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Book Reviews

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BOOK REVIEWS

The books reviewed in this issue of the IJLI reflect the ongoing globalization of the legal profession. Among international topics covered are terrorism, copyright, human rights, and the environment. There are also reviews of minority rights in both Europe and Asia as well as reviews of the ongoing legal reforms in Russia and China. We have also delved a bit deeper into the substance of a work with an indepth review of *European Fair Trading Law, The Unfair Commercial Practices Directive* by Howells, Micklitz and Wilhelmsson. This text is reviewed by Professor James Nehf. Finally, Marylin Raisch, Associate Law Librarian for International and Foreign Law at the Georgetown Law Library brings it all together in her review of Oxford University Press's *Handbook of Comparative Law.* Enjoy!

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National Minority Rights in Europe. By Tove H. Malloy. Oxford; New York: Oxford University Press, 2005. Pp. xi, 354. ISBN 0-19-927443-6. £64.95; US$125.00.

In the wake of 21st century civil wars, unlawful occupations, and sovereignty waiting in the wings for many minority groups around the world, *National Minority Rights in Europe* details the development of minority rights in Europe and provides a model for the rest of the world. Although the title designates the regional focus as Europe, Malloy provides numerous examples throughout history from other regions of the world, which increases the book's appeal and demonstrates the subject's universal application.

This monograph is much more than a historical account. Malloy considers the many phases of the development of minority rights in Europe, including jurisprudence, legal and political theory, moral and political philosophy, and international relations throughout the text. Perhaps in light of this broad coverage of such a wide array of topics, Malloy does not treat these subjects exhaustively and he excludes a critique of theories of rights, freedoms, duties or responsibilities, as well as other major theories, such as democracy, pluralism, and liberalism, to name a few. The coverage of jurisprudence is also limited, and full case studies are not provided. Instead, cases are discussed to reveal examples of national minority rights implementation, or lack thereof.

The definition of minority is the core of the discussion in part one, and readers should note that Malloy's focus here is on a specific type of minority, namely, national minorities or autochthonous minorities. Autochthonous minorities are native to the region, in this case certain regions of Europe that were once either independent or belonged to a neighboring state. Other groups of minorities, for example, ethnic minorities, are only discussed in passing to distinguish the topic at hand throughout the text. Thus, the overarching theme of this book is what Malloy refers to as the European international politics of accommodation of national minorities.

Part two provides a noteworthy analysis of political theories and moral and political philosophies that have played a role in the development of national minority rights in Europe. Malloy addresses the idea of "co-nation" and its several characteristics: inclusion, recognition and deliberation. Nationalism, self-determination, national identity, autonomy, and citizenship are among the many aspects of political philosophy that Malloy explores at length.

Part three widens the scope to include international governance and European integration, with a particular look at the Council of Europe, which preceded the Framework Convention for the Protection of National Minorities (FCNM). An examination of the *travaux preparatoires* of the FCNM, a table of which can be found in the beginning of this book, is also discussed here. The co-nation theme continues in this section, with further discussion of collective rights and political representation in the post-FCNM period. In reviewing these particular topics Malloy highlights the actions of the Congress of Local and Regional Authorities of Europe, one of the key committees that support the process of democratization in post-1989 democracies in Europe.

Malloy is a Senior Research Associate with the European Centre for Minority Issues, where she is in charge of the EU program and serves as the Managing Editor of the European Yearbook of Minority Issues and a permanent member of the Danish Foreign Service. Her extensive research on this topic is reflected by the comprehensive bibliography and the wealth of the pertinent footnotes. This title is particularly geared towards an academic audience and those readers involved in policymaking. This book would be a good addition to any international collection, in particular those libraries with a focus on human rights literature.

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***Terror and Anti-terrorism: A Normative and Practical Assessment* (International and Comparative Criminal Law Series)**. By Christopher L. Blakesley. Ardsley, New York: Transnational Publishers, 2006. Pp. ix, 329. ISBN 1-57105-332-8. US$125.00.

Christopher L. Blakesley, the Cobeaga Law Firm Professor of Law at UNLV's William S. Boyd School of law, is an accomplished scholar in the area of international and comparative criminal law, and has authored a number of publications in that area. He is also a very active member of the American National Section of the International Association of Penal Law and one of several scholars who posts to that organization's blog (http://www.aidpblog.org/). *Terror and Anti-Terrorism* can be taken to be Blakesley's attempt to weigh in on the very relevant and in vogue legal topic of terrorism and responses to it.

In *Terror and Anti-Terrorism*, Blakesley sets out some rather difficult tasks for himself. He attempts to provide an objective definition of "terrorism" and explain why such a definition is necessary and how it should be applied. He also attempts to explain the legal context for terrorism, i.e., its relationship to both domestic crimes and war, and touch on how all of this affects us as humans. Considering the difficulty of these tasks, Blakesley is somewhat successful. He makes a good attempt at defining "terrorism" and does a good job of explaining why it should be defined. But after he has laid out his basic argument, Blakesley pursues too many seemingly tangential arguments and examples for this reviewer, and his attempts to give the book a literary bent seem to take away from his basic arguments.

Blakesley's proposed definition of terrorism is, "[V]iolence committed by any means; causing death, great bodily harm, or serious property damage; to innocent individuals; with the intent to cause those consequences or with wanton disregard for those consequences; and for the purpose of coercing or intimidating some specific group, or government, or otherwise to gain some perceived political, military, religious, or other philosophical benefit." He also adds "without justification or excuse," because he conceptualizes matters like terrorism and war by analogy to domestic criminal law and its defenses.

Blakesley provides two good reasons why it is necessary to have an objective definition of "terrorism." One, while "terrorism" exists only as a term, various groups have more freedom to use it to describe the conduct of their enemies, whatever that may be. And two, because of any jurisdictional differences terrorism may have from other crimes, as terrorism may give rise to *jus cogens* principles, and thus universal jurisdiction, which Blakesley says that it unquestionably does.

While Blakesley's definition of terrorism attempts to be objective, his scholarly agenda does not. Unsurprisingly, Blakesley has particular opinions about his area of expertise (for instance, he is working on another book titled *Clear and Present Danger: Evisceration of Human & Civil Rights in the War on Terrrorism and the War on Drugs*). These views are present in *Terror and Anti-Terrorism*. The fact that Blakesley takes the somewhat controversial position that states can commit terrorism is a good example of this, as is the fact that he begins the book by using the bombing of Nagasaki as an example of a terror tactic. Regarding his argument that states can commit terrorism, Blakesley does some legal calisthenics to support this position, both by explaining how only this paradigm supports having a truly objective definition of terrorism, and by differentiating terrorism from war crimes and crimes against humanity committed by a state. The result is rather convincing.

While many of Blakesley's positions are actually not much different from those of many other legal scholars, they unfortunately seem more polemic than they really are because of Blakesley's writing style, which is replete with literary references. The book opens with a quote from *Candide*, ends with a quote from *Paradise Lost*, and many of its chapters open with quotes from W.H. Auden. The effect seems to take away from *Terror and Anti-Terrorism* as legal argument and make it more like ruminations on a subject. This is, however, a deliberate style that Blakesley believes in.[1]

Terror and Anti-Terrorism may actually suffer because Blakesley has published widely on international criminal law. Parts of the book have the feel of an article that has been beefed up for publication in a longer format. Indeed, Blakesley has written three articles and delivered at least three papers or speeches with titles including the phrase "terror and anti-terrorism" or "terror and counter-terrorism," and one questions his reason for making such long examples of things such as the extradition of Augusto Pinochet, until noticing that these are topics he has studied in the past. Additionally, the book could have been edited more closely. For instance, the sentence, "The *Akayesu* decision suggested that that when there is no state of war, terrorism or crimes against humanity" (p.203), is not really preceded or followed by anything that would help explain it, and thus creates unnecessary confusion.

While *Terror and Anti-Terrorism* has some shortcomings, scholars studying the subject will nonetheless want to read it to compare Blakesley's definition of "terrorism" to the others that have been proposed, and students

[1] "Thoughts I have been having over the past several years on the impact of good literature on helping us understand ourselves, the law, and each other. I have been writing these down and in my books and articles. I have expounded on them in works currently in progress or at press." Christopher Blakesley, *On What We Can Become – Thoughts Prompted by Mike and the "Lucifer Effect,"* AIDP BLOG, (Mar. 21, 2007).

researching international and non-U.S. responses to terrorism and related offenses may choose to use the book for its wealth of citations. The book, however, should not be read for its analysis of post-9/11 anti-terrorism in the U.S.—despite concluding with two chapters on the subject, Blakesley does not attempt to give it an in-depth analysis.

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Minority Rights in Asia: A Comparative Legal Analysis. By Joshua Castellino and Elvira Domínguez Redondo. Oxford; New York: Oxford University Press, 2006. Pp. ix, 286. ISBN 0-19-929695-7. £60.00; US$105.00.

The dearth of minority rights literature focused on Asia inspired Joshua Castellino, Lecturer at the Irish Centre for Human Rights, National University of Ireland, and Elvira Domínguez Redondo, Post-Doctoral Fellow for the Irish Research Council for Humanities and Social Sciences, to write this organized and informative work. In addition to providing an overview of the human rights debate as it pertains to Asia, the authors present case studies of the minority rights regimes adopted by four states in the region: India, China, Malaysia, and Singapore. This comparative approach reveals the significant differences between the mechanisms employed by each state for the projection of minority rights.

The first chapter provides a brief history of international human rights regimes, including a discussion of key international treaties, before introducing the "Asian Values Debate," which considers whether Asian states espouse specific values that are incompatible with universalist human rights norms. The authors briefly describe the three models of Asian values, which share certain core elements, such as respect for authority and the priority of law and social order above individual civil and political rights. In addition to these values, Castellino and Domínguez Redondo identify the emphasis on sovereignty among Asian states as a primary reason for the absence of a collective human rights system in the region. Despite this, however, Asian state participation in international human rights treaties is substantial, as demonstrated in the authors' survey of Asian participation in certain core human rights treaties. The chapter concludes with an overview of state

attitudes toward minority rights in each region within Asia – central, south, east, and southeast.

The second chapter presents the first case study – India. After introducing the relevant historical background, the authors identify the minorities in India, including the scheduled castes and tribes described in the Indian Constitution. The authors then examine the substantive provisions of Indian minority rights law, addressing India's religious protections, its provisions for linguistic rights, and the affirmative action measures conferred on the scheduled castes and tribes. The case study concludes with a discussion of the remedies available under Indian law for minority rights violations.

The chapters on China, Malaysia, and Singapore follow the same format. Each case study illustrates the singularities of the particular state discussed. China's extraordinary diversity (the state recognizes fifty-six internal "nationalities") and rapid economic growth, for example, contribute to a unique minority rights regime. Likewise, Malaysia's affirmative action programs targeted at the majority population, and Singapore's rigorously managed meritocracy reflect significantly different approaches to minority rights protection.

The concluding chapter offers a comparative perspective on the four cases studies presented, followed by recommendations for increased international cooperation. The authors emphasize the importance that an understanding of local conditions plays in international efforts to effect worthwhile change in the region. This work, written in clear, unbiased prose, furthers that understanding. It is a valuable addition to any library that collects in the areas of human rights law, or general foreign, international, and comparative law. In addition to its thoughtful analysis of the subject matter, the work offers a well-organized index, an extensive bibliography, a table of cases, a table of international instruments and domestic legislation, and a table of official and governmental sources.

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Russia, Europe, and the Rule of Law (Law in Eastern Europe). Edited by Ferdinand Feldbrugge. Leiden; Boston: Martinus Nijhoff Publishers, 2007. Pp. 1, 223. ISBN 90-04-15533-3. €110.00; US$149.00.

This book contains a collection of twelve short, scholarly essays on the Russian legal system; it also contains chapters on Serbian and Bulgarian

law. The essays cover a wide range of topics, including in-depth discussion of the Russian Constitutional Court, judicial review, lay judges, judicial culture, the procuracy, and EU judicial cooperation with Russia. While the chapters on relatively narrow legal topics are interesting, they are pitched to a scholarly and specialist audience and assume significant background knowledge. They are unlikely to be of interest to those without knowledge of Russian and East European legal issues.

Ferdinand Feldbrugge, the editor, is Professor Emeritus for East European Law at Leiden University and has served as Special Advisor Soviet and East European Affairs ("Sovietologist-in-Residence") to the Secretary-General of NATO from 1987 to 1989. He selected these essays from among those presented at the VII World Congress of International Council for Central and East European Studies held in Berlin in July 2005.
Only his essay weaves together common threads from the other chapters.

