BOOK ANNOTATIONS

Bollinger, Lee C., Uninhibited, Robust, and Wide-Open: A Free Press for a New Century (New York, New York: Oxford University Press, 2011).

Bru, Sascha, Democracy, Law and the Modernist Avant-Gardes: Writing in the State of Exception (Edinburgh, Scotland: Edinburgh University Press, 2009).

Chesterman, Simon, One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty (New York, New York: Oxford University Press, 2011).

Christie, George C., Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values (New York, New York: Oxford University Press, 2011).

Horrigan, Bryan, Corporate Social Responsibility in the 21st Century: Debates, Models and Practices Across Government, Law and Business (Cheltenham, Gloucestershire, UK: Edward Elgar Publishing, 2010).

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ROBINSON, GEOFFREY, "IF YOU LEAVE US HERE, WE WILL DIE": HOW GENOCIDE WAS STOPPED IN EAST TIMOR (Princeton, New Jersey: Princeton University Press, 2010).

Uninhibited, Robust, and Wide-Open: A Free Press for a New Century. By Lee C. Bollinger. New York, New York: Oxford University Press, 2011. Pp. xiii, 163. $21.95 (hardcover).

REVIEWED BY ELISHEVA YUN

Globalization and the increasing popularity of new communications media have presented challenges to the viability of the American institutional press. The widespread use of the Internet has undermined the profitability of large press organizations. In *Uninhibited, Robust, and Wide-Open: A Free Press for a New Century*, Lee Bollinger grapples with the declining role of the traditional American press, presenting a clear and nuanced discussion of the challenges confronting journalism today. He argues that the technology that opens new avenues of communication also undercuts the ability of American institutions to effectively present information to the public. Bollinger identifies the need to find a way for the press to remain autonomous, financially viable, and to preserve its sense of public purpose as one of the defining issues of our time.

Bollinger begins the book with an accessible synthesis of the complex body of First Amendment case law, providing a coherent narrative of the evolution of law that has produced our current understanding of freedom of speech and press. He traces Supreme Court cases that define the freedom of the press, framing institutional journalism as an important check on government and a crucial element of American democracy. The strength of Bollinger's survey of First Amendment jurisprudence lies in his categorization of the law into three pillars: first, the Supreme Court has established extraordinary protection against censorship; second, the press has no right of access to information that the government holds or controls; third, the government has regulated the press for the purposes of improving the press. Not only do the three pillars organize the jurisprudence in a way that is understandable without an extensive legal background, they also create a unified work by anticipating Bollinger's later suggestions on how to remedy the current challenges to the institutional press.

Chapter Two approaches the concerns that underpin freedom of the press with an eye toward adapting the law to the challenges of new media. Bollinger identifies two primary interests that motivate freedom of speech and press. First, he argues that we have an interest in discovering the truth, which we can achieve most effectively through discussion that is free of overly burdensome regulation. Second, he argues that freedom of speech is essential to a democratic society. Bollinger's discussion goes beyond tracing commonly understood rationales to articulate an alternative view of the motivations underlying Supreme Court First Amendment case law—that it is a great social experiment in tolerance. Bollinger's goal in shifting the focus is to appreciate not only the value of speech itself, but also to perceive the necessity of confronting issues arising from reactions to speech; freedom of press forces us to encounter ideas with which we disagree and also to tolerate diversity of opinion. One of Bollinger's most compelling points is that there is an impulse to suppress differing views that everyone—not just "bad" people who pursue censorship—experiences. Furthermore, this commonly experienced desire for an excessively uniform voice undermines a pluralistic polity.

The first two chapters provide foundational knowledge for Bollinger's discussion of our current experience of the press. After tracing the evolution of freedom of press jurisprudence and the principles that underpin freedom of speech law, Bollinger's explanation that the Internet has made the press more powerful and pervasive while weakening traditional media naturally builds on the previous chapters. Despite these momentous changes in the world, which bring about new cross-border communities, the primary rationales for freedom of speech and press remain the same. For instance, during times of crisis, the authoritarian impulse becomes stronger, necessitating robust freedom of speech protections regardless of frontiers. Rather than calling for entirely new rationales, globalization and the advent of the Internet require responses to increasing interdependence, global scale problems, and a changed world outlook. According to Bollinger, the first step in responding to these global issues is to acquire information and knowledge—a purpose which journalism serves. Traditional media, however, has experienced declining audiences

and advertising revenues as Internet voices have become a basis for news, ultimately weakening journalism.

As a result of budget crises, traditional media institutions have decreased remote news operations by such means as eliminating foreign bureaus and correspondents. Bollinger articulately proves this point through strings of compelling examples. On September 11, 2001, only the *New York Times* and CNN had journalists in Afghanistan. Most of the American journalism community now relies on the Associated Press and Reuters news services for international news. The crux of Bollinger's argument is that a tragic irony results: "At the moment when our technological capacities to communicate globally are greater than ever, and when the need for news about international and global issues is greater than ever, the technology that facilitates this communication is undermining the financial capacity of American media institutions to meet their responsibility to the public." He concludes that the risk is American intellectual isolationism and a lower quality of news.

Following the 2009 presidential election in Iran, Western news media reported the role of social networking sites and cell phones to provide information and evade censorship. Bollinger argues, however, that while new communications media, and the types of interactions that result, may be valuable, they nevertheless cannot replace the quality of institutional news reporting. While Bollinger presents compelling reasons why traditional media offers more valuable news—longstanding expertise in a region, the resources of a large institution, and a culture of journalism as a profession—he does not sufficiently address the point that new communications media and novel uses of media are developing at a rapid pace. Given the relative newness of many forms of Internet communication, such as social media sites, the current lack of quality reporting does not mean that Internet voices will not adapt and become more sophisticated to adequately meet this need in the future.

Bollinger stresses that the American value of freedom of speech and press contrasts with a common foreign concept of the press as a means to implement government policy. For instance, Russia has "seemingly tolerated" private violence against independent journalists in place of direct official censorship. Sixteen journalists have been murdered since Vladimir Putin became president in 2000, but only one conviction has resulted. As the American press increasingly becomes a

part of the global arena, it encounters these policies of censorship that are strikingly different from that of the United States. Bollinger contends that there is a need for the American press to be involved journalistically in the world to widen American understanding, act in a global arena, and facilitate foreign development in beneficial ways. Given the technological ability to supply a free and independent press, jurisdictions with little freedom will undermine the freedom of others without an international system of protections for free speech. Bollinger's diagnosis of the weakened American press raises broad international implications. In particular, he ties the viability of American press institutions to foreign countries' ability to develop more robust First Amendment rights. In doing so, Bollinger also links foreign legal bodies' capacity to adopt a broad understanding of freedom of press with national and global endeavors to cultivate tolerance.

There is a tinge of paternalism in the way Bollinger frames the relationship between the American press and foreign countries. Bollinger asserts that journalists around the world envy the American press and that the United States offers an international model. Bollinger states, "We need actively and deliberately to try to influence the rest of the world to embrace what we have come to believe is vital to a good society." This statement itself seems to run counter to the tolerance that lies at the heart of Bollinger's vision of a free press; preaching how a system of openness moderates authoritarian impulses may preclude different approaches and equally effective ways to understand the value of free debate.

In addition to influencing foreign understandings of freedom of speech, Bollinger offers a wide range of other solutions to find a way for the press to remain autonomous, financially viable, and preserve its sense of public purpose. Each element of his proposed solutions seeks to support the American institutional press. As a response to the challenge of profitability, he advocates the injection of public funds into the traditional press. Yet, publicly funding an institution that acts as a check on government presents a stark risk that making the press financially viable might undermine its freedom and objectivity. Bollinger quickly anticipates this criticism and suggests that courts should play a central role in preventing funding from undermining independence. He asserts that media institutions have generally resisted government intrusions suc-

cessfully, evidenced by PBS's coverage of the Watergate hearings despite its receipt of federal funding. While his suggestions and examples are compelling, Bollinger sweeps this problem aside too quickly with the result of discounting the significant complications of preserving independence.

In summary, Bollinger provides an insightful analysis, rendering First Amendment jurisprudence accessible to readers who may not be well-versed in legal doctrine. The most compelling portions of the book move beyond legal analysis to address broad and timely questions about the role of media in a rapidly changing global forum. Bollinger successfully distills the ways in which American First Amendment rights have become tied to foreign countries' willingness to expand their understandings of freedom of press; the American ability to foster tolerance becomes largely dependant on an international readiness to embrace critical messages. To implement Bollinger's suggestions, the United States and international organizations must exert more pressure on countries that significantly censor—or tolerate private violence against—controversial voices. *Uninhibited, Robust, and Wide-Open*, offers a lucid account of both the history of freedom of press case law and the challenges of globalization and new communication technologies, going beyond offering ways to understand the issues by advocating a solution with international implications.

Democracy, Law and the Modernist Avant-Gardes: Writing in the State of Exception. By Sascha Bru. Edinburgh, Scotland: Edinburgh University Press, 2009. Pp. v, 256. $95.00 (hardcover).

REVIEWED BY HAROLD WILLIFORD

The complex relationship between law, literature, and politics has produced a vibrant array of scholarship, most notably in comparative literary studies. Sascha Bru, a professor of literary theory and comparative literature at Ghent University, aims in *Democracy, Law and the Modernist Avant-Gardes: Writing in the State of Exception* to develop a fuller understanding of the relationship between the modernist avant-garde movement and democracy. Bru advances the argument that literature and politics intersect and collapse into each other in times of legal crisis, in this case the instances of martial law and revolu-

tion during and immediately after World War I in continental Europe. In such environments, according to Bru, institutional structures that normally maintain boundaries between these elements of public life dissipate, allowing literature to act politically as law or, at the very least, as a form for writers to explore alternate legal worlds. Bru engages with three different authors' works from this period to examine such literary politico-legal experimentation, which, he argues, took advantage of the vacuum created by the breakdown of state institutions at this historical moment.

This annotation presents a short explication of Bru's framework before progressing to an exploration of the successes and shortcomings of the specific literary analysis and Bru's efforts to develop a larger theoretical perspective. Although a valuable contribution for its detailed interpretations of often-opaque avant-garde texts, the book sometimes loses sight of its broader thematic goals in these extended interpretive passages. For scholars of the modernist avant-garde and others who evince an interest in accounts of the intersection of law, politics, and art, *Democracy, Law and the Modernist Avant-Gardes* will nevertheless illuminate aspects of a unique and crucial period in the development of modernity that will benefit from further consideration.

