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Human Rights in Theory and Practice: A Review of *On Human Rights*

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Abstract

One of the most important issues facing the international human rights movement is the claim that human rights values are universal and not culturally specific, and thus can be used to understand, evaluate, and influence global actors. This claim has obvious political and philosophical dimensions. That the concept of international human rights is being taken seriously by both governmental and nongovernmental actors is a sign of the importance of human rights today. The number of countries ratifying the basic international human rights treaties has reached an all-time high. Nevertheless, current events are drawing into question the universality and efficacy of the human rights regime. These events include women's rights violations and genocide in Bosnia-Herzegovina, genocide in Rwanda, violation of the humanitarian laws of war in Chechnya, and the increased use of the death penalty in the United States. It is a tribute to the resiliency and appeal of the human rights idea that efforts to address these situations have begun to attract some of the most thoughtful advocates and philosophers of the twentieth century. *On Human Rights* is a collection of essays that addresses both the philosophical and political dimensions of the human rights debate, and provides useful guidelines for further advances in international human rights theory and practice. The seven essays in the collection range from philosophical inquiries concerning the source of international human rights norms to powerful critiques of our current understanding of the content of these norms and suggestions about how to create, support, and sustain an international human rights culture. The essays were presented over the course of a year at Oxford University, England, as part of an annual series of lectures sponsored by Amnesty International. It appears that the only thematic demand made of contributors was that they address a subject related to human rights.

BOOK REVIEWS

HUMAN RIGHTS IN THEORY AND PRACTICE: A REVIEW OF *ON HUMAN RIGHTS*. Edited by Stephen Shute & Susan Hurley. BasicBooks, 1993, 262 pp. ISBN 0-465-05223-1.

*Reviewed by Ronald C. Slye**

The end of the Cold War and the resulting search for new paradigms with which to understand the world presents the international human rights movement with both an opportunity and a challenge. The opportunity is created by the demise of the global bipolar world view that manipulated and distorted many human rights concerns. The corresponding challenge is the creation of a new world order in which human rights are respected by all societies.

One of the most important issues facing the international human rights movement is the claim that human rights values are universal and not culturally specific, and thus can be used to understand, evaluate, and influence global actors. This claim has obvious political and philosophical dimensions. That the concept of international human rights is being taken seriously by both governmental and nongovernmental actors is a sign of the importance of human rights today. The number of countries ratifying the basic international human rights treaties has reached an all-time high.¹ Nevertheless, current events are draw-

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1. The two major international human rights treaties are the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR], which had been ratified by 125 states as of January 1, 1994, and the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICESCR], which had been ratified by 127 states as of January 1, 1994. These two covenants, along with the Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, at 71, U.N. Doc. A/810 (1948), make up what is called the International Bill of Rights. The increased adherence to international human rights norms is best illustrated by the rapid acceptance of the Convention on the Rights of the Child, Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 1, U.N. Doc. A/44/736 (1989), 28 I.L.M. 1448 (1989), which had been ratified by 152 countries as of January 1, 1994.

ing into question the universality and efficacy of the human rights regime. These events include women's rights violations and genocide in Bosnia-Herzegovina,² genocide in Rwanda,³ violation of the humanitarian laws of war in Chechnya,⁴ and the increased use of the death penalty in the United States.⁵ It is a tribute to the resiliency and appeal of the human rights idea that efforts to address these situations have begun to attract some of the most thoughtful advocates and philosophers of the twentieth century. *On Human Rights*⁶ is a collection of essays that addresses both the philosophical and political dimensions of the human rights debate, and provides useful guidelines for further advances in international human rights theory and practice.

The seven essays in the collection range from philosophical inquiries concerning the source of international human rights norms to powerful critiques of our current understanding of the content of these norms and suggestions about how to create, support, and sustain an international human rights culture. The essays were presented over the course of a year at Oxford University, England, as part of an annual series of lectures sponsored by Amnesty International. It appears that the only thematic demand made of contributors was that they address a subject related to human rights.

It is dangerous to attempt to identify common themes in a collection of essays conceived and written independently of each other. Nevertheless, one can recognize common basic questions and concerns in a number of the essays. For example, the contributions by Steven Lukes, John Rawls, Richard Rorty, and Jean-Francois Lyotard all seek to identify a common set of values or rights that constitute a universal human rights minimum because they transcend, or have the capacity to transcend, any par-

2. See Richard Johnson, *Some Call it Genocide; but Not Those Who Can Make a Difference*, WASH. POST, Feb. 13, 1994, at C7 (discussing U.S. failure to recognize Serb campaign of mass murder against Bosnian Muslims as genocide).

3. See *U.N. to Investigate Killings in Rwanda*, L.A. TIMES, July 2, 1994, at 22 (reporting U.N. envoy's assessment that tribal massacres in Rwanda were largest in modern African history and were planned and systematic).

4. See Carey Goldberg, *Chechen War Raises Fear of New Instability*, L.A. TIMES, Dec. 24, 1994, at 1 (reporting that Russia's conduct in suppressing Chechnya's bid for independence showed "fundamental lack of respect for human rights and humanitarian law").

5. See *Cranking Up the Killing Machine*, WASH. POST, Feb. 26, 1995, at C1 (reporting that New York has joined "national rush" to embrace death penalty).

6. ON HUMAN RIGHTS (Stephen Shute & Susan Hurley eds., 1993).

ticular society. Lukes and Rawls explicitly answer the question of what rights or social structures are needed to create a universal set of human rights norms. Rather than identify the substantive content of a universal conception of human rights, Rorty and Lyotard identify strategies for creating such a universal conception through an inquiry into the role of "the other" in perpetuating human rights violations.

