and fairness may be the result when two legally represented parties of equal bargaining positions hammer out a deal, but it is not the aim of the parties' lawyers. The lawyers' aim, as required by their ethical code, is to achieve the best legitimate result for their client. Likewise, Wood states that lawyers "should lead and set the moral agenda" (p. 240). It is not made clear how they are to do so when they are acting in the best interests of their clients, in accordance with their clients' instructions.

The West has undoubtedly seen a reduction in the significance of religion in private and public life. There are a variety of views as to whether this is good: much comes down to whether the historical and factual claims made by a particular religion are actually true. Wood does not engage in detail with this question – perhaps surprisingly, given the otherwise enormous scope of this work. Most would agree that it is important for the survival of the human race that we coordinate our functions. Law helps us achieve this, through matters ranging from which side of the road we should drive on, to basic laws concerning the personal security and property rights. However, the coordination of functions depends not only on a widespread (and somewhat nebulous) commitment to the rule of law, but also upon the content of the law.

There are some editorial slips in the text. For instance, the cryptic sentence "There is much commonality but little commonality" (p. 248) is, presumably, unintentional. At one point, the presentation of the illustrations obscures the meaning of the text. In a tour through the various families of the law helpfully illustrated by world maps (chapter 8), what look to be headings for the various families of law sit under the maps to which they relate as captions. This, however, means that they are not placed at the start of the relevant section of text dealing with a particular family of law, and there is no other form of heading for the sections. As a result, it is unclear what family of law is being considered. There is also a legal error. The statement that "[a] crime requires a deliberate intent to commit it, whereas a civil wrong can be just negligent or even without any kind of recklessness or intention" suggests that intention is required for criminal liability, ignoring offences for which recklessness is sufficient *mens rea*, let alone strict liability offences.

Wood's book raises important questions, and includes interesting insight and information. The breadth of learning revealed is significant. The force of the argument is, however, undermined by a certain lack of rigour in its expression. Readers are likely to react differently to it, perhaps especially depending on their religious viewpoints. There may be few who would agree with everything Wood has written here. But then, this is an unusual book.

Alistair Mills
Magdalene College

The Common Law of Obligations: Divergence and Unity. By Andrew Robertson and Michael Tilbury (eds.) [Oxford: Hart Publishing, 2016. xxxvi + 331 pp. Hardback £70. ISBN 978-1-78225-656-4.]

Divergences in Private Law. By Andrew Robertson and Michael Tilbury (eds.) [Oxford: Hart Publishing, 2016. xxxiii + 350 pp. Hardback £70. ISBN 978-1-78225-660-1.]

Double albums are notoriously difficult to pull off. For every *White Album* or *Blonde on Blonde* – astonishing bursts of creativity that demand a longer format to be fully realised – there is a *Tusk* – an unlistenable, self-indulgent mess with only occasional

highlights. It is with some trepidation, then, that we approach the books under review: not one (as has been the case in the past) but *two* books made up of papers from the Obligations VII conference entitled "The Common Law of Obligations: Divergence and Convergence" that was held at Hong Kong University in July 2014, comprising 28 papers plus two introductions by the editors. Do we have here the private law equivalent of *Exile on Main Street* or *The Wall*?

Divergences in Private Law (hereinafter, "*Divergences*") is the more coherent of the two volumes. For the most part, the papers in *Divergences* look at a number of different areas of private law where common law jurisdictions have taken different positions. The two exceptions are two of the best papers in *Divergences*: Graham Virgo's essay on unconscionability and Stephen A. Smith's paper on equitable orders. These look, respectively, at seeming divergences of approach *within* English law on what amounts to unconscionability, and the nature of a judicial order.

Virgo draws a helpful distinction between (1) cases where relief is awarded against a particular defendant because the defendant's state of mind meant that he acted unconscionably and (2) cases where a court acts, or declines to act, in a particular way because doing anything else would affect *its* conscience. Virgo goes on to suggest that the second sense of "unconscionability" allows us to reconcile the English approach to when a defendant will be held liable to give up to a claimant some benefit that the defendant has obtained from the claimant (which asks whether the defendant has been unjustly enriched at the claimant's expense) with the Australian approach (which asks whether leaving the benefit in defendant's hands would be unconscionable): "In England unjust enrichment operates to establish whether the receipt of the benefit is unconscionable [in sense (2)], whereas in Australia unconscionability can only be interpreted [in sense (2)] with reference to unjust enrichment" (p. 316).

