Cambridge Law Journal, **65(1)**, March 2006, pp. 227–244
Printed in Great Britain

BOOK REVIEWS

Frederick Pollock and the English Juristic Tradition. By NEIL DUXBURY. [Oxford: Oxford University Press. 2004. xxii and 335 pp. Hardback £60.00. ISBN 0–19–927022–8.]

THIS is an intriguing book. The title suggests biography. But the General Editor's Preface says that it "is not in a conventional sense a biography". The author, anxious to get the message across in the opening sentence of the Acknowledgments, goes further: "This book is not a biography". Yet the cataloguing data are equally emphatic the other way: "Biography". Nor is there much help for the reader inclined to judge books by their covers. Neil Duxbury's previous book, *Jurists and Judges*, could not have been mistaken for a biography of Maitland, but had a portrait of Maitland on its cover. So it might be unwise to jump to conclusions about the painting of Dartmoor on the cover of *Frederick Pollock*. At first sight, the safest classification seems to be mystery, with the reader as detective.

What unfolds is a penetrating and engaging study of various aspects of Pollock's life and work. A substantial biographical chapter is followed by detailed studies of Pollock's abstract jurisprudential writings, his theorizing about common law, his treatises and his work as an editor. The depth of research is astonishing, revealing a mastery of secondary sources (particularly in relation to the wider intellectual world of the late nineteenth century) and a familiarity with an enormous range of primary sources. Pollock's voluminous books, articles, essays, lectures, case-notes, book reviews, letters and notebooks are drawn upon, apparently effortlessly, to build up a compelling portrait of the subject using his own words.

Duxbury's aim, however, is not limited to producing a portrait. He is more ambitious, and the book is, in this sense, more than a biography. The ultimate aim is to make an assessment of Pollock's significance and achievement in the various areas of his professional life—as professor, jurist and editor.

Pollock the professor was clearly his least successful role. He was temperamentally reluctant to commit himself to grand schemes or theories—something of a drawback in a Victorian Professor of Jurisprudence—and, as Duxbury skilfully demonstrates, failed to propound the historical comparative method with much emphasis or conviction. As a theorist, his interest was more narrowly focussed on the nature of the common law. His writings on the subject highlighted the common law's strength in its basis of reason (meaning common sense) and the stability it gained through reliance on precedent. One of the most interesting themes in the book is that Pollock saw these virtues as a reflection of the English character.

Pollock's greatest significance lay in his juristic work as the author of important treatises on contract and tort, and as a frequent contributor to periodical literature. Duxbury devotes a lot of space to the treatises, tracing

meticulously how Pollock's ideas evolved through successive editions, and highlighting his views on controversial questions such as the unification of the duty of care. Here Pollock was advocating a general duty of care from the first edition of his treatise, which was not a fashionable view to have held at the time. It might, Duxbury fascinatingly suggests, have been influenced by his own strong sense of the importance of moral duty.

Duxbury's conclusion is that Pollock is important, though not for obvious reasons. His failure to propound an alternative to Austinian analytical jurisprudence may partly explain, to use Duxbury's phrase, "why English jurisprudence is analytical". His treatises are not showy, nor classic texts, but reflect important, hard-won insights. He also has a strong claim to having determined the format of academic critique of case law through his case notes in the *Law Quarterly Review*. In other words, he is, perhaps (although this is not said explicitly), rather like the cover illustration of Dartmoor: a recognisable part of the English landscape; not spectacular or breathtaking, but solid and reliable; an acquired taste worth acquiring.

This may be Pollock's true significance. But my only reservation about the book is that it risks selling Pollock short. Duxbury is very tentative about attributing lasting significance to Pollock's common law writing, saying in the final page that "Pollock's works are hardly ever read today, and with good reason: his expositions of the law are generally outdated, his manner essentially antiquated". However, several of Duxbury's own examples show how much Pollock may still have to tell us. For instance, Pollock argued that *Rylands* v. *Fletcher* should be analysed in terms of negligence, which is still a controversial question. Similarly, his attempt to make sense of the principles where consideration consists of the performance of an obligation already due is still highly relevant. In other words, many of the problems that concerned Pollock are still with us, and we are often trying to solve them, as Pollock did, by reference to fundamental principles. Perhaps renewed interest in Pollock, which this excellent book is likely to provoke, will prompt recognition of the continuing contemporary relevance of his best work.

PAUL MITCHELL

Remedies Reclassified. By RAFAL ZAKRZEWSKI. [Oxford: Oxford University Press. 2005. 235 and xxxii pp. Hardback £60.00. ISBN 0–19–927875–X.]

DOCTORAL THESES published as monographs rarely make useful student texts but this book on remedies is an exception. Despite the author's own reservation (p. v), this is a comprehensive book—or at least it is comprehensive in the area of private law—that, in what is effectively its second half (chapters 7–13), covers the common law, equitable and statutory remedies in an informative, clear and concise manner. Each remedy is analysed according to the same formula, namely under the headings of the form of the order, the nature of the remedy, the nature of the substantive right replicated, and enforcement. And within this formula the author often makes a number of very pertinent observations which more general textbooks on private law overlook.

