses upon three areas in which the interrelation can be seen most clearly: (i) the use of economic and financial sanctions against third States; (ii) the legal regulation of international sales of military goods; and (iii) the legislative regime governing the export of goods that could be used for either military or civilian purposes, known as “dual-use goods”. The book is a valuable tool not only for anyone interested in these three specific subject areas but also for those interested in the constitutional development of the Union, particularly in the development of the Common Foreign and Security Policy (C.F.S.P.) of the second pillar.

The areas examined are developing at such a pace that the descriptions of the different legal regimes are inevitably now incomplete. Nevertheless, the clarity of the descriptions of the legal regimes and the analysis of their relative positions in relation to the constitutional order of the EU—particularly the analysis of the European Court of Justice’s case law—mean that the book is still invaluable for anyone interested in these areas. The reader should, however, be aware that the EU regime of economic sanctions now includes financial sanctions against non-State targets, that the common rules on exports of dual-use goods are now grounded within the Community’s legal order rather than the C.F.S.P. (as argued for by Koutrakos and noted in the Epilogue), and that a Common Position under Title V of the Treaty on European Union relating to arms brokering has now been adopted. The reader is presumed to have at least a basic knowledge of EU constitutional law; despite the useful introduction to the C.F.S.P. provided in Chapter 2, such knowledge is a prerequisite. Prior knowledge of the specific subject areas addressed in the book, however, is not necessary. In Chapters 2 and 3, the development and post-Maastricht structure of the EU’s economic and financial sanctions against third countries are clearly described, and the same occurs in Chapter 5, 8 and 9 for dual-use goods and armaments.

Koutrakos’s fundamental thesis is that economics and foreign and security policy are inherently interrelated and that the economic aspects of national and supranational security and foreign policy can and should be managed within the European Union as a “single institutional framework”. This, he argues, should be done by utilising instruments of both the Community and the C.F.S.P. in a manner which ensures consistency and coherence between the activities undertaken within the first and second
pillars and protects and contributes to the development of the *acquis communautaire*, as provided for in Article 3 of the Treaty on European Union, whilst also recognising individual Member States as fully sovereign subjects of international law (i.e., respecting their competence in relation to foreign and security policy). This is an approach that the author believes is shared by the Court of Justice. To demonstrate this he looks first at the Court’s jurisprudence relating to the regulation of dual-use goods (Chapter 6) and then, building upon this case law, its position as revealed in judgments relating to sanctions against third countries (Chapter 7). Koutrakos presents a strong argument that the Court has adopted a functional conception of the interactions between trade and security in which it tries both to protect and develop the Community legal order whilst also preserving Member States’ competence to conduct foreign policy.

The approach advocated by Koutrakos had not, however, at the time of writing been adopted as a basis for the regulation of the exports of dual-use goods nor has it been adopted as a basis for the regulation of arms exports. Indeed, although the EU regulation of arms exports was negotiated within the second pillar, it has not even been brought fully within the C.F.S.P. as the Member States chose not to use either of the instruments provided for under Title V, namely Joint Actions or Common Positions, but have instead committed only to a non-binding Code of Conduct adopted as a Declaration by the Council. Koutrakos argues forcefully that the Commission’s proposals for the regulation of dual-purpose goods based upon Article 133 EC relating to the Community’s Common Commercial Policy should be adopted—which they since have been—and also that the export of armaments should be subject to an inter-pillar arrangement within the EU’s institutional framework.

The author’s thesis is developed clearly throughout the book. At the beginning of Chapters 6, 7 and 9 there are useful summaries of the arguments developed thus far, helping the reader to understand more quickly the complex and diverse subject-matter and to see the links that are being drawn between the different areas. The concluding chapter is similarly clear and succinctly sets out the general conclusions that have been drawn throughout the book and the way in which they fit with the underlying thesis. Notwithstanding the developments that have taken place since the publication of this book, it is still a timely and pertinent work. The clarity of the descriptions of the subject areas examined in the book and the depth of analysis of the constitutional implications of legal regulation within the interrelated areas of EU trade and foreign and security policy make it a valuable tool and a necessary read for anyone interested in such issues.

Rachel Barnes