Rorty and Catharine MacKinnon's essays both offer critiques of the current international human rights regime. Rorty criticizes the philosophical inquiry that underlies much of the discussion concerning the content of international human rights norms, and offers an alternative strategy for creating those norms. MacKinnon challenges basic assumptions underlying the international human rights regime and almost all, if not all, municipal legal regimes. Agnes Heller and Jon Elster address the question of how to instill a respect for human rights in Eastern European societies emerging from dictatorial governmental regimes.

In his essay, Lukes seeks to identify a common set of rights that transcend contemporary societies, and thus, make up a universally recognized basic human rights minimum. He correctly points out that there is near-universal consensus among states today that human rights, however defined, must be defended, even though most states violate what they themselves classify as basic human rights norms.⁷ Lukes proposes a thought experiment wherein he proposes five different ideal-type societies to determine what it means to take the concept of human rights seriously. Two of these societies take human rights seriously,⁸ three do not.⁹ He assumes that there is a set of specific human rights upon which all societies can agree. He concludes that, to

7. Steven Lukes, *Five Fables About Human Rights*, in *ON HUMAN RIGHTS* 19, 20 (Stephen Shute & Susan Hurley eds., 1993). Lukes is correct in stating that the commission of human rights violations in virtually every state does not mean that there is no consensus on the concept of human rights. Although torture is actively practiced in many states, no state claims to have a right to torture. Thus, there is universal consensus on the norm that prohibits torture, even if enforcement of that norm is clearly deficient. Lukes' point is that there is a universal consensus that something called human rights should be defended.

8. *Id.* at 31-40. The two states where human rights are taken seriously are *Libertaria*, a society run completely on market principles, and *Egalitaria*, a society where all people enjoy equal status and equal rights. *Id.*

9. *Id.* at 21-31. In *Utilitaria*, the maximization of the utility of everyone is the basic principle. *Id.* at 21-23. In *Communitaria*, individual identities are submerged in com-

have the best prospect of securing universal agreement, this set of basic human rights should be relatively limited and reasonably abstract.¹⁰

The rights Lukes specifies are basic civil and political rights, the rule of law, freedom of expression and association, equality of opportunity, and a basic level of material well-being.¹¹ It is unclear from Lukes' discussion how or why he concludes that these particular rights have the best prospect of achieving universal consensus. The rights identified are included in the so-called International Bill of Rights, however, and this is accepted by most societies today.¹² Nevertheless, Lukes admits that a universal consensus on these abstract rights does not, by any means, imply a consensus on how to translate them into concrete reality.¹³

Elaborating upon the content and definition of these abstract rights is one of the major challenges confronting the international human rights movement today. The caning of Michael Fay in Singapore illustrates this nicely.¹⁴ In that case, the United States took the position that caning is cruel, inhuman, and degrading treatment or punishment.¹⁵ Although such treatment is prohibited by numerous international treaties, including the International Covenant on Civil and Political Rights,¹⁶ Singapore obviously took the opposite position.¹⁷

munal identities. *Id.* at 23-25. Finally, *Proletaria* is the fulfillment of the communist ideal of a global society without a state. *Id.* at 26-28.

10. *Id.* at 38.

11. *Id.*

12. See *supra* note 1 (identifying international agreements that, together, constitute International Bill of Rights).

13. Lukes, *supra* note 7, at 38.

14. See Martin Fletcher, *Teen Asks for Mercy to Stop Caning*, S.F. EXAMINER, Apr. 20, 1994, at A14 (reporting that U.S. teenager Michael Fay faced flogging in Singapore as punishment for vandalism).

15. See *id.* (reporting that American Medical Association called caning cruel and inhuman, U.S. President Clinton deemed it extreme, and 24 U.S. senators wrote the Singapore government urging clemency).

16. See ICCPR, *supra* note 1, art. 7. Singapore has not ratified the ICCPR. The prohibition against cruel, inhuman, and degrading treatment, however, has been recognized by U.S. federal courts as a norm of customary international law binding on all states. See, e.g., Paul v. Avril, 812 F. Supp. 207 (S.D. Fla. 1993); Abebe-Jiri v. Negewo, No. 90-2010, slip op. (N.D. Ga. Aug. 20, 1993), *appeal docketed*, No. 93-9133 (11th Cir. Sept. 10, 1993); Martinez-Baca v. Suarez-Mason, No. C-87-2057-SC, slip op. (N.D. Cal. Apr. 22, 1988).

17. See Philip Shenon, *Singapore Carries Out the Caning of a U.S. Teenager*, N.Y. TIMES, May 6, 1994, at A1 (reporting that U.S. teenager Michael Fay was caned in Singapore as

The conflict between the universally-accepted right to life and the use of capital punishment in the United States provides another example of the need to define abstract human rights. The United States recognizes the right to life — indeed it is a right enshrined in our Constitution¹⁸ — but does not interpret this right to preclude capital punishment.¹⁹

Lukes recognizes that these conflicts exist, but does not suggest how to confront them other than by permitting them to be discussed. Defense of the basic rights he identifies creates what Lukes terms an egalitarian plateau, or level playing field, upon which political debates on the content and definition of specific human rights can occur.²⁰ In other words, disagreement and conflict is permissible on all issues except those that question the set of basic rights identified by Lukes. These basic rights are so important that countries rejecting or actively violating them may be subject to forceful intervention by the international community.²¹