For example, the author reminds the reader that the action of debt is by far the most common remedy in contract, thus making nonsense of the

statement that the leading remedy for non-performance of a contractual obligation at common law is damages. Debt is also a form of specific performance in as much as the court is directly enforcing a contractor's primary obligation, another point often overlooked by those keen to assign specific performance uniquely to equity. It is also refreshing to see that Zakrzewski is sceptical about the distinction between "debt" and "liquidated damages"; an award of a specific sum, including an indemnity, is different from an award of money to compensate for damage arising out of a wrong. This is refreshing because the remedial distinction between debt and damages can be particularly helpful in separating the "restitution" case from the "damage" problem. Another helpful point that emerges out of his analysis of legal remedies is the distinction between an equitable claim for an account of profits and an action for "restitutionary damages", the former of course being much closer to an equitable debt claim (*London, Chatham & Dover Railway Co*. v. *S.E. Railway Co*. [1892] 1 Ch. 120, 143), a point, disappointingly, not really developed by Zakrzewski. In fact he tends to conflate account with damages (pp. 188–9), which rather undermines his excellent argument with respect to debt and liquidated damages.

Perhaps one reason why contract books tend to emphasise damages rather than debt is that few works on English contract law ever analyse the contractual obligation from the generic position of non-performance. Instead the topic is broken down into the specific parts of discharge by performance, agreement, breach and frustration. Such an approach has its advantages, of course; but it tends to assume that each time a person non-performs it must amount to a "breach" and breach is a violation of a promise, itself once a form of trespass. Damages seem, in other words, to be the natural remedy because trespass (*assumpsit*) became the dominant form of action and the common law courts could not issue a general order to perform an obligation other than the one to pay a debt. This historical point is not irrelevant to a work like Zakrzewski's which aims to draw a "clear line between substantive rights and remedies" and where "the domain of remedies cannot include questions such as when substantive rights to compensation, restitution or punishment will arise, what their content is or what interests they protect" (p. 61). From an historical position—that is to say from the viewpoint of a system that once thought in terms of a list of personal (forms) of action supplemented by a selection of equitable remedies—such distinctions between rights, remedies and interests were almost impossible to make. Was debt a remedy or a substantive right? This question has not been properly answered even today in that it is both a cause of action and a remedy (*Overstone Ltd.* v. *Shipway* [1962] 1 W.L.R. 117). "Debt" is not, then, like "damages" because it cannot be divorced from substantive issues and categories with ease. Indeed, given that a debt is a form of property, it must, by definition, form part of the law of property and so it could be said that what mediates between a contract right (*in personam*) and a property right (*in rem*) is the remedial "right" to a debt (*actio ad rem*).

One might equally recall Lord Nicholls in *Mercedes Benz AG* v. *Leiduck* ([1996] 1 A.C. 284, 310) where in a dissenting speech he says that "practising lawyers tend to think in terms of established categories of causes of action, such as those in contract or tort or trust or arising under statute" and thus they "do not always appreciate that the range of causes

of action already extends very widely, into areas where identification of the underlying 'right' may be elusive". In an earlier case where an underlying right had proved elusive, Browne-Wilkinson V.-C. commented that in "the pragmatic way in which English law has developed, a man's legal rights are in fact those which are protected by a cause of action" and that it "is not in accordance ... with the principles of English law to analyse rights as being something separate from the remedy given to the individual" (*Kingdom of Spain* v. *Christie Ltd.* [1986] 1 W.L.R. 1120, 1129). Zakrzewski fails to mention such cases, although in fairness he does spend many pages attempting to define a remedy and to distinguish it from a primary right (see pp. 43–61). Moreover he might justifiably retort that an author trying to develop a schematic analysis is entitled to leave aside those comments that undermine what is a valid exercise in coherence. In short, can one really criticise an author for attempting to define precisely and clearly what is meant by the term "remedy"?

Yet in doing this he raises a fundamental epistemological question. Why should legal knowledge divide neatly into "rights" and "remedies"? Might not legal knowledge be a matter of a dialectical relationship between these two ideas? Might it not be a fundamental part of legal reasoning that the line between them is moveable and shifting, thus making the legal model far more amenable to what Stephen Waddams has called "the countless levels of [fact] generality" (*Dimensions of Private Law*, p. 14)? Zakrzewski clearly thinks not (p. 56). But is he not imposing on social fact a causal scheme of intelligibility that sees legal consequences flowing as a matter of logic from well-defined rights that are objectively "discoverable" in any fact objective situation? What if a judge decides not to use this scheme of intelligibility? What if a judge decides to adopt a functional (policy) approach in order to arrive at a solution? Or what if one judge decides to construct the factual image differently from that constructed by another judge? For example one judge might choose to emphasise a perceived "economic interest" in a set of facts while another sees in the same facts only a "reputation interest".

Zakrzewski goes some way towards considering these problems in his chapter devoted to the classification of remedies. However it is here that the book becomes problematic. The author starts out by asserting that taxonomical problems can occur if foreign matter is included in the set of things to be classified and he illustrates this by reference to a scheme of categorizing books: the category must "not inadvertently include paintings and newspapers" (p. 65). He then goes on to assert from this example that the "taxonomy of remedies ... must be kept pure" and that it must include only "rights which fall within a precise definition of remedy" (p. 66). But how can the definition be tested? With a newspaper and the category of books, one can objectively examine a physical object in order to see if it corresponds to the elements in the system that act as describers for the book category. With "rights" no such test is remotely possible because rights exist only in terms either of the classification system itself or of another parallel semantic scheme that cannot be subject to testability. In other words, Zakrzewski is conflating two quite different epistemological systems. One system (books) is classifying material that can be observed while the other (rights) is a semantic construction whose force lies in its own auto-definitional character and its internal coherence. Validity thus becomes a matter of asserting one's own model with

reference to another schematic model equally dubious in its testability. It is rather like proving the existence of "God" by reference to the existence of the "Devil".