After an intriguing introduction, the first chapter lays out the overarching framework for the more specific analysis, drawing on Walter Benjamin, Julia Kristeva and other notable modernist and post-modernist theorists. In the introduction, Bru proposes that we should relocate our understanding of continental European avant-garde literature from the framework of the cultural politics of totalitarianism to consideration in the context of democracy, which, Bru argues, is the political environment that made this literary trend thrive. Bru never quite specifies what the modernist avant-garde comprises, although it appears to encompass the experimental, the subversive, the intentionally absurd, and, sometimes, the dumbfoundingly incomprehensible. Within the framework provided by Kristeva's observation that "semiotic subversion" of literary forms inevitably includes political critique, Bru traces how the traditional categorization of art into boxes defined by genres and imposed onto works after the fact obscures the avant-garde's exploration of innovative cultural and political territory. Bru explains that adherence to defined cat-

egories creates an analytical mode entirely inapposite to the cultural environment of the World War I-era states of exception, in which, according to Bru's historical interpretation, these very lines blurred, faded, and vanished. Bru convincingly shows that only a radical change in methodology will allow the postmodern scholar to unpack the full potential of literary work created in this period defined by fluidity and uncertainty.

Bru situates his analysis on the Continental side of the avant-garde, claiming that the Anglo-American half of the movement developed in the starkly different political circumstance of stable and continuous democracy whereas the Continental counterpart dealt with a succession of revolutions and states of exception. Bru takes a standard view of Carl Schmitt's concept of the state of exception as periods where normal democratic processes and institutions are suspended in order to deal with a crisis that threatens the existence of the state. Martial law, during wartime, provided the paradigm for Schmitt's original formulation, which played out on a grand scale in Europe during World War I. Although states of exception were present in the Anglo-American sphere, the particular intensity of these political disruptions in continental Europe leads to Bru's differentiation between Anglo-American and Continental avant-gardes and then his focus on the latter. This element of the book's argument is where Bru's analysis has its greatest interdisciplinary potential, as the concept of the state of exception has influenced many fields of cultural, political, and social studies. Some proponents of international law see the system they advocate as a way to fill these legal lacunae in which human rights abuses occur.

His attention to the geography of contrasting political circumstances allows Bru to delve into the politics of democracy in the European avant-garde, where it was part of advocacy and vision rather than the established order. Bru looks at the intersection of the lives of the artists, the processes of production and the works themselves to explore the particularities of democratic and legalistic motifs in this 'exceptional' time. He selects three avant-garde writers from different European nations, the Italian futurist Filippo Tommaso Marinetti, the Belgian expressionist Paul van Ostaijen, and the German Dadaist Richard Huelsenbeck. Bru notes that each of these schools of the avant-garde, during the period around World War I,

lacked equivalents in the Anglo-American world. He suggests that this geographical specificity may indicate connections between these three manifestations of the avant-garde and the political instability of continental Europe. This is part of his overall project of deconstructing generalizations that inhibit our understanding of the political potential of the Continental avant-garde.

Bru confines his analysis to World War I and the years immediately afterward, although both Huelsenbeck and Marinetti continued to write well into the twentieth century. These chapters chart the writers' development in the avant-garde genre through rich historical detail and anecdotes. The three central chapters highlight the peculiarities of living and producing during World War I and the early years of the Interwar period. This is where Bru's book accomplishes perhaps its most valuable historical work, as it locates compelling individual stories in a pivotal historical period, particularly the idiosyncratic and dramatic political history of Marinetti. Marinetti, the most overtly politically active of the three writers featured in the book, provides an engrossing story of an attempt to wield experimental literature as a political tool in the state of exception, from Marinetti's active support of the war as an opportunity for radical political change to the subsumption of his short-lived political party by Mussolini's fascism. The nexus of art and politics is clearest in this chapter. The works of van Ostaijen and Huelsenbeck, progressively less involved with the practice of politics and more with the abstract, allow Bru to extend the analysis that begins with the "stato di eccezione" in Italy to higher theoretical planes.

Firmly ensconced in the upper recesses of a comparative literature department, *Democracy, Law and the Modernist Avant-Gardes* is not for the uninitiated. Bru announces in the introduction that Huelsenbeck and Marinetti require no introduction, which might come as a surprise to those not already familiar with the modernist avant-garde cultural period. The book will likely bewilder a reader with no background in modernist avant-gardes, literary theory or the concept of the state of exception, as it embraces its function of unearthing deeper possibilities within an already complex field. Avant-garde literature – in translation – is an esoteric subject that defies easy interpretation even as it has potential to increase our understanding of the confluence of factors that created a radical

politics of democracy. While obscure, the works that resulted from these circumstances are anything but boring, laden with colorful if lunatic details. Marinetti's highly allegorical post-World War I novel, *The Untameables* (*Gli Indomabili*), presents fascinating material with which Bru adeptly engages. Bru's strengths at literary analysis shine through as he takes on such heavily symbolic and mysterious texts. He excels at drawing out the multiple valences of motifs in Huelsenbeck's novel *The Downfall of Doctor Billig* (*Doctor Billig am Ende*). His reading of the character of Margot spans fifteen pages, effectively arguing for a Dadaist political understanding of the figuration of her body and sexuality.

The relationship between the three case studies is not always clear within these chapters, which creates a somewhat fragmented reading experience. Bru could perhaps have better mapped out the book by furthering the contrast with the Anglo-American avant-garde, which more or less drops out of the picture after he sets up the general framework for his analysis. The focus on Continental avant-gardes would benefit from this historical foil to highlight the unique ideas and potential of the three case studies. Admittedly, Bru critiques historical categorization from the outset, which sets the stage for a fractured analysis as Bru seeks to undo overly broad conceptualizations of the Continental modernist avant-gardes through close readings of the writers in historical context. Bru's mistrust of broad analysis exists in tension with the first definite article in the title, which would perhaps more appropriately be *Democracy, Law and Three Modernist Avant-Gardes*.

The difficulty of combining historical analysis and literary criticism of Dadaist and other avant-garde works shows through in the thinness of the overall analysis. As art that throws off the bounds of grammar and causality, these texts resist attempts to create historical narratives. Where Bru deftly carries out detailed close readings of the works in their immediate context, the organization of the chapters reveals that Bru resorts to simplistic reliance on historical chronology rather than macroanalytic theoretical argumentation to frame his interpretations. This organizational technique results in the chapters on the specific authors falling into the trap of retelling stories and summaries of the works rather than making cohesive arguments. The writers absorb Bru more than he draws out the political implications of their work. Conse-

quently, his evident fascination with their works draws the reader into the analysis but also might leave those who are less enthusiastic about the extreme level of detail unsatisfied, with the disproportionate ratio of close readings to articulation of the historical arc on which Bru seeks to situate these three authors. There are broad and powerful arguments about trauma, literature, and rejection of difference-effacing readings of the avant-garde, but they tend to dance above the close readings.

Bru's central thesis, that these three authors presented "literature as law," suffers from the absence of elaboration of the implications for law and the state of exception at a practical level. Rather, law remains a somewhat undefined entity, whose contours in Bru's analysis blur, perhaps unintentionally, with political activism and literary theory. Bru mainly draws on political and literary theorists with little attention to legal scholars. The works that Bru reads do reach for the dizzying heights of revolutionary politics, but Marinetti's proposals for reform, for example, included specific ideas about the reintegration of ex-combatants and remaking institutions. Such gestures at legal policy warrant more inquiry about the practicality and possibility of their implementation to evaluate the limitations of these artists' democratic politics. As the state of exception signifies the absence of laws, Bru's efforts to situate these authors' oeuvres and politics within this extralegal environment provokes further contemplation of the role of art in filling the legal voids in similar times of crisis. While he adeptly articulates how these three artists wrote *in* the state of exception, he does not effectively use the analysis to refresh our understanding of Carl Schmitt's concept. This is a missed opportunity to provide cultural context to a concept that pervades modern political theory.

Bru more capably illustrates the historical and practical intersection of law and literature, particularly with censorship, as well as the risks of literary political activism. The historical substance, however, could provide an extremely useful starting point for those interested in developing a more legalistic critique of art, democracy, and the state of exception. Interdisciplinary theorization that further explores the questions raised by recontextualizing the Continental modernist avant-gardes as part of an emergent democratic politics could increase the

nuances of the usage of the concept of the state of exception in areas such as political theory and international law.

Democracy, Law and the Modernist Avant-Gardes succeeds within its niche even if it ultimately does not fully accomplish the goals implied by the definite article in its title. For students and scholars of the avant-garde, it brings together three writers, each of whose work contextualizes the others' to reveal subtle but fascinating political developments in the early twentieth century. While not an introduction to the movement and perhaps not to be read in isolation, this book merits its own close reading by those with an active interest in the field and who may wish to build on Bru's intriguing, if occasionally underdeveloped, arguments.

One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty. By Simon Chesterman. New York, New York: Oxford University Press, 2011. Pp. viii, 297. $45.00 (hardcover).

Reviewed By Hannah Bloch-Wehba

Since the September 11th attacks, much has been written about government abuses of power—at Guantánamo, Abu Ghraib, and Bagram Air Base, not to mention through warrantless wiretapping, Office of Legal Counsel memoranda, and the distortion of intelligence to justify the invasion of Iraq. In *One Nation Under Surveillance*, Simon Chesterman, Dean of the National University of Singapore Faculty of Law, addresses many of these same abuses through a new lens, assessing the balancing of personal privacy and the need for intelligence. Chesterman offers an important and comprehensive look at surveillance and privacy in Europe and the United States, tackling some of the most important issues associated with intelligence gathering. In reframing intelligence gathering as a problem not just for governments, but also for citizens, Chesterman posits a structure in which intelligence services can be held accountable through control, oversight, review, and organizational culture.

Unlike recent examinations of privacy, many of which have focused on the roles of new media and services such as

Facebook, Twitter, and Foursquare,[1] Chesterman's account focuses directly on what may be the most problematic use of "private" personal information: intelligence. Surveillance of foreign nationals has historically been governed by neither domestic nor international law—as Chesterman points out, even the Echelon signals intelligence network, administered jointly by the United Kingdom, United States, Australia, Canada, and New Zealand since 1947, is a bit of a gentleman's agreement. Touched on only tangentially and through "indirection," foreign surveillance typically takes place in a legal black hole. The pressures of globalization and the "global war on terror," however, threaten to erode the traditional distinctions between "foreign" and "domestic" and make obsolete the diplomatically enforced "rules of the game" that evolved during the Cold War. In the next phase of history, methods used to surveil citizens will overlap considerably with those used to gather intelligence abroad.