Unlike the other chapters, Professor Feldbrugge's integrative final chapter is of general interest. He gives a sweeping account of Russia's past fifteen years, arguing that the turmoil has largely abated and that a new legal system is in place. Legal policy has shifted from legislation to the courts and to the Constitutional Court in particular. He discusses the trial of former oligarch Khodorkovskii, with its enormous political implications, as no "ordinary criminal case." He points out that Russia' future depends in large part on its relations with Europe, and that for now the European Union's course in its relationship with Russia is unclear. He argues that the wise course for Russia is to "mark time and preserve its options" while Europe decides its future. Unlike many commentators, Professor Feldbrugge's greatest concern for Russia's rule of law is not the certain authoritarian tendencies, but rather the fact that Russia has not yet come to grips with its Stalinist past.

For scholars of the Russian judicial system, this book is required reading. For general readers, most of the book will be far too narrowly focused, with the exception of the last chapter which provides a very thoughtful and interesting overview of legal currents.

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Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'. By Stephen Cretney. Oxford; New York: Oxford University Press, 2006. Pp. 1, 346. ISBN 0-19-929773-8. £25.00; US$45.00.

The Civil Partnership Act of 2004 is the law of England that recognizes the legal status of relationships between same-sex partners. The provisions of the act, which are numerous and detailed, establish the process by which same-sex couples can register their unions as civil partnerships. According to Stephen Cretney, a well-known writer and expert in English family law, this statute is the latest step in the process of moving homosexual relationships from criminal acts to marriage, although he points out that, according to its framers, the Civil Partnership Act does not establish same-sex marriages; civil partnerships are seen as parallel but different legal relationships. In *Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage'*, Mr. Cretney analyzes the Civil Partnership Act by discussing the history and background relating to the criminalization and subsequent decriminalization of homosexual relationships.

Chapter one looks at the history of the law relating to sexual relationships. It begins with a brief description of the 1953 trial of three men accused of having homosexual sex. This case is used to illustrate the fact that as recently as the middle of the Twentieth Century consensual sex between people of the same sex was illegal and people were still being prosecuted under the law. Later in the 1950s, a committee was entrusted with the responsibility of exploring the morality and immorality of both prostitution and homosexuality. The subsequent report produced in 1957, the *Wolfenden Report*, recommended that, because homosexual conduct between consenting adults was a private matter, it should not be criminalized. The report concluded that there were proper areas for government regulation and consensual homosexual conduct did not fall within those areas.

In the aftermath of this report, the law was changed, although it took until 1967 for the passage of the Sexual Offences Act to decriminalize private homosexual acts. It took almost forty more years for the law to advance to the point where relationships between same-sex partners were themselves given legal status. In an interesting twist, the author mentions that the initial bill proposing what became the Civil Partnership Act was intended to apply to both same-sex couples and heterosexual, cohabiting couples in an attempt to give them an equivalent legal status to married couples. As it progressed through Parliamentary debates, however, it evolved into covering homosexual relationships and left out heterosexual, cohabitating couples.

In the second chapter, Mr. Cretney analyzes specific provisions of the Civil Partnership Act to show the progress that it made as well as the difficulties that it did not solve or address. The Act defines a civil partnership

as being formed when a same-sex couple registers as "civil partners." It sets out, in detail, the steps needed for proper registration and the eligibility requirements to be able to register. It provides for the process of dissolution as well as inheritance, adoption, and property rights. Mr. Cretney states that it appears that the "draftsman has trawled through the statute book and, from the Explosive Substances Act 1883 through the Law of Property Act 1925….down to the Sexual Offences Act 2003, the principle seems to have been to add a reference to civil partners wherever there is a reference to husband and wife." However, there are differences between a marriage and a civil partnership. A prime example is that adultery is not a valid basis for the dissolution of a civil partnership, as it is for a marriage. If a same-sex partner wants to end the relationship because of a partner's infidelity, it is for the judiciary "to determine what level of sexual fidelity is appropriate for a same sex couple and what kind of conduct is inconsistent with that standard." An additional problem is that, because the government specifically stated that the Act does not provide for same-sex marriage, the Civil Partnership Act has not satisfied everyone.

Chapter three begins to explore the wider context of how laws relating to same-sex relationships in other countries have been developing. In England the law has developed through the legislature. In other countries, the courts have been at the forefront to change in the law. Mr. Cretney specifically discusses the cases that have changed the law in the United States, notably *Lawrence v. Texas* and *Goodridge v. Department of Public Health*. He also provides an interesting look at the process by which U.S. Supreme Court justices are chosen, showing how politically charged the process is. He compares it with the judicial selection provisions of England's Constitutional Reform Act of 2005. The Act established a Selection Commission that recommends judges for the Supreme Court and a Judicial Appointments Commission that makes recommendations for other courts. Since the Act specifies that the recommendations are to be on merit alone, the intent is to make the process apolitical. However, the author proceeds to discuss how merit will be evaluated and what level of judicial review will be allowed to the Supreme Court of the United Kingdom, given the doctrine of parliamentary sovereignty.

Same Sex Relationships: From 'Odious Crime' to 'Gay Marriage' is based on three lectures given by Mr. Cretney as part of the Oxford Clarendon Lectures in Law in 2005. As the author points out, the text of the book is as it was delivered in the lectures. No attempts were made to bring the text up to date, or to include any changes in the law or other developments that may have occurred between October 2005 and the time of publication. Because the text is based on lectures, it is clearly presented and easily understood. Footnotes have been added to provide needed references and extra

explanatory information. Also included in the book are extensive appendices that contain the specific provisions of the Civil Partnership Act, the text of the *Wolfenden Report*, and cases from the United States, Canada, and South Africa. These are intended to give the reader "an opportunity for a case study of different methods of law making" and to provide a look at differing views on the "proper role law in relation to sexual activity." This book is an excellent resource for understanding the Civil Partnership Act through its development and history, and would be valuable for anyone interested in the area of same-sex relationships and same-sex marriage.

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China's Legal Reform: Towards the Rule of Law. By Zou Keyuan. Leiden, The Netherlands: Koninklijke Brill NV, 2006. Pp. ix, 266. ISBN 90-04-15232-6. €99.00; US$129.00.

Zou Keyuan is a prolific scholar who has published extensively on Chinese and international maritime law. His latest work, *China's Legal Reform: Towards the Rule of Law,* is a comprehensive and succinct study of how, since the country opened its doors to the world in the late 1970's, China is relinquishing her deeply rooted political and ideological tradition of "*ren zhi*" (人治*rule by people*) and moving toward building a system of government premised on "*fa zhi*" (法治 *rule by law*).

The opening two chapters delineate in detail the historical context in which the Chinese legal system has evolved over the last five decades. This section provides a well-documented analysis of how the modern Chinese Constitution developed from its infancy between the years 1954 and 1982 to its present form. Beginning in 1983, in a process that continues, a number of constitutional amendments were added to balance the pragmatic challenges of the economic needs of the country, the ideological struggles within the ruling administration, and the dynamics of party politics. With meticulous research Mr. Zou presents interesting and informative details of the historical milieu that shaped the present Constitution.

The middle chapters of the book trace the enactment of a series of economic laws and regulations to accommodate the needs of the rapidly developing market economy within the Communist framework, as advocated by former Premier Deng Xiaoping. The book also touches upon thorny issues

that continue to plague China, i.e., regionalism and widespread corruption, compounded by the administrative measures of the legislature to combat these problems. Enactment of these administrative laws and regulations has in turn triggered widespread demands for judicial reform.

In the final chapters, the book looks beyond China's domestic issues to her engagement with international politics and diplomacy. This last section examines China's human rights record, particularly in relation to the controversial penal system "*laodong jiaoyang*" (劳动教养*Reforming the Re-education through Labour System*), and China's compliance with WTO and other major international treaties and agreements

As the author states in the Preface, the book is "the outcome of the first phase of a long-term research project on 'Legal Reform in China'," first launched in 1998 when he joined the faculty of the East Asian Institute at the National University of Singapore. The chapters of the book consist mostly of articles published between 1999 and 2004. The compilation is well organized in a systematic, coherent, and balanced manner. While short on critical in-depth analysis, the book gives a fair and concise review of the wide range of political, ideological, and economic issues that China confronted as she transitioned from an isolationist state into an international powerhouse. From 2005 to the present, the years following the period covered by this book, the actual pace of substantive legal reform in China has been slow and sporadic. At the same time, however, a groundswell of citizen action has begun to challenge the powers of the legislature, judiciary, and ruling administration. Myriad issues ranging from subtle legal challenges to spirited calls for reform simmer at the grassroots level in both rural and urban regions of the country, e.g., the "*weiquan*" (维权 *rights defense)* movement, the trial and imprisonment of the blind lawyer-activist Chen Guangcheng (陈光诚), the controversy preceding the adoption of the Property Rights Law, and the call for legal education reforms, just to name a few. Mr. Zou's book provides well-organized and balanced background reading about the transition of China's legal system in the last five decades up to the year 2005. For an up-to-date assessment, however, legal scholars of China are on their own if they want the most recent developments of China's legal apparatus amidst the current political and economic landscape of the country.

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European Fair Trading Law: The unfair commercial practices directive, by Geraint Howells, Hans W. Micklitz, and Thomas Wilhelmsson. London; Burlington, VT: Ashgate Publishing, 2006. Pp. 312. ISBN 0-7546-4589-4. £60.00; US$115.00

There is a longstanding debate in the development of consumer policy over whether consumers are better served by regulatory measures that prohibit unwanted marketing practices outright, or by measures that facilitate informed decision making and more efficient consumer markets, letting consumers decide what is best for them. When protecting the consumer's interest in market transactions, Europe is often regarded as more interventionist than the United States, which tends to take a more market-enhancing approach to consumer law. Rather than banning unfair commercial practices outright, Congress and state legislatures generally favor non-interventionist mandates, such as requiring that certain contract terms (e.g., an APR in a credit transaction) be conspicuously disclosed[2] and prohibiting selling tactics that are fraudulent, misleading, or otherwise inhibit informed consumer choices. Market-enhancing laws are designed to help consumers make better informed decisions, resulting in more efficient market transactions. A more interventionist approach prohibits contract terms and selling practices that regulators deem unfair and therefore illegal in all consumer transactions.[3]

Although the EU had taken an interventionist approach in other directives, most notably the Directive on Unfair Contract Terms in 1993,[4] the most recent consumer initiative, the Unfair Commercial Practices Directive,[5] is primarily a market-regulating measure designed to foster informed choices. The focus of the law is almost entirely on prohibiting deceptive and "aggressive" selling behavior that can influence consumer decisions. This Directive is an important step toward harmonizing the law of unfair commercial practices throughout Europe, but its primary goal is breaking

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[2] See, e.g., U.C.C. § 3-316(2) (a merchant disclaiming the implied warranty of merchantability must do so conspicuously). Rent-to-own transactions are another example. Despite effective interest rates exceeding 200% annually, nearly all state legislatures permit rent-to-own sales under laws that require the disclosure of certain contract terms. See, e.g., Ind. Code § 24-7-1 to -9 (2006).

[3] Examples would include usury laws that cap interest rates and laws that prohibit confession of judgment clauses in consumer credit transactions.

[4] Directive on Unfair Contract Terms, Council Directive 93/13 EEC, 1993 O.J. L95/29.

[5] Directive 2005/29/EC concerning unfair business-to-consumer commercial practices in the internal market, O.J. 2005 L149/22 (hereinafter, the "Directive" or "Directive on Unfair Commercial Practices").

down barriers to cross-border sales of goods and services by harmonizing unfair trade laws in the twenty-seven EU Members States, thereby promoting efficiency in consumer markets.

The likely effects of the Directive on consumer welfare and cross border trade are subjects addressed by Geraint Howells of the United Kingdom, Hans W. Micklitz of Germany, and Thomas Wilhelmsson of Finland in their extensively researched and well-organized book, *European Fair Trading Law: The Unfair Commercial Practices Directive.* The authors place the Directive in its wider European law context and offer a wealth of historical and comparative analysis to guide governments, courts, and administrative bodies that will implement the Directive in the coming years.

