bilateral arrangements". In the jargon of global administrative law, "steps by principals to strengthen their regulatory capacities generate correlative increases in agency costs", which causes problems at the national and global levels as states' priorities diverge from those of the institutions they empower. This may be uncomfortable reading for those who think Britain is about to "take back control" of its sovereignty by embarking on a new round of trade negotiations, but Stewart emphasises that the internal administrative law so beloved of Mashaw can be put to the laudable end of promoting "a democratic element in regulatory decision making and [securing] rule of law values".

In his concluding comment, Mashaw makes two arguments to which administrative lawyers across the world should turn an attentive ear. First, he argues for "a more granular, neo-Realist approach to how law works in practice and for the building of theoretical hypotheses from fine-grained empirical investigation". Second, however, he cautions against over-reliance on quantitative empirical methodology, arguing instead for a qualitative approach pursuant to which "we must also look inside at agency methods, explanations, procedures, and organizational arrangements". Much like the body of work it celebrates, this excellent volume suggests that administrative lawyers should pay close attention to the internal workings of administrative decision-making processes.

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Claims to Traceable Proceeds: Law, Equity and the Control of Assets. By ARUNA NAIR [Oxford University Press, 2018. xiv + 229 pp. Hardback £70.00. ISBN 978-01-98813-40-8.]

The Law of Tracing in Commercial Transactions. By MAGDA RACZYNSKA [Oxford University Press, 2018. Hardback £155.00. ISBN 978-01-98796-13-8.]

The author of any book on tracing faces a daunting task. The law of tracing concerns when the law will treat one asset as the substitute of another, and so allow a person who had an interest in the first asset to assert an interest in the second. It plays a crucial role in cases involving money laundering and fraud. It has received no shortage of scholarly attention, especially in monographs published by Oxford University Press. Lionel Smith's *The Law of Tracing* (1996) synthesised the modern approach for resolving tracing problems: an approach sanctioned by the House of Lords in *Foskett v McKeown* [2001] 1 A.C. 102. Likewise, David Fox's *Property Rights in Money* (2010) provides a crystalline account of the most important type of tracing: tracing money, in particular through bank accounts. Given this, do we need two new books on tracing? If so, why? Raczynska's and Nair's works make a strong case that we do in very different ways.

Raczynska's *The Law of Tracing in Commercial Transactions* is the more practitioner oriented of the two. It is not purely about tracing in the sense of identifying the proceeds of an asset disposed of without authority. It examines when A, the holder of a security interest in an asset, or title to an asset under a retention of title clause, can claim an equivalent interest in other assets derived from the original asset. "Derived assets" include proceeds (where the product is sold or exchanged), products (where the asset is manufactured into another), and fruits (where the asset "produces" others such as the olives of an olive tree or the rents of a house). Further, Raczynska looks at cases where the derived assets have been created with authority,

as well as without. The book only discusses security rights and retention of title clauses, so does not discuss when holders of other interests can trace.

Raczynska concludes that whether A acquires an interest in derived assets depends both on the type of derived asset and whether the derivation was authorised or unauthorised (chs. 2 and 3). Her basic argument is that A should acquire no interest automatically in derived assets (ch. 4). Where it has been agreed that A will have an interest in derived assets, that agreement should be effective – though this might have an impact on how A's interest is characterised (ch. 5). For instance, a retention of title clause purporting to give A title to the proceeds of sale of the asset would most likely be characterised by the courts as a charge – and so require registration where A has dealt with a company. Where A is owed custodial duties in respect of the asset, but it is disposed of *without* A's authority, A should be able to assert an interest in the proceeds or products of the initial asset (ch. 6). Arguing that the current law offers no sufficient justification for tracing of this type, Raczynska contends that it is justified on the grounds of economic efficiency (ch. 7). Allowing A to assert an interest in substitutes where A's interest in the initial asset is destroyed "may be seen as preserving the bargain between the parties and avoiding additional transaction costs associated with transacting for this rule" and "the creditor need not include the risk of losing security in the cost of borrowing" (7.19–7.20). On the other hand, A ought to have no right to fruits generated by the initial asset in the absence of agreement, as typically the creation of fruits will not reduce the value of the initial asset and the security. There is thus no threatened loss to A's security which justifies the additional right.