In Chapter Two, Chesterman deals explicitly with the theoretical argument for keeping intelligence outside of the scope of law—Carl Schmitt's theory of the exception. Schmitt, who is now widely known as a supporter of German fascism, challenged the efforts of liberal constitutionalism to deal with exceptional circumstances through law, an effort he thought was misguided and ultimately fruitless. Calling Schmittian exceptionalism "difficult to locate within a coherent theory of limited public power," Chesterman then proceeds to cite, for the same "exceptional" notion, Locke, Hobbes, and Jefferson—the theoretical godfathers, in one view, of American republicanism and of liberal democracy in general. In writing off Schmitt, Chesterman also discounts the rationale of Presidents Nixon, and, later, George W. Bush, in advocating for unlimited executive power in the national security realm. Given the importance of emergency powers in theorizing the scope of liberal democracy, particularly with regard to war and foreign affairs, Chesterman's swift dismissal of the subject seems

1. *See, e.g.*, DANIEL J. SOLOVE, THE FUTURE OF REPUTATION: GOSSIP, RUMOR, AND PRIVACY ON THE INTERNET (2007) ("Details about many people's private lives are finding their way onto the Internet, often without the subjects' knowledge and consent.").

to give short shrift to an area that has provoked much discussion in recent years.[2]

Chesterman details profound abuses by the NSA, CIA, British government, and private contractors, among others. Yet perhaps his most interesting innovation is in distinguishing "routine expansion of surveillance technologies from exceptional actions." The proliferation of services that rely on private data is a fact of modern life and thus falls squarely in the first category. Moreover, the danger in aggregating large amounts of data is not in the accumulation alone, but in the application of a "mosaic theory" that permits "the compilation of diverse data points from an individual's life." Adopting a pragmatic approach to this collection, Chesterman argues that while collection must continue, it should be "public, legal, and consequence-sensitive." Indeed, the main value of Chesterman's contribution is in questioning the assumptions that secrecy is "central to the work of intelligence," and that intelligence cannot be effectively regulated in ways protective of personal privacy. Borrowing from European privacy jurisprudence, which requires that laws infringing on individual privacy must be sufficiently clear to notify citizens when their actions may be subject to surveillance,[3] Chesterman excoriates the culture of secrecy that has grown around intelligence-gathering.

Yet the suggestion that the existence of surveillance programs ought to be public is not quite radical enough to support Chesterman's contention that, indeed, citizens have already voluntarily "given" our private data in exchange for security and "the practicalities of modern life." Chesterman's supposed main contention—that structures of routine surveillance are emerging from a "new social contract that goes beyond the centralization of political authority to make organized society possible"—does not come until the last pages of the book, and then only briefly. Much is made of the ability to "opt out" of these new social arrangements, but the effect is to deem public what used to be private data, and to stamp it with

2. David Luban, *Carl Schmitt and the Critique of Lawfare*, 43 Case W. Res. J. Int'l L. 457, 468 (2011) ("A Lexis search reveals five law review references to Schmitt between 1980 and 1990; 114 between 1990 and 2000; and 420 since 2000, with almost twice as many in the last five years as the previous five.").

3. *Malone v. United Kingdom*, ECtHR App. No. 8691/79, ¶ 67, 1984.

citizens' approval. This appears a lazy analytical move in light of the fact that Chesterman argues vehemently for public administration of intelligence—a goal that has yet to be achieved, as he acknowledges. If intelligence services are only privately accountable, and sometimes even concealed entirely from public view, is the social contract into which the citizenry have supposedly entered truly a voluntary trade? Something more is needed to show that citizens, in entering this supposed contract, have made an informed and valid choice.

Even the relationships that individuals enter with the providers of modern services are sometimes less than voluntary, as attested to by coercive terms of service and click- and shrink wrap agreements. And yet these relationships often provide the bulk of the metadata making up "systematic surveillance," composing the dots that the mosaic theory seeks to connect. Even beyond third-party doctrine, the role of private actors in the national security and intelligence arenas has become central to the challenge of holding government accountable to the public. The U.S. government has contracted out not only military tasks, but also the provision of hardware and software, electronic surveillance, and interrogation—key items in the intelligence community. In this respect, "secrecy appears to have compounded ignorance." The failure to hold private actors accountable at the same (low) level as their government counterparts has resulted in a system in which governmental functions are delegated to actors who face lower risks and lower political costs. As Chesterman acknowledges, relying on these private actors poses its own threat to accountability and transparency. But shying away from a rule that would limit the execution of "inherently governmental" functions to the government itself, he writes that government reliance on private actors is inevitable. Without a solution to the problem of independent private actors, it is difficult to give teeth to the proposition that intelligence collection should be public and policed by someone other than the collectors themselves.

For this reason, the distinction between "routine surveillance" and Schmittian "exceptional" abuses generates more heat than light. Chesterman seems to argue, despite evidence to the contrary, that by participating in modern society, citizens have knowingly assented to the expansion of intelligence gathering—and this assent both legitimates the act of gather-

ing intelligence and makes it routine. A deeper flaw is the failure to probe deeply into why—or whether—massive, wholesale surveillance is preferable to group profiling, or indeed, to surveillance of individual targets, except in the sense that it might better achieve the results wished for by the intelligence community. "Rather than targeting a specific group for closer examination it may be possible to gather information on the entire population in such depth that human intervention. . .is significantly reduced." Many private sector firms have adopted methods of data mining, social network analysis, and link analysis that achieve just this. Yet the notion that the accumulation of massive amounts of data does not violate privacy is not at all uncontroversial. In comparing weak U.S. privacy protections to their stronger European counterparts, Chesterman would do well to acknowledge that data mining and private sector data aggregation are far more constrained in Europe than in the United States, not just because of different statutory and constitutional protections, but also because data aggregation is seen to pose a concrete threat to personal privacy.

In short, blanket surveillance, in Chesterman's view, is an "evolution" of the traditional underpinnings of democratic society and not an exception to them. But his uncritical acceptance of this account undermines the general project of showing the capacity of law to inform, constrain, and regulate intelligence services. The problem is that Schmitt's account has proven profoundly influential in national security scholarship, both as a descriptor of the current state of affairs and as an emblem of how things ought not to be. This background does the argument no favors. While Chesterman describes a variety of accounts of how emergencies should be dealt with, he ultimately reaches no conclusion powerful enough to support the underlying conviction that intelligence can and should be regulated through law.

Despite its weaknesses, the sheer breadth of *One Nation Under Surveillance* makes it invaluable as a resource on modern surveillance in all its incarnations. Touching on almost every current issue somehow related to secrecy, accountability, and regulation in intelligence, it serves as a welcome introduction and a comprehensive overview of these important questions. As Chesterman makes clear, the modern surveillance state encompasses an extraordinary array of tasks, actors, and processes, which the author examines in case studies to paint a

rich portrait of the manner in which secrecy, intelligence, and transparency interact in modern liberal democracies. In the U.S. context, the role of secrecy comes into play with regard to rendition, classification of documents, and the invasion of Iraq. In the United Kingdom, the case of closed circuit television represents a pervasive surveillance apparatus that was only brought under statute in 1989 and, later, in 1994. In the international sphere, the lack of an intelligence mandate in the Security Council renders it captive to the member states that choose to (selectively) share intelligence—although intelligence is a crucial factor in the decision to authorize the use of force. All of these, as Chesterman notes, are related in important ways to the endeavor of providing intelligence to national governments.

Admittedly, breadth sometimes comes at the cost of depth. It is not always clear exactly how Chesterman's case studies relate concretely to issues of personal privacy and freedom—the effect can be like glimpsing the forest through the trees. Yet the presentation of these seemingly disparate issues together, in the context of a fresh and unorthodox look at the role of surveillance in modern society, constitutes a powerful way of looking at the state of privacy and civil liberties in a new technological era.

Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values. By George C. Christie. New York, New York: Oxford University Press, 2011. Pp. xiii, 195. $65.00 (hardcover).

Reviewed By Leah Trzcinski

With such an ambitious title, readers of George Christie's *Philosopher Kings? The Adjudication of Conflicting Human Rights and Social Values* are struck first by its relatively modest length. The preface moderates readers' expectations by specifying that Christie will undertake a focused comparative study of the conflict between the right to privacy and the right to freedom of expression. He restricts his consideration to the judicial reasoning of the highest courts in the United States and the United Kingdom, as well as the European Court of Human Rights. While this might disappoint human rights scholars expecting a discussion of those non-derogable values embodied

in *jus cogens* norms, Christie's focus is appropriate given his goal to describe a model of legal reasoning that would facilitate adjudication of cases involving the balancing of rights. The most challenging cases for Christie's model of legal reasoning are those in which the two rights are of relatively equal value; hence his decision to focus on the evenly matched rights of privacy and freedom of expression. In the end, the challenge proves too great and Christie's model is found wanting. This conclusion is not immediately apparent to the reader, however, because Christie's style is to slowly build up his argument so that the contours of his proposed model are only revealed at the end. This review will adopt a similar style, evaluating aspects of the book as they would become apparent to the reader. Accordingly, I will first address the title and structure of the book, next the assumptions underlying Christie's argument, and then the argument itself before concluding that Christie's model of legal reasoning is unlikely to achieve its goals.

From the outset, the reader's interest is piqued by the title's provocative mention of the concept of philosopher kings from Plato's *Republic*. Unlike Plato, Christie has a dim view of these scholarly rulers, arguing that they are elitist and countermajoritarian; nevertheless, he does not accuse any judges in the jurisdictions he considers of adopting the adjudicative approach or judicial attitude of a philosopher king. Rather he thinks that judges are "trying to conform to what has been traditionally accepted as the function of the judiciary," an approach which he considers normatively attractive. He does admit that a legal system comprised of judges acting as philosopher kings might be more stable in that it would have a clear hierarchy of rights, but he fears that this system would achieve stability at the expense of democracy. The metaphor of philosopher kings is used sparingly throughout the book and is invoked with an appropriate level of modesty so as to avoid critiques of intellectual aggrandizement.

Turning to the structure of the book, Christie organizes his argument into five parts, beginning with the introduction (or "prolegomena") and ending with the conclusion. He begins by problematizing the conflict of rights: first in a theoretical sense that conceives of rights as universal, and then in a practical sense in the context of statutory interpretation and litigation. Next, he describes the weaknesses of other disci-

plines (notably philosophy and social sciences) in reconciling this rights conflict, before offering his own solution in the form of case-by-case adjudication. Having admitted the limitations of his model of legal reasoning, he concludes the book with only a question: "what if we must choose?" In doing so he suggests to the reader that rights balancing may be futile and thus admits defeat. While the structure is laid out in the introduction and proceeds logically, Christie does not sufficiently guide the reader throughout the text, so at times it is unclear exactly where he is going, where he has been, and what comes next.