With respect to coherence of classification, Zakrzewski makes a number of valid and important points about double-counting and the like. More importantly, if one abandons testability, he provides a perfectly coherent scheme for classifying remedial rights (since "remedies are themselves rights": p. 82), something that many consider a valid intellectual exercise (validity by consensus?). But in conflating a scientific taxonomy scheme (external objects) with a semantic scheme (objects created by the scheme or other semantic schemes) the author gives the impression that what he is doing is providing a more accurate account of "things" that are "out there". They are not and he is not. What exists in a discipline like law is a mass of schemes of intelligibility, paradigms and orientations which become the means of presenting both the apparent external world (facts) and the law (schemes of rights and remedies). This in turn means that the only way of validating Zakrzewski's thesis is by reference to its internal coherence (together with consensus). But there is more to law than internal coherence, as common law judges (and some academics) have continually observed.

The problem with Zakrzewski's monograph, as excellent as it is for the remedies student, is that it actually tells us nothing about this "more". It tells us nothing about how judges actually make deliberate use of conceptual ambiguity in law and in fact in order to construct what they consider the right solution. Zakrzewski is no doubt implying that they should not do this and is using the authority of "scientific" coherence to support his worldview. His book is essentially, then, a work of "theology" rather than enquiry. One has to buy into the system if one is to appreciate the intellectual effort that has gone into it and one has to be prepared to accept that his quest for ever-more internal order is an intellectual good. Such works are fine, but they should steer clear of trying to draw authority from epistemological schemes utilised by the natural or social sciences, for the conflation is simply misleading law students into thinking that law is "scientific". It is not and cannot be since scientific method is governed by a spirit of enquiry (what is out there?) and not normative "theological" authority. Moreover few judges are going to test the validity of their reasoning just by reference to the internal coherence of a taxonomical model. So why do we pretend otherwise to law students? In substance, then, Zakrzewski's monograph is valuable in a descriptive and informative sense (the second half of the book). What is less useful, although by no means valueless, is the first half. Obsession with classification, rigid definition and scientific deduction simply isolates students from the forms of legal reasoning and schemes of intelligibility actually employed by common law judges and suggests to them that legal epistemology is identical to epistemology in the natural sciences.

GEOFFREY SAMUEL

Principles of Human Rights Adjudication. By CONOR GEARTY. [Oxford: Oxford University Press. 2004. xxxii, 214, (Bibliography) 8 and (Index) 8 pp. Hardback £35.00. ISBN 0–19–927068–6.]

THE HUMAN RIGHTS ACT 1998 has spawned a voluminous secondary literature; the majority of these books are descriptive of the Act and its case law. Unlike such works, Professor Gearty's most recent contribution to the field does not purport to be a comprehensive guide to each of the ECHR rights; instead it seeks to identify three "core principles" that the author believes ought to, and to some extent already do, guide the courts' approach when HRA points arise in domestic cases.

The book is divided into four sections. The first is a clear and concise introduction to the legal and political background of the HRA and its key provisions: the majority of this section will be familiar to those experienced in the field. Weaved into this section are some interesting reflections, in particular on the distinction between what Professor Gearty calls the "idea" of human rights and human rights *law*.

Having set the scene, the second section describes Professor Gearty's three core principles: respect for civil liberties, legality and human dignity. The identification of each of these principles is inherently interesting, but the discussion of the—primarily domestic—case law is also infused with discussions of related points; the distinction between civil liberties and human rights is particularly enlightening. An oversimplified summary of the central argument that follows is that the ECHR and HRA reflect these principles, and that only when a case engages one of them ought judges to adopt an activist approach. Although much of the lucid discussion in the first two sections is theoretical, it should not be thought that the book is written in purely abstract terms. Indeed, the second and third sections are focussed on the practical implementation of the core principles, and consider an impressive range of the domestic cases.

The third section sets out three further considerations of which the author suggests judges ought to be mindful: institutional competence, proportionate intrusion and analytical coherence. A greater proportion of this material will be familiar to non-human rights lawyers, since considerable chunks of the discussion relate to the inherent nature of the judicial process and so are relevant beyond human rights cases; the need to build a jurisprudence that is internally and externally consistent is one such theme. Again, Professor Gearty is thought-provoking in this section. His critique of judicial deference is particularly stimulating, seeking to focus on the judiciary's institutional competence alone in determining the width of the margin of discretion in a particular case, rather than attempting a *relative* assessment of the decision-maker's and judiciary's institutional competence. The fourth section provides an opportunity for the author to draw together his arguments.

Professor Gearty's ambitious undertaking—to reduce the complex jurisprudence surrounding the HRA to a handful of principles—succeeds in provoking the reader to consider whether these themes can truly be identified in the HRA. Clearly, not everyone will agree with his selection of principles or their definitions; some might even dispute that the ECHR is coherent enough to be reduced to *any* set of core principles. With that in mind, it may be wondered whether the book is sufficiently argumentative in style: this reviewer would have liked to have seen some of the counter-

arguments considered in more detail; the sources of such counter-arguments are often left tantalisingly in the footnotes. This applies to both the identification of the core principles (*e.g.*, the explanation of why property rights and commercial speech are not at the centre of the ECHR) and to their implementation (*e.g.*, the author's approach to HRA, s. 3). Contrariwise, for those convinced by the merits of his arguments, it would be interesting to read how far Professor Gearty would *extend* his approach beyond the determination of the appropriate degree of judicial activism. For example, if the ECHR and HRA are felt to have a shared and coherent philosophy of this sort, these principles might be relevant to the anterior question of identifying who possesses ECHR rights and which bodies owe them duties (*i.e.*, the meaning, respectively, of "victim" in the ECHR and "public authority" in the HRA). Although there is considerable description of the cases that consider these points, Professor Gearty's preferred position was on this point a little unclear. It would also be preferable to set out explicitly how cases that involve a conflict between the core principles—of respect for privacy and freedom of expression, for example—are to be resolved.