Each of the authors study consumer law and policy in a national legal system that will be profoundly affected by the legal mandates of the Directive, albeit in different ways. The fair competition laws of Germany, which national and local courts have construed aggressively to protect consumer rights in a wide variety of commercial sectors, may have to be scaled back by the uniform fairness standards imposed by the Directive. Finland's tradition of strong, interventionist consumer protection may be challenged as too unfriendly to outside business interests that seek to penetrate Finnish consumer markets with unconventional marketing schemes. In the United Kingdom, the government must deal with the Directive's general prohibitive clause, which has no parallel in national marketing laws and may require a major review of the current regulatory regime to ensure national compliance with the Directive's standards.

1. The Directive's Place in European Consumer Law

The Directive is one of the most recent EU initiatives that attempt to deal with a fundamental problem in modern life, i.e., the lack of truly informed consent in merchant-consumer transactions. How should courts interpret and apply contracts that merchants created but consumers neither read nor understand, and in many cases never even knew existed? Contracts have historically been viewed as legitimate creations of private law between the contracting parties (therefore justifying the power of the state through court enforcement), because they result from consensual undertakings of willing participants.[6] Although the consent model is still taught in most first-year Contracts classes, it is widely criticized as neither an adequate

[6] See Randy E. Barnett, Perspectives on Contract Law 346 (1995) ("A fundamental tenet of the liberal conception of justice is that resources rightfully belonging to another may not be taken without the manifested consent of the rights-holder."); John Rawls, A Theory of Justice 342-47 (1971).

description of, nor a normative justification for, contractual relationships between businesses and consumers.[7]

Sophisticated commercial parties who negotiate at arms length are nearly always held to the written terms of their bargains, and in resolving disputes about contract meaning, judges are justifiably reluctant to imply limits on contractual autonomy. In the typical merchant-consumer transaction, however, the bargain model is far less descriptive of the actual contracting process. Apart from the most basic terms of the agreement the written contract is seldom seen as reflecting a "meeting of the minds" or even a tacit agreement between consumer and merchant. Most consumer transactions result in contracts of adhesion where all but the most basic terms are neither read by the consumer nor negotiable.

The problem of defective consent in consumer transactions typically elicits three categories of response in an effort to justify enforcement of the resulting agreement. One is to champion measures that create an environment in which informed consent is more likely to occur. Laws calling for conspicuous disclosure of contract terms, notice of rights and obligations, plain language requirements, and mandatory rescission or cooling-off periods all seek to move consumers toward better informed and more voluntary undertakings.[8] When sellers comply with such a law, courts usually conclude that the merchant has complied with its legal duties and the resulting bargain is binding on the parties.

A second category of response is to acknowledge the fiction of true consent, even with mandatory disclosures, accept it as unavoidable in the modern world, and argue that non-consensual consumer transactions are

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[7] See Lawrence Kalevitch, Gaps in Contracts: A Critique of Consent Theory, 54 Mont. L. Rev. 169 (1993); William W. Bratton, Jr., The "Nexus of Contracts" Corporation: A Critical Appraisal, 74 Cornell L. Rev. 407, 458-59 (1989) ("Contract law literature contains commentary effectively challenging classical contract's conjunction of contract, consent, and freedom."); Duncan Kennedy, The Stages of the Decline of the Public/Private Distinction, 130 U. Pa. L. Rev. 1349, 1351-52 (1982) ("The 'free' 'private' market is really an artifact of public violence."); Betty Mensch, Freedom of Contract as Ideology, 33 Stan. L. Rev. 753, 764 (1981) ("Coercion, including legal coercion, lies at the heart of every bargain. Coercion is inherent in each party's legally protected threat to withhold what is owned. The right to withhold creates the right to force submission to one's own terms.").

[8] In the early 1990s, Norbert Reich and others labeled this disclosure-based form of consumer protection a pre-interventionist approach to the defective consent problem. See Norbert Reich, Diverse Approaches to Consumer Protection Philosophy, 14 J. Cons. Pol. 257 (1992) (observing possible exceptions in Spain and Brazil); J. Goldring, Consumer Law and Legal Theory: Reflections of a Common Lawyer, in Essays on Comparative Commercial and Consumer Law 316, 326-27 (D. King, ed., 1992).

legitimized in other ways. Presently, the most widely accepted is rational choice and the efficiency of consumer markets.[9] A nonconsensual contract is just one of many non-negotiable aspects of a product or service being offered to the public. Consumers purchase many products and services without knowing many of their physical, experiential, and legal attributes—good, bad, or otherwise. In the sale of a computer, for example, a typical buyer may be aware of some software and hardware properties, but far from all of them. Similarly, a buyer may be aware of a few contract terms (e.g., a one-year warranty) but is only vaguely aware of others. At time of delivery, the computer comes as a bundled, packaged product, and the buyer takes the entire bundle, contract and all.

Observing that contracts are simply one part of a package deal may describe consumer contracting in today's world, but it does not necessarily legitimize the contract that the merchant seeks to impose. Without a normative justification to legitimize the private law created in the absence of an informed and voluntary agreement, there is no reason why courts should not ignore the non-bargained for contract and use default rules found in legislation, at common law, or in some other source.

One normative justification for consumer contracts is essentially fault based. If a consumer chooses to enter into a transaction without reading the terms, the consumer takes a risk and the law will not hear the complaint if harm later results. We might say that the consumer waived any legitimacy claim by foregoing the opportunity to withhold consent if the consumer thought a contract term (e.g., a mandatory arbitration provision in a distant locale) or selling practice was unfair. Fault-based justifications often have normative appeal, but only when there is a societal consensus that a person is genuinely at fault. Through personal experience, consumers know that in most contracting situations their failure to read, understand, and negotiate terms is excusable and even expected. If someone insisted on reading, questioning, and dickering over standard terms in consumer contracts, others would likely find the behavior odd and pointless.

Those who argue for enforcing standard form agreements, therefore, seldom use fault-based justifications. Instead, they argue that if market participants behave rationally, market forces will ensure that merchants' forms include efficient terms, whether bargained for or not.[10] Market actors

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[9] See Margaret J. Radin, Humans, Computers, and Binding Commitment, 75 Ind. L.J. 1125 (2000); Maureen A. O'Rourke, Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?, 14 Berkeley Tech. L.J. 635, 648 (1999).

[10] See Russell Krobokin, Bounded Rationality, Standard Form Contracts, and Unconscionability, 70 U. Chi. L. Rev. 1203. 1206, 1210-11 (2003); Richard Craswell,

make choices in their own best interests, and the resulting equilibrium, of product attributes and contract terms, is roughly as it should be. If efficiency is accepted as a morally legitimate end, then consumer contracts are morally defensible and justifiably enforced in court because the market will ensure efficient results. As Judge Easterbrook wrote in *ProCD, Inc. v. Zeidenberg*, discussing a term in an adhesion licensing contract that appeared inside software packaging, "Competition among vendors, not judicial revision of a package's contents, is how consumers are protected in a market economy."[11]

Our consumer markets work reasonably well, but market failures still abound, which suggests that the rational choice model may not work in all markets for consumer goods and services. Generally perceived market failures include the tendency of markets to concentrate and become less competitive over time; the inability of consumers (through lack of cognitive ability or issues of saliency) to obtain and process relevant information and make intelligent purchasing decisions that will move markets to more efficient outcomes; and the difficulties of ensuring effective consumer representation in political and judicial spheres, when the business community is well organized.[12]

When market inefficiencies persist, a third category of response to the problem of defective consent is a more interventionist approach. Consumer interventionists posit that disclosure and reliance on market forces are not enough. Non-bargained for terms have no legitimacy if they unreasonably favor the merchant over the consumer, and in their place, mandatory terms should be imposed after parliamentary debate and participation by competing interests. Legitimacy of the consumer-merchant legal relationship is then re-established through the democratic process and negotiation by committee, rather than by the individual parties themselves. Indeed, broadly speaking, the evolution of law in many fields can be viewed as a movement away from consent-based assumptions and ineffective disclosure-based market enhancements, and towards mandatory rules imposed by judges or, more commonly, by statutory or regulatory imperatives.[13] Statute books are filled

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Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships, 43 Stan. L. Rev. 361, 363 (1991).

[11] 86 F.3d 1447, 1453 (7th Cir. 1996).

[12] Thierry Bourgoignie, Elements for a Theory of Consumer Law, in Essays on Comparative Commercial and Consumer Law 277, 285-86 (D. King, ed., 1992).

[13] Examples are found in virtually all fields: employment (e.g., exceptions to employment at will, numerous anti-discrimination laws, and mandatory accommodations for workers with disabilities), insurance (e.g., state-imposed insurance terms), competition (e.g., restrictions on anti-competitive mergers and product tie-ins), landlord-tenant (e.g., court- or legislature-imposed habitability requirements, anti-discrimination laws, eviction procedures), to name a few.

with laws that impose mandatory terms in relationships that previously had been left to market forces and the immediately affected parties to decide for themselves.

Whether government-mandated contracts are more efficient than terms produced by market exchange is continually debated, but the practice of state interference with private contractual relationships, as a means of legitimizing the law governing those relationships, is commonplace.[14] In the consumer context, laws ban exculpatory clauses deemed unreasonably to favor sellers and impose minimum standards of protection for consumers, such as minimum warranty and rescission periods. Despite occasional criticism from economists and the business community, the interventionist model is accepted today as necessary when markets forces yield outcomes that policy makers, and their constituents, are not willing to accept.[15]

It might therefore have been disappointing to some consumer advocates when the EU adopted the Unfair Commercial Practices Directive in 2005, which favors a market-regulating approach focusing almost exclusively on contracting procedures, rather than substantive terms, and ensuring informed consumer decision making. It should not have been surprising, however. The European Commission proposed the Directive only in part to protect consumers from unfair marketing practices. The main purpose of the Directive was to harmonize the unfair trade laws of the EU Member States and thus to remove another barrier to cross-border commerce. More uniform

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[14] Debates about regulating the sub-prime lending market are a recent example. In some states, disclosure of subprime lending fees and corresponding annual percentage rates is regarded as sufficient to protect societal interests. In others, caps on fees or outright prohibition of certain lending practices, such as "payday" loans, have been legislated. See Secured Consumer Credit and the Fringe Banking Industry, in Secured Transactions Under the Uniform Commercial Code, ch. 20A (J.B. McDonnell, ed. 2005) (discussing state and federal laws governing traditional pawns, automobile title pawns, "payday" loans, tax refund anticipation loans, and rent-to-own transactions).

[15] Beginning in the 1960s and continuing through subsequent decades, the governments of Europe and North America enacted numerous laws that recognized the inadequacy of market mechanisms, competition and freedom of contract to protect consumer interests. For an insightful comparison of the effects of federalism on the development of consumer law in Europe and the United States, see Thierry Bourgoingnie & David Trubek, Consumer Law, Consumer Markets and Federalism in Europe and the United States (1987). In less developed countries, the most necessary consumer laws are likely to be those ensuring the safety of foods and health products, not laws mandating information disclosures and other market-regulating devices. Hans B. Thorelli, Consumer Policy in Developing Countries, in 29th Annual Meeting of the American Council on Consumer Interests 149 (Karen P. Goebel, ed., 1983).

trading laws should make it easier for merchants to market goods and services throughout Europe.

Though limited in its scope, the Directive is one of the most significant consumer initiatives to emerge from Brussels in recent years, largely because it introduces a clause that prohibits unfair trade practices in very general terms, which does not exist in some Member States and which may result in stronger consumer protection than others now provide. The Directive is also noteworthy because of its "maximum harmonization" approach. Unlike previous consumer initiatives, the Directive restricts Member States from enforcing national laws that are more restrictive of commercial practices, thus raising concerns that it will weaken consumer rights in Member States that have comparatively strong consumer protection regimes.

2. Three Tiers of Prohibited Commercial Conduct

The Directive prohibits "unfair" commercial practices in transactions with consumers. A practice is unfair if it violates at least one of three tiers of prohibited conduct, moving from the specific (a laundry list of prohibited practices) to a general clause whose meaning is open to varying interpretations. The first tier is a list of thirty-one specific practices that are per se unlawful throughout the EU. They include marketing tactics such as "claiming to be a signatory to a code of conduct when the trader is not," "creating the impression that the consumer cannot leave the premises until a contract is formed," and other specific trade practices that have been identified as deceptive or overly aggressive in all circumstances.[16] This approach is familiar to consumer lawyers in the United States because similar lists of prohibited marketing practices are common in many state deceptive practices statutes.[17]

The second tier is a more general prohibition of practices that fit within the Directive's definition of "misleading" or "aggressive" practices. A practice is misleading if it "is likely to deceive the average consumer . . . or is likely to cause him to take a transactional decision that he would not have taken otherwise."[18] It is also misleading to omit "material information that the average consumer needs, according to the context, to make and informed transactional decision."[19] These are similar to the standards used by the Federal Trade Commission to determine whether a practice is deceptive under

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[16] Unfair Commercial Practices Directive, Annex I ("Commercial Practices Which Are in All Circumstances Considered Unfair").