The reader is next afforded an opportunity to consider the assumptions underlying Christie's argument. A careful reader will find them fairly uncontroversial. First, he assumes that there is a universal standard of human rights norms and even includes this provision in his definition of rights, stating that "the right is not merely the court's own views but reflects a generally accepted entitlement." Given Christie's belief that there is one single conception of each human right, it naturally follows that he would promote greater convergence toward this universal standard. While most human rights scholars would agree that rights are universal, there is likely to be contention about such a narrow definition of rights that leaves no space for relativist notions that respect differing cultural and social values.[4] Christie does admit that "there are historical and cultural factors that will materially affect our ability to achieve true congruence in the application of transnational human rights law," but nevertheless contends that such congruence would be the ideal.

Another assumption underscoring Christie's argument is that "sovereignty resides in the people" rather than in the nation state. Although this understanding rests him in good

4. *See, e.g.*, Daniel A. Bell & Joseph H. Carens, *The Ethical Dilemmas of International Human Rights and Humanitarian NGOs: Reflections on a Dialogue Between Practitioners and Theorists*, 26 HUM. RTS. Q. 300, 304 (2004) (describing "ethical conflicts where they [activists] must decide between promoting their version of human rights norms and respecting local cultural norms that may differ from these"); David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101, 108 (2002) ("A 'universal' idea of what counts as a problem and a solution snuffs out all sorts of promising local political and social initiatives to contest local conditions in other terms.").

company with such scholars as Eyal Benvenisti, Benedict Kingsbury, and Jeremy Waldron, the dominant paradigm generally describes sovereignty as flowing from the state. A similar critique can be raised about the premise Christie supports with this assumption, namely that for Christie, "whatever primacy is accorded to the legislature rests on the fact that its members are chosen by the people." This implies a weak view of the legislature relative to the judiciary, in that the former's legitimacy extends only so far as its populist credentials. In keeping with Christie's preference for a strong judiciary, he readily admits that the courts, in applying the model of legal reasoning that he promotes, "perform a traditional legislative or administrative function."[5] Yet the prevailing notion, at least in the United States, is that courts should refrain from highly politicized questions which are best left to the political branches to avoid a critique of countermajoritarianism.[6] While Christie's fresh approach is laudable, his model of legal reasoning would be strengthened by more directly addressing the strong counter-arguments.

As mentioned previously, while Christie lays out his assumptions at the outset, he takes his time building up his argument such that the reader only grasps the true outline of his proposal in the final chapters. In summary, he promotes a judicial style of case-by-case adjudication to tackle those difficult situations wherein judges are forced to balance one or more rights. Christie hopes that this model would give guidance to future litigants and decision makers through a sufficiently large number of factually similar cases in a comparatively finite period of time. He posits that guidance will be enhanced "if the final decision-maker is a relatively fixed body with a relatively fixed composition" and that it is helpful if there is "an accepted . . . objective for the area of law" and "concrete and narrowly focused . . . factual issues." The fact that this conflu-

5. In other parts of the book Christie even calls on the courts to play the role of a "super-administrator undertaking to decide fundamental issues of social policy," implying perhaps an even stronger role for the judiciary than that which is afforded either the legislative or executive branches independently.

6. *See, e.g.*, Barry Friedman, *The Road to Judicial Supremacy (The History of the Countermajoritarian Difficulty, Part One)*, 73 N.Y.U. L. REV. 333 (1998) (describing the tension between judicial review and the democratic process as "the central obsession of modern constitutional scholarship").

ence of factors is nearly impossible in practice is not lost on Christie. For example, the institutional structures of many transnational courts preclude the construction of a fixed bench by requiring limited terms and geographic representation. Additionally, there is the risk, Christie admits, that a large number of cases could muddy the doctrine rather than clarify it. But most importantly, those cases with which Christie is most concerned –which demand courts balance two human rights of relatively equal importance – are not ones for which there is an accepted objective or narrow factual issue, and thus they are not well suited for his model of legal reasoning. Given the impracticality of the model, one questions its utility.

Nevertheless, Christie sees this attempt as important as there is an "increasing reliance on courts" to resolve "complex social issues." Accordingly, the proper social role of courts must be determined to allow sufficient flexibility to address changing social norms while at the same time adequately confining judges' discretion to provide a degree of predictability. Christie sees the optimal solution as one "that produces decisions that are broadly accepted as being correct, consistent, and legitimate." Yet by the book's conclusion he is willing to settle for a decision that is at least not obviously wrong, even if not clearly correct.[7] Even so, the reader sympathizes with Christie, who bemoans repeatedly that human rights cases are particularly difficult as they are highly emotive. He has in many ways, however, painted himself into a box by setting such an ambitious bar and then rejecting guidance from other disciplines to help him achieve his aim.

Christie's failure to assert a workable solution to the legal reasoning challenge he identifies may not be particularly damning as his target audience, lawyers and academics, are likely to be sympathetic to his project. They will similarly appreciate the impressive depth of comparative research underpinning Christie's text and the originality of parts of his model of legal reasoning. The reader is left, however, wanting more

7. One might analogize this to the "margin of appreciation" principle adopted by the European Court of Human Rights to give deference to member-states' decisions. Christie, however, would likely reject this comparison given his critique of the "margin of appreciation" doctrine as "combin[ing] the worst elements of the common law and civil law traditions."

and longing for the clarity proffered by the very philosopher kings that Christie eschews.

Corporate Social Responsibility in the 21st Century: *Debates, Models and Practices Across Government, Law and Business.* By Professor Bryan Horrigan. Cheltenham, Gloucestershire, UK: Edward Elgar Publishing, 2010. Pp. xxii, 427. $60.00 (Paperback).

REVIEWED BY RUTH GAO

Corporate Social Responsibility (CSR) is becoming one of the foremost issues that the global community must address and embrace. The turn of the twenty-first century marks a remarkable shift in the movement to hold corporations accountable for their actions and to consider the social and environmental impact of their decisions. Proponents of the movement urge for changes within the organization, shifting from pure profit bottom-lines towards producing more social benefits. Others urge government and regulatory bodies to create legal sanctions and reporting standards to increase corporate compliance, and enforcement mechanisms to hold corporations accountable. CSR, alongside climate change, sustainable development, human rights, and poverty eradication, has become a dominant topic and challenge for governance and regulation. However important the concept has become, there has yet to emerge a coherent consensus on the purpose, direction, and overarching framework needed to create a replicable framework for the world-wide development of CSR, especially in our increasingly interconnected economy.

In his book, *Corporate Social Responsibility in the 21st Century*, Professor Bryan Horrigan offers a timely analysis of the outstanding scholarly debates, cross-jurisdictional initiatives, and interdisciplinary efforts worldwide. He is a strong proponent for CSR, arguing "CSR is a 21st century force to be reckoned with, an idea the time for which has definitely come, and a precondition of both corporate viability and planetary survivability for the generations that follow." In order to better advance CSR's course, the biggest hurdles to overcome are the cross-disciplinary, theoretical and empirical research needed to bridge cultures and create a "mass normative acceptance" of CSR, and the achievement of standardized regulation and en-

forcement. *Corporate Social Responsibility in the 21st Century* is an ambitious attempt to tackle an incredibly muddled field. In a series of articles, Horrigan takes the reader through the current scholarship, weeding through the various definitions of CSR at large, illustrating several examples of actual legal and governmental reforms, and lastly, surveying current debates and future prospects for the development of CSR. While each article focuses on distinct topics, the collection offers a thorough overview of the growth of CSR, CSR currently in practice, and a future direction for global players to develop.

Horrigan formats his book primarily as a survey of CSR, written for a wide and inter-disciplinary audience, spanning all fields of practice and across cultures. He approaches the topic in a similar fashion: juxtaposing regulatory action, legal reform, boardroom literature, and scholarship. He stresses the necessity to speak a common language and grasp a common understanding of CSR's goals, byproducts, and approaches. The first section of the book is devoted purely to defining terms and introducing CSR's global context. This section clearly demonstrates Horrigan's strength in distilling information into manageable summaries and overviews for the lay reader. He does not shy away from fairly presenting both sides of a debate, pointing out the strengths and weaknesses in various theories and existing legal frameworks. For example, in discussing the connections between governance and CSR, one view holds that national governments have moved from only interacting with one another through formal international institutions and laws to increasing reliance via "cross-cutting networks, interactions and coalitions of interests." This view supports the proposition that non-state market demands will drive deliberate and adaptive governmental and non-governmental institutions to embed social and environmental norms in the global marketplace, deriving authority directly from those it purports to regulate. Whereas, another viewpoint suggests that global governance in the 21st century is a disaggregated concept of nation-states and that governmental parts are joined by non-governmental bodies and actors in addressing common areas of governance and regulatory concern. Here, the government takes the leading role in creating a hub where all transnational networks involved may engage in a "kind of disaggregated global democracy based on individual and

group self-governance." Which view is correct? Horrigan leaves it to the reader to decide.

After establishing a basic foundation of knowledge upon which to work, Horrigan lays out some of the current regulatory structures and options, moving towards more practical implications for CSR. Building up to his final argument, Horrigan first posits that the demarcation between business and government has been misplaced, and by focusing on the common points of interest, "a new way to look at the relationship between business and society that does not treat corporate success and social welfare as a zero-sum game" can be developed. He amply supports this contention by providing examples of areas where demarcation would not work; for example, a business that creates a local medical facility in a town or city to stimulate AIDS awareness and precautions interacts not only with government but integrally engages with the "real world" by improving social prosperity and well-being, dovetailing with governance needs, coordinating the fight against mass epidemics, and contributing to a variety of societal goods.

Next, Horrigan builds upon the first argument by integrating legal reform as another much needed and closely related field in this multi-disciplinary approach, and thus lays out a nine-fold governmental model to advancing CSR. He uses the reformation process in several countries as case studies. For example, legislative reform in Australia has demonstrated negligent impact on the content of Australian law so far; however, reform initiatives have served to legitimize CSR as a mainstream concern. Europe, however, has made greater headway in incorporating CSR elements within corporate law. The European Commission communications and corresponding European Parliament resolutions show institutional dialogue grappling with the dilemma of how much incorporation is possible and desirable. The U.K. Companies Act of 2006 is a stakeholder-inclusive approach to "enlightened shareholder value" reflecting the CSR objective in focusing on relevant shareholder and non-shareholder interests as they relate to business activity. From these case studies, Horrigan concludes that governmental and legal reform is indispensible in advancing CSR and he argues for nine major focal points in mapping the government's role: creating initiatives for change, harmonizing and rationalizing laws, implementing international CSR-related obligations, developing and promoting responsi-

ble business practices, implementing policies and reporting, approaching CSR reform on a government-wide perspective, certifying CSR initiatives, prescribing and facilitating regulation, and creating fiscal, regulatory and market incentives for businesses. By adopting such measures, governments can show that they are taking seriously the geopolitical significance of CSR.