Like Lukes, John Rawls identifies a basic set of norms that can form a basis for identifying universal human rights norms. Unlike Lukes, however, Rawls devotes much of his argument to the difficult question of why his proposal is workable and why it should be accepted by most of the world's societies. He seeks to develop a system of international human rights, or what he calls a "law of peoples," that, while liberal in conception, would be acceptable to some non-Western and non-liberal societies.²²

punishment for vandalism, notwithstanding U.S. President Clinton's request that punishment be commuted). In contrast, the European Court of Human Rights, in 1978, found that giving a 15-year-old boy three strokes of a birch on his naked buttocks was cruel, inhuman, and degrading treatment or punishment under the European Convention on Human Rights. *Tyrer Case*, 26 Eur. Ct. H.R. (ser. A) (1978). More recently, however, the European Court of Human Rights has found that the "slipperping" of a seven year old boy, whereby his school principal whacked him on the buttocks with a rubber slipper, did not constitute cruel, inhuman, and degrading treatment or punishment. *Costello-Roberts v. United Kingdom*, 247 Eur. Ct. H.R. (ser. A) (1993).

18. U.S. CONST. amends. V, XIV.

19. *Gregg v. Georgia*, 428 U.S. 153 (1976). Moreover, the United States finds that capital punishment is not a violation of the U.S. Constitution's prohibition against cruel and unusual punishment. *Id.*

20. Lukes, *supra* note 7, at 39.

21. *Id.* at 40. Lukes implies this by calling for the use of force to confront what he identifies as the major challenge to the egalitarian plateau today: ethnic cleansing in Bosnia-Herzegovina. *Id.*

22. John Rawls, *The Law of Peoples*, in *ON HUMAN RIGHTS* 41, 42-43 (Stephen Shute & Susan Hurley eds., 1993).

Drawing upon his earlier work on liberal justice and liberal societies, Rawls asks whether an international human rights regime presupposes a world of liberal societies.²³ This question goes to the heart of some of the most important issues concerning international human rights today. Do we need to create liberal democracies throughout the world before we can effectively protect international human rights? From the beginning of the Cold War to the present, much of U.S. external policy has been predicated on answering this question affirmatively. In contrast, Rawls answers no, and identifies what he calls well-ordered non-liberal societies that are compatible with a regime of international human rights.²⁴

Rawls "well-ordered" society must have the following attributes: 1) it must be peaceful and not expansionist; 2) its legal system must exhibit a certain level of internal legitimacy; and 3) it must honor certain basic human rights.²⁵ Rawls then identifies a particular type of non-liberal society, what he calls a hierarchical society, to explore the possibility of extending a liberal conception of justice into the international arena without requiring that all societies be liberal.²⁶ Rawls concludes that a world consisting of both well-ordered liberal and hierarchical societies is compatible with a set of universal human rights that apply to all human beings.²⁷

The basic set of rights that Rawls identifies are: 1) the right to life and security; 2) the right to personal property; 3) elements of the rule of law; 4) some liberty of conscience; 5) some freedom of association; and 6) the right to emigrate.²⁸ These basic rights flow from the second requirement for Rawls' well-ordered hierarchical society: that its legal system must enjoy internal legitimacy.²⁹ In order to be internally legitimate, a legal system must impose moral duties and obligations on all members of society.³⁰ Moreover, laws must be guided by a conception of justice based on the common good, and must be seen to be so

23. *Id.*

24. *Id.* at 43.

25. *Id.*

26. *Id.* at 60-68.

27. *Id.* at 77-82.

28. *Id.* at 68.

29. *Id.*

30. *Id.*

by their enforcers.³¹ Rawls is quick to point out that such a conception of justice need not be consistent with a liberal conception of justice.³² He recognizes that there is no requirement that citizens have rights, only that persons be responsible, cooperating members of society who can recognize their moral duties and obligations, and act accordingly.³³

Thus, Rawls is attempting to identify a common set of human rights values that can be adopted by a diverse set of societies, both liberal and non-liberal. His vision is of a world of sovereign states that have different domestic conceptions of justice, but that still adhere to the basic values he identifies. These basic values would limit the types of societies that are consistent with Rawls' law of peoples, and thus legitimate members of the international community.

Like Lukes, Rawls would permit the use of international force to defend these basic rights in some cases. For example, force would be allowed if a law-abiding state, or well-ordered state, was threatened by an outlaw regime (i.e., a state that consciously and intentionally fails to comply with Rawls' basic set of human rights).³⁴ Thus, both self-defense by individual states and collective self-defense would be permitted.³⁵ Force would also be allowed in grave cases to protect innocent persons subject to outlaw regimes.³⁶ Rawls does not elaborate on what would constitute a grave case, although presumably the recent atrocities in Bosnia-Herzegovina³⁷ and Rwanda³⁸ would qualify.

Thus, Rawls' basic set of rights plays an important functional role. These rights determine the legitimacy of a regime. Moreover, they determine when international force is justified and limit pluralism among societies.

Although Rawls goes further than Lukes in discussing how to get from the current state of the world to his vision of a world of law-abiding states, he merely addresses the problem in pass-

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 72-73.

35. *Id.* at 73.