These criticisms ought to be kept in perspective: indeed, they are evidence of the success of the book in provoking thought on the key themes addressed. For this reason, it is a valuable contribution to the ongoing debates in this area; its attempt to construct a coherent approach to the HRA is a useful complement to the more detailed guides to ECHR rights.

SIMON ATRILL

Judicial Review and Bureaucratic Impact: International and Interdisciplinary Perspectives. Edited by MARC HERTOGH and SIMON HALLIDAY. [Cambridge: Cambridge University Press. 2004. xi, 284, (Bibliography) 17 and (Index) 14 pp. Paperback £22.99. ISBN 0–521–54786–5.]

Judicial Review and Compliance with Administrative Law. By SIMON HALLIDAY. [Oxford: Hart Publishing. 2004. xviii, 175, (Bibliography) 8 and (Index) 4 pp. Hardback £25.00. ISBN 1–84113–265–9.]

THESE TWO empirical studies deal with the impact of judicial review on administrative decision-making, building particularly on the use of law as a tool in controlling the executive and achieving social change. Until recently, judicial review has been studied mainly from a doctrinal legal perspective. Socio-legal studies of judicial review to assess its socio-bureaucratic impact are a contemporary trend, to which these books constitute a timely and insightful addition.

The first book, divided into three parts, is a collection of 10 essays from an international workshop held in 2002. Part 1 concerns basic conceptual and methodological issues involving "judicial impact studies" and aims to diagnose appropriate research techniques for such studies. Peter Cane's opening paper suggests that across the globe judicial review has developed into many models, each characterised by particular functions and objectives. He accordingly emphasises contextualised impact studies and argues that understanding judicial review's objectives is vital to assessing impact. Though Cane seems to side with an instrumentalist

approach to law, he confronts optimism about judicial review's capacity with scepticism that we may never obtain sufficient empirical data about its impact to properly inform policy choices. Maurice Sunkin considers two sets of issues important for impact research, issues of "territory" and analytical issues. Under the first, he stresses the need for viewing judicial review's multifaceted character (litigation, judgement, or a set of values, legal norms and principles) and studying the nature and organisational context of the target bureaucracy. Sunkin then underlines the need for methodological tools like "positivism" and "interpretivism" to give proper perspective to the task of evaluating judicial impact. Bradley Cannon adds a political science perspective and surveys the American impact literature and research methodologies. He seeks to develop a model of bureaucratic reactions toward judicial decisions, showing that their implementation has not always been spontaneous and smooth. Rather, unwilling or indifferent agencies follow a verily bureaucratic tactic by first engaging in interpretation of decisions, then by searching ways of response, and only finally by implementation, sometimes in an all-or-nothing fashion. This complex process is influenced by many factors such as resources, bureaucracy's attitude toward judicial abilities and threats of sanctions. Researchers will gain much insight from his discussion of these issues.

Part 2 presents empirical research from five jurisdictions: the UK, Canada, Australia, Israel and the USA, providing a comparative understanding. Evidently, a case study from India or/and South Africa—whose models of judicial review merit worldwide attention—would have made this collection more truly international. In the first case study, Genevra Richardson places "judicial review" and "impact" within a UK context, surveys the UK literature and examines whether the findings of her earlier study of judicial impact on a quasi-judicial body (the Mental Health Review Tribunal) could be applied to other decision-making contexts. Considering it unwise to generalise by applying those findings to other non-adjudicatory agencies, she notes that in studying judicial impact on bureaucracies, one should draw on law, regulation and discretion as well as on broader "values". Lorn Sossin attempts to shift the focus of Canada's "remarkably little" impact literature to show that a court's ruling is not the end of the story but rather "the beginning of a complex, new chapter". Based on three case studies (involving housing, immigration and obscenity standards), he examines judicial review's impact through an analysis of "soft law" (informal administrative guidelines, oral instructions and circulars, used to communicate judicially declared standards to front-line decision makers). These, he thinks, reflect bureaucratic responses and have a role in regulating discretion. For Sossin, the best way to assess judicial impact is to understand the politics of soft law.

The Australian experience is captured by Robin Creyke and John McMillan, whose study displaces the anecdotal belief that a successful judicial review action would most likely produce a refined remaking of the same decision by an agency. Recognising judicial review's ability to enlighten the agencies as to the meaning of the legislation they administer, the authors conclude that despite instances of negative bureaucratic responses to court decisions, judicial review matters significantly on two important fronts: it benefits litigants and impacts upon the broader scheme of law and government. Dealing with the difficult role of the judiciary in protecting human rights in situations of national emergency, Dotan Yoav

describes the nuances of judicial activism by the Israeli Supreme Court in reacting to allegations of torture by the country's security forces. This interesting behavioural study shows that the Court's different stands against torture—from avoidance through reluctant engagement to a complete ban—had correspondingly different impacts on the Israeli bureaucracy and military. In the last case study involving three US courts, Malcolm Feeley reports how American judges became successful managers or "executives" of their prison reform project with the aid of "special masters". Feeley's optimistic and success-focussed analysis of judicial review effectively challenges the traditionally-held view that the judiciary is the weakest organ of the state and incapable of generating social reforms.

The final part of the book focusses on the future of judicial review and its bureaucratic impact. Martin Shapiro introduces a European dimension by analysing the judicial and regulatory developments in the EU. He foretells that a US-style body of European administrative law is in the offing with increased judicial oversight to ensure governance, transparency, participation, and so on, resulting in an increase in agency behaviour towards such issues. In the concluding chapter, Hertogh and Halliday set out a future research agenda, suggesting benefits from interdisciplinary and methodologically pluralist research.