In the final section, Horrigan uses England's reform in corporate law as an illustration of how one government has embraced CSR and how it has begun implementing greater regulatory oversight and legal pressure. He delves into the law again through various lenses, analyzing its efficiency and potential challenges. Keeping in mind the global audience, Horrigan also spends a great deal of time comparing U.K., Australian, and U.S. corporate law. He points out similarities and differences, and briefly discusses the advantages and disadvantages that the U.K. laws face in these new contexts. More importantly, he emphasizes the importance of setting consensus on universal concerns about environmental integrity and global welfare, which require the G8 and G20 nation leaders to jointly adopt an agenda of change and commit to CSR reform.

Scholars and regulatory organizations have proposed many options and methods to attempt a solution at the problem. The best solutions, argues Horrigan, are those recognizing and emphasizing the common interest between business and society, providing an enticing pitch for boardrooms to adopt socially beneficial strategies because the business will benefit greatly as well. Horrigan highlights ten basic benefits for businesses subscribing to CSR, including improved corporate ability to adapt to and respond to market changes, improved reputation and talent retention rates, and improved governmental, regulatory, and community relations. One repeating weakness in Horrigan's presentation, however, is the lack of evidence to support many of his claims. For example, from the list of ten benefits of CSR, he claims that "socio-ethical business responsibility and shared societal infrastructure that involves business contributing to the common good . . . should accompany generating high returns to investors." While the statement implies that a direct benefit of contributing to CSR is high returns for investors, Horrigan fails to pre-

sent any empirical evidence and his claim at best reflects a correlative and not a casual relationship.

Ultimately, Horrigan offers a successful survey of CSR development in the leading developed economies of the world. One drawback of the book, though perhaps reflective of the field of study, is a lack of a coherent theme or conclusion for each argument. Horrigan fairly presents the pros and cons to each point of view, yet he generally steers clear of promoting any one specific argument or approach. Also, while the book consistently advocates for CSR, it does not clearly address any of the antagonists' arguments against CSR. While the goal of Horrigan's book may be simply to nudge its reader to action and to spur independent thought, the neutrality leaves much to be desired. The work would be better positioned as a supplementary guide to CSR, or a complementary text in a classroom.

Giving Well: The Ethics of Philanthropy. Edited by Patricia Illingworth, Thomas Pogge & Leif Wenar. New York, New York: Oxford University Press, 2011. Pp. v, 306. $45.00 (hardcover).

REVIEWED BY G. ALEX SINHA

Philanthropy plays an important role in a world marked by sharp economic inequality. *Giving Well: The Ethics of Philanthropy* stands against that background, billing itself as the first step toward launching a new field of inquiry—that named in its subtitle. The book comprises thirteen chapters, covering a variety of topics that fall under the broader heading of the "ethics of philanthropy." All three of the book's editors are philosophers, and each of them contributes a chapter. The authors of the remaining ten chapters represent a range of disciplines; while some are also philosophers, the rest are legal scholars, political and social scientists, and non-profit experts. The result is an interesting and informative collection of papers, but also a somewhat disorganized hodgepodge of offerings that vary widely in approach, readability, subject matter (dominant themes notwithstanding), and quality.

By way of introduction, the editors lay out a list of the most basic ethical questions pertaining to philanthropy: who should donate and in what quantities? To whom should they

donate, for what purposes, and why? How should such money be raised, and how should charitable organizations spend the money that they raise? While most of the chapters attempt to answer these questions, it is striking that not all of them do. Indeed, the relationship between the chapters is not always clear, and while the first half of the book comes together nicely, the second half begins to come apart.

The book begins (quite fittingly) with a chapter by Peter Singer, who is arguably the father of the ethics of philanthropy. In the early 1970s, Singer published "Famine, Affluence and Morality," a paper that has since been canonized in the field of normative ethics as offering a classic and compelling formulation of a general argument for utilitarianism. In that article, Singer argues for utilitarian conclusions based on the seemingly indisputable duty that a passerby would have to save a child drowning in a pond. Singer offers an argument by analogy, suggesting that relatively affluent individuals have a similar duty toward the global poor. Further, as *Giving Well* reveals, Singer's influential paper has also acquired a special status in the ethics of philanthropy: Singer's forty-year-old, drowning-child example pops up at multiple points in the book, serving as a foil for arguments advanced in several of the chapters.

While it is thus natural for the book to start with a contribution by Singer, it is noteworthy that his chapter is not, in fact, a reproduction of "Famine, Affluence and Morality." It may seem redundant to republish an older paper in an attempt to launch a new discipline, but it is disorienting to encounter multiple reactions to Singer's classic article throughout the book, while finding almost no reaction to the actual chapter he offers in this collection. Readers who have had no occasion to read Singer's earlier contribution may find this feature of the book confusing. Nevertheless, it is apropos that Peter Singer uses the first chapter to discuss the relationship between one's wealth and one's obligations to engage in philanthropic activity.

The following two chapters are strong. Chapter Two, by Elizabeth Ashford, builds on Singer's argument from "Famine, Affluence and Morality," arguing for an even stronger duty owed by the affluent toward the global poor on the ground that the former have positively benefitted at the expense of the latter. This is a provocative argument, if not an entirely novel

one, and the book would feel incomplete without it. The third chapter, by editor Thomas Pogge, contains a lucidly argued and quite convincing discussion of how charitable organizations might triage their limited spending. As with the first two chapters, Pogge's contribution feels essential to a volume on the ethics of philanthropy.

But the fourth chapter is disappointing. Its author, Jon Elster, discusses scientific evidence suggesting that individuals perform philanthropy for purely self-interested reasons (the "warm glow" of giving). This too seems like a subject worthy of the book; but while the notion is interesting in theory, the chapter is both dense and needlessly opaque. It is not designed for a lay audience, and it is not especially clear what the author wishes his readers to conclude.

Chapters Five and Six constitute a return to form, echoing the strength of the book's beginning. In the fifth chapter, Roger Riddell canvasses a number of the difficulties facing donor nations, such as ensuring the efficacy of their donations, and making the choice between providing emergency aid and development aid. In the sixth, editor Leif Wenar outlines some of the epistemic and practical challenges posed to the affluent who are in fact committed to philanthropic activity—again, as Ashford does, using Singer's "Affluence, Famine and Morality" as a launching point. Specifically, Wenar argues that Singer's original pond analogy breaks down; Wenar considers, among other things, how difficult it is for individual donors to track the effects of their donations, and he addresses the possibility that, at least in some cases, donations might harm certain recipients rather than benefit them.

Unfortunately, the remaining chapters—with perhaps an exception or two—are more difficult to classify within the editors' purpose, harder to understand, or both. They include Alex de Waal's ethnographic discussion of various African states, punctuated by an orthogonal case study about the Sudan (Chapter Seven); Kenneth Anderson's well written but perhaps peripheral history of the relationship between international NGOs and the United Nations (Chapter Eight); two chapters (Nine, by Rob Reich, and Ten, by Patricia Illingworth) devoted to a discussion of the United States income tax deductions permitted for certain charitable donations—a surprisingly interesting, though technical, topic, and one that probably does not warrant two separate chapters in a general

introduction to the ethics of philanthropy; James Shulman's peculiar guide for those uncommon individuals who wish to establish their own non-governmental, philanthropic organizations (Chapter Eleven); Thomas Dunfee's crucial (if perfunctory) discussion of "corporate philanthropy" (Chapter Twelve); and Devesh Kapur's discussion in Chapter Thirteen of the relationship between elite U.S. universities and developing countries (relationships that often seem to lack any meaningful resemblance to philanthropy).

While the authors of these later chapters seem qualified to offer their respective contributions, and some of the chapters contain truly impressive arguments or information, the chapters themselves appear to nibble around the edges of the core issues raised in the book's introduction, rather than addressing such issues directly. In the midst of this mélange, readers can be forgiven for losing some interest—especially with respect to more technical chapters (like Four and Nine), which are likely to command the attention only of a much narrower audience.

None of this is to say that the problem rests with the diverse backgrounds of the chapters' authors. In principle, soliciting contributions from different disciplines stands to broaden the book's appeal, and is arguably the proper approach to take in attempting to establish a new area of inquiry. The problem, rather, is with the second-half's contributions themselves, and with how they relate to one another. The concept behind the book is extremely compelling, so it is all the more frustrating to witness the project losing focus as the chapters progress.

In sum, *Giving Well: The Ethics of Philanthropy* is a timely foray into an important area. It offers readers valuable information, underscoring the pressing need for philanthropy while clarifying (to some degree) how effective philanthropic efforts are likely to be. For those who are not well versed in the subject, *Giving Well* is also likely to reveal a layer of complexity to the moral questions surrounding philanthropic practices—a particularly welcome and thought-provoking effect of the book. But readers will need to exert extra effort to benefit from all of what the book has to offer: certain chapters are a challenge to read, let alone to comprehend, and the general absence of a manifest narrative linking the chapters strips the book of a desirable cohesion. Indeed, while many could

gain from parts of the book, it is difficult to envision any single reader who would benefit from all of it.

Customary International Law: A New Theory with Practical Applications. By Brian D. Lepard. New York, New York: Cambridge University Press, 2010. Pp. ix, 419. $54.99 (paperback).

REVIEWED BY RÉMI JAFFRÉ

Despite its status as one of the two main sources of international law and the increasing role it is beginning to play in international litigation, customary international law ("CIL") remains a conceptual mystery. Given that it is the result of an informal and decentralized rulemaking process, what is the basis for the obligations it creates? What are the roles of state practice and *opinio juris* in determining the formation of new customary rules? How do state practice and *opinio juris* allow for its evolution? In a global community where democratic political systems are championed, what is the source of its legitimacy? Finally, in light of its "soft, indeterminate character"[8] and the absence of a centralized enforcement mechanism, is it even law at all?