[17] Some form of the Uniform Deceptive Sales Practices Act, which contains a list of prohibited practices, has been enacted in many states. See, e.g., 815 Ill. Comp. Stat. § 510, 510/2 (2006).

[18] Unfair Commercial Practices Directive, Article 6.1.

[19] Unfair Commercial Practices Directive, Article 7.1.

Section 5 of the FTC Act,[20] and by courts interpreting state deceptive practices acts that follow FTC precedent, as many do.[21]

A prohibited "aggressive" practice occurs if, by means of "harassment, coercion or undue influence, [it] is likely to significantly impair the average consumer's freedom of choice or conduct . . . and thereby causes him or is likely to cause him to take a transactional decision that he would not have taken otherwise."[22] This concept has no direct corollary in the FTC Act, but it may roughly correspond to the concept of "unfairness" in Section 5. "Aggressive" sales tactics may not be as broad a concept, however, because the Directive only addresses practices that impair a consumer's freedom of choice or ability to make decisions. Overbearing door-to-door sales tactics might be an example. Other types of unfair conduct might not be covered.[23]

The third and most controversial tier is the general clause, which prohibits a commercial practice that is "contrary to the requirements of professional diligence" and "is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed."[24] "Professional diligence" means the standard that a trader "may reasonably be expected to exercise towards consumers, commensurate with honest market practice and/or the general principle of good faith."[25] A practice "materially distorts the economic behaviour of consumers" if it "appreciably impair[s] the consumer's ability to make an informed decision."[26] Combining the two, the general clause appears to combine principles of good faith and fair dealing that are familiar to lawyers in the United States. These are very flexible concepts, of course, and their application in the twenty-seven EU Member States is uncertain.

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[20] 15 U.S.C. § 45 (2006). See F.T.C. v. Pantron I Corp., 33 F. 3d 1088, 1095 (9th Cir. 1994)(a material representation or omission is deceptive if it is likely to mislead a consumer acting reasonably under the circumstances).

[21] See, e.g., State ex rel. McLeod v. C & L Corp., 280 S.C. 519, 525, 313 S.E.2d 334, 338 (1983).

[22] Unfair Commercial Practices Directive, Article 8.

[23] For example, sale of financial information obtained through pretexting, F.T.C. v. Rapp., No. 99-WM-783, 1999 F.T.C. LEXIS 112 (D. Colo. filed Apr. 12, 1999) (stipulated consent agreement and final order entered June 23, 2000) (*Touch Tone*); use of information obtained in violation of a competitor's privacy policy to spam consumers, F.T.C. v. ReverseAuction.com, Inc., No. 00-0032 (D.D.C. filed Jan. 6, 2000) (available at http://www.ftc.gov/os/2000/01/reverseconsent.htm); and charging consumers for non-existent Internet services, F.T.C. v. J.K. Publications, 99 F. Supp. 2d 1176 (C.D. Ca. 2000).

[24] Unfair Commercial Practices Directive, Article 5.2(a) and (b).

[25] Unfair Commercial Practices Directive, Article 2(h).

[26] Unfair Commercial Practices Directive, Article 2(e).

Consequently, the authors devote an entire chapter to analysis of the general clause alone.[27]

3. Enforcement Issues

All EU consumer protection directives deal with enforcement issues only marginally, and the matter of individual enforcement by consumers (for money damages or injunctive relief) is usually not addressed at all.[28] Under general principles of EU law, Member States are responsible for implementing directives and including effective enforcement mechanisms, so long as those mechanisms give full effect to the mandates of the directive and give parties with standing effective legal protection. Decisions of the European Court of Justice emphasize the duties of Member States in this regard and seldom encroach on Member State autonomy when it comes to choosing effective remedies that implement a directive's legal mandates.[29]

The Unfair Commercial Practices Directive, however, includes a bit more concrete direction on enforcement issues, while leaving considerable flexibility to the Member States in deciding how to carry out those directions.[30] For example, the Directive tells Member States to give standing to "persons or organizations regarded under national law as having a legitimate interest in combating unfair commercial practices," but it allows enforcement by those persons or organizations to be through either court or administrative processes.[31] A Member State need not allow individuals to seek money damages in court. Because the Directive is not the first to address consumer rights in market transactions, similar enforcement issues have already been decided in other contexts. Thus, enforcement mechanisms that are already in place to enforce fair trading laws in other contexts should be available to enforce this Directive as well.[32]

By referencing actions brought by "persons or organizations," the Directive leaves open the possibility of collective enforcement actions, and even class actions in some form, but it does not mandate them if they are not already allowed under national law. Member States can decide if collective redress is limited to government enforcement agencies, or whether consumer groups and trade organizations have legal standing as well.[33]

4. The Directive's Maximum Harmonization Approach

Harmonization is the process of creating similar legal rules in all EU Member States. "Maximum" harmonization occurs when a directive creates

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[27] *European Fair Trading Law*, ch. 4.
[28] *European Fair Trading Law* at 220.
[29] See, e.g., Palmisani v. INPS, Case C-261/95, 1 E.C.R. 4025 (1997).
[30] Unfair Commercial Practices Directive, Articles 11, 12, and 13.
[31] Unfair Commercial Practices Directive, Article 11(1).
[32] *European Fair Trading Law* at 223-25.
[33] *European Fair Trading Law* at 222.

legal mandates that cannot be exceeded by Member States. It is roughly analogous to the concept of federal preemption in the United States, but many of the consumer protection laws in the United States do not preempt state law on the subject. They set a minimum level of consumer protection, and states are free to provided greater protection if they so choose. Similarly, the EU Commission had previously strived for "minimal" harmonization in the field of consumer law, which set a base level of protection that Member States could choose to exceed, although the Commission was showing signs of shifting its approach in recent years.[34] Consequently, when the Directive was being debated, one of the central points of discussion was the European Commission's decision to make it a maximum harmonization directive.[35]

Maximum harmonization means that Member States are not permitted to enact or enforce laws that are more restrictive on the free movement of goods and services than the Directive allows. In other words, Member States cannot enact or enforce laws that create a higher level of consumer protection if doing so could impede the sale of goods or services across borders. Consumer organizations protested to no avail the maximum harmonization approach because they did not want the Directive to weaken stronger consumer laws that exist in some Member States.[36] The Commission successfully argued that European firms should not have to adjust their marketing practices across borders to comply with the vagaries of national laws. A European standard of unfair commercial practices would encourage trade across borders, and maximum harmonization was critical to this end.[37]

The Commission's maximum harmonization approach may have limited effect, however, because a wide variety of unfair practices can be attacked under the general clause, and even under the second tier that prohibits "misleading" and "aggressive" practices broadly defined. There is

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[34] *European Fair Trading Law* at 28-29, 35.

[35] Unfair Commercial Practices Directive, Article 4, which states, "Member States shall neither restrict the freedom to provide services nor restrict the free movement of goods for reasons falling within the field approximated by this Directive." Although this language is rather obtuse to readers unfamiliar with EU drafting conventions, it means that Member States cannot create laws on unfair trade practices that restrict commercial activity more than the Directive does.

[36] See National Consumer Council, United Kingdom, Unfair Commercial Practices: Response to DTI Consultation on the Draft EU Directive (2003); European Consumer Law Group, The Proposed Directive on Unfair Commercial Practices (2004).

[37] *European Fair Trading Law* at 35. The Directive does provide for a transition period, however, in which Member States may apply more restrictive laws through June 12, 2013, if certain conditions are met. Unfair Commercial Practices Directive, Article 3(5).

plenty of room for different interpretations of these critical clauses among the Member States. While it is true that Member States cannot apply national laws in a manner that restricts trade more than the Directive allows, national courts and administrative tribunals may create varying standards for acceptable commercial conduct on a case-by-case basis. For example, the concept of "professional diligence" under the general clause may be interpreted differently from state to state so that a trade practice that is legal in one state will be banned in another.[38] To the extent that this occurs, the harmonization goal will be undermined and barriers to cross-border marketing will remain. The European Court of Justice can promote harmonization through case law as it resolves disputes that challenge a Member State's trade laws as contrary to the Directive's mandates. The Court's jurisdiction is limited, however, to cases brought by the Commission and referrals from national courts, so national consumer protection agencies and tribunals in Member States will be primarily responsible for implementing the Directive in a way that is consistent with other Member States. If they reach different conclusions on similar issues, harmonization will be lost.

5. Areas of Consumer Concern

The authors criticize the Directive on several fronts, although only a few will be discussed here. One area of concern is the Directive's focus on protecting the "average" consumer, not the most vulnerable, credulous, or trusting consumer.[39] Recital 18 defines the average consumer as someone who is "reasonably well-informed and reasonably observant and circumspect."[40] This may exclude a large number of consumers who are frequent victims of unscrupulous marketing practices. While a trader should not be held liable if its marketing message is taken literally when it is clearly unreasonable to do so, many riches have been gained at the expense of people who are not reasonably well informed or observant. Indeed, the most vulnerable may have the greatest need for protection in the law. The Directive does provide that one should take "into account social, cultural and linguistic factors," but it is not clear that this language could be used to protect the most credulous consumers in Member States.[41]

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[38] *European Fair Trading Law* at 100-01.

[39] *European Fair Trading Law* at 111.

[40] Unfair Commercial Practices Directive, Recital 18. This has been an issue in the United States as well. The Directive's focus on the "average" consumer may not be materially different from the standard that the FTC uses, banning misleading practices only if they are likely to mislead consumers "acting reasonably under the circumstances." F.T.C. v. Pantron I Corp., 33 F. 3d 1088, 1095 (9th Cir. 1994).

[41] Recital 18 also states, "Where a commercial practice is specifically aimed at a particular group of consumers, such as children, it is desirable that the impact of the commercial practice be assessed from the perspective of the average member of that

The authors also note that the Directive omits a "safeguard" clause that would have permitted Member States to enact more restrictive laws if unexpected events rendered the mandates of the Directive outdated or ill-advised.[42] A safeguard clause could have weakened the maximum harmonization principle because it would have given Member States leeway to opt out of the Directive in emergency circumstances, but it also would have allowed Member States to react to unusual developments that the drafters of the Directive did not envision. Traders can be creative, exploit loopholes, and push legal rules to their limits. A safeguard clause, which was included in the General Product Safety Directive[43] and the E-Commerce Directive,[44] might have been a sensible precaution.

Most notably, the authors question the effect of the general clause, which prohibits a commercial practice that is "contrary to the requirements of professional diligence" and "is likely to distort the economic behaviour with regard to the product of the average consumer whom it reaches or to whom it is addressed."[45] Some civil law Member States had already enacted general clauses that limit unfair commercial practices,[46] but they use varying language and national legal institutions have applied them in different ways.[47] Even though the Directive adopts the basic form of general clause that appears in the laws of a few Member States, differences in culture persist as to what are acceptable commercial practices in those Member States, so it is not clear what effect, if any, the Directive will have in those locales. Moreover, Germany and the Nordic states have traditionally been highly protective of consumers, so it is possible that their stronger limitations on commercial practices will have to be scaled back if they are not covered by the more specific prohibitions of the Directive and do not fit within the confines of the general clause. The United Kingdom and Ireland do not have a general clause, relying instead on a legion of conduct-specific prohibitions, so the

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group." While this language does allow Member States to protect vulnerable and credulous consumers, it does so only if the marketing is directed at that subgroup, and not at the public at large. Unfair Commercial Practices Directive, Recital 18.

[42] *European Fair Trading Law* at 31-36.

[43] Article 3(4), Directive 2001/95/EC on general product safety, O.J. 2002 L11/4.

[44] Article 3(4), Directive 2003/31/EC on certain aspects of information society services, in particular electronic commerce, in the Internal Market, 2000 O.J. L178/1.

[45] Unfair Commercial Practices Directive, Article 5.2(a) and (b).

[46] *European Fair Trading Law* at 3.