Smith argues that there is nothing distinctively "equitable" about equitable orders, in either their form or substance. In terms of form, common law orders tend to order that a state of affairs that can be brought about by a third party (such as the payment of a debt) shall be brought about; Smith calls this an "executable ruling". In form, equitable orders instead tend to order that a state of affairs that can *only* be brought about by the defendant (such as ceasing to interfere unreasonably with a claimant's use and enjoyment of land) shall be brought about; Smith calls this a "non-executable ruling". But either way, both sets of orders are designed to bring about a certain state of affairs and both sets of orders could be made in a unitary system that did not recognise a distinction between law and equity. In terms of substance, the various grounds on which a court may refuse to grant an equitable order do not (Smith argues) seem particularly "equitable" in nature. For example, if a court refuses to grant an order of specific performance because doing so would cause unnecessary hardship to the defendant, the court does so not because the defendant's hardship makes it unconscionable for the plaintiff to enforce the contract. Rather, Smith suggests, in this kind of case, the defendant has no moral, and therefore legal, duty to perform her contract but is still required to compensate the claimant for letting him down. Virgo's paper gives rise to the suggestion that, in this kind of case, the court might refuse to make the defendant perform her contract because doing so would affect the *court*'s conscience – in which case the refusal to grant an order on grounds of hardship might still be based on distinctively equitable grounds.

The remaining 13 papers in *Divergences* (disregarding the introductory chapter by the editors) fall roughly into two groups. The papers in the first group are content to describe divergences between different common law jurisdictions on a number of

different issues (recovery in tort for distress and other forms of mental harm (Louise Bélanger-Hardy), liability for defamation on the Internet (Robert Ribeiro), non-delegable duties (Neil Foster), restitution for services (Alvin W.-L. See), resulting trusts (Man Yip), the basis of recovery in unjust enrichment (Zoë Sinel) and undue influence (Robyn Honey)) and to suggest some reasons for these divergences.

Of the papers in this group, Honey's was weakened by her relying too much on some unsubstantiated remarks of Lord Nicholls at the start of his judgment in *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44, [2002] 2 A.C. 773 to make out a case for divergence between English and Australian law as to the basis of relief for undue influence. Judges are not legislators: whether their words become law depends on how far they are subsequently accepted by future courts. As Honey herself concedes, several English cases since *Etridge* have accepted (contrary to what Lord Nicholls might have suggested at the beginning of *Etridge*) that "a transaction may be set aside" on the grounds of undue influence "notwithstanding that the influential party did not behave in a reprehensible manner" (p. 287). Yip makes some very interesting observations on how the social conditions in Singapore might have affected the law on when the courts are willing to presume that property was intended to be held on resulting trust for the donor or purchaser of that property, and how changes in those social conditions might bring about a convergence with the English law on this issue. Sinel's paper is an important contribution to the literature on unjust enrichment. She suggests (1) that the Canadian approach to the question of whether a defendant has been unjustly enriched at a claimant's expense reflects the more communitarian nature of Canadian society (as opposed to the rough individualism that prevails in Anglo-American societies) and (2) that the real issue is "what injustice in the context of unjust enrichment means" and that "[n]either the presence of an unjust factor nor the absence of a juristic reason answers this fundamental question" (p. 197). She goes on to make some tentative suggestions as to what we must take into account in answering this question.

The papers in the second group are each happy to take a side on an issue that has divided different common law jurisdictions and argue that one jurisdiction is wrong and the other is right. Both Sirko Harder and Robert Stevens criticise the High Court of Australia's novel decision in *Andrews v Australia and New Zealand Banking Group Ltd.* [2012] HCA 30, (2012) 247 C.L.R. 205, holding that the rule against penalty clauses may apply to clauses requiring a defendant to pay money to a claimant even though the defendant has not actually committed a breach of contract. Harder points out a number of "methodological flaws" in the High Court's reasoning, while Stevens argues that the whole point of the rule against penalty clauses is to stop an obligation (say) to clean the windows of a house being transformed, on breach of that primary obligation, into an obligation to pay the owner of the house £1 million. This, Stevens argues, is incoherent; a case of "trying to transform a caterpillar into a water buffalo" (p. 170). Any secondary obligation arising out of breach of a primary obligation must, in some sense, match that primary obligation because the secondary obligation is "in an important sense the *same* obligation, but in a different form, as the primary obligation to perform" (p. 176, emphasis added). On this view, the traditional position, that the rule against penalty clauses only applies to clauses stipulating what happens on *breach* of contract, makes perfect sense as the rule is designed to ensure that secondary obligations arising on breach of a primary obligation correspond in some way to that primary obligation.