In *Customary International Law: A New Theory with Practical Applications*, Brian Lepard, a professor at the University of Nebraska College of Law, offers a comprehensive rethinking of CIL that purports to answer these questions. His central contention is that *opinio juris* alone is sufficient to create a rule of custom, and that state practice should be relegated to an evidentiary role. In this respect, Lepard departs from such authorities as the International Law Association, which in 2000 reached the opposite conclusion, specifically that *opinio juris* was not necessary for the formation of a customary rule.[9] This disagreement reflects fundamentally differing views of the role of CIL. An emphasis on state practice goes hand in hand with a more conservative approach, requiring an accretion of practice over a period of time before a rule of custom can be recognized. In contrast, a view emphasizing *opinio juris* will likely

8. LOUIS HENKIN, INTERNATIONAL LAW: POLITICS AND VALUES 29 (1995).

9. INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW 30–31 (2000).

be more flexible and open to recognizing changes more quickly. Indeed, whether one accepts Lepard's theory is likely to depend largely on whether one agrees with his belief that CIL should be a "dynamic process" capable of responding rapidly to new issues, and that it can thus be "a tool that states can use to achieve morally praiseworthy ends."

Lepard defines *opinio juris* to mean the general belief of states "that it is desirable now or in the near future to have an authoritative legal principle or rule prescribing, permitting, or prohibiting certain conduct." This definition allows his theory to avoid the "paradox of *opinio juris*" generated by the traditional definition, which is that a rule of custom can only become law if states believe—erroneously—that it is already law. By enlarging *opinio juris* to encompass the belief that a rule should become law in the near future, Lepard does away with the need for states to hold obviously inaccurate beliefs during the law-formation process (the ILA, of course, avoided this problem by not requiring a showing of *opinio juris* in the first place).

Having established this basic foundation, the book then goes on to provide a framework for determining whether a certain rule has entered into CIL and for answering questions such as when persistent objection should be recognized, when treaties and UN General Assembly resolutions should be considered evidence of *opinio juris*, and what norms should be considered *jus cogens* and/or *erga omnes*. Lepard insists that the touchstone for resolving these issues should be the views of the states themselves. He argues that the persistent objector exception, for instance, should not be applicable to norms that states believe are so important that they should bind all states, even objecting ones. He further argues that even where states consider persistent objection to be permissible, their views should regulate the *conditions* of its application (i.e. how strenuous and unambiguous the objection must be to have legal relevance).

Since clear evidence of states' detailed beliefs in this regard is likely to be scant, however, Lepard offers a system for making presumptions about states' beliefs. This system, and not the diminished role of state practice, is the most original aspect of the book. Part of the system draws on game theory. Lepard looks first to the nature of the collective action problem facing states: if it is a "coordination game," a mere conven-

tion will be sufficient to solve the problem, and thus we should presume that states do not think that a legally binding norm would be desirable. In the case of prisoner's dilemmas, though, states have an incentive to defect from the optimal outcome, and thus we should presume that states desire the establishment of binding legal rules, preferably with sanctions regimes.

In keeping with his view of CIL as morally inflected, Lepard also derives similar presumptions from a series of "fundamental ethical principles." His contention is that CIL should be interpreted in light of these principles, which all trace their roots back to a "preeminent ethical principle," "unity in diversity." Because the vision of a global "human family" that nevertheless respects differences of opinion, nationality, ethnicity and so on is enshrined in many international legal instruments (as well, Lepard claims, as in Kant, Mill, and a variety of religious texts), it should provide a standpoint from which to analyze CIL. From "unity in diversity," Lepard derives a series of other principles, which he classifies, in ascending order of importance, as fundamental, compelling, or essential (amusingly, this leads him to qualify the right to periodic holidays with pay as "merely fundamental"). To the extent that a norm is considered by states to further an essential ethical principle, Lepard asserts, we should presume that states desire it to become a binding rule of CIL, that the rule does not allow for persistent objection, and that the rule requires less in the way of confirmatory state practice. This factor is also important in determining whether a rule is *jus cogens* or *erga omnes*.

Lepard's theory has an undeniable elegance to it. The view of CIL that it reflects is clear and untroubled by the conceptual messiness that often bedevils accounts of customary law. If one accepts its premises, it also presents a clear method for determining the content of CIL. Furthermore, Lepard argues that because his theory's ethical foundations are explicit, he is more honest than the International Court of Justice, which has often "resorted to blunt declarations that a particular norm is or is not a norm of customary international law." Finally, Lepard's exposition of his theory and its application to the practical problems he sets out to resolve are a model of clarity and concision—although the fact that the same factors recur repeatedly to help solve various practical problems makes a cover-to-cover reading rather arduous.

This concision, however, occasionally works to the book's detriment. The chapter that deals with ethical principles, in particular, dispatches in less than twenty pages the justification for the preeminent status of "unity in diversity" and the derivation from it of a host of associated ethical principles. Thus we are told that such principles as human dignity, limited state sovereignty, the right to freedom of moral choice, open-minded consultation, and the duty to honor treaties are all logically related to "unity in diversity." As a result, some of the subsequent analysis feels a bit tautologous. In one of his case study chapters, for example, Lepard finds that the right to change one's religion should be a binding norm of CIL (and even a *jus cogens* norm), partly because it furthers the "essential ethical principle" of freedom of moral choice. This is important because, despite Lepard's protestations to the effect that the actual views of states are central to his theory, his framework of presumptions ends up determining his conclusions to a significant extent. The principle of "open-minded consultation" is also found to require that the views of democratic states be given greater weight in the formation of CIL. Given how controversial these propositions are, Lepard should have spent more time explicating the link between these subsidiary principles and "unity in diversity."

Moreover, Lepard's argument for considering "unity in diversity" to be the central ethical principle of CIL is not entirely satisfactory either. The argument relies largely on the fact that provisions reflecting the principle can be found in such instruments as the UN Charter, the Universal Declaration on Human Rights, the 2000 Millenium Declaration and the 2005 World Summit Outcome Resolution. Lepard takes this as evidence that states have endorsed the principle. But, as Lepard himself recognizes of voting in General Assembly resolutions, states may well have believed that supporting the inclusion of language to the effect that UN members will "live together in peace with one another as good neighbours" was politically and legally cost-free. It is unrealistic to think that states, by endorsing such broad and high-flown language, expected it to bind them legally, whether directly or indirectly.

There is a more basic problem, however, with Lepard's ethical framework. It is true that many international legal instruments refer both to a global community and also affirm individual states' sovereignty and people's right to self-deter-

mination. But considering both of these tenets under the same umbrella obscures the fact that "unity in diversity" is fundamentally an equivocal principle, and that the recognition both of universal rights and of state autonomy is a source of considerable tension. Lepard often reconciles the two by determining that a norm provides only a persuasive, rather than binding, legal obligation, which means that states are obligated to give the norm "great weight" in their decision-making, but the norm does not have to determine their behavior completely. This allows for more room for universal human rights in CIL without intruding too much upon state sovereignty. Bringing such "softer" obligations into CIL, however, is bound to make its application more unpredictable, leaving courts with leeway to give these obligations greater or lesser weight as they see fit. It is hardly an accident that an ambivalent central principle should have generated hazy legal rules.

None of the foregoing reservations are meant to detract from the fact that this book presents an engaging, original and appealingly coherent contribution to the theory of CIL. Whatever one thinks about the particular framework of ethical principles adopted by Lepard, he sets forth a rigorous and honest way for bodies interpreting CIL to use ethical principles in general. The book's use of game theory is also novel and deserving of attention. Despite its shortcomings, then, and though it is more likely to appeal to readers who share Lepard's outlook than to convince legal "positivists" to change sides, *Customary International Law* is a valuable piece of scholarship worth reading for anyone interested in the conceptual problems raised by CIL.

Corruption and Democracy in Brazil: The Struggle For Accountability. Edited By Timothy J. Power and Matthew M. Taylor. . Notre Dame, Indiana: The University of Notre Dame, 2011. Pp. vii, 315. $38.00 (paperback).

Reviewed By Stephanie Rohlfs

Corruption and Democracy in Brazil: The Struggle For Accountability presents a series of essays addressing the pervasive problem of corruption that afflicts modern Brazil. Numerous scholars have previously explained the pervasive corruption in Brazil as the result of specific cultural practices, for example,

the *jeitinho,* or "game" of circumventing rules in order to accomplish goals or achieve wealth. Confident that the explanation for Brazil's corruption problem is rooted in something other than culture, the volume's editors, Matthew M. Taylor and Timothy Power, set out to examine the institutional mechanisms responsible for this problem. The editors argue that though cultural factors are a significant contributor to the problem of corruption in Brazil, they don't "tell the whole story" insofar as they cannot explain why this problem is so widespread and enduring. The authors chose to conduct a single-country study of corruption, with a view to furnishing readers withinsights into causes for corruption that go beyond culture, providing a more comprehensive view of this pervasive social problem. A single-country study, the editors argue, will mean that culture will be a "constant" and the structural elements that contribute to the problem can be brought to light. Over eight chapters, the book's editors and contributing authors examine the problem of corruption and the struggle for accountability from a number of different angles, providing the reader with an in-depth view of the multiple ways in which governmental institutions and groups in civil society function in ways that breed or mitigate corruption. This review will provide a discussion of some particularly strong chapters in the book, which are representative of the tome's overarching goal of explaining corruption in Brazil by examining institutions both at the broader structural level as well as at the level of the agency.

The first three chapters following the introduction focus on the interplay between government institutions, the electorate, and public opinion in generating and policing corruption in modern Brazil. In an insightful analysis of presidential coalition management, Carlos Perreira, Timothy J. Power, and Eric D. Raile discuss the structural aspects of Brazilian politics, in particular presidentialism, federalism and proportional representation in the national legislature, which make the country especially prone to corrupt deal-making between the executive and the legislature. These authors illuminate the complex web of bargains that must be made by incumbent presidents for the purposes of implementing policy as well as how these circumstances are exacerbated when presidents are faced with the challenge of appeasing both sides of a divided political party for the purposes of retaining legislative support.

This chapter explores the ways in which Brazil's governmental structure can, quite often, lead to the quick exhaustion of presidential bargaining resources, which results in recourse to illicit payments and promises such as those which were made in the *mensalão* scandal that rocked Brazil in 2005. This insightful discussion of the ways in which Brazilian institutions combine to make corruption all but inevitable provides a convincing opening argument for the editors' case that it is institutional design, and not the personal proclivities of political actors, that have so firmly entrenched the culture of corruption in Brazil.