[47] Reiner Schulze and Hans Schulte-Nolke, Analysis of National Fairness Laws Aimed at Protecting Consumers in Relation to Commercial Practices, at 12, available at:
<http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/green_pap_comm/studies/unfair_practices_en.pdf>.

Directive's impact in those Member States is unclear.[48] Consequently, the reach of the general clause is uncertain, and it will take years to see if Member States interpret it in similar ways.

6. Assessing the Directive's Impact

The authors conclude that the Directive is among the most important consumer protection initiatives in the EU to date, but they are concerned about its impact on consumer laws across Europe. To the extent that the harmonization goal succeeds, European fair trading rules may be more uniform but they might not be as consumer friendly as the rules that now exist in some Member States.[49] Consumer advocates will be looking to see if the European Court of Justice strikes down national consumer laws that impede cross-border trade if they are not clearly authorized by the Directive.

Practical obstacles may limit the harmonization goal, however.[50] National traditions and social understandings of fairness are bound to affect legislative and judicial outcomes. If the Court of Justice allows Member States to interpret their fair trade laws broadly to enforce a wide array of idiosyncratic trade restrictions, the Directive will have limited effect and its primary purpose will be frustrated. For the Member States that have no general clause, it will be a huge task to modify existing conduct-specific legislation to ensure consistency with the mandates of the Directive,[51] and one wonders whether the task will be undertaken vigorously. If it is not, the Commission faces an equally difficult task to monitor that progress and see that the Directive has been implemented properly in those Member States. Maximum harmonization of some commercial practices laws might be necessary and in some cases desirable, but an attempt to harmonize the entire field may have come too soon in the evolution of European integration. The introduction of a common general clause on fair trading creates a base level of protection and a mechanism for developing a European-wide concept of fair trading, but the field of commercial activity may be so multi-faceted that all problems cannot be resolved coherently by a single law on the subject. Consumer laws in the United States still vary greatly among state and local jurisdictions, and Europe is much more diverse. At least in the short term, the Directive will more likely increase legal complexity in this area of the law rather than simplify it. If that proves to be true, it would not be the first or last

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[48] *European Fair Trading Law* at 3.

[49] *European Fair Trading Law* at 242-44, 248-49.

[50] *European Fair Trading Law* at 254.

[51] *European Fair Trading Law* at 255. Christian Twigg-Flenser, Deborah Parry, Geraint Howells & Annette Nordhausen, An Analysis of the Application and Scope of the UCP Directive (2005), available at: <http://www.dti.gov.uk/ccp/consultpdf/final_report180505.pdf>.

time that policy makers tried and failed to create a simple solution to a complex legal problem.

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The Oxford Handbook of Comparative Law. Edited by Mathias Reimann and Reinhard Zimmermann. Oxford; New York: Oxford University Press, 2006. Pp.xxi, 1456. ISBN 0-19- 929606-5. £125.00; US$220.00.

The publication of this work in 2006 as a one-volume compendium of comparative law, covering history, theory, and example, opens the entire field of comparative law to a new generation of law students and scholars. It belongs on the shelves of all major legal and general academic libraries, and many others, and should be standing together with other recent or recently updated core titles in the field, such as K. Zweigert and H. Kötz, *Introduction to Comparative Law* (3rd ed. trans. Tony Weir. Oxford: Oxford University Press, 1998) (hereinafter Zweigert and Kötz), and H. Patrick Glenn, *Legal Traditions Of The World: Sustainable Diversity In Law* (2nd ed., Oxford; New York: Oxford University Press, 2004)(hereinafter Glenn). While the title under review invites comparison with these important works, it stands apart in several important ways that make it a unique contribution to a complex field.

First, the study is divided into three principal sections containing essays written by a very impressive list of scholars; indeed, it is a collaborative effort reflecting views of many of the most influential writers in the field active after the Second World War. The beginning section follows an introduction by Charles Donahue of Harvard, "Comparative Law before the *Code Napoléon*," and proceeds to tell the story of the development of comparative law as a focus of scholarship from perspectives *within* major jurisdictions and regions of the world. This is a unique perspective and provides an invaluable guide for librarians and scholars in its careful attention to the history of legal education in those jurisdictions as well as the role of comparative law within them. Best of all, the essays in this section list major authors and works that have advanced the study of comparative law generally and in particular from within that legal culture, with more or less initial success or acceptance.

German scholarship played a leading role in the rise of comparative methodologies, as is fairly well known. This role followed rather naturally from work on the civil codes of Germany and Switzerland via grand debates

about historical versus natural law, the role of Roman law, and other related issues. There is particularly valuable information on the role of Ernst Rabel (in the section on Germany, Switzerland, and Austria), the founding of UNIDROIT, and an unflinching account of what happened to many scholars both during and after the Nazi period in Germany. However, the establishment of the Max Planck Society institutes, Konrad Zweigert's role in the project to create the ongoing *International Encyclopedia of Comparative Law*, and the work of German scholars on uniform and harmonized private law have left a legacy of leadership by this jurisdiction in the field of comparative law.

American, Asian, East European, African customary, and Islamic contributions to the development of comparative law within their distinctive traditions is not only unique, but prepares the way for the second section on the theory of comparative law and its methodologies, such as taxonomies, transplants and reception theories, and theories of relationships among legal traditions (as opposed to static properties of a legal system). This section provides a set of essays that would bring the researcher up to date on the thinking of H. Patrick Glenn, Vivian Curran, and others who have contributed excellent essays that summarize major themes in their own writings about the purpose of comparative law. Themes from other comparative knowledge inquiries, such as language and religion, are brought in to suggest how comparison works in literary and historical contexts other than, or along with, law.

Finally, a collection of essays on several specific subject areas completes the tripartite division of the book. Again, some of the best minds have been brought together, such as the late Allan Farnsworth (in a last essay) on contract law, Mark Tushnet on comparative constitutional law, and editor Mathias Reimann on comparative law and private international law.

This work seems to be more theoretical and bibliographically oriented than Zweigert and Kötz, which remains an excellent and accessible introduction and a descriptive book, alerting new researchers to features of the major systems, now including Islamic, Hindu, Chinese and Japanese law as well as English based common law and civil law. Multiculturalism and controversy over Eurocentrism and taxonomy are less important in that earlier work than history and description. As a result, this new *Oxford Handbook* fills a gap by providing details about the context for the development of comparative law and attempts by some to make it a "science." I would have titled the *Handbook* "Concise Encyclopedia" or even have placed it within the Oxford "Companion to…" series rather than "handbook." That handbook purpose seems already well served by the Zweigert and Kötz approach, even with its equally acceptable title as an "introduction."

Similarly, Professor Glenn's "legal traditions" and "common laws" contributions to the comparative law project stand apart in their exploration of the complex interrelationships historically and culturally among many different legal regimes, often in place simultaneously in some modern multicultural jurisdictions. The modern experiment of creating the national legal state as a uniform entity may turn out to be the anomaly rather than the norm. This work complements and does not replace this title or the still invaluable Zweigert and Kötz.

In short, all of the recent contributions to this newly relevant field deserve attention and make valuable contributions to comparative law, but this edition by Reimann and Zimmermann supplies a rich bibliographic history of scholarship and a wealth of perspectives to guide the field into the future through what is hoped may be successive editions.

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Managing the Modern Law Firm: New Challenges, New Perspectives. Edited by Laura Empson. Oxford; New York: Oxford University Press, 2007. Pp. xi, 238. ISBN 978-0-19-929674-3. £40.00; US$74.00.

This book reflects the continuing interest on the part of academics in the function and structure of professional services firms. In 2001, the University of Glasgow Business School collaborated with the Law Society of Scotland in a study of solicitor-mangers at a group of Scottish firms. Academic interest then began to focus on large international law firms, coincident with the ascendance of London's Magic Circle, the five leading "mega firms." Editor Laura Empson is a lecturer at Oxford University's Saïd Business School. Her collaborators in this book include professors from the graduate business schools at Harvard, Northwestern, and New York University, and senior partners at Clifford Chance and Linklaters. Together, they employ an interdisciplinary approach drawing upon the latest research into the state of the legal services market, organizational behavior, business strategy, human resources, and information technology, all in an attempt to address the scale, complexity, and unique challenges associated with running large law firms.

Perhaps this book's most provocative proposition is that the partnership model, the very organizational basis for law and other

professional services firms, is ripe for replacement during the coming decade. Indeed, law firms have been among the last to retain this model; consultancy McKinsey & Company, though still privately held, jettisoned partnership in the 1950s, and in 1999 investment bank Goldman Sachs went public through a listing of a portion of the company on the New York Stock Exchange. The arguments for retaining the partnership model are well known to practicing lawyers: it enhances the training of new lawyers through apprenticeship rather than through the management model that corporations use; it implies the ongoing oversight that the partners exercise among themselves, which tends to keep any free riders and shirkers in their ranks to a minimum; and it promotes autonomy of judgment, a quality corporate-style governance often undermines. The most compelling argument against partnership is that an increasingly competitive business environment implies a need for executive leadership, with its identifiable locus of decision-making and clear chain of command, rather than consensus.

Some jurisdictions still mandate the partnership model for law firms, reasoning that the unlimited liability of the partners helps ensure that the public is exposed to the highest service and ethical standards. (There is currently no market for the public listing of law firm and this would also present an ethical dilemma to the degree that such a listing would place lawyers under the supervision on non-lawyers.) But partnership, in the opinion of most of the authors, is on its way out. In its stead a new model, a hybrid between the traditional and the new, will likely arise, attempting to blend the collegiality of partnership with the revenue focus of the modern company. In short, a model that retains the partnership ethos under a different governance structure and uses that ethos as a counterpoise to the stresses attendant with competing in a global environment.

In addition to these predicted changes in governance, the different authors seem to agree that law firms need to begin to assess the productivity of partners, associates, and staff, as well as attempt to value quantitatively everything from firm/client relationships to human and social capital. And it is suggested that, as with partnership in the governance area, the billable hour as the basic revenue unit is likely to come under scrutiny. Although seen as innovative when introduced in the 1950s, the billable hour was just one in a series of revenue units lawyers have employed historically. The fixed-fee regime was in place for many years and was often required by the various state Bar associations in the United States. However, a 1975 Supreme Court decision abolished all minimum-fee schedules on the grounds that these violated the anti-trust laws. This decision was felicitous, since the shift to the billable hour was meant to reflect the increasing complexity and time-intensiveness of modern legal work, and consequently to halt the decline in revenues that many practitioners had attributed to fixed fees.

One of the more intriguing aspects the book addresses is a firm's status affiliation, and how this affects revenue. An intangible like so many other facets of legal practice, it yet has real implications for the bottom line. For instance, an American firm's *Martindale-Hubble* entry, its ranking in the *National Law Journal*, or whether any of its partners feature in *The Best Lawyers in America*, all speak to the firm's brand equity and might be used as inputs in justifying the firm's fees. Another relevant finding concerns the way a firm's social ties in the business community relate to its income. For instance, billing rates stemming from these social relationships may be lower per unit, but work from the client is often steadier and typically translates into higher annual gross revenue for the firm. Cognizance of these sorts of differences helps a manager or managing partner limn the competitive space between his firm and others.

This book should impel lawyers to consider afresh what it means to exercise leadership and management at their firms, and how all the firm's activities might be rationalized to deliver optimal value to the customer and add to revenue. The area of scholarship this book represents is increasingly topical; Oxford University Press alone has four related titles in print. Any of them ought to complement this volume nicely, and all should be useful additions to libraries serving law and business schools, or law firms.

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Mapping the Law: Essays in Memory of Peter Birks. Edited by Andrew Burrows and Lord Rodger of Earlsferry. Oxford; New York: Oxford University Press, 2006. Pp. vii, 675. ISBN 0-19-920655-4. £60.00; US$105.00.

The sad circumstance of the early loss of one of the legal academy's most engaged and engaging personalities is the occasion for this collection of essays, articles, works in progress, and tributes by his colleagues, former students, and admirers. Peter Birks was Regius Professor of Civil Law at Oxford University at the time of his death at 62 from cancer in 2004. He was among the most prolific British legal scholars and, as his friend and colleague Jack Beatson, former professor of English law at Cambridge and presently Justice of the High Court, notes in an obituary for a British newspaper, Birks "was a superb doctrinal lawyer, a passionate and inspirational teacher, and . . . a key figure in the extraordinary development of the law of restitution in the

[52] Mr. Rasmussen is a legal editor and translator.

last 45 years."[53] The reader of only a sample of contributions to this volume will find these opinions confirmed and compounded. It is evident that Birks was an entirely charismatic jurist, whose affection and ambitions for law and legal history were infectious. On the evidence of this work, they remain so.