Australian law also comes under some criticism from Andrew Robertson, who argues vigorously in favour of the idea of "proximity" playing a much larger role in determining whether or not a defendant owed a claimant a duty of care than some High Court of Australia decisions have been willing to allow it to do. The

basic issue engaged by the duty of care question – "whether it was fair to expect a person in the position of the defendant to be mindful of a particular interest of a person in the position of the plaintiff" (p. 21) – must turn, Robertson argues, on the nature of the relationship between the defendant and the claimant and the "closeness and directness of the defendant's conduct on the [claimant]" (p. 35): in other words, the proximity of the defendant to the claimant. Sticking with tort law, the restrictive position of English law on recovery for negligently inflicted economic loss is criticised by Sarah Green and Paul S. Davies, who argue in favour of a much more liberal approach (closer to that adopted in New Zealand, Canada and Australia) to allowing recovery in defective building cases. Jason Neyers focuses on the law of public nuisance and attempts to sort out divergences between English law and Canadian law on what amounts to a public nuisance and who can sue for damages in respect of loss that they have suffered as a result of a defendant's creating a public nuisance. Neyers argues (1) that the tort of public nuisance should work to protect "rights that people have (in the nature of easements and profits) over public land" (p. 77) and (2) that anyone who suffers harm as a result of *their* (as opposed to someone else's) rights over public land being interfered with should be able to sue for damages in respect of that harm.

Erika Chamberlain provides readers with a very helpful summary of the current state of Canadian fiduciary law, and argues in favour of the Canadian willingness to push the boundaries of who is classified as a fiduciary. That willingness has allowed the Canadian courts to provide relief to patients wishing to access their medical records, or to sue doctors who have traded medical services for sex, and to allow a parent to sue his or her former partner for disrupting access to the couple's children. She argues that "Given the choice between a court that is willing to act creatively to provide compensation to victims of sexual abuse and incest, and one that is paternalistic, doctrinally rigid and wilfully blind toward the realities of sexual exploitation, the creative court has substantial appeal" (p. 244).

Reflecting on this second group of papers prompts the thought that one factor that might account for a large number of divergences between different common law jurisdictions is *how much* imperfection – either in its law or in society as a whole – and *what kind* of imperfection a particular jurisdiction is prepared to tolerate. For example, a penalty clause rule that only applies to clauses that stipulate what a defendant must do on *breaching* her contract with the claimant can be easily avoided in ways that Stevens illustrates in his paper. What do we do about this? There are three possibilities: (1) do nothing: in the interests of legal certainty we allow parties who know how to do it, to draft their way around the penalty clause rule; (2) adopt the Australian approach and abolish the traditional limit on the penalty clause rule; (3) adopt a halfway position and affirm the traditional limit, while warning that a clause which has obviously been drafted with the aim of avoiding the penalty clause rule will still fall under the rule. Given that each of these positions gives rise to problems, none of them is obviously "right". It is easy to see how different jurisdictions can end up going in different directions on this issue.

Similarly, if the law on public nuisance took the position that Neyers wants it to take, what would we do in the case of "a [claimant] who suffers personal injuries as a result of crashing into a vehicle which has been parked or left on the highway" (p. 92)? Neyers thinks there will be recovery in such a case, provided that the presence of the vehicle in the road amounts to a public nuisance. However, even on Neyers's approach, this is incorrect. The presence of the vehicle can only amount to a public nuisance if it is parked in the road for an *unreasonably* long time. But how long the vehicle has been parked in the road only has a coincidental connection with the fact that the claimant has crashed into the back of it: the claimant

would still have crashed into it had the vehicle been parked in the road for a couple of minutes. Denying recovery to the claimant in this case is not so easy. The claimant would not take the news well were he to hear that he could not sue for his injuries, while a businessman who suffered economic loss as a result of being stuck in the build-up of traffic caused by the parked vehicle could sue. Neyers's example again provides us with a choice of imperfections: (1) allow recovery to the injured claimant and ignore the normal rules on when a wrong can be said to have caused someone loss (which may have knock-on effects elsewhere in the legal system) or (2) deny recovery and make the legal system look as though it discriminates in favour of businesses over people. It easy to see how, faced with this choice of imperfections, one jurisdiction might choose option (1) while another chooses option (2).