Following the discussion of the structural elements of the Brazilian government that make the state particularly prone to corrupt behaviors is a chapter on corruption and voting by Luis Rennó which addresses the important question of whether Lula's reelection in 2006 (following the *mensalão* scandal) suggests that voters are complicit in corrupt practices by failing to "punish" corrupt politicians by voting them out of office. Rennó's approach suggests that the outcome of the election gives a false impression that the scandal was an example of corruption with impunity, as Lula won by a wide margin. However, Rennó examines data from both the primary election and the presidential contest, revealing that Lula was "punished" in party elections preceding the presidential election, as many voters chose to support Lula's competition within the party. Rennó's contribution to this volume suggests that elections remain an important source for ensuring accountability, but an imperfect instrument for control. While Rennó's discussion makes a convincing case for how Lula came to win the presidency even after being disgraced in a corruption scandal, it may have benefited from further elucidation on the manner in which voting serves to control corruption in light of Lula's eventual triumph.

Following this discussion of institutional causes of and controls for corruption, the book shifts to a discussion of the many non-electoral aspects of control and accountability.The second half of the book provides valuable insights into the everyday workings of a number of different agencies and the roles they play in policing and punishing corruption in Brazil, as well as the challenges they face in accomplishing this task. An illuminating chapter on the Brazilian news media discusses the proliferation of exposés detailing the activities of corrupt gov-

ernment officials in the recent past and suggests that the media plays an important "watchdog" role in stemming corruption in Brazil. While the exponential increase of these exposés has had the result of turning allegations of corruption into spectacles that sometimes unnecessarily rock Brazil's political boat, author Mauro M. Porto notes that increased interest in corruption on the part of the media and the public means a significant increase in the quality of political accountability in Brazil; the media drives anticorruption agencies to prosecute dishonest public officials and the prospect of national embarrassment frightens many government employees into staying on the straight and narrow. This chapter effectively explores the changing role of the news media in Brazil, suggesting that it may serve as an increasingly useful tool for combating corruption in the future.

Later chapters explore the extent to which institutions in Brazil are (sometimes inadvertently) complicit in political corruption even as they try to combat it. These "thick descriptions" of the everyday operations of different agencies demonstrate the extent to which corruption is instituitonally entrenched in Brazil. Chapter Six, which examines the government auditing agency responsible for monitoring for corruption, discusses the extent to which this agency is effective, and makes some suggestions for how its operations may be improved to make the agency more operational. Chapter Seven on the federal judiciary and electoral courts similarly reveals another institution that has truly been flagging in Brazil's fight against corruption. The author suggests that Brazilian courts, being under-resourced and bureaucratically entangled, are difficult to enlist as allies in the fight to ensure accountability, and this ineffectiveness in turn makes it more difficult to effectively fight corruption in the other ministries. This latter half of the book, which covers the federal police and criminal justice systems in addition to the aforementioned bodies, presents variations on the same theme: while Brazilian institutions that are intended to battle corruption have been improving in recent years, an era in which these bodies are genuinely effective is but a distant wish, not the least because those who have the power to change these institutions are often benefiting substantially from their ineffectiveness.

In sum, *Corruption and Democracy in Brazil* is an important contribution to Political Science literature on the institutional

problems plaguing developing states in the modern world as they attempt to do away with the disadvantageous elements of their political systems. Given the volume's desire to "hold culture constant," the book may have benefited from a historical analysis of corruption in Brazil, as a view of changing corruption levels over time would have helped to shore upt the authors' institutionalist argument. The first part of the book, which discusses the institutional causes of corruption and suggests measures that may more effectively reduce corruption is an appealing argument in that it moves away from the standard explanations, which fall back on culture as an explanatory factor, suggesting there are ways by which this problem may be more effectively addressed. The authors identify numerous places in the Brazilian judicial process and in judicial agencies where corruption might be significantly reduced by increased transparency. In addition, the thick descriptions of Brazilian institutions in the second half of the book provide a useful insight into the everyday workings of the Brazilian state, and will provide useful detail that will no doubt benefit any student of the region. I am inclined to agree with the editors' contention that similar in-depth studies of other states that battle chronic corruption would serve to confirm many of the hypotheses set forth in this volume and contribute to an understanding of institutional design that avoids these pitfalls.

The Judge as Political Theorist: Contemporary Constitutional Review. By David Robertson. Princeton, New Jersey: Princeton University Press, 2010. Pp. ix, 420. $35.00 (paperback).

Reviewed By Matt Hartz

When a judicial branch of government interprets its constitution, it exercises immense power, as it is able to define the limits of the powers of every branch of government, including its own. In addition to setting the structural boundaries of government, constitutional interpretation decisions protect and balance rights held by the nation's populace. Because of the extraordinary importance and wide-reaching impact of constitutional decisions, many nations have established special courts that solely decide cases involving constitutional interpretation. These "Kelsen courts," named for the man who formulated the concept behind them, may vary widely in the

means by which they interpret their respective constitutions, but almost all have looked to the reasoning of constitutional decisions of foreign courts as a guide for their own constitutional interpretations.

In *The Judge as Political Theorist: Contemporary Constitutional Review*, David Robertson examines these similarities and differences between various courts' resolutions of core problems that are inherent in decisions requiring constitutional interpretation. Robertson argues that judges in these constitutional decisions are in fact acting as a fourth branch of government, and that they decide such cases by utilizing applied political theory as opposed to traditional legal analysis. To support his argument, Robertson analyzes the decisions of the constitutional courts of Germany, Eastern Europe (as represented by Hungary, Poland, and the Czech Republic), France, Canada, and South Africa. In his comparative study of these courts, he seizes on multiple issues that each of the courts have had to deal with, including: whether to allow judicial interference where there is no state action ("horizontal enforcement"), how to maintain separation of powers limits, and how courts assess the basic values of human dignity and equality under the law. Robertson argues, however, that all of these issues are merely proxies for the ultimate job of the constitutional court—translating and applying to society as a whole the values that are enshrined in a nation's constitution. This mission of the courts can best be seen through Robertson's examination of how and where courts place limits on government intrusions on individual rights.

The book's structure succeeds in allowing for concrete divisions of the regions which the author wants to discuss, and includes a summary chapter that focuses on the author's core themes and arguments without muddling the issues with jurisdiction specific explanations. Instead, by focusing on a single jurisdiction in each chapter, the author is able to build a set of issues addressed by all of the constitutional courts, specifically addressing some early which are perhaps uniquely addressed by a single country's court due to its national history. Although this approach creates a rather schizophrenic treatment of the problems facing all the constitutional courts throughout the majority of the book, it generally works as a means of setting up the in-depth analysis contained in the final two chapters.

The author admits at the outset that the chapters exploring the jurisprudence of the constitutional courts of the different nations are highly descriptive in nature. These descriptions narrow in on the unique commitments and histories of each jurisdiction. For example, Robertson argues that the commitment to the rule of law that is especially emphasized in the Eastern European nations makes sense in light of their commitment to move away from their past of corruption and power driven rule under the Soviet Union. Similarly, the emphasis in South Africa's constitution on equality and dignity, while notably shared by many other jurisdictions examined in the book, is particularly strong due to its creation out of the regrettable history of apartheid. This emphasis on the historical context in which these constitutions and their courts arose is remarkably absent from the comparative analysis chapter.

In fact, the book seems to struggle with the importance of history in the constitutional jurisprudence of the examined nations. While each chapter presents a rich history of the origin of the analyzed constitution and its respective values, there is considerable tension in Robertson's argument as to the relevance of history to modern constitutional adjudication. Some chapter subsections, for example the Eastern European chapter's sections on lustration, give intense focus on how nations deal with the problem of having to recognize and accept some inherited features of their previous legal regimes. These subsections acknowledge that states must place these inherited features in the context of a country needing to forge new doctrine and legal structures to avoid repeating old mistakes. In slight opposition to this observance that the difficulties and mistakes in a nation's history, existing prior to its adoption of a new constitution, are never fully removed from modern designs, the final page of the book emphasizes the author's view that nations wishing to fully transform and break from their past are the most likely locales for finding constitutional judges acting as applied political theorists. This assertion certainly explains the nations selected by the author for case studies; however, it leaves the reader with a conflicted portrayal of how important historical context and traditions are to modern constitutional jurisprudence in courts in transformative nations.

Although Robertson makes some comparisons throughout the book on the arguments made by the various courts,

including some comparisons to the U.S. Supreme Court, the majority of Robertson's comparative inquiries are saved for the penultimate chapter of the book. Instead of acting as compartmentalized instances of comparing constitutional analysis between different nations, the five chapters investigating the specifics of the jurisdictions of the case studies place each of the jurisdictions along a theoretical spectrum. This spectrum is perhaps most interesting when viewed in terms of how different constitutional courts address the problem of balancing constitutionally protected rights with necessary government policy intrusions that may infringe on those rights.

It is with this spectrum that Robertson starts and organizes his comparative analysis chapter, and it serves as a great example of the larger points that he is arguing in the book. Robertson defines the spectrum by comparing the manner in which states justify government intrusions to constitutional rights. On one end of Robertson's spectrum lies the United States, with its allegedly steadfast refusal to "treat rights as less than absolute." Instead of openly balancing rights with competing policy interests, the U.S. Supreme Court is said to develop a set of doctrinal tests that narrowly construe any challenged right so as to avoid conflict by definition with any apparently conflicting governmental policies that are nonetheless politically desirable. In contrast, the other end of the spectrum is said to contain nations with constitutional courts that limit rights explicitly, utilizing a type of proportionality test to justify the needs of the state when infringing on rights. This reliance on proportionality measurements is made easier in the context of foreign nations that of the United States due to a plethora of foreign constitutions which contain clauses that explicitly provide for limitations on specific, or all, rights therein provided. This latter end of the spectrum is composed of states such as France and Germany, which rely heavily on notions of proportionality to justify explicit limitations of rights so long as some baseline level of the right in question is not invaded. Between the United States and the France/Germany poles lay South Africa and Canada, which both have constitutional provisions similar to Germany's limitations clause allowing for proportional restriction of rights outside of its "essential content."

Robertson's spectrum needs to be qualified, though, because there are certainly instances in which the U.S. Supreme

Court has upheld a government intrusion on constitutionally protected rights as justified due to its proportionality to a legitimate state interest. Similarly, the other end of the spectrum's maintenance of prohibitions on laws that conflict with something like the "essence" of a protected right demonstrates that such states are not willing to fully relinquish an idealized concept of uninfringeable rights. For the most part, however, Robertson's spectrum makes sense as a framework for conceptualizing how different states address the need to justify rights limitations. It intuitively focuses in on the manner in which courts apply their respective constitutional guidelines to common problems as a guide to objectively understanding constitutional adjudication.