Those not persuaded by the testimony of his friends appearing in a collection expressly designed to celebrate Birks' personal and professional legacy need only turn to his own writing, which is replete with anecdote, caricature, wry comment, exact analysis, aphorism, and almost poetically figurative diction. For example, Birks constellates the fewer than twenty pages comprising his Foreword and Introduction to his edition of the two-volume *English Private Law*[54] with instances of these stylistic elements as he describes the problem of legal information overload and recommends with scholastic intensity the need for rational order to address it. Legal specialization, he remarks, leads young practitioners to:

> know their law only in the way that many people know London, as pools of unconnected light into which to emerge from a limited number of friendly tube stations. Prescriptions for this condition are sometimes quite bizarre. One proposal, apparently seriously made, was that law schools should consider abolishing categories. Categories are abolished only in the last stages of Alzheimer's disease. (pp. xxxv-xxxvi)

Birks was an adamant categorizer, and taught that the solution to a legal problem entails construction of a rigorous taxonomy (even if that means including a miscellaneous catch-all category) and never failing to lose sight of its structuring principles. Put another way, he wrote, "the truth is that a practitioner will practise better if he can see a map of the whole law and can take a firm grip on the concepts and principles which fit its various parts together."[55] Here appears an instance, and certainly not the only one, of Birks' use of the map metaphor that would serve as the key figure for the present volume's title.

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[53] Jack Beatson, *Peter Birks: Brilliant and Prolific Academic Lawyer Who Brought the Law of Restitution Up to Date*, GUARDIAN (London), July 16, 2004, at 31.

[54] ENGLISH PRIVATE LAW, ed. Peter Birks (Oxford: Oxford University Press, 2000).

[55] Birks elsewhere apologizes for the volumes' recourse to the masculine pronoun. MAPPING THE LAW, at xxxii.

Although Birks had hopeful and high ambitions for "a structural overview"[56] of English law, private and public, the contributions to *Mapping the Law* largely pertain to his own particular areas of expertise, with which many academics and practitioners will not necessarily be familiar. Judging the book by the title, a prospective reader might expect something like "a map of the *whole law*," but in fact only three or four areas of law are nominally represented: English and comparative unjust enrichment law, Roman law, and legal history. Nevertheless, Birks' holistic approach to analysis assures that the contributions even to these relatively narrowly circumscribed categories will include bridges to others. Furthermore, a successful map of the law doesn't necessarily assure order. An accurate map will delimit the swamps and thickets. Birks did not shy from identifying them, and his cartography occasionally worked to prescribe routes through or around them.

The first and longest of the volume's four parts, "The English Law of Unjust Enrichment and Restitution," commences with a historical account by Prof. Francis Rose of "The Evolution of the Species," i.e., of Anglo-American unjust enrichment law. (In his introduction to *English Private Law*, Birks notes with admiration Darwin's achievements at classification of the natural world.[57]) Rose describes the context of law and academic milieu in which Birks pursued his career, interspersing biographical, professional, and jurisprudential developments, which were in some cases to merge. Birks' scholarly advances occasionally appeared as informative authority in rulings from English courts on the evolving doctrine.

Birks infamously capped his unfortunately abbreviated career with the post-mortem publication of a second edition of his then only two-year-old treatise on unjust enrichment. In the new edition, he proposed a wholesale revision of his former ideas. Rose is not the only contributor to the volume to remark upon Birks' notoriety for changing his mind, a potentially aggravating quality for which he is admired. It reflects his intellectual integrity and the skepticism to which he subscribed despite his drive to state the law in unambiguous, precise terms. He was also forthright about his capacity for self-revision. In the contribution following Rose's addressing "The New Birksian Scheme" of "absence of basis" as the factor determining which cases of enrichment are unjust, Prof. Andrew Burrows remarks that "it was entirely in character that . . . he should portray his change of mind as a conversion of

[56] 1 ENGLISH PUBLIC LAW, *supra* note 2, at xlix.
[57] *Id.* at l.

the most dramatic kind. Only he could have written that 'almost everything of mine now needs calling back for burning'."[58]

A bonfire of books and articles, a dramatic conversion, the London underground, Darwin, dementia… These are not among the themes or images one would ordinarily anticipate at the prospect of reading the minutiae of unjust enrichment law. Yet they fairly represent the typically animated figures in Birks' writing and, appropriately, in some of the tributes included in this volume. A colleague, Dr. Arianna Pretto-Sakmann devotes her chapter to an interpretation of Roman legal texts pertaining to swarms of bees.[59] Prof. John Baker uses as examples for his "Chapter in the History of the Tort of Deceit" cases involving three kinds of stones: "Bezoar-Stones, Gall-Stones, and Gem-Stones."[60] This aspect of the volume, its attention to and flattering imitation of its honoree's literary and pedagogical styles, serves to render it a fascinating and informative resource, instructive both about Birks' life and work, and about the legal issues on which he and the contributors focus.

As noted, the first part dealing with unjust enrichment and restitution is the longest of the four, reflecting (along with the comparative perspectives of unjust enrichment comprising the second part) the area of law for which Birks perhaps earned his greatest celebrity.[61] It is subdivided, following Prof.

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[58] Andrew Burrows, *Absence of Basis: The New Birksian Scheme*, *in* MAPPING THE LAW 33-48, 33 (quoting PETER BIRKS, UNJUST ENRICHMENT, 2d ed. (Cambridge: Cambridge University Press, 2005) xii.

[59] Arianna Pretto-Sakmann, *'You Never Can Tell with Bees': Good Advice from Pooh for Students of the* Lex Aquilia, *in* MAPPING THE LAW 475-96.

[60] John Baker, *Bezoar-Stones, Gall-Stones, and Gem-Stones: A Chapter in the History of the Tort of Deceit*, *in* MAPPING THE LAW 545-59.

[61] Birks strongly opposed the traditional confusion of unjust enrichment and restitution, noting that the former is the event which precipitates the latter as a legal response. *See, e.g.*, 2 ENGLISH PUBLIC LAW, *supra* note 2, at 526 ("Unjust enrichment at the expense of another is an event. A right to restitution is the law's response to that event."). He titled the chapter in ENGLISH PUBLIC LAW and the two editions of his late treatise exclusively after the event to put the topic on an equal footing with "the cognate categories of contract and tort," both triggering events in law. *Id.* In his account of the competing maps of the territory occupied by unjust enrichment, Birks lamented the approach taken by the work yet in progress RESTATEMENT OF THE LAW THIRD, RESTITUTION AND UNJUST ENRICHMENT (Philadelphia, PA: American Law Institute, 2001-), for which the Reporter is Prof. Andrew Kull, Boston University School of Law. Birks writes, "Professor Kull is now in a position to give us at long last a law of unjust enrichment. Yet the signs are that he will not. He will probably persist in the American preference for a law of gain-based recovery, which includes but is larger than the law of unjust enrichment properly so-called." Peter B.H. Birks, *A Letter to America: The New Restatement of Restitution*, 3 GLOBAL JURIST, no.2 (2003) http://www.bepress.com/gj/frontiers/vol3/iss2/art2.

Rose's initial piece, into three clusters of chapters relating respectively to general concepts, unjust factors, and property and insolvency. The general concepts include issues relating to defenses, such as change of position, subrogation, tracing, and, already noted, absence of basis, the new approach Birks took to determining when enrichment would be unjust. Formerly, he argued that enrichment was unjust where certain identifiable "unjust factors" compromising a party's voluntary participation in a transaction—such as mistake of fact, duress, undue influence, or payments received *ultra vires* by a public authority—resulted in one party's enrichment at the expense of another. This is the theory he showed signs of abandoning even three years before its fullest elaboration in the first edition of *Unjust Enrichment*.[62] In his chapter on unjust enrichment for *English Private Law* in 2000, for example, he noted the "taxonomic disruption" caused by attempting to force the concept of absence of basis into a category of unjust factor.[63]

The second subdivision of part one includes discussion of some of these traditional doctrinal factors, while the third subdivision contributions broach restitutionary ramifications of resulting trusts, unjust delivery of goods, and insolvency proceedings. One chapter in this last subdivision consists largely of transcripts of Lord Peter Millett's correspondence with Birks reflecting their disagreement over a Court of Appeal ruling to which Lord Millett had lodged an opinion. The dispute depicts the importance of distinguishing unjust enrichment (in this case, arguably, the profits earned by a wife who invested her bankrupt husband's money) from property (the money owed to creditors but surreptitiously withdrawn by the husband from his account and given to his wife).

The authors in this first part take up disputes they had with Birks (one author admitting that his essay emanates from a "being-disagreed-with" by Birks[64]) and problems not fully addressed by Birks' own work. A memorial or *festschrift* is, of course, not the ideal resource for an introduction to a topic such as the English law of unjust enrichment. For that, see Birks' chapter in *English Private Law*, his post-mortem treatise, or one of the several editions of the core work on the topic cited in this volume, Goff and Jones' *Law of Restitution*.[65]

The second part, "The Comparative Law of Unjust Enrichment and Restitution," examines German and, in one chapter, Scots legal responses to questions Birks strove to resolve. One contributor, Dr. Sonja Meier, was the

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[62] PETER BIRKS, UNJUST ENRICHMENT (Oxford: Oxford University Press, 2003).

[63] 2 ENGLISH PUBLIC LAW 567.

[64] David Ibbetson, *Sir William Jones and the Nature of Law*, *in* MAPPING THE LAW 619-39.

[65] ROBERT GOFF & GARETH H. JONES, THE LAW OF RESTITUTION, 7th ed. (London: Sweet & Maxwell, 2007).

student whose work Birks acknowledged as the motivation for his switch to the absence of basis approach. Aptly, she contributes "A Comparative View" of the approach.[66] Taken together, the first two parts offer more than mere refinements or adjustments to an otherwise settled area of law. Nor, from Birks' perspective, is unjust enrichment law simply adapting to new demands imposed by external forces, such as new technologies, economic developments, globalization, and so forth. For Birks, the confusion of unjust enrichment law has evolved for centuries, as a result of sloppily deployed legal fictions (e.g., quasi-contract, implied contract, and constructive trust) that upset the taxonomy. The contributions are thus often taking sides in a dispute over how best the law should operate, according to which principles, and respecting which precedents.

The third part, "Roman Law," contains, not surprisingly, by far the most rigorously philological scholarship in the volume, emphasizing transmission of texts, laws, and legal norms. Birks' own work in Roman law informed his ideal of legal conceptual order and structure, as well as his ability to discern order in modern rules whose formative logic has been obscured by a fog of historical remoteness. The final part, "Legal History," similarly reveals the persistence of concerns shared by judges and jurists across centuries. Thus, for example, one chapter describes the inception and evolution of a strict rule against fiduciaries who profit from their positions of trust, even absent loss to the beneficiary. The volume closes with Prof. David Ibbetson's response to "being-disagreed-with" by Birks regarding the analysis of duties of care in negligence liability by the eighteenth century lawyer, linguist, comparativist, and polymath William Jones.[67] Ibbetson describes what he regards as Jones' tendency to force his logical arguments into Natural Law containers, despite the resulting distortions.

Throughout *Mapping the Law*, the contributors frame their substantive legal ideas with personal anecdotes about and panegyrics for Birks. Biography is not their primary task, yet they present evidence of his personality, pedagogical and analytical skills, and contributions to scholarship and the legal system. In their own contributions, they demonstrate that the loss of Birks is not total. Dr. Joshua Getzler's brief closing paragraph suitably reflects similar remarks by the others:

> Peter was passionate in his advocacy of a reasoned law, built on secure historical foundations and refined by scholarly debate, always seeking a better understanding and open to

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[66] Sonja Meier, *No Basis: A Comparative Approach*, *in* MAPPING THE LAW 343-61.

[67] Ibbetson, *supra* note 12, at 619.

> new arguments. He gave and in turn inspired strong loyalty and affection as he shared with friends and colleagues his ideal. This is a precious legacy.[68]

Mapping the Law extends the legacy in its own way. The collection presents some of the latest compelling thought in unjust enrichment law, yet it does so in fitting Birksian fashion, by recognizing the connections, paths, and borders that unjust enrichment law has to other areas of law, today and throughout history.

