vulnerable, such as those with disabilities, and a chapter on the reality of (often undiagnosed) clinical depression in many of those seeking assisted suicide. The final part contains a chapter by Cicely Saunders on the philosophy and growth of hospice care, and one by Foley on the disturbing ignorance among doctors and patients of palliative care and the urgent need to make such care more widely available. In a concluding chapter, Foley and Hendin observe that the evidence from those jurisidictions which have tolerated euthanasia or physician assisted suicide has shown that such tolerance "complicates, distracts, and interferes with the effort to improve end-of-life care" (p. 331). They conclude that the current challenge is to create a culture which identifies the care of the seriously ill and dying as an urgent public health issue.

Both of these books have major strengths. The former is the culmination of the sustained reflections of one of the world's leading experts in the law and ethics of medicine and merits reading for that reason alone. The book is, particularly on the factors generating the current debate, wonderfully illuminating and thought-provoking. The latter book is an excellent, readable compilation of essays whose contributors include stellar experts in ethics, medicine and the law. Foley, Hendin, and their contributors have produced a truly outstanding resource.

A few minor criticisms could perhaps be made. Some material in the former book, perhaps inevitably in such a compilation, contains material which either overlaps or is a little dated. Both books could have said more about the argument from the sanctity of life, at least as that argument has traditionally been understood. However, such criticisms cannot detract from the fact that these thoughtful, scholarly works will enrich what is too often a superficially-conducted debate and, in their cogently argued conclusion that society's focus must be on better caring, not easier killing, should give even the keenest euthanasia supporter pause. Which of the two should anyone interested in the euthanasia debate buy? In this reviewer's opinion, both.

JOHN KEOWN

Between Law and Custom: "High" and "Low" Legal Cultures in the Lands of the British Diaspora—the United States, Canada, Australia and New Zealand, 1600–1900. By PETER KARSTEN. [Cambridge: Cambridge University Press. 2002. xvi, 540 and (Index) 21 pp. Hardback £70.00. ISBN 0–521–79283–5.]

INCREASINGLY, historians have become interested in the role of law in the British Empire and the separate anglophonic jurisdictions spawned in North America and Australasia. The orthodox imperial legal histories focussed on "state" law; that is to say, the constitutional processes by which the colonies received (or, in the case of the United States, reconceived) Parliamentary institutions and fashioned their own national law and juridical identity. These "top down" histories did little to explain how anglophonic legalism actually manifested itself in these transoceanic settings in the period before the full ascendance of state law. Also, the focus upon state law and constitutional form lacked a sociological account not just of local legalism but of its engagement with metropolitan

authority. It is that shortfall that Peter Karsten's book *Between Law and Custom* attempts to address. The book describes the law ways of these transplanted anglophonic communities and examines the gap between what he terms "high legal culture" of the metropolitan centre and its agents, and "low legal culture", the settlers' actual practices. The book is highly ambitious in scope, covering the anglophonic diaspora and settler communities of North America and Australasia (and occasionally other sites of British imperialism such as southern Africa and Fiji). It spans four centuries, from late Tudor plantation of Ireland to the white settlement colonies' achievement of Dominion status in the late nineteenth century. In essence the book describes the formation of national legal identity, the way in which the stage was set for state law's mastery in each jurisdiction at the end of the nineteenth century. However, unlike the older historiography he does this from the "bottom up", by reference to settlers' legal practices.

Implicitly—though not overtly—rejecting the conception of "law" as emanating from the state (statism) the author describes the initial divergence between the high and low legal cultures. There was frequently a large gap between the regulation of frontier life as contemplated by London and officialdom and the actual conduct of it on the ground. The author shows how frequently the latter confounded and defied official stipulation and expectation, as by squatting on aboriginal peoples' land contrary to higher command. As the settler communities acquired greater jurisdictional competence during the mid-nineteenth century their legal institutions consciously manufactured state law, so reinforcing the authority of the settler polity. As the settler-state formed, law and practice converged, frontier contrariness became less marked and the settler more "law-abiding". The gap between high and low cultures diminished as state law became more pervasive and authoritative in these late nineteenth century proto-nation states.

This process of divergence and convergence is set out as a sociological rather than historical phenomenon. The book is structured about three legal aspects of colonial or, more aptly, frontier life: land (especially with regard to the indigenous owners), agreements (contract) and accidents (tort). The author uses historical material as examples and amplifications of divergence and convergence. In that sense there is no sustained historical structure beyond description of that process, so much as sociological observation and commentary. His sequence of examples cuts across time and jurisdiction, showing how the author's primary concern is with the sociology rather than history of law.

The broader theme of divergence and convergence is not of itself novel. Two generations of American legal historians have examined the historical sociology of colonial and republican law. Their interest has been broader than Karsten's, incorporating an interest in intellectual and political history absent from this book. In Canada a new and exciting tradition of legal history has been emerging in the past twenty years, so too in Australia singlehandedly through Bruce Kercher, although New Zealand lags badly. What is novel about Karsten's book is the attempt to consolidate and elaborate those localised accounts into a panoramic, cross-jurisdictional picture of anglophonic legal voyaging and proto-nationalism. It is a detailed, highly informative compilation or digest of legal populism and settler autochthony. However, despite drawing upon these North American and Australian schools, this is not an historical work as often it seems to

be claiming. It is a sociology of law in anglophonic frontier settings where unempowered settler populism buckles against authoritarian, and frequently distant or remote, *diktat*. It is a description (and less an explanation) of that localism eventually prevailing over metrocentrism.