36. *Id.*

37. See *supra* note 2 and accompanying text (reporting mass murder in Bosnia-Herzegovina).

38. See *supra* note 3 and accompanying text (reporting tribal massacres in Rwanda).

ing. He identifies two types of problematic states: outlaw regimes and regimes that do not comply with human rights norms because of unfavorable conditions (i.e., historical, social, and economic limitations).³⁹ While, in grave cases, force may be used against outlaw regimes, Rawls suggests that moral pressure, coupled with sanctions, is the most important tool in pressuring outlaw regimes to become well-ordered, and thus to respect human rights.⁴⁰ In addition, Rawls calls for formation of international institutions, composed of well-ordered societies, to act as federative centers and fora for discussing and creating policy towards non-well-ordered societies.⁴¹ States with internal conditions that make it impossible to create well-ordered societies must be assisted in overcoming these obstacles.⁴² Rawls recognizes that the main problem in these societies is not a resource shortage, but the existence of oppressive governments and corrupt elites, and the subjugation of women supported by unreasonable religion.⁴³ He asserts that well-ordered societies have a duty to assist such societies, but it is not clear what form such assistance should take. If the problem is not a lack of resources but corrupt elites and the oppression of women, financial assistance and other wealth transfer programs may be counterproductive.

Rawls' essay is an important effort to justify universal human rights that transcend liberal Western societies. It addresses the common criticism that international human rights, as currently conceived, are historically and culturally specific, and thus not transferrable across societies. The essay does this by examining the requirements for a stable international order that permits a level of pluralism among societies which extends beyond liberalism, but which ensures that liberal societies will survive and that certain basic human rights will be accepted.

Rawls recognizes, however, that his solution is an extension of his liberal ideology from the domestic sphere to the interna-

39. Rawls, *supra* note 22, at 74-77.

40. *Id.* at 73-74.

41. *Id.* at 74.

42. *Id.* at 75.

43. *Id.* at 77. Although he could probably make a strong argument, Rawls does not elaborate on why the subjugation of women is incompatible with his conception of well-ordered hierarchical societies. This is important because women are presently subjugated in most, if not all, societies.

tional arena, and thus that it is vulnerable to the same criticism he attempts to address.⁴⁴ Well-ordered non-liberal societies would have to accept an international society governed by liberal principles, while simultaneously rejecting such principles domestically. Rawls seeks to demonstrate that such a position is tenable for a well-ordered and non-liberal society. It is unclear, however, how many non-liberal societies today would qualify as well-ordered, or how acceptable these societies would find the requirements to be well-ordered.

Under Rawls' law of peoples, societies have the right to choose their own domestic justice systems if they are compatible with his set of basic human rights and are not expansionist. Ultimately, Rawls favors using moral, economic, and military pressure to force conformity upon societies that do not see the virtues of becoming well-ordered. What Rawls has created is an expanded universe of societies that meet a specific basic set of universal human rights. That universe is still limited, however, and requires the use of force to preserve it.

Rawls provides us with an ideal type of international society for the protection of human rights, relies implicitly upon reason to establish its validity, and explicitly approves moral, economic, and military pressure to preserve and enforce it. Richard Rorty, in contrast, explicitly rejects such a rationality-based approach to establishing and strengthening universal human rights. He is not concerned with constructing from first principles, liberal or otherwise, an ideal society where human rights are honored. Instead, he identifies the rise of a human rights culture⁴⁵ in the twentieth century and asks how it can be strengthened and supported.

Rorty does not identify specific rights that are included in this human rights culture, other than to refer to moral goodness. His essay addresses those who already identify with the human rights culture and asks how that culture can be expanded and strengthened. The answer is not by showing that it is superior to others, although we may believe that this is true, but by making our culture more self-conscious and powerful.⁴⁶

44. *Id.* at 79.

45. See Richard Rorty, *Human Rights, Rationality, and Sentimentality*, in *ON HUMAN RIGHTS* 111, 115 (Stephen Shute & Susan Hurley eds., 1993) (explaining that Argentinian jurist and philosopher Eduardo Rabossi coined phrase "human rights culture").

46. *Id.* at 117.

Rorty's endeavor is not fundamentally different from that of Rawls and Lukes. All three essayists identify a universal notion of human rights which they argue should be adopted globally. They differ, however, in the strategies they suggest for expanding their respective visions of basic human rights. Rorty identifies sentimentality and the manipulation of feelings as the best means to strengthen the human rights culture,⁴⁷ whereas Lukes and Rawls combine rational arguments with, in certain limited cases, force and coercion to expand their human rights regimes.

On the one hand, Rorty's approach is quite liberating. Instead of delving into the question of what is the nature of human beings and human society, and then developing a system of human rights and justice out of that nature, Rorty asks what can we as human beings make of ourselves. History demonstrates that human nature is malleable, not fixed, and thus is amenable to change.⁴⁸ In this, Rorty includes Serbians who are ethnically cleansing Bosnia-Herzegovina, men who violate women, and white supremacists who terrorize and murder people of color. This raises the question of how to prevent such atrocities, now and in the future.

One cause of human rights violations throughout history has been a dehumanization of "the other."⁴⁹ This process permits people to claim that they are proponents of goodness and justice, while still engaging in torture, murder, and rape.⁵⁰ When victims are not viewed as part of the human community, their entitlement to human rights protection can be denied.⁵¹

Rorty suggests that sentimental education be used to show human rights violators that "the other" being violated is like the "us" committing the violation.⁵² In other words, we need to manipulate the sentiments and feelings of the Serbs so that they recognize that Muslims are human like themselves. The tool for liberation and justice is effective storytelling.⁵³

47. *Id.* at 122-23, 129.

48. *Id.* at 115.

49. *See id.* at 112 (describing dehumanization of Muslims by Serbs in Bosnia-Herzegovina).

50. *See id.* ("The Serbs take themselves to be acting in the interests of true humanity by purifying the world of pseudohumanity.")

51. *Id.*

52. *Id.* at 122-23, 129.