The book falls within the best tradition of doctrinal legal scholarship, by drawing together different strands of authority into a coherent framework for dealing with difficult issues. Practitioners will find it useful as a source of relevant cases, a framework for understanding the law, and source of potential lines of argument. For reformers too the book will be indispensable, not just in its consideration of the desirability of both specific and wholesale reforms of English law, but in signposting those areas where the law is at crossroads – for instance as regards whether the income generated by wasting assets should be treated as proceeds or fruits (5.50–5.56).

Where Racyznska's work breaks new ground, Nair's digs deeper into well-tilled soil. It is no criticism to say that the book is more remarkable for its reasoning than its conclusions. Nair expounds a theoretical justification of tracing which takes the reasoning in cases seriously – bucking the fashion for decrying the current ambit and judicial explanations of the tracing rules as indefensible and instead arguing for rules of tracing based on causation or intention.

Nair builds on judicial statements that trustees and fiduciaries by "changing the form" of trust property cannot be allowed to harm their beneficiaries. This is interpreted by Nair as meaning that a trustee or fiduciary by an unauthorised disposition cannot be allowed simply to deprive a beneficiary or principal of their rights. This is built into an argument that where

(1) A holds a right in an asset,
(2) B has a power to destroy that right or render it unenforceable, and
(3) B exercises that power in breach of his or her (custodial) duty to A,

then A can claim the traceable proceeds of the asset in question. Examples include cases where B holds personalty on trust for A and sells in breach of trust to a bona fide purchaser of legal title for value without notice; or where B exercises apparent authority to sell an asset in which A has an interest, despite express instructions not to do so. Drawing on Ernest Weinrib's work, Nair argues that tracing claims are

justified because an incident of A's right is an entitlement to the "value" of their right – including the ability to exchange A's right for another – which has been destroyed or rendered unenforceable by B.

The term is not used, but tracing thus conceived is a consolation prize for A, where A loses a priority dispute with a purchaser from B. Where bona fide purchase and similar defences render A's right unenforceable against a purchaser, A can claim the proceeds in B's hands and "cherry-pick" substitutions. The law nevertheless respects B's autonomy in respect of his or her own property, by limiting A to "funds" into which the substitute was placed, through the law's insistence on transactional links, and the lowest intermediate balance rule. B's autonomy is also protected in that A can only claim traced assets where A's right in the original asset has been destroyed.

Nair therefore treads between "fiduciary" and "proprietary" conceptions of tracing. Tracing requires custodial duties, which are sometimes described as fiduciary, but no broader duties of loyalty. Tracing does protect A's rights in assets, but a "proprietary interest" – treated as meaning a legal property right (6.22) – is not necessary to trace, in that tracing can be used by holders of personal rights and equitable interests (though it is questionable whether any commentator suggests that a beneficiary of an express trust cannot trace). Likewise, a "proprietary interest" (and a fortiori legal or equitable title of any kind), is not sufficient to allow A to claim traceable proceeds: such a claim depends on showing B has breached a custodial duty to A.