The Common Law of Obligations (hereinafter, "*Obligations*") is much less homogeneous than *Divergences*. Two papers (one by Andrew Burrows, the other by Goh Yihan) amount to data-mining expeditions. Burrows focuses on how frequently decisions of the House of Lords and the UK Supreme Court have referred to Commonwealth authorities (often) and cases from civil-law jurisdictions (not often) in the last 25 years. Goh provides a wealth of information on how often Singapore courts cite cases from other common law jurisdictions, and how often the decisions of Singapore courts are cited by the courts of other common law jurisdictions. Paul Finn provides readers with a wonderfully thorough account of how the Privy Council operated to maintain unity among the various common law legal systems, how the Privy Council lost that role and what effects this had on the state of private law across the common law world. Many of Finn's points find an echo in James Goudkamp and John Murphy's paper, which examines the evolution of tort law in common law jurisdictions as those jurisdictions became more separated from each other, both institutionally and philosophically. Anthony Mason focuses on a different source of divergence between different common law jurisdictions, which is the willingness of the courts to develop the common law of a particular jurisdiction in light of the legislation that obtains in that jurisdiction. Pursuing this theme, Paula Giliker asks whether the UK's membership of the European Union, and its being a signatory to the European Convention on Human Rights, have caused English private law to drift away from its sister common law jurisdictions and concludes that there is little evidence of such drift occurring: in tort cases at least, "English judges still feel a greater affinity with common law sources" (p. 111).

Obligations also contains three papers (by Sian Elias, Peter Cane and Niamh Connolly) on the liability of the state, and of public authorities, under private law. Cane and Connolly both focus on the divergence between American law – where the doctrine of sovereign immunity still holds, and protects the federal government and the states from being sued under private law without their consent – and English and Australian law, where the doctrine of Crown immunity has largely been overturned. Cane suggests that this division reflects different views of the nature of law: the idea of sovereign immunity is more congenial to an instrumental view of law which sees law as working to achieve certain ends using certain means than it is to a non-instrumental view, which sees law as existing to uphold rights and remedy wrongs. Connolly agrees, and argues in favour of a non-instrumental view of private law, organised around the ideals of freedom and equality. Crown immunity offends against both ideals, but so – Connolly argues, with some sympathy from Sian Elias – does private law when it fails to recognise that public bodies are significantly different from private persons and simply applies the same liability rules to public bodies as it does to private persons. Like Connolly, Sarah Worthington sees the ideal of freedom as integral to private law in common law jurisdictions generally, and the ideal of "party autonomy" as central to the common law of contract in particular. She

examines a number of different areas of contract to see how far they match up to this ideal of "party autonomy" and only finds the law of penalty clauses wanting.

The three most theoretical papers in *Obligations* are by Allan Beever, Dan Priel and T.T. Arvind. Beever seeks to establish the apparently paradoxical point that divergence among common law jurisdictions is both welcome and regrettable. He reaches this conclusion by arguing that: (1) all common law jurisdictions aim at legal justice; (2) they diverge when they take different views as to what legal justice entails; (3) this divergence is welcome because it is by experimenting with different views about legal justice that knowledge about what legal justice entails is advanced; (4) this divergence is regrettable because the law to one side of the divide will turn out to be wrong. One problem with Beever's argument is this: if two common law jurisdictions take radically different views of what legal justice requires, can the jurisdiction whose view is wrong really be said to be *aiming* at legal justice? It is, rather, aiming at something that is *not* legal justice. One (and perhaps the only) way out of this problem is to take the Dworkinian route of arguing that legal justice is an *interpretive concept*. On this view, different people can adopt different interpretations of what legal justice entails that are based on certain shared premises about the nature of legal justice. While one of these interpretations will be correct and the others wrong, all of the interpreters are aiming *at the same thing* – coming up with the best account of what legal justice entails – that is, the account that makes the best sense of the interpreters' shared premises about the nature of legal justice. However, Beever does not attempt to argue that legal justice is an interpretive concept. Priel might be taken as offering some support for this idea in his paper when he argues that what unites the different common law jurisdictions (for the time being and only so long as they are willing to work at it) is a *shared tradition*. Priel is less than clear on what this tradition might be, other than saying that it is "political in one sense – it reflects certain political commitments (for instance, a certain conception of liberty) – while remaining apolitical in another, as its political commitments are distinct from the everyday politics of majoritarian democracy" (p. 244) and that it allows for certain differences of approach in its elaboration so that, for example, the US version of the common law tradition is more open to influence from current popular opinion than the version adopted by other jurisdictions, which is more hidebound by past precedent.