Simon Halliday's *Judicial Review and Compliance with Administrative Law* seeks to fathom the extent of judicial review's capacity to secure compliance with administrative law requirements (both common law and statute-based). Instead of flatly describing "impact", the author claims to have followed the alternative route of exploring the barriers to judicial review's influence over administration. His aim is to offer a model analytical framework to study judicial review's regulatory and modifying abilities. Following an internist research approach (going close to judicial review's subjects), he studies the conditions and factors that influence the dynamics of the judiciary—bureaucracy relationship, conducting his study through examining routine decision-making by a local government body that administers English homelessness law. His hypothesis ("The Heuristic Device") is that judicial review's effectiveness depends, along with other factors, on the degree of existence of these negative and positive conditions.

This book has nine chapters, divided into five parts. The introductory part provides a relatively detailed, somewhat repetitive discussion of methodological issues and explains some basic typologies and the author's particular stance. His awareness about the "limits of a compliance focus" of judicial review studies leads him not only to dismiss the idea of "perfect compliance" but also to prioritise the promotion of good governance as a goal for judicial review. Part 2 focusses on the decision-makers and presents three inter-linked hypotheses in three chapters. It is argued that compliance with administrative law is enhanced by: (i) the administration's reception of the court's message about administrative justice; as well as by (ii) an increase in its "legal competence" to extract legal principles from judicial decisions and then to re-apply them to similar future situations; and that (iii) the degree of judicial review's effectiveness depends on "conscientious" application of the decision-makers' legal knowledge to routine tasks. Complexities associated with the peculiarities of administrative decision-making are also discussed to strengthen the arguments. Part 3 concerns the decision-making environment and considers various competing pressures under which the administration has to operate.

It argues that reduction of competition between law and other normative forces enhances judicial review's ability as a regulatory tool. Part 4 (chapters 5–8), entitled "The Law", focusses on the contested concept of administrative justice by analysing two parallel competitions: that between judicial control and agency autonomy, and that between agency and individual interests. Here, the hypothesis is that administrative compliance will be increased by both consistency in judicial decisions and clarity in identifying the imperatives of administrative justice. Part 5 summarises the findings and argues that the book's analytical framework will work beyond the confines of its case study, homelessness law.

On the whole, these fascinating studies are a good reminder of the strengths and influence of law and judicial review in our life, despite the second book's deliberate exclusion of judicial review's broader social significance. Each book contains rich bibliographies and refers to a wide range of cases, which will enormously benefit future researchers of judicial impact. Intellectually insightful and focussed, these two books should attract a wide readership.

RIDWANUL HOQUE

The Class Action in Common Law Legal Systems: A Comparative Perspective. By RACHAEL MULHERON. [Oxford: Hart Publishing. 2004. 506, (Bibliography) 20 and (Index) 9 pp. Hardback £65.00. ISBN 1–84113–436–8.]

AS MULHERON rightly re-iterates, the guiding principle in developing a useful class action regime is "proportionality rather than perfection". This book is a comprehensive introduction to existing common law attempts to achieve that goal. It compares and contrasts the legislative class action models which apply under the federal regimes of Australia and the United States of America, and the provincial regimes of Ontario and British Columbia (the "focus jurisdictions"). It argues that each regime has confronted similar problems and that comparison of the responses in each jurisdiction may be relevant to proposals for reform. It is divided into three parts. The first introduces the concept of the class action generally, examining the features of modern class action regimes and their objectives; it then goes on to examine the approach adopted in England and Wales. The second Part considers issues relevant to the commencement of a class action in the focus jurisdictions. The final Part examines the conduct of the class action and considers the definition and treatment of the class, the effect of security for costs applications and limitation periods, the availability of monetary relief and issues of costs and funding.

This is a concise examination of the legislation and judicial decisions in each of the focus jurisdictions. It is ambitious in its scope, covering four separate jurisdictions and including in addition a chapter on the approach in England and Wales. While this prevents it from going into detail on any individual issue, it will provide an excellent source for those new to this subject, offering clear discussion of the major themes and extensive references to further reading.

However, despite this book's admirable survey of the field, its stated purpose is a narrow one. Mulheron advocates comparison of different

jurisdictions' experience of the class action, but it is clear that the value of such a comparison is well-established. The author notes that law reform commissions "have uniformly undertaken comparative legislative and case law studies" and that "judiciaries responsible for implementing the class action regimes in ... Canada and Australia have been receptive to the jurisprudence that has emanated from the much longer-standing class action regime [in the United States]". It may be that this book is a more systemic comparison of the focus jurisdictions than has hitherto been undertaken. However Mulheron acknowledges that the focus jurisdictions have much in common and so, insofar as they can learn from each other, it is on points of detail. In this regard, the book provides a useful introduction to the works that consider these points in more depth.

Broader themes do emerge in the book but the failure explicitly to develop them, given the author's evident expertise, is disappointing. On the most basic question of the value of the class action, the author notes that views as to its utility vary considerably. However, she does not argue that it is either desirable or undesirable, although the general tenor of the book is favourably disposed to the procedure. It becomes clear during the course of the book that Mulheron favours statutory class action regimes, and express legislative responses to the dilemmas to which the procedure inevitably gives rise. It would have been interesting to have the arguments in favour of this approach clearly and explicitly made.