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Rethinking Copyright: History, Theory, Language. By Ronan Deazley. Cheltenham, UK; Northampton, MA: Edward Elgar Publishing Limited, 2006. Pp. vii, 201. ISBN 1-84542-282-1. £55.00; US$95.00.

In *Rethinking Copyright*, Ronan Deazley, Professor on the Faculty of the University of Birmingham School of Law, UK, produces a well researched history of copyright and introduces some parallel critical themes, among them how historical antecedents have misconstrued copyright as a sort of natural right of the kind that is found in intellectual property laws of civil law jurisdictions. A central thesis of the book is that copyright does not exist under common law and is not and has not been supported by any previously advocated natural or property rights theory. The author traces the "conceit of common law copyright" that has been perpetrated through misuse of language by scholars and jurists alike to promote the interests of parties never intended to benefit by statutory authority, beginning with the Statute of Anne of 1709,[8 Ann, c. 19] the first copyright act in England.

Popular notions of common law copyright have made their way from the strategy books of entrenched London booksellers in the 1600s who sought to extend their copyright protection against Scottish booksellers (*Millar v. Taylor* (1768) 4 Burr 2303 and *Donaldson v. Beckett* (1774) 4 Burr 2408) all the way to the language and rhetoric of modern cases involving the Digital Millennium Copyright Act of 1998 and the EU Information Society Directive. Deazley refutes the notion of common law copyright, whether it stems from

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[68] Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* MAPPING THE LAW 577-98, 598.

John Locke's *Labor Theory of Property* or other writers misconstruing copyright, as he asserts was the case with Copinger's *The Law of Copyright* (1870) as well Joshua Montefiore's *The Law of Copyright* (1802) and Espinasse's *Treatise on the Law of Actions on Statutes…and on the Statutes Respecting Copyright* (1824). Deazley is also critical of reference to common law copyright in Robert Maughm's A *Treatise on the Law of Literary Property* (1828).

Chapters one to three provide a history tinged journey through the backdrop of copyright and supporting philosophies. It is a bit slow going, but the journey then resumes on the correct path, according to Deazley, with *Jeffreys v. Boosey* (1854). Subsequent proliferation of published works and the phenomenon of the novel caused a clamoring for the expansion of copyright terms, and the legal scholarship of the era, according to Deazley, continued the misconception of a common law right in unpublished works. This issue arose in the case of the estate of Charles Dickens, *Dickens v. Hawksley* (1935), as to whether a legatee had the right to sell an unpublished manuscript of Dickens.

Chapter four discusses the theoretical approach to copyright and the issue of the public domain. The author traces the history of this contemporary topic and also surveys some useful current literature relating to open source movement matters. The chapter continues the discussion of the public domain and the impact of Digital Rights Management (DRM) technology, and their conflict with copyright law in extending copyright protection beyond copyright terms and interfering with the users ability to engage in lawful fair use reproduction of copyrighted works. This chapter is valuable for its articulate discussion of current and relevant international treaties and related domestic laws.

Chapter five begins the second part of the theory of copyright discussion, again using an array of impressive sources, such as Blackstone and Daniel DeFoe, and modern authorities such as Paul Goldstein, Raymond Nimmer and Jessica Litman, to support the author's argument for a more "instrumentalist" or "consequentialist" approach to copyright. versus the misguided natural rights or moral rights approach of authors such as Copinger and found in civil jurisdictions espousing droit d'auteur.

The author offers as a solution a change in the discourse of copyright. Rather than revert to ancient terminology of "monopoly" or "licenses" versus the misguided "property rights," the author proposes using "Intellectual Property Freedoms" and "Intellectual Property Privileges" as phrases more accurately reflecting the true history of copyright. The author expertly surveys the historical and contemporary scholarly, legislative, and juridical record to support his interpretation of the misplaced characterization of copyright as an inherent natural or human right. He does so in a time when there has been a

great expansion of the rights of copyright owners and when there has been a diminishment of the public domain and a call for changes in the copyright laws to strengthen the rights of individual copyright users in the wake of new technology that often overly restricts user freedoms. The book also speaks to the current firestorm over the expansion of the public domain and related Open Source Movement that challenges notions of traditional copyright.

The author has tried to combat the recharacterization of copyright as a fundamental right in a sweeping fashion, using an array of impressive authorities in a short space of about 200 pages. His success is unclear as the debate is ongoing; however, his argument is bold and at a minimum he demonstrates the great reach of copyright by beginning his discussion with John Locke's' *Second Treatise on Government*(1690) and ending with a discussion of the 2005 case of *Capitol Records v. Naxos*. The book is of particular value as a reference tool with over 500 footnotes, a table of cases, a table of legislation, reference section, and an index. Overall, *Rethinking Copyright* is a small gem for an audience broader than copyright and intellectual property scholars, and well worth acquiring by a variety of general, corporate, law, and academic libraries.

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E-Cycling: Linking Trade and Environmental Law in the EC and the U.S.
By Harri Kalimo. Ardsley, New York: Transnational Publishers, 2006. Pp. ix, 757. ISBN 1-57105-356-5. US$165.00

"Recycling is here to stay," proclaims the author of this substantial tome that developed out of an earlier dissertation. Of course, the collaborative principles of free trade are firmly entrenched as well. This book explores the intersection and harmonization of the oft-competing interests of environmental protection and barrier-free economic growth through an in-depth examination of the policies and processes concerning electronics recycling in the European Community and the United States. The author's central point is that increased environmental protection does not have to be won at the expense of free trade, and vise versa.

By focusing on the methods that deal with the end-of-life treatment of electronics and electrical components, the author presents a case study that differs from most works that cover trade and the environment. Kalimo keeps

his analysis trained on this narrow topic in order to more fully flesh out the legal, economic, social, and even constitutional/federalism issues that arise when mature economies with established legal systems implement recycling requirements. He looks for ways in which both environmental and economic interests have been reconciled and advanced, a desirable circumstance that he describes as pareto-preferable, or at its best, pareto-optimal. He includes some analysis that contrasts the EC and U.S experiences, but unlike many comparative works that seek to explain the reasons for similarities and differences between jurisdictions, the purpose of Kalimo's comparisons is to present the reader with a larger set of controversies and solutions than could be found by limiting his analysis to one jurisdiction alone.

The book begins with a thorough introduction that suffices to orient most readers, even those with only a passing knowledge of environmental or trade law concepts. The second part of the book discusses the fields of trade and environmental law as well as the practical and regulatory processes of recycling electronics. Harmonization and preemption schemes are given a fair amount of consideration from both the American and European legal perspectives. The third part of the book goes into great detail about the various legislative and regulatory frameworks available for use in the EC and U.S. One such framework is that of "extended producer responsibility," under which the manufacturer is held responsible for its product after it becomes waste (an idea that has worked in some instances in Europe and Japan, but will strike some Americans as highly improbable, as the concept has received extensive opposition from industry in the U.S.). The use and features of market-based incentives and programs, such as tradable pollution permits, are examined as well. Finally, the fourth section of the book ties together the preceding chapters and offers pathways to the optimal solutions that provide for both growth and protection.

In addition to covering hundreds of secondary sources, letters, interviews, and other documents, an expansive bibliography at the end of the book also includes a list of cases and a useful table of legislation, regulations, and reports from the EC and its individual member countries as well as from federal and state governments in the U.S. An index, albeit short, adequately covers the topics addressed in the book.

Don't be fooled by the book's narrow focus into believing that it is only for niche collections. In the end, it is a well-researched examination of a problem that is situated at the intersection of two major areas of law, the elucidation of which entails not only the use of traditional legal analysis, but also the employment of analytical tools found in other disciplines such as economics, political science, and applied technology. Furthermore, the concepts within can be applied to other regulatory systems that affect two or more sectors that have generally competing interests. This book belongs in

most academic law libraries, especially those with strong environmental or law and economics collections.

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Statelessness, Human Rights and Gender: Irregular Migrant Workers from Burma in Thailand. By Tang Lay Lee. Leiden; Boston: Martinus Nijhoff Publishers, 2005. Pp. xi, 285. ISBN 90-04-14648-2. €95.00; US$136.00.

The continued existence of stateless populations throughout the world over the past half century has proven to be a persistent and vexing problem for those concerned with refugee, migration, and humanitarian issues. While a large number of the relevant international law instruments addressing the question of statelessness were drafted in the aftermath of the great upheaval and displacement in Europe following the Second World War, the aspirations of the international community at that time to completely eradicate the scourge of statelessness has proven in retrospect to be a much more difficult task than first imagined. Indeed, the re-emergence of statelessness as an significant humanitarian and human rights concern over the past decade has dramatically underscored the need to refocus attention on this basic human right. As a result of events such as the breakup of the former Soviet Union, the former Yugoslavia, and the former Czechoslovakia as well as the unintended consequences of globalization and worldwide economic instability, sizable stateless populations have once again emerged throughout the world. While definitive statistics on the total number of stateless individuals are difficult to obtain, in 2006 the U.N. High Commissioner for Refugees (UNHCR) reported that those nations keeping reliable statistics estimated their stateless populations at 5.8 million, although the UNHCR believes worldwide populations to be closer to 15 million persons.[69]

Given this robust resurgence of statelessness, fresh perspectives on the international law defining their legal status are essential for non-governmental organizations, policy makers, and legislators tasked with drafting laws that will more effectively meet the exigencies of an increasingly interdependent world. Porous borders and economic migrants have created a

[69] U.N. HIGH COMMISSIONER FOR REFUGEES. 2006 GLOBAL TRENDS: REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS 14 (2007) *at* http://www.unhcr.org/statistics/STATISTICS/4676a71d4.pdf.

new paradigm of statelessness and these individuals are no longer adequately protected under current international standards. Thus, the publication of Tang Lay Lee's *Statelessness, Human Rights and Gender: Irregular Migrant Workers from Burma in Thailand* is a much-needed comprehensive overview and critique of contemporary international law on the issue. Its exhaustive treatment of the topic also makes it an excellent primer for those unfamiliar with this area of law. Most importantly, the author looks beyond the black letter law to investigate the practical application of immigration and citizenship laws on vulnerable populations such as women and children.

Statelessness, Human Rights and Gender begins with a detailed review of the international law of statelessness which is derived from United Nations resolutions, basic human rights provisions such as article 15(1) of the *The Universal Declaration of Human Rights* as well as other international and regional conventions dealing specifically with the issue. Other protections can be found in the *1951 Refugees Convention* as they apply to refugees which may also include stateless persons. As is made clear by this chapter, this amalgam of international law instruments do not adequately safeguard the rights of all classes of stateless individuals and in total contain significant gaps in protection. For example, the *1954 Convention Relating to the Status of Stateless Persons* provides the definition of a "stateless person" as someone "who is not considered as a national by any state under the operation of its law."[70] In practice, statelessness can take two forms: *de jure* or *de facto*. The first, *de jure* is defined in the 1954 Convention as an individual who does not enjoy citizenship in any country. Unfortunately, for many years, international law did not recognize and protect the second category of stateless person, the *de facto* or "effectively stateless person." This is an individual who has fled or was expelled to another state and who could no longer count on the state of origin for protection even though the person retains his or her nationality. This is often the situation of illegal economic immigrants crossing borders to find work.

As noted earlier, the fundamental law of statelessness was drafted in the post-Second World War period and it reflects the European experience of mass displacement. It also perpetuates the authority of the state to grant nationality *vis-à-vis* the individual, rather than focusing on protecting the fundamental human right of an individual to nationality. Given that much of the modern migration is economic and the state retains the inherent power to control its borders and determine immigration status, this has created a new class of stateless individual that falls outside the protections of the present legal framework. Thus, migrant workers classified as "illegal" or "irregular"

[70] Convention Relating to the Status of Stateless Persons, Sept. 28, 1954, art. 1, 360 U.N.T.S. 117.

may, by the force of that designation, be excluded from protection under these instruments and other human rights provisions. Indeed, Lee also examines the protections granted to other classes of individuals such as migrant workers and refugees under several International Labor Organization (ILO) and United Nations conventions. From this analysis, a clear dichotomy emerges between the economic migrant and the political refugee. Mutually exclusive categories are created through exclusions in the applicable treaties and thus individuals often "fall through the cracks" between the three regimes of statelessness, refugee law, and migrant law.