53. *Id.* at 118-19; *see* Mari J. Matsuda, *Public Response to Racist Speech: Considering the*

On the other hand, Rorty's view is terrifying in certain respects. Recognizing that humans are malleable, we can no longer draw comfort from traditional notions of a fixed human nature. Instead, we must confront the terrifying fact that humans are capable of endless transformation. Just as they can increase the human rights culture, so can they diminish it.

Rorty implies that each individual is a central actor in the human rights drama. Because human beings are malleable, they must always be vigilant and resist those who would eliminate the human rights culture. Moreover humans must convince others, through sentimental education, to strengthen human rights.

Rorty recognizes that strengthening the human rights culture depends upon the decision of the powerful to stop oppressing the powerless.⁵⁴ This is disheartening because it means that liberation depends upon the oppressors, not the oppressed.⁵⁵ Rorty accepts that this is a deficiency in his recommended approach, but nevertheless believes that it is the correct path to take.⁵⁶ Accepting sentimental education and its power to influence oppressors, however, does not eliminate the power of the oppressed. For the struggles of the oppressed provide the sentimental stories upon which Rorty relies. Thus, consistent with Rorty's prescription, the oppressed and their stories can be identified as the primary vehicle for change.

Rorty correctly identifies the phenomenon of "the other" as at least a partial explanation of why a great many people treat their fellow human beings in a horrible and degrading fashion. Lyotard uses the concept of "the other" as the starting point for his essay, but unlike Rorty, uses reason and human nature to argue that all human beings should be treated alike. Specifically, Lyotard points out that only humans have the faculty of locution.⁵⁷ Because humans can both speak and listen, they each carry "the other" within themselves, and thus can identify "us" in the other.⁵⁸

Victim's Story, 87 MICH. L. REV. 2320 (1989) (using storytelling to argue for restrictions on hate speech).

54. *Id.* at 129-30.

55. *Id.*

56. *Id.* at 130.

57. See Jean-Francois Lyotard, *The Other's Rights* (Chris Miller & Robert Smith trans.), in ON HUMAN RIGHTS 135, 137-38 (Stephen Shute & Susan Hurley eds., 1993) (discussing characteristics of human communication).

58. *Id.*

While his theory is intriguing, Lyotard offers nothing to suggest that his concept of the individual will be persuasive to human rights violators or that they can be convinced of its truthfulness. It seems little more than a sophisticated version of "treat thy neighbor as you would have your neighbor treat you." The problem is that people in the United States do not regard Muslims in Bosnia-Herzegovina as their neighbors. In fact, as Rorty suggests, U.S. residents may even believe that Muslims are not human,⁵⁹ and thus in Lyotard's terms, not possessing the faculty of interlocution.

Because Lyotard raises interlocution as the defining faculty of human beings, he also identifies the act of silencing as a fundamental human rights violation.⁶⁰ This is an interesting notion as Lyotard applies it to Nazi death camp victims. Not only were these victims subject to torture and murder, but they were also silenced, and thus forgotten both by their torturers and, at the time, by most of the rest of the world.⁶¹ They were not spoken to, but were spoken *at*, treated as objects, or ignored.⁶²

Lyotard overextends this notion, however, by outrageously claiming that a child with whom others refuse to play in a playground suffers a wrong "equivalent, on its own scale, to a crime against humanity."⁶³ While Lyotard does not explain the qualification "on its own scale," its breadth suggests that practically all wrongs are crimes against humanity. This is clearly a dangerous claim, because it threatens to trivialize the seriousness of crimes against humanity, diminishing those crimes until they appear everyday and almost benign when viewed against the backdrop of the horrors of the twentieth century.

While Rorty and Lyotard focus on the concept of "the other" to explain most human rights abuses and, in Rorty's case, to identify strategies for change, MacKinnon uses the same idea to launch a powerful critique of the current international human rights regime. She believes that legal regimes, including the international legal regime, are products of human experi-

59. Rorty, *supra* note 45, at 113.

60. Lyotard, *supra* note 57, at 140-41.

61. *Id.* at 144-45.

62. *Id.*

63. *Id.* at 145.

ence of domination, change, and resistance to change.⁶⁴ MacKinnon first seeks to identify those whose experience is the source of law.

MacKinnon is clearly correct in asserting that legal regimes are based on the particular experiences of specific groups of people. The Nazi legal system, and more recently, South Africa's apartheid legal system, are striking examples of legal regimes resulting from domination and oppression. Furthermore, the history and current reality of many U.S. rape and wife-beating laws reveal that our legal system is by no means immune to this phenomenon.⁶⁵

MacKinnon applies her analysis to the international arena to identify power distortions in the current international human rights regime. She draws an analogy between the differing treatment accorded public and private sectors under U.S. law and the international law doctrine that generally holds state actors, but not private non-state actors, responsible for their actions.⁶⁶ While MacKinnon uses her analysis of U.S. law to inform her examination of the international legal regime, it is equally useful to use her analysis of international law to help understand domestic law.

States created international law, and thus it developed in a way that gave priority to the primary interests of states. The doc-

64. Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, in *ON HUMAN RIGHTS* 83, 84 (Stephen Shute & Susan Hurley eds., 1993).

65. See Anne Reifenberg, *Emerging From Silence: Women Worldwide Want Violence Seen as Abuse of Rights*, *DALLAS MORNING NEWS*, Mar. 7, 1993, at 1A (reporting estimate that one woman is battered every fifteen seconds in the United States).