Moreover, this reviewer's impression is that the book is in fact an argument for the introduction of such a regime in England and Wales. This impression is reinforced by the (otherwise slightly incongruous) inclusion of the approach to group claims adopted in England and Wales in Chapter 4. If the book is (as claimed) a comparison of legislative regimes in four common law jurisdictions, then the reason for devoting one chapter out of 12 to a jurisdiction not having such a regime is unclear, unless it is intended positively to advocate its introduction. While the Introduction justifies the comparative analysis undertaken as being in part "warranted and useful for those jurisdictions in which no class action regime presently exists", the argument that England ought to adopt such a regime is not explicitly made.

This is not to say that this argument is not alluded to at all. The author refers to England as a "notable exception" to the common law jurisdictions which have embraced a formal class action. Moreover, an explanation for its failure to introduce such a regime is suggested. While proposing that England's aims are different, it emerges that it is perceptions, not aims, which are in issue. Mulheron notes that the regimes in Canada and Australia were relatively recent when Lord Woolf conducted his review of civil procedure and that only the US procedure was referred to in the Lord Chancellor's Department reform proposal. The chapter considering the existing English approach includes a section entitled "Fear of US-style Litigation". The useful caution against using particular features of civil litigation to argue against the introduction of others is clearly aimed at the English perception of the US approach to multi-party claims. This implies that the value of the comparative study undertaken is not limited to the general information it may provide to law reformers. The comparison of the focus jurisdictions supports a more specific agenda: dispelling English concerns about class actions based on the US experience. Examination of similar regimes in Australia and Canada demonstrates that

class actions can operate successfully outside the US environment. Furthermore, reference to specific provisions introduced in Australia and Canada to overcome the limitations of the English approach (which, until relatively recently, prevailed in those jurisdictions) suggests a particular interest in reform of the English approach to multi-party claims.

This argument makes the selection of the four focus jurisdictions more explicable. If the purpose of the book is to argue for legislative reform in England, then consideration of the experience of four common law jurisdictions is clearly a useful starting point. If this is not the book's purpose, it is not clear why the particular focus jurisdictions were selected. The author notes that class actions are not exclusively a device for common law systems but goes on simply to state that the "emphasis in this book, however, is upon three common law jurisdictions where major and established class action statutory regimes are operative". As noted earlier, it is true that this comparison provides some insight on points of detail in each regime. However, Mulheron's survey of the legislative regimes considered is sufficiently comprehensive to justify her going further and proposing adoption of a model incorporating her analysis of their merits and disadvantages. Such a proposal would seem to be the natural conclusion of her analysis—but the book does not have any conclusion at all.

A "model" regime, although not explicitly proposed, again is implied. Where the focus jurisdictions differ, Mulheron generally argues clearly and persuasively for one approach over another. So, for example, she concludes that Australia's decision not to require certification of the class is not a success and that its requirement that there be seven or more class members is inferior to the requirement of two or more. There are a very few occasions where she is reluctant to take a view on which of different approaches is preferable. For example, in relation to a 2003 amendment to the US rule whereby the court certifying a class action must also appoint class counsel, the author notes that the provision is "unique among the focus jurisdictions" and concludes that whether other jurisdictions "follow the lead of the US ... remains to be seen". Given her comprehensive command of the subject, it would have been interesting to have the author's view on whether the other focus jurisdictions ought to adopt such a provision.

This book raises some interesting issues, not all of which are clearly resolved. So, for example, the author notes that there are those who argue that the certification process necessarily involves some enquiry into merits and refers to the view that this is in fact desirable. However, she does not assess whether this argument is convincing but rather notes that "[c]ertain US commentators observe that ... a re-examination of the [US] prohibition on preliminary merits assessment is timely". Her later observation that "as a matter of practice, it is not easy to divorce a consideration of merits from the certification hearing" hints that her view may be that whether or not some consideration of the merits is desirable, it is inevitable. Mulheron also raises the question whether the class action is procedural or substantive, but concludes that this is a matter on which opinions differ. Again, the author's conclusions on these questions would have been a valuable addition.

The book provides a clear and succinct analysis of the common and divergent responses to the challenges to which multi-party claims inevitably

give rise. To say that it would have benefited from more explicit exposition of latent themes is not so much a criticism as an acknowledgement of its scope and scholarship.

JILLAINE SEYMOUR

Corporate Insolvency Law: Theory and Application. By RIZWAAN JAMEEL MOKAL. [Oxford: Oxford University Press. 2005. xix, 339 and (Bibliography and Index) 19 pp. Hardback £70.00. ISBN 0–19–926487–2.]

THIS PENETRATING and stimulating analysis of English corporate insolvency law derives from the author's doctoral thesis, adapted to take account of the Enterprise Act 2002, and offers a perspective driven by a theory constructed to accommodate and reconcile the demands of fairness and economic efficiency. Theoretical treatments of insolvency law are, of course, by no means a novelty; nor, indeed, are attempts to scrutinise its standards by reference to economic models or notions of equity. Dr Mokal's approach, however, is marked by a rigour that sets it apart from its contemporaries and leaves the reader both enlightened and, moreover, inclined to investigate further its ideas and claims.

This work is timely, in that the Enterprise Act has radically altered certain norms and institutions of insolvency law: in particular, the new streamlined administration regime, which to all intents and purposes supplants administrative receivership as the predominant "non-terminal" insolvency procedure, is clearly aimed at sponsoring a rescue ideology. Interestingly, and in accordance with Dr Mokal's proposed model for testing insolvency law, it also aspires to enfranchise *all* creditors of an insolvent entity, not least by making the administrator accountable to all of them. An examination of this innovation alone along the lines adopted by the author would be of considerable value, but this work is far more ambitious and subjects what might be described as the "core" characteristics of corporate insolvency law to a searching assessment rooted in a bespoke theory that attempts to give due weight to the interests and expectations of all affected stakeholders.