However, the book's claim to represent the "legal" dimension of the historical contest between imperial metrocentrism and colonial localism is problematic. For a book about "law" the author is remarkably brief and vague in his explanation of what the term means. Formal "high" law he describes as carried in statute, common law (in the sense of being judge-made), and imperial instructions to colonial functionaries (such as Governors). The difficulty with this is that imperial instructions could be formal (issued under the royal sign manual) or informal and contained in despatches from the Colonial Office, the latter not being in themselves of any *legal* weight. To give another example he discusses (pp. 126–128) the treatment by the mid-nineteenth century courts of Upper Canada of the English law rule regarding the wasting of timber by tenants. He notes that Chief Justice Sir John Beverly Robinson, a notable Loyalist, applied the English rule strictly in the court of Queen's Bench unlike Chancellor Blake who took a more flexible approach. What Karsten does not explain was that the latter was exercising an *equitable* jurisdiction that for many years had not reached the Upper Canada legal system, the former a *common law* one. This was a colonial culture finely attuned to the difference between law and equity and not simply a case of Robinson's conservatism. High law, by Karsten's approach, was what those in authority were prescribing, not merely in a strictly legal sense but by other informal means (such as despatches). The problem with that is that this "high culture" was not so much, or even preponderantly, "legal" as a complex, layered and changing set of beliefs about the nature of public authority. Law was certainly a central element, but so too religion, conceptions of history, political economy, science and associated notions of the role of the individual. Not only were those imbricated conceptions interacting, often haphazardly, they were also prone to change over time. Indeed the "high culture" conception of law underwent considerable change in the mid-nineteenth century but this intellectual development, which has important, highly supportive consequences for Karsten's tale of the eventual triumph of state law, is not explored. The complexity of "high" metrocentric thought is lost and its historicisation is missing from Karsten's depiction of "high legal culture" as essentially static and monolithic.

These prescriptive statements from the "high legal culture" are sometimes regarded unsceptically. He asserts, for example, that under English common law there is a rule that upon termination of a lease all structures fitted by a tenant become the landlord's (p. 125). He contrasts this rigid rule with the more flexible approach of the early republican American courts. However, by the early eighteenth century English law had recognised "tenant's fixtures" for which there was a right of removal. English law was not as inflexible and American law more responsive, as the author says. Rather nationalist American jurists (like Kent and Story) were revealing their ambivalence towards the common law. Why were they doing so? The law of the republic retained its foundation in common law method, but with the experience of revolution behind it and the memory of the 1812 war fresh, had its own nationalist agenda. Karsten misses the more interesting question by taking the American jurists at their word.

Karsten's failure to explore the character of "law" in its "lower" form is highly problematic. It is insufficient for him to say that his notion of law is not that of "jurists". There is no doubt that he takes a non-statist, pluralistic conception of "law", as his inclusion of aboriginal custom and settler folk-ways makes plain. Indeed his argument is that the totalising conception of state law, with its stifling belief in legal monoculture, eventually prevailed in the late-nineteenth century legal nationalism of each jurisdiction. Still, one is left with the problem of what Karsten means by "law". Santos, a prominent legal pluralist, defined "law" as "a body of regularised procedures and normative standards, considered justiciable in any given group, which contributes to the creation and prevention of disputes, and to their settlement through an argumentative discourse, coupled with the threat of force". (*Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition*, New York: Routledge, pp. 114–115.) Karsten joins those who argue that "not all phenomena related to law, and not all that are law-like have their source in government" (Moore "Legal Systems of the World" in L. Lipson and S. Wheeler, eds., *Law and the Social Sciences*, New York: Russell Sage Foundation, 1986 at p. 15). By his broad approach, however, all forms of social control become "law". Where, one might ask, "do we stop speaking of law and find ourselves simply describing social life"? (Merry "Legal Pluralism" (1988) 22 Law and Society Review 869 at p. 870.) It is that question which dogs Karsten's discussion of law. Were settlers by their conduct really constructing something they perceived as their own "legality" or were they simply social practices at odds with the "higher" law? Did the metropolitan agents perceive this gap in as strong a manner as Karsten portrays it or did they feel there was a more organic relation between English law? The royal charters and instructions may be regarded as attempts to re-create a legal Albion. They may be seen also—and this is perhaps a more historically sensitive view—as trellises for the growth of a local legal identity up which settler practice intertwined (though not always happily) with English law.

The book contains numerous typographical errors and, to this reviewer's eye anyway, there is over-intrusive use of the authorial first person. Stronger and more attentive editing was needed.

PAUL MCHUGH

The Law of Internal Armed Conflict. By LINDSAY MOIR. [Cambridge: Cambridge University Press. xix, 277, (Bibliography) 20 and (Index) 9 pp. 2001. Hardback £45.00 net. ISBN 0–521–77216–8.]

ACCORDING to studies by the Oslo Peace Institute, 73 States were engaged in armed conflicts in the period between 1990 and 1995. In the clear majority (59) of these cases, the armed conflicts were non-international in character. The state of international law hardly mirrors this factual assessment. While traditional inter-State conflicts are regulated rather comprehensively, the law governing internal armed conflicts is still somewhat unsettled. This body of law is based on the vague terms of common Article 3 of the Geneva Conventions; it has been partly codified in Additional Protocol II of 1977, and it also continues to evolve as