Robertson emphasizes that rights limitation cases are some of the best examples for demonstrating how judges are political theorists as they necessarily require courts to develop methods of analysis that translate vague constitutional values into a working definition of the bounds of government power and democratically ensured popular protections. In this sense, the rights limitation cases provide a limited rebuke to the counter-majoritarian criticism of judiciaries, for when courts uphold a legislative or executive infringement on ensured rights as within the scope of the constitution, they reconcile popular sovereignty at both the constitutional and political levels. Robertson recognizes this feature as just one of the benefits of recognizing constitutional adjudications as instances of political theory implementation.

In summary, *The Judge as Political Theorist* contains an interesting and well-presented argument that re-imagines the job of judges who render decisions on constitutional matters. While at times David Robertson may overstate his claims, generally his conclusions make intuitive sense and are supported by tangible evidence. Furthermore, at a systematic level, Robertson's portrayal of various constitutional courts choosing alternative approaches to solve a shared set of general political problems fits nicely with theories trying to explain the unique position of the court as a non-political actor that must make inherently political decisions that define the role of government in society. The ambit of the project was admittedly large, taking up five individual case studies in addition to a significant amount of international comparison; but, it works well to provide the reader with a substantial picture of how different

constitutional courts, with strongly differing approaches to solving many core constitutional problems, nonetheless arrive at a rather similar set of results. Robertson seems to present this shared set of results embracing political necessity in constitutional adjudication as validation of his view of judges as applied political theorists, and his argument is hard to refute.

"If You Leave Us Here, We Will Die": How Genocide Was Stopped in East Timor. By Geoffrey Robinson. Princeton, New Jersey: Princeton University Press, 2010. Pp. xi, 344. $45.00 (hardcover).

Reviewed by Relic Sun

East Timor is not a place that we often see or hear about in Western media. During the East Timorese genocide of 1975-79, however, at least a 100,000 East Timorese perished as a result of the Indonesian occupation, which culminated in the massacre of at least 1,500 civilians during the 1999 United Nations-supervised vote for the nation's independence. Among the UN Mission in East Timor ("UNAMET") staff tasked with this supervision, Geoffrey Robinson is uniquely positioned to discuss how genocide—defined by the UN Genocide Convention of 1948—was prevented in the face of rapid descent into mass violence following East Timor's vote for independence. In *"If You Leave Us Here, We Will Die": How Genocide Was Stopped in East Timor*, he offers a new and nuanced perspective on the cultural, historical, political, and individual factors leading up to the violence of 1999, and argues that the effective prevention of genocide was the result of a rare confluence of individual choices, political pressures, and historical changes in views of humanitarian intervention. The fact that Robinson believes intervention was made possible by a "unique and unpredictable concatenation" of historical events may not be encouraging to those who hope to derive a formula for genocide prevention from the case of East Timor. At the end of the day, however, Robinson's account of East Timor in 1999 is a story of hope: it demonstrates that that individuals can make history through the accumulation of their choices large and small, which can lead to the prevention of genocide.

The book begins with a strictly historical account of the legacies of colonialism in East Timor, leading up to the vote for independence in 1999. As Robinson reveals the details of the violence during and following the vote, the story launches into a harrowing narrative, interlaced with vivid personal accounts, of the mass violence and eventual prevention of a second genocide. Because Robinson witnessed first-hand the violence of 1999, some may consider his account of the 1999 events to be biased. Robinson's position as both a historian and a witness, however, gives him the advantage of presenting a fuller view, including his perspective on the ground and the real human interactions of kindness, fear, courage, and resolve among the UN staff and locals, in addition to a scholarly historical account. This fuller perspective is particularly valuable to the legal world, in which textbooks on international law are often a compilation of legal cases, lacking significant placement of the cases in their historical, international, and political context, much less a human context. This personal, human aspect is perhaps one the most notable contributions of Robinson's book to the historical documentation of the story of East Timor in Western texts.

Robinson first presents a new and nuanced perspective on the causes of the frenzied violence that took place in 1999. He argues that the violence in 1999 was not a result of spontaneous uprising or of the culture and traditions of the East Timorese, as Indonesian authorities claimed. Instead, it was the culmination of several factors. First, Portuguese colonial legacies and the Indonesian occupation created political tensions in East Timor causing internal factions within the county. Second, outside powers such as Portugal and Indonesia, had an existing history of using violence within East Timor to achieve their own strategic goals. Third, the Indonesian army had instilled in its military and militias an institutional culture of terror. Finally, the complicity of powerful countries, such as the United States, during the occupation allowed Indonesia's brutality in East Timor to persist. Robinson's ability to bring to light the influences of foreign powers of East Timor presents a safe, middle-ground explanation of the events of 1999: he factors in many historical and political variables, compared to the more polarized views that the violence was a result of solely East Timorese culture. Robinson's argument may be convincing to those who believe that mass violence does not

happen due to one particular culprit. Those who would prefer a cleaner explanation, however, may find Robinson's argument to be too safe, distributing the causes among so many factors as to render it difficult to draw a concrete general conclusion on who or what was to blame. Robinson seems precisely to be making the argument that there is not one particular culprit, but many—mainly the outside powerful states. To that end, Robinson's argument seems to place East Timor in a largely victimized position, lacking the power to change the course of its own history. The reader is left wondering what Robinson's view is on to what degree East Timor itself should be responsible for the violence that occured in 1999.

Robinson's argument that the rare success of genocide prevention in 1999 was the result of the confluence of several unusual and even unpredictable factors provides, again, a nuanced view that is more holistic than one simply attributing the success to a single factor, such as foreign intervention. He skillfully breaks down the bits and pieces of individual, organizational, and political acts that added up to a coordinated international effort to intervene. First, the outsize presence of media and UN personnel on the ground brought the violence under an international spotlight. Second, the impressive existing network of NGOs with good access to national and international decision makers placed effective pressures on powerful states to act. Third, there was a rare climate of openness to humanitarian intervention at the time, following humanitarian intervention in Kosovo in the late 90s. Fourth, there were the personal commitments of leading figures in both the Catholic church and the UN to reach a peaceful outcome. Fifth, there was the very recent memory of the costs of delayed intervention in Rwanda and Srebrenica. Sixth, the extraordinary courage of the East Timorese moved others to do everything in their power to stop the violence. Finally, Robinson attributes the success of international intervention to the pro-independence resistance forces' restrain from retaliating through violence, which made apparent that the violence was one-sided, and to the decision by a group of UN staff to remain in the country until there was finally international intervention. Robinson sheds light on the complexity of the situation leading to the prevention of genocide in a manner that is digestible even for an average reader who may not be an expert in genocide or the history of East Timor. One cannot help but

wonder how probable (or improbable) such rare and varied factors will again intersect in a timely fashion to prevent future cases of genocide.

Ultimately, Robinson's account of East Timor is a story of inspiration. He inspires the reader more so than a historical account by an outside Western historian, because he is a witness and a survivor of the violence in 1999. Robinson illustrates East Timor's story on a human level, providing a relatable human aspect to the events occurring on the ground. This perspective would have been difficult for an outsider to capture given the removal of foreign journalists from East Timor as the election progressed. Because Robinson tells a firsthand account of the impact that the individual decisions made by his colleagues and acquaintances had on the ultimate intervention, Robinson's book is a testament to the power of individual choice.

A poignant example of Robinson's beautiful articulation of the power of humanity and individual choice is during Robinson's detailing of the internal turmoil experienced by UNAMET staff and local community figures in deciding whether or not to evacuate the international UNAMET staff. In a time of escalated violence—with the militias attacking even churches and the offices of Médecins Sans Frontières and the Red Cross—Robinson and fellow UNAMET staff had to decide either to follow UN protocol and U.S. wishes to evacuate only international staff and leaving the East Timorese in their darkest hour, or stay and be the human shield against the imminent attack on the 1,500 East Timorese refugees seeking shelter in the UN complex. Robinson not only provides a factual account of UNAMET staff and leaders' resolve in incessantly pushing the UN headquarters towards not abandoning the refugees but also illustrates the urgency, despair, and eventual overwhelming sense of relief and joy that accompanied the final decision for the international staff to stay. Robinson's personal account makes his book accessible and engaging not only for historians and those who study genocide or East Timor but also for a leisure reader.

For those in the study of legal reform, Robinson's detailing of how justice was—or was not—obtained through criminal tribunals offers constructive insight on the suitability of different legal fora for post-mass violence prosecutions in impoverished states. Robinson's discussion of East Timor's local

proceedings that are community-oriented, culturally fitting, and emphasizing reconciliation elucidates a valuable alternate means to addressing crimes committed by lower level militiamen in countries in which reconciliation may be preferable to incarceration. The local proceedings, Robinson argues, may be a positive alternative to having all crimes tried by a judiciary lacking the resources to try all the crimes that occurred. Lessons from similar situations such as in Rwanda and Cambodia lend support to Robinson's analysis. Often, international criminal tribunals can be extremely costly or incapable of handling a large caseload, especially when a war-torn country is in dire need for rebuilding, feeding the hungry, and jump-starting the economy.

Robinson argues that while reconciliation and peace are desirable, justice cannot be obtained when the ultimate perpetrators of egregious crimes are not held accountable for their actions. Although his reasons rest on the idea of justice and the injustice that victims feel from crimes going unpunished, legal considerations support his position as well. First, allowing masterminds of genocide and crimes against humanity to commit these crimes with impunity is clearly against any sense of justice in any legal system, whether one is a supporter of retribution, rehabilitation, deterrence, or any other theory of criminal law. Second, allowing criminals to go unpunished may send a dangerous signal that the international criminal justice system is purely political and that if perpetrators of such crimes can garner the support of powerful states, they will not be subject to international criminal law. Third, the value in setting an official tribunal, with the power to prescribe and enforce, not only provides the teeth necessary to ensure that perpetrators are brought to justice, but also officially documents the events and crimes that occurred. Robinson provides a grim view on the lack of will among powerful states such as the United States to support a criminal tribunal to try the crimes committed in 1999 or the late 1970's. He leaves the international community to contemplate what kind of closure, if any at all, the international community is willing to provide to the people of East Timor.

While law students often learn cases divorced from their historical context, Robinson's story of East Timor illustrates the importance of taking into account the social, cultural, and larger historical backdrop in order to understand the condi-

tions in which international law may be successfully employed. His narrative of the violence is also a reminder that, while those studying the law may not always be able to put a face on the parties of a case, the tragedies involved are real. They afflicted, and often continue to afflict, the victims of the crimes. Robinson places not one but many faces on the story of violence in East Timor in 1999. We are left wondering whether East Timor's story will ever be replicated in terms of a successful humanitarian intervention. Robinson does not offer a clear direction for what the future holds in this regard. Instead, he leaves the reader to contemplate the significance of one's own choices in contributing to larger historical events such as genocide—or its prevention.