66. See MacKinnon, *supra* note 64, at 93-94. Modern international human rights law has begun to challenge this. The United States, the Soviet Union, France, and Britain "cooperated in 1946 in holding an international trial at Nuremberg[, Germany,] of twenty-two major Nazi leaders charged with crimes against humanity and world peace, condemning twelve to execution by hanging." R.R. PALMER & JOEL COLTON, *A HISTORY OF THE MODERN WORLD SINCE 1815*, at 893 (7th ed. 1993). As established at the Nuremberg trials, and as codified in some international treaties, including the Genocide Convention and the Geneva Conventions of 1949 and their 1977 Protocols, private non-state actors can be held liable for acts of genocide and certain war crimes. In fact, a current case in the U.S. Court of Appeals for the Second Circuit against Radovan Karadzic, the Bosnian Serb leader, is predicated, in part, on these now well-established international law doctrines. *Kadic v. Karadzic*, No. 94-9069 (2d Cir. filed Oct. 27, 1994). The suit was brought by MacKinnon, the National Organization of Women's Legal Defense Fund, the Center for Constitutional Rights, and the Lowenstein International Human Rights Law Clinic at Yale Law School. *Id.*

trine of state sovereignty⁶⁷ permits states to order their domestic affairs as they please. States developed the doctrine to separate their actions in the international arena from those conducted within their own borders. While the former affected other states' interests, it was believed that the latter did not. Until recently, international law did not apply to states' actions within their own borders.⁶⁸ Only with the development of the modern international human rights movement and the principles articulated at the Nuremberg trials⁶⁹ has the state sovereignty shield against international interference in domestic state affairs begun to lose its sanctity.

Applying this generally-accepted analysis of international law to domestic U.S. law, MacKinnon seeks to identify the interests that shaped the development of domestic U.S. law. Although U.S. legal development could be attributed to a number of groups, including white people and property owners, MacKinnon focuses on gender, and asks what gender interests are served by the domestic legal structure. According to MacKinnon, the home, and "private" activity, are protected from legal scrutiny because men established our modern legal system.⁷⁰ Thus, the state action requirement in much of our civil rights law is the domestic equivalent of the state action requirement in international law.⁷¹ Just as states left each other free to act within their own territory, men left each other free to act within their own homes and within their own private spheres.⁷² The international/national distinction and the public/private distinction thus become shields that block legal scrutiny and regulation.

That the legal distinction between private and public spheres has diminished somewhat does not, in itself, reduce the power of MacKinnon's analysis. Similarly, the existence of international human rights law does not signify that state interests no

67. See J.B. BRIERLY, *THE LAW OF NATIONS* 7-16 (Sir Humphrey Waldock ed., 6th ed. 1963) (discussing development of doctrine of sovereignty in international law).

68. An exception was recognized for states' treatment of foreign nationals within their borders, because such treatment was deemed to affect the interests of the foreign nationals' home states.

69. See *supra* note 66 (discussing war crimes trial that commenced in Nuremberg, Germany, in 1946).

70. MacKinnon, *supra* note 64, at 93.

71. *Id.*

72. *Id.*

longer dominate international law. Understanding that state interests dominate international activity is as useful as understanding that power groups dominate domestic activity.

Nevertheless, some of MacKinnon's assertions indicate that her analysis is overly simple in certain respects. For example, she asserts that "[n]o state effectively guarantees women's human rights within its borders [and that no] state has an incentive to break ranks by setting a human rights standard for women's status and treatment that no state yet meets."⁷³ This analysis, however, is equally applicable to the protection, or lack thereof, of all human rights. No state effectively guarantees human rights for anyone, either male or female, within its borders. While some states have recently set human rights standards, such as a prohibition against torture, few, if any, meet these standards in every instance. The prohibition against torture resulted, in part, from pressure by the international human rights movement, and not because most states were adhering to it.

Gender discrimination is more obviously responsible for the failure to regulate "private" activity in the domestic arena than for international law's inability to effectively pierce the veil of state sovereignty. States constantly violate the rights of both men and women, and hide behind the shield of sovereignty to do so. Moreover, individual violations or harm are insufficient to trigger international legal action. In peacetime, international law is no more concerned with the assault of an individual man than with the rape of an individual woman. In fact, before conduct becomes an international legal concern, there must be either state action or a consistent pattern of gross human rights violation.

The foregoing is not intended to imply that international law treats violations that primarily affect women the same as violations that primarily affect men, or both men and women. It does indicate, however, that human rights violations are likely to be more gender neutral under international law than under domestic U.S. law.

MacKinnon is right to point out that the international human rights movement has traditionally ignored or downplayed violations against women as women, as opposed to viola-

73. *Id.*

tions like non-sexual torture that apply to all humans, including women. The minimal attention that states historically have paid to such violations, both domestically and internationally, is even more apparent. Most depressing, although probably not very surprising to MacKinnon, are the numerous reports of U.N. personnel committing violations against girls and women.⁷⁴ For example, MacKinnon cites allegations that a commander in the U.N. peacekeeping forces in the former Yugoslavia accepted Muslim girls from the Serbs for orgies, and that the girls subsequently disappeared.⁷⁵ Such violations by the alleged enforcers of international peace and justice raise profound questions about the pervasiveness of gender discrimination in international norms and institutions.