The fifth chapter of *Statelessness, Human Rights and Gender* provides a feminist critique of the law of statelessness, citizenship and migration. The United Nations estimates that women accounted for 49.6 per cent of global migrants in 2005, so their experiences are crucial in understanding the full scope and breadth of the issue.[71]**x** Through this analysis, Lee is able to place in sharp focus the gender inequities of statelessness inherent under international law and demonstrate how they intersect with domestic nationality laws that determine citizenship to disadvantage women and deprive them of their fundamental human rights. In many parts of the world, citizenship is often based on the nationality of the father or husband. Thus, upon divorce or death of a spouse, foreign wives of nationals may face statelessness if they cannot retain their spouse's nationality or reclaim their former citizenship, even while children retain their father's nationality based on the *jus sanguinis* principle. The author illustrates the true cost of such patriarchal and discriminatory nationality laws through a case study of Burmese irregular workers in Thailand. The study effectively illustrates the role of nationality and migration law in producing statelessness among Burmese illegal immigrants working in Thailand. Burmese workers departing their homeland to work in Thailand find themselves in a legal no-man's land upon arrival in the host state and unable to secure adequate protection from either state. Nor do they enjoy any procedural rights to challenge their expulsion. Thus, Burmese women and children are trapped in a vicious cycle and forced to remain in the vulnerable position as "irregular" or "illegal" workers in order to earn a livelihood with no ability to establish legitimate citizenship status. Lee suggests that in view of the discriminatory nature of Burmese and Thai laws and the inherent shortcomings of international instruments, women should look to treaty-based human rights instruments such as the 1990 protocol to the *1979 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).* She argues that the petition procedure in the protocol could possibly provide a

[71] WORLD MIGRATION STOCK: THE 2005 REVISION POPULATION DATABASE *at* http://esa.un.org/migration

more fruitful avenue for redressing claims for discrimination and violations of the rights protected under the Convention. Of course, this presupposes that the Committee on the Elimination of Discrimination against Women, the body administering the treaty. is granted more robust powers to enforce its decisions in the future .

In addition to the book's comprehensive treatment of these important legal issues, it also includes additional supplementary materials pertinent to the analysis. Three appendices translate Thai citizenship and immigration laws referenced in the text. Unfortunately, relevant international conventions dealing with statelessness cited in the work were not included, although they would have been a welcome and useful addition. A selected bibliography offers a thorough overview of the essential literature on statelessness and migration issues and the volume includes a comprehensive subject index. *Statelessness, Human Rights and Gender* takes an insightful look at the intricate interplay between international law, human rights, nationality, and migration, especially with regard to its pernicious effect on vulnerable populations. Researchers interested in human rights issues of women and children will find much of interest in Tang Lay Lee's account of Burmese irregular migrant workers in Thailand and the role that migration law plays in creating and perpetuating statelessness and gender discrimination. Her work is a valuable contribution to the literature and is a worthy addition to any collection of international human rights law, refugee law, and feminist legal studies.

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Humanitarian Intervention: An Inquiry into Law and Morality, 3rd ed. By Fernando R. Tesón. Ardsley, New York: Transnational Publishers, 2005. Pp. vii-456. ISBN 1-57105-248-8. US$125.00.

In the third edition of his book, *Humanitarian Intervention: An Inquiry into Law and Morality*, Professor Fernando R. Teson has expanded and revamped his argument that armed intervention in a foreign state may be justified on purely humanitarian grounds. Teson defines humanitarian intervention as proportionate help (including the use of force) by foreign governments to protect individuals in another state who are the victims of

severe tyranny or anarchy. He defines tyranny simply as a government's denial of human rights.

Teson argues, as a foundational principle, that debates about humanitarian intervention in international discourse should include considerations of moral philosophy in addition to the conventional positivist view of the international legal order. Traditionally, arguments about humanitarian intervention have been framed chiefly as a legal conflict between the ban on a state's use of force against another state and the principle that individuals are entitled to fundamental human rights. In attempting to balance these imperatives, Teson argues that individual human rights should ultimately outweigh states' interests as a matter of moral principle. He rejects the utilitarian "statist" approach to international law as morally deficient. Based on his thesis that states have legitimacy only as agents of their citizens, Teson criticizes the accepted view that states, and not individuals, should be the primary subjects of international law.

Teson's overarching thesis is that allowing foreign intervention to suppress tyranny or anarchy is the best philosophical view, given the primacy of individual rights, and this view should direct how international legal materials relating to humanitarian intervention are interpreted. The first part of the book addresses his philosophical argument, and the second part addresses his legal argument for the right of humanitarian intervention.

Teson first develops his argument negatively, not with his own proposed framework, but by attacking the arguments *against* any right of a state to intervene in the domestic affairs of another state. He criticizes what he sees as some of the wrong-headed assumptions of conventional non-interventionist theory, e.g., that political morality is relative to particular societies and that foreigners should respect different cultures, even with tyrannical leaders. However, he devotes the most time to disputing the idea that the state is an autonomous entity with moral rights or interests independent of those of its citizens (what Teson terms "the Hegelian myth"). Because traditional international law, and its emphasis on the sovereignty of states, rests on this premise, it is an important obstacle to Teson's argument for a liberal right to intervene in other sovereign states for humanitarian reasons. He challenges this deferential view of state sovereignty as morally and ethically unacceptable, because it shields certain governments from intervention that do not deserve protection. Teson argues that a government that abuses its citizens ceases to represent them and should lose its claim to sovereignty in international law, at least for some purposes.

Because Teson's views on humanitarian intervention require a significant departure from traditional assumptions underlying international law, he tackles those assumptions first, and it is not until well into the book that he finally integrates the philosophical themes underlying his previous

responses to sketch a positive framework for humanitarian intervention. He argues that governments are mere agents of their citizens, both internationally and domestically, and their rights derive narrowly from a consensual transfer of rights from those citizens. In Teson's view, states exist not primarily to ensure peace and order, but to secure the natural rights of individuals. Because one of the chief purposes of states is to protect the human rights of their citizens, a state becomes illegitimate when it turns against its people, forfeiting its own protection under international law against foreign intervention. Teson argues that all states are morally obliged to protect human rights at home and abroad, to promote respect for human rights globally, and to rescue victims of tyranny or anarchy if they can do so at reasonable cost to themselves. The necessary corollary to this moral obligation is the legal permission to rescue those victims, i.e., the right of humanitarian intervention.

To guide legitimate humanitarian intervention, the author proposes several limitations on that right. First, the intervention must be aimed at ending only severe tyranny or anarchy—Saddam Hussein's Iraq, Idi Amin's Uganda, and Pol Pot's Cambodia are easy examples. Given this limitation, Teson concludes that intervention is rarely ever permissible merely to restore democracy, especially in regions that have not enshrined democratic rule as a principle of government. Second, any humanitarian intervention must do more good than harm, must be proportionate to the evil it aims to suppress, and should never target innocent persons to achieve the humanitarian end. Additionally, the intervention must have a reasonable chance of success. In Teson's view, humanitarian intervention may sometimes infringe the rights of innocent persons, but only to restore human rights in a country where they are being ignored in a widespread, obvious, and consistent manner. Finally, for intervention to be legitimate, the victims of tyranny or anarchy must welcome the assistance; states have a moral obligation to rescue individuals from the human rights abuses of their government only if they wish to be rescued.

Teson rejects the idea that humanitarian intervention should require the approval of the United Nations Security Council. Given the deficiencies in the composition and international decision making procedures of the Security Council, he does not believe that Security Council approval should be necessary for international legitimacy. He notes that certain members of the Security Council, both permanent and nonpermanent, lack political credibility on human rights issues, thus giving the Council only the illusion of democratic legitimacy in votes on humanitarian intervention. The decision to help victims of human rights abuses should not depend on the approval of states with poor human rights records themselves. Additionally, he argues that the veto power for Security Council votes is morally arbitrary and gives disproportionate power to some states, effectively preventing humanitarian intervention against any permanent member of the Council or its allies.

Professor Teson does believe, in principle, that a humanitarian intervention should have the approval of the community of democratic states, i.e., states that are morally entitled to speak for their citizens. However, given the inaction or lack of political will that may occur in democratic states even in severe humanitarian crises, e.g., during the atrocities in Rwanda and Kosovo, he believes that sometimes unilateral intervention is morally justified.

In the second part of the book, Professor Teson argues that humanitarian intervention is not incompatible with existing international legal norms, particularly article 2(4) of the United Nations Charter, which prohibits the use of force against the territorial integrity or political independence of any state, or in a manner inconsistent with the purposes of the United Nations. He then surveys state practice relating to humanitarian intervention, including examples of both unilateral intervention and intervention authorized by the Security Council.

Teson reads article 2(4) narrowly, not to flatly prohibit the use of force against another state, but to ban it only in the circumstances specified, i.e., when it impairs territorial integrity, when it affects political independence, or when it is otherwise against the purposes of the United Nations. The first two conditions are not implicated in a genuine humanitarian intervention, because intervention does not end in the capture of territory or political subjugation. Although the literal language of the third condition, referring to any other use of force against the purposes of the United Nations, could in fact be interpreted to support armed intervention to protect human rights, Teson notes that in practice, the U.N. system has placed priority on peace and the stability of governments rather than on human rights. He then argues, under basic principles of natural law and regarding the sanctity of human life, that protecting human rights is as important as controlling international conflict. Finally, he concludes that neither the U.N. Charter's text, nor its intent, prevents an interpretation of its norms in favor of humanitarian intervention.

Although the thesis of his book is primarily a philosophical one, the author uses numerous case studies to support his arguments for a right of humanitarian intervention, and to show at least a limited custom or practice of intervention among democratic states. In characterizing an intervention as humanitarian, he argues that what governments say is not as definitive as what they do, and thus, for example, rhetoric justifying an intervention as self-defense should not affect the essential humanitarian result. The case studies provide a chilling review of some of the atrocities committed by governments during the late twentieth century, and support the author's view of an emerging custom of state humanitarian practice, at least within the limits he has defined. He includes Tanzania's intervention in Uganda and French

intervention in Central Africa in 1979, India's intervention in Bangladesh in 1971, and the United States' interventions in Grenada and Panama. His examples of interventions authorized by the U.N. Security Council include those relating to Iraq's treatment of the Kurds in 1991; Somalia in 1992-93; Haiti, Rwanda, and Bosnia in 1994; and Sierra Leone in 1997.

Finally, in a thoughtful chapter on NATO's intervention in Kosovo and the U.S.-led intervention in Iraq, Teson asserts that events since 1999 have both affirmed and tested the moral and legal assumptions of his theories. He interprets the intervention in Kosovo as the "purest" example of the balancing of sovereignty against human rights in favor of humanitarian considerations, in that the intervention against Yugoslavia reflected the moral consensus of nations to act against "ethnic cleansing" and severe tyranny. Consistent with his earlier critique of the U.N. Security Council, the author was untroubled by NATO's inability to obtain approval from that body for the intervention.

Regarding Iraq, Professor Teson is careful to limit his analysis to whether the war could be justified as a legitimate humanitarian intervention; he does not address the most heated issues of political debate, e.g., whether the arguments given for the intervention were genuine, whether preemptive self-defense is ever permissible under international law, or whether the war on Iraq could be justified as a reaction to the attacks of September 11, 2001. Consistent with his thesis that moral philosophy should inform international law in this area, he argues that the war was indeed justified as a humanitarian intervention. Even if the coalition forces did not have a humanitarian intent in going to war, they intended to topple Saddam Hussein and committed themselves afterwards to helping Iraqis reconstruct their society politically and economically. In Teson's view, ulterior motives do not negate the humanitarian nature of the intervention, and we should not require that an intervention be motivated *only* by humanitarian concerns. More controversially, Teson argues that in addition to ending severe tyranny in Iraq, the intervention also meets his other tests for legitimacy in that it did more good than harm, did not involve unacceptable civilian losses, and was welcomed by the great majority of ordinary Iraqi citizens. He concludes that in the end, the U.S.-led intervention reflected a courageous effort to rid the world of a ruthless tyrant and should be supported by anyone committed to liberal democratic values in the broad sense.

World events at the turn of the new century have brought debates about humanitarian intervention to the forefront of social, political, and legal attention. Professor Tesson's book in its third edition is a thought-provoking vehicle for questioning traditional views of international law and the modern balance it should strike between human rights and respect for state sovereignty. Notwithstanding the difficulty of defining or implementing

specific standards for legitimate humanitarian intervention, it is hard to argue against the need for greater emphasis on the protection and sanctity of human life under international law in the twenty-first century.

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