The book presents an elegant model of tracing deeply rooted in the cases. It is aimed more at those seeking a deeper understanding of the law and its principles, and looking for a principled rebuttal to tracing's critics, than practitioners seeking to solve tracing problems daily. Many of the conclusions Nair reaches on doctrinal controversies will not raise eyebrows: *Clayton's Case* (1816) 1 Mer. 572 should not be applied to determine the relative entitlements of innocent contributors to a mixed fund; backwards tracing should be limited to situations where parties deliberately seek to obscure the proceeds of misappropriated funds; common law claimants should be able to assert equitable title to assets traced through mixed funds; and there are conceptual problems with a claimant asserting legal title to traced assets such as a bank account, registered land or shares, which stand in the name of another. Interestingly, it is suggested that where B uses the asset in which A has a right to improve another asset of his or hers – in reference to the facts of *Re Diplock* [1948] Ch. 465 – whether A can trace or not should depend on whether the improved asset is "personality rich" (i.e. has more than financial value) or "personality poor" (i.e. is valuable only financially, rather than through a link to B's personhood). But the point is not much explored. This reviewer found the most useful doctrinal section that at the end of ch. 7, where Nair suggests that we can determine which interest holders can claim traceable proceeds on the basis of determining whether they are owed custodial duties – or in Nair's language whether B has "control" of A's assets. This is used to explain why trust beneficiaries, purchasers under vendor-purchaser constructive trusts, and those who have exercised mere equities to set aside a transaction should be able to trace – and marries up neatly with Raczynska's approach to the issue of which rights allow their holder to trace.

Indeed, Nair and Raczynska adopt very similar models of tracing. It is the law's response to B exercising a power, which destroys or renders unenforceable A's right in an asset without authority (i.e. in breach of their custodial duties) – though Raczynska treats this power as including the "power" to extinguish the asset's identity through manufacture (Raczynska 1.54), whereas Nair explicitly excludes such powers (Nair, 6.62–6.72) sticking to the narrower definition, "authority to deal with or dispose of any assignable right" (Nair, 6.48). Each emphasises that where

B exercises his or her power with authority – either from A, or under the terms of the trust where B is a trustee – that it is the terms of B's authority which determine what interest A has in any substitute. The right to a substitute in such cases is not simply an incident of A's right in the initial asset. As above, tracing is A's consolation when the original right is destroyed or rendered unenforceable by an unauthorised disposition. It is the combination of B's unauthorised action and the destruction of A's right which justifies the infringement to B's autonomy by A's right to cherry-pick substitutes.

If this conception applies to all claims to traced assets as Nair argues (Raczynska limits her observation to claims by holders of security interests or retention of title clauses), then no private law claim to traced assets can be brought where A's right is not destroyed or rendered unenforceable. This is novel and unorthodox. It suggests that for A to assert a right to a traced asset, A has to plead that his or her right in the original asset has been destroyed or rendered unenforceable. This has never been an element of a claim to traced assets. A beneficiary of a trust can choose whether to claim proceeds in the hands of a trustee or to claim trust assets from a third party who is not a bona fide purchaser (see McGhee (ed.), *Snell's Equity* (2017), 30–055). On this view, if the original asset is stolen from B, or B disposes of it without authority to a third party who cannot successfully plead bona fide purchase (or an equivalent defence), then A cannot claim any proceeds in B's hands. The former instance is relatively unimportant given, as Nair notes in ch. 1, the Proceeds of Crime Act 2002 allows A to claim proceeds of the asset if it is stolen. The remainder of this review will thus focus on the implications of the second point.

Imagine a case where B holds personalty on trust for A. In breach of trust, B sells trust assets to C who has notice of the breach. On orthodox thinking, A can claim the proceeds of sale from B by "ratifying" the disposition, and so electing to take the substitute instead of vindicating A's equitable interest as against C (see *Re Hallett's Estate* (1879) 13 Ch.D. 969, 709–711; *Foskett v McKeown* [2001] 1 A.C. 102, 129–133). Nair rejects the language of ratification and this reasoning. On her model A could not claim the proceeds from B, because B has not destroyed A's equitable interest. There would therefore be no justification for tracing. This has some difficult implications.