Dr Mokal sets the template for this assessment in the first three chapters of the work, beginning with an explanation of the importance of consistency of principle in corporate insolvency. This basic tenet is lucidly fleshed out, leading to a conclusion that principles are consistent where "they uphold the moral equality of all those subject to them by showing equal concern for their interests". One of the most entrenched principles of insolvency law, the collectivity of the liquidation regime, is then examined in order to continue the construction of a suitable standard by which to gauge other legal principles. In this regard the author is not afraid to challenge the validity of the dominant model of insolvency scholarship, the "Creditors' Bargain" (as expounded most authoritatively by Thomas Jackson). Dr Mokal's objections to that model are overwhelmingly persuasive and his meticulous dissection of the model explained, to this reviewer at least, precisely why it had always seemed somehow flawed. The following chapter then proposes an alternative approach in the form of an "authentic consent model" by which, the

author claims, all principles of corporate insolvency law can meaningfully be tested. It is difficult in a review of this nature to do justice to the attention and insight that clearly informed the construction of this template, but it suffices to say that the authentic consent model remedies the (previously undetected) defects of the creditors' bargain and facilitates a coherent and informed discussion not only of the principle of collectivity but of other insolvency law norms.

The remaining six chapters proceed with such a discussion, evaluating by reference to the authentic consent model the *pari passu* principle, the priority of secured credit, administrative receivership and the floating charge, the "new" post-Enterprise Act administration regime, the wrongful trading provisions of the Insolvency Act 1986 and, finally, the "avoidance" provisions of that Act. Confines of space do not allow for detailed evaluation of each of the Chapters, but some particular comments are worth making. First, as noted earlier, Dr Mokal does not shirk from challenging head-on what might be considered established canons of insolvency law, and tends to do so cogently. Particularly impressive in this respect is his use of empirical evidence to expose certain weaknesses in otherwise convincing expositions. For example, in a compelling defence of the priority of secured credit, the oft-cited objection that such priority is unacceptably prejudicial to "involuntary" claimants such as tort victims is noted and then clinically eviscerated, at least as far as this jurisdiction is concerned. Moreover, recourse to empirical evidence to demonstrate a positive characteristic of secured lending lends weight to the argument. There are, inevitably, further questions raised by this discourse, including whether the "pattern" of secured lending corresponds to that identified by the author of a "main" creditor with an incentive to monitor its debtor and to intervene early in the cycle of decline so as to prevent insolvency. Questions such as this can only be answered by further empirical research but at the very least the reader is alerted to interesting and unresolved issues and ones which would benefit from a similar, probing treatment.

Indeed, if one were inclined to search for a limitation in Dr Mokal's account, it is in those areas where little or no empirical work exists to support his hypotheses: in this regard the reviewer would venture to dispute some of his conclusions on the ostensible unfairness of the administrative receivership procedure on the basis that the legal structure of that mechanism may not necessarily reflect its practical operation, and that its alleged predilection for the interests of a single secured creditor may be more imagined than real. On the other hand, the focus on the legal mechanisms by which the "new" administration regime is to be governed is doctrinally immaculate and imaginative. The author identifies and supports a system of accountability enshrined in the statutory framework and perceptively draws parallels with duties more commonly associated with trustees and their exercise of discretionary powers. As Dr Mokal recognises, whether or not this inclusive and transparent scheme will bear fruit rests with the willingness of the courts to strictly enforce the underpinning duties. One might add that its effectiveness will also be determined by the inclination or otherwise of its beneficiaries to challenge decisions; with the regime still in its relative infancy this is an area that will bear close attention. Interestingly, two fairly recent decisions (*Re Transbus International* [2004] EWHC 932 and *Re Cabeltel Installations* [2005] B.P.I.R.

28) both involve applications for directions from administrators (rather than challenges by creditors) and the latter involves precisely the rigorous degree of judicial scrutiny called for by the author, in startling contrast to the former, where a far more *laissez faire* approach is apparent. It will be fascinating to view developments in this area against the background of Dr Mokal's plea for a purposive judicial style.

On a more general note, this book is extremely well written and immensely readable. This is not to say that its style is in any sense undemanding; on the contrary, it challenges the reader throughout, but at no time does the author fail to explain his position (and, indeed, the positions of those whose works he draws upon) with anything other than absolute clarity. It is no criticism of the work to say that its arguments and conclusions will not be universally accepted, and, inescapably, it will provoke further debate; but this is an aspect that is to be welcomed. In conclusion, this book is an essential addition to the scholarship of corporate insolvency law. It examines, updates and exposes the perceived wisdom with pinpoint precision and introduces the reader to a methodology that is both refreshing and assured.

SANDRA FRISBY

The Limits of Competition Law: Markets and Public Services. By TONY PROSSER. [Oxford: Oxford University Press. 2005. xiii, 246, (Bibliography) 10 and (Index) 4 pp. Hardback £50.00. ISBN 0–19–926669–7.]

"ONE OF the most fundamental problems facing modern law is how to attempt to reconcile the values of markets, rights, and social solidarity and how to deal with the tensions between them" (p. 1). Will the market provide healthcare for those who are unable to pay? Is it acceptable for the media to produce only what consumers, sponsors, or advertisers are willing to pay for? The question Prosser considers is whether markets can maximise economic growth whilst maintaining a commitment towards and concern for the well-being of fellow citizens.