Arvind's paper addresses the relationship between the common law of obligations, on the one hand, and the statutory regulation of various significant areas of social life, on the other. Arvind sees the traditional role of the law of obligations as being to manage and shape people's expectations, especially in cases where people's expectations conflict. However, the modern-day law of obligations is more concerned with facilitating the management and distribution of risks. That task results in the law of obligations (1) becoming more remote and technocratic, and ripe for takeover by regulatory experts, and (2) ceding the territory of setting standards of conduct to regulatory bodies. This, Arvind thinks, accounts for "the slow retreat of the law of obligations, and the corresponding rise of regulation" (p. 277). Arvind concludes by calling for a revival of the law of obligations' traditional function "through the manner in which it uses, develops, applies and engages with [the] concepts" (p. 278) that give the common law its characteristic way of "thinking about social expectations, social relations, and the manner in which and conditions under which the expectations of one will be required to give way to the contradictory expectations of another" (p. 277). Arvind's topic is an important one, but many will question his analysis of why we are where we are. Some might say that the law of obligations is, and always has been, based on the idea of its subjects as being self-governing people while regulation is based on the idea of people as being

unable to look after themselves. As such, the two areas of law must come into conflict and one will wax and the other will wane as the ideas on which they are based come into, or fall out of, fashion.

Overall, both of these volumes are of the same high quality as their predecessors in the Obligations series, and they certainly do not amount to the private law equivalent of *Tusk*. But neither, I think, does either of these books come close to reaching the heights of something like the *White Album*. Two weaknesses hold them back. First, many of the papers in these books are so much of their time that there is no chance that they will be read even 10 or 15 years from now. Private law scholarship generally is too concerned at the moment with reportage and analysis of what is being reported on and too little concerned with viewing private law *sub specie aeternitatis*; the volumes under review suffer from that same lack of balance. Secondly, there is a striking lack of reference to anything other than primary and secondary *legal* sources in most of the papers in this collection. Private law scholarship that hermetically seals itself off – aided by common law ideologies that dismiss the relevance of a vast range of human learning and experience, telling private scholars, "Move along, nothing to see here" – cannot sustain itself for very long.

Nicholas J. McBride
Pembroke College

Constitutional Conventions in Westminster Systems: Controversies, Changes and Challenges. By Brian Galligan and Scott Brenton (eds.) [Cambridge: Cambridge University Press, 2015. xii + 275 pp. Hardback £69.99. ISBN 978-1-10-710024-4.]

This book seeks to offer a political approach – drawing on political theory, history and accepted practice – to the analysis of constitutional conventions operating in the UK, Canada, New Zealand and Australia. Constitutional conventions are fundamentally important to the operation of constitutions in Westminster systems. They are the customs and rules unenforceable in law that operate mostly behind the scenes and out of site, usually gaining public attention during challenging constitutional moments of national significance. The public generally have little knowledge about them and decision makers dispute their form, application and existence. Analyses of such disputes have often been confined to the realm of legal academic scholarship. This work succeeds in providing an eye-opening and interesting account of conventions in the four countries. It raises thought-provoking questions and draws conclusions from a fresh political perspective.

The book covers much ground. It consists of a collection of 14 chapters written by a number of contributors. First, in chs 1 and 2, it distinguishes the political approach undertaken in the book from the usual legal approach. Second, in chs 3–8, there are analyses of constitutional conventions which apply to – and are affected by – actors within the primary institutions of the Westminster systems; namely, the executive, both houses of the legislature and the judiciary. Chapters 9–12 offer an abundance of examples which illustrate the practical impact of the theory, history and practice of conventions in the four countries. The final chapters consider the issues of codifying and reforming conventions.

In ch. 1, Galligan and Brenton contend that conventions are more fundamental than laws because they govern the formation and basic functioning of the