First, why should A be forced to pursue the remedy against C? Where C has later consumed or destroyed the asset, or is otherwise difficult to sue, B's wrongdoing has clearly put A in a worse position. Tracing operates to preserve the integrity of the trust fund by allowing A to waive his or her right to the wrongly disposed of asset and claim the substitute, thereby avoiding the necessity of litigating against C. It also looks odd that A should be forced to plead that failure in a priority dispute with C to claim traced assets from B. The difficulty with conceptualising tracing claims as consolation prizes is that a claim for traceable proceeds might be much more valuable, for instance where C has later destroyed the asset or B has invested the proceeds profitably.

Most troublingly of all, Nair's suggestion that a beneficiary can only claim traced assets upon proof that his or her right has been destroyed implies that a trustee can defeat a beneficiary's claim to a traced asset by pleading that the beneficiary's right subsists; for instance, because the trustee sold without authority to a purchaser who had notice of the breach of trust. A trustee cannot typically rely on pleading breach to avoid liability, and the suggestion that that is desirable needs greater discussion and justification. Of course, a trustee might be estopped from making such a plea, but that would render the requirement that a beneficiary's right be destroyed much less important. That in turn would make Nair's claim that the law of tracing only concerns the law's response to the destruction of A's interest, and plays no role in vindicating that interest while it subsists, look weaker.

Nevertheless, these points do not detract from each work's impressiveness. Both books are interesting, thought provoking and extremely cogently argued. They are welcome additions to the stellar Oxford University Press tracing collection.

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Liberal Legality: A Unified Theory of Our Law. By Lewis D. Sargentich. [Cambridge University Press, 2018. xii + 176 pp. Hardback £85.00. ISBN: 978-11-08425-45-2.]

Jurisprudence is a fractured discipline, with ever-expanding interpretations of age-old disputes and stubbornly entrenched positions on increasingly fine distinctions. It is therefore refreshing to see work that goes back to basics, provides a new framework through which to view extant debates and aims to unify and not divide.

Professor Lewis D. Sargentich offers such work in his first publication on legal theory, *Liberal Legality: A Unified Theory of Our Law*. He begins by affirming that "[l]egality is our topic" and "toward unification" we go. The author is not, however, concerned about law in the abstract; rather he is focused on "our law": the law of America and of "kindred legal systems"; liberal law, law that is liberty-serving – "Nomological" law, "law-like law". The nomenclature is unfamiliar at first but, once grasped, rewarding. This is because it is not terminology that states a definition; it is terminology that encapsulates a specific prescriptive conception of law. This is law in a specific guise, and the author argues that this guise is identified by two features: the existence of an instituted legal practice coupled with the nomological commitment. The first quarter of the book is devoted to an examination of how an instituted discourse of law is set up, and the rest forms an argument for why and how the nomological commitment operates.

The author begins ch. 1 by defining "law-like", "nomological" and "liberal" law (where all these terms refer to the same thing) as a perfected condition sought by law, where legal entitlement and legal justice are achieved through legal rationality. In other words, law that takes the form of "general, coherent and impersonal" prescriptions that allow for rational resolution without reference to materials outside law, in order to secure entitlements under law and achieve justice through law. This type of legal system is guided by the aspiration to achieve the perfected condition of legality. It thus aspires to itself. Chapter 2 takes a step back from this abstraction and focuses on what argument looks like in our legal systems. The author notes that H.L.A. Hart's theory is incomplete since it leaves out the role of canons of argument within a legal system, and hence cannot account for the function of courts in a modern legal system. He further suggests that Dworkin fails to trace the enterprise of coherence-seeking to its roots since coherence-seeking must stem from the criteria of good legal argument. Chapter 3 builds on these two points to construct the general character of an instituted practice of law, something the author describes as an ongoing discourse within three zones. These three zones together form legal argument: primary arguments by the courts, derivative arguments by counsel and affiliated arguments that occur without the restraints of "institutional status".

There is little to criticise about this image; indeed readers will recognise it as a familiar picture of our legal system. Judges render decisions based on certain