The Limits of Competition Law claims that special considerations may limit the application of competition law and argues that public service values are one such consideration. These values are inadequately defined, it being recognized that the idea of public service value is "inherently vague and highly politicised". However, Prosser argues that a workable definition emerges from national and Community legal traditions so that, whilst not at a developed stage of articulating the values inherent in public service, there "is a strong tradition of the distinctiveness of public service ... and the inherent duties of the state to ensure its proper delivery, either through ownership or through effective supervision of private operators". Particularly in broadcasting, through the Communications Act 2003, the UK has most clearly defined the meaning of public service, which entails universal access to services necessary for participation in modern life at an affordable price.

Accepting that public service and public service values exist, the question is whether the market or the state should provide them. The author compares the competition-based model—in which public service

provision is best undertaken through market-based mechanisms and in which normal provisions of Community competition law are applied—with the public service-based model, based on Continental traditions in which, regardless of how the service is provided, the values of public service are perceived to be threatened by the application of competition law. Market provision reflects the right of the individual to make choices and to bear responsibility for those choices and the welfare of society is enhanced by maximising efficiency. Competition law applies to ensure that markets remain efficient and open to welfare-enhancing innovation and change. The liberalization and deregulation agenda accept that public services benefit from provision through competitive markets and so are accompanied by the creation of regulators charged with restraining monopoly until the market becomes competitive.

Whilst public services can be provided by the market, "liberalization involved a potential tension between the values of competitive markets and those of public service" because competitive markets require that prices should be aligned to costs. Whilst the consumer citizen is treated with dignity and respect, this ceases when payment for consumption ceases. The services could become so uneconomic without supporting cross-subsidy that they could no longer be provided, and that would undermine the concept of universal service. The market respects the consumer citizen as long as they are willing and able to pay; however, as citizens are equal and because consumer citizenship is revealed as a simulacrum of a constitutional citizenship there are certain values in the form of social and economic rights that will "trump" competition law and the market.

How should public service values be protected in market provision and against competition law? Different approaches have been taken at the Community level and in various national jurisdictions. Chapters 3 and 4 examine the UK approach, with public service values initially protected by the common law, the courts ensuring a right of access to essential services. The courts ceased to protect or promote this right of access, though we are not told why, and public service values were then protected by political means. This occurred by nationalising essential services so that universal service provision would be guaranteed by the state without the distraction of a profit motive. When public service providers were privatised and liberalized, public service values were then protected by empowering regulators not only to promote the transition to competition but also to promote public service values. In the "Continental Tradition", constitutions permit the privatisation of public service activities subject to legal controls to ensure that the goals of public service remain protected when in private hands. So universal access to telecommunications was set as an important regulatory goal, and in the case of electricity we find amongst the secondary duties protection of the interests of consumers in rural areas. Likewise, the issues of social regulation that arose in water and sewerage centered on the protection of vulnerable groups. This body of law made it clear that although delivering competition and maximising profits are important goals, wider social objectives are also important.

Chapters 6 to 8 concern the way in which Community law has handled tensions between public service and competition objectives in key areas. Articles of the EC Treaty are examined to advance the thesis that whilst the special treatment of public services was initially seen as an impediment

to market creation, Article 16 now affords public service values constitutional status, in recognition of "the independent value of public services as exemplifying a Community commitment to citizenship" (p. 121). That this treatment of the law leans heavily on Buendia Sierra's *Exclusive Rights and State Monopolies in EC Law* does not detract from the clarity of exposition or quality of discussion. The idea of limits to competition law is reflected in the discussion of how sectors liberalised by Community measures have been placed under explicit obligations to maintain public service values.

The Limits of Competition Law argues that there is a growing consensus, particularly at the Community level, that there are various services that are a necessary means for participation in modern life, that European citizens are entitled to such services as of right, and that markets are the most effective way to provide these services, as evidenced by the liberalisation agenda. It argues that provision of public service is imbued with certain ideals, and that the protection of such values can occur negatively—through setting limits to the application of normal competition law—or positively, through developing public service law to protect distinctive values. The perceived need for protection stems from an approach which views markets and competition law as fragmenting the important values of social solidarity. This book is a plea for a clarification and recognition at the Community level of the extent to which public service values should trump competition law.

The book's thesis is thought-provoking and appealing, yet not unproblematic. There is the vague definition of public service value, and the extent to which such values exist as rights. The problem of identifying values is illustrated by the fact that politics could protect public service values through taxation. Prosser recognises that taxation and social security could provide a neat solution to the problem of citizens lacking the economic means to be represented in the market, but considers that redistribution on this scale is highly unlikely to occur. If constitutional citizens do not value the values enough to pay for them through taxation, and consumer citizens do not value them enough to pay for them in the market place, the question is whether the values really are valued. Prosser takes the view that they are simply "too important to be left only to markets and politics and not to law" (p. 246). Whilst showing that public service values can be maintained in the market if their provision is imposed by law, scepticism over the existence of a continuing sense of distinctive public service values brings to the fore the undesirability of the state imposing arbitrary values on its citizens. On the other hand, take an alternative mechanism for protecting public service values—nationalisation: nationalisation failed because, whilst imbued with public service values, the firms could not provide service. It is clear that a clash between public service values and the market can only occur when efficient provision creates services that can be imbued with values. Yet the argument that markets and competition law matter, and that a failure to apply competition law to such enterprises only serves to give them an unfairly protected position and to mask inefficiencies is never clearly or convincingly rejected.

Whilst *The Limits of Competition Law* provides a timely account (with cases like *AOK Bundesverband*, *Altmark*, *FENIN*, *Wouters*, and *Bettercare* considering and reconsidering questions about the legitimate scope and

content of competition law) this is a topic on which much has been said and on which there is still much to be considered. Prosser provides a clear account but by no means the final word.

OKEOGHENE ODUDU