It is to be hoped that the contemporary equivalent of a Nuremberg tribunal will be convened to judge the recent atrocities, including rape camps,⁷⁶ forced impregnation,⁷⁷ and forced prostitution,⁷⁸ perpetrated against women in the former Yugoslavia. This tribunal would force a rethinking of certain assumptions about the way society is structured and how that structure allows, or even actively promotes, gross violations of the rights of women, who constitute a majority of our population. The possibility that such a tribunal may be convened leads MacKinnon to ask disturbing question about whether a group must survive genocide and related gross violations before its rights will be recognized. That is, the Jews had to survive the Holocaust⁷⁹ in order for the crime of genocide to be recognized. Tragically, it was not enough that the Armenians had to survive it decades earlier.⁸⁰

74. See *Foreign Relations: Visiting Cambodian Minister Notes "Dark Side" of UN Mission*, Brit. Broadcasting Corp., Jan. 16, 1995, available in LEXIS, News Library, Non-US File (reporting Cambodian government minister's complaint that U.N. peacekeeping forces were raping women and young girls in Cambodia); Sam Kiley, *UN Soldiers 'Using Child Prostitutes'*, TIMES, Jan. 28, 1994, available in LEXIS, News Library, Non-US File (reporting charges by charitable organizations that U.N. soldiers have sexually exploited children in Mozambique).

75. MacKinnon, *supra* note 64, at 91 & n.24.

76. *Id.* at 86.

77. *Id.* at 87 n.5.

78. *Id.* at 86.

79. See Palmer & Colton, *supra* note 66, at 819 (explaining that Holocaust is name given to Nazi program of exterminating Jews and Judaism in Europe before and during World War II).

80. See DONALD E. MILLER & LORNA TOURYAN, *SURVIVORS: AN ORAL HISTORY OF*

These reflections raise troubling questions. Must women survive rape camps in order for rape to become a universal international concern? Why does the human species require the commission of horrendous atrocities like the Nazi Holocaust and Serbian "ethnic cleansing" before it can recognize the evil of what occurs daily in many parts of the world? What will it mean if we learn nothing from ethnic cleansing and fail to recognize the dignity of each individual person, including those that are women?

On Human Rights' final two essays are by Agnes Heller and Jon Elster and focus on post-Cold War realities in Eastern Europe. Both seek to determine what is required to cultivate a respect for human rights, or in Eduardo Rabossi's words, a human rights culture,⁸¹ in Eastern Europe. Heller raises the profound question of what is evil in the context of determining whether post-Cold War Eastern Europe should and, more importantly, can prosecute individuals for human rights abuses committed by the communist regimes. While Rorty asserts that perpetrators of human rights violations are acting out of a misguided sense of who is human and who is "the other,"⁸² Heller identifies "evil" as the primary cause of such violations.⁸³

Heller focuses on the "visible face of evil," the people who not only undertake evil acts but also create the conditions under which these acts are committed.⁸⁴ Thus, for Heller, the visible face of evil is not necessarily in the person who rapes, or pulls the trigger, or wields the machete, but in the person at the top of the chain of command who induces or coerces or forces these actions. In Heller's opinion, it is the Hitlers and the Stalins of the world, and not their followers, who are the true embodiments of evil, for they create the atmosphere and circumstances that encourage, and even demand, evil acts.

Heller points out that evil is qualitatively different from

THE ARMENIAN GENOCIDE (1993) (providing history of massacre of estimated 1.5 million Armenians between 1915 and 1923).

81. See *supra* note 45 (noting that Argentinean philosopher Eduardo Rabossi coined term "human rights culture").

82. See *supra* notes 49-51 (discussing consequences of human tendency to dehumanize people that belong to other groups).

83. Agnes Heller, *The Natural Limits to Natural Law and the Paradox of Evil*, in *ON HUMAN RIGHTS* 149, 155-58 (Stephen Shute & Susan Hurley eds., 1993).

84. *Id.*

moral badness.⁸⁵ Central to her definition of evil is freedom of choice, the ability to choose one's principles of action.⁸⁶ Thus, a person who kills because he will suffer if he does not, or one who kills because he is convinced by others that what he is doing is right, is not morally evil, although he is probably morally bad.⁸⁷ It is the person who threatens to punish another who does not kill, or who induces another to believe that the killing is just, who is evil.⁸⁸ In addition to covering the commission of evil acts and the establishment of evil conditions, moral evil encompasses the creation of sophisticated and consistent systems of self-justification.⁸⁹

Having made a useful distinction between the morally bad and the morally evil, Heller goes on to say that it is only the morally evil who should be punished.⁹⁰ She argues, however, that those who were morally evil under the Eastern European communist regimes cannot, and probably should not, be punished. Heller contends that although gross violations of human rights are evils that should be prosecuted, retroactive legislation is also an evil that should not be tolerated.

The punishment of members of past regimes for their violations of human rights is one of the most important topics facing human rights advocates and scholars.⁹¹ Heller is concerned with the fundamental legal doctrine that prohibits retroactive criminal legislation.⁹² How can individuals be held responsible for their actions under a normative system alien to their reality? How can someone be charged with a crime for acts that were not criminal when committed and, in many cases, were sanctioned by the existing legal regime?

Those who argue that past regimes should be punished for

85. *Id.* at 155.

86. *Id.*

87. *See id.* at 155-56 (asserting that people who choose to commit injustices against others rather than suffer themselves are bad but not evil).

88. *See id.* at 156 (asserting that person who does no wrong personally but who induces others to do so is evil).

89. *Id.* at 155.

90. *Id.* at 158-59.

91. *See, e.g.,* Diane F. Orentlicher, *Settling Account: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *YALE L.J.* 2537 (1991) (discussing law governing prosecution of prior regimes for human rights abuses); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 *YALE L.J.* 2619 (1991) (discussing prosecution of past human rights abuses in Argentina).

92. *See* Heller, *supra* note 83, at 164.

their human rights violations invoke notions of natural law to justify what appears to be retroactive legislation.⁹³ It was natural law that justified the Nuremberg verdicts, preventing them from being tainted as an exercise in retroactive legislation.⁹⁴ Natural law proponents argue that genocide is clearly a crime under all legitimate legal regimes, whether this is explicitly enunciated or not. Thus, the Nazi laws and policies that created the death camps were illegal because they conflicted with natural law.

Heller does not go quite this far. She gives due deference to natural law, but sees it as simply a projection of "our moral intuitions."⁹⁵ Thus at Nuremberg, our moral intuition was so outraged by the Holocaust that we used natural law to justify prosecution.⁹⁶ According to Heller, our current moral intuition is not equally outraged by the atrocities of the Eastern European regimes,⁹⁷ and thus natural law does not provide an escape from the dilemma, or in Heller's words the evil, of retroactive legislation.

Why is our moral intuition not outraged by the violations that occurred in Eastern Europe during the Cold War? In providing an answer, Heller employs a biological metaphor that identifies evil as a virus.⁹⁸ Evil primarily exists in, or "infects," people while they have power.⁹⁹ Once people lose power, the evil leaves them and moves on to infect others. Although her metaphor has weaknesses, Heller has identified a familiar phenomenon. Evil people, such as murderous dictators and serial killers, often appear benign after they lose power. Once out of power, the terror disappears and, with it, the palpable sense of evil. This was the truth Hannah Arendt drew from the trial of Eichmann.¹⁰⁰

It is unclear, however, that this phenomenon explains the

93. *See id.* 164-65 (citing argument that legalisms must not stand in way of justice as understood intuitively).

94. *Id.* at 167.

95. *Id.* at 171. Heller does not clarify whether "our" refers to the people of Eastern Europe, people in the West, certain governmental or other elites, or all the people of the world.

96. *Id.* at 167.

97. *Id.* at 171.

98. *Id.* 156-57, 170-71.

99. *See id.* at 172 (stating that evil dissipates once it loses power).

100. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (Penguin Books 1977).

reluctance to prosecute in the former communist states of Eastern Europe. After all, a benign-looking Adolf Eichmann was still tried and executed. Heller's distinction between morally evil and morally bad may illuminate the analysis. Arguably, government leaders in Eastern Europe were morally bad but not morally evil, because they were constrained by the former Soviet Union. Moreover, they were constrained by the perpetuation of the Cold War by the United States and the Soviet Union. Furthermore, prosecution would be difficult because of the large numbers of people in Eastern Europe who were morally bad, whether through governmental service or through becoming informants against friends and neighbors.

While the moral intuition of at least some of the residents of the formerly communist states of Eastern Europe cries out for prosecution, there is clearly a general reluctance to undertake full-scale prosecution in Eastern Europe. Heller helps explain this reluctance and its relevance when confronting human rights violations committed under other past regimes.

Heller reaches a pessimistic conclusion concerning prosecution of those suspected of violating human rights under past regimes. She argues, however, that the important time to resist evil is while its perpetrators are in power, not after they have been ousted.¹⁰¹ Without the deterrent effect of prosecution, however, it is unclear how the recurrence of evil can ever be prevented, if at all.

Elster's essay focuses on the danger of Eastern European governments evolving from tyrannies of the party into tyrannies of the majority that also threaten individual freedom.¹⁰² In evaluating ways to institutionally protect individual rights, Elster examines both the U.S. and French revolutionary periods and the debates and decisions that shaped the governmental structure and institutions of the post-revolutionary republics. Drawing on this discourse, Elster identifies three levels of individual rights, and three threats to those rights.

The first set of rights are those that permit real and equal political participation, such as voting, free-speech, and free-asso-

101. See Heller, *supra* note 83, at 170 (noting that it takes courage and decency to oppose evildoers while they hold power, but that even cowards can call for evildoers to be prosecuted after their ouster).

102. Jon Elster, *Majority Rule and Individual Rights*, in *ON HUMAN RIGHTS* 175, 176 (Stephen Shute & Susan Hurley eds., 1993).

ciation.¹⁰³ Parliamentary majorities threaten these rights.¹⁰⁴ The second set of rights are those that promote the rule of law, such as prohibitions against bills of attainder, retroactive legislation, and confiscation of property without compensation.¹⁰⁵ Standing interests and sudden passions endanger these rights.¹⁰⁶ The third set of rights are those that protect religious and ethnic groups.¹⁰⁷ These rights are threatened by standing passions,¹⁰⁸ such as the ethnic hatred that is all too common in parts of Eastern Europe.

Elster identifies four major devices that can help neutralize majoritarian threats to the rights he enumerates. These are: constitutionalism,¹⁰⁹ judicial review,¹¹⁰ separation of powers,¹¹¹ and checks and balances.¹¹² In measuring the progress of the Eastern European states, Elster evaluates how well the constitutions and institutions of these newly emerging democracies incorporate these devices.¹¹³ He does not inquire directly into the issues of economic and social development that some argue are a parallel development for, if not a precursor to, the protection of the civil and political rights Elster identifies. Nevertheless, Elster reaches the interesting conclusion that the states that were most despotic during the Cold War now have the weakest countermajoritarian devices, while those that were least despotic now have the strongest countermajoritarian devices.¹¹⁴ At least with respect to government institutions, extreme despotic executive power appears to have given way to the other extreme of unchecked legislative power. Elster does not offer any advice for addressing this phenomenon, other than his general analysis of the virtues of the four countermajoritarian devices he identifies.

Elster clearly equates human rights with traditional liberal notions of justice, and, unlike Rawls, does not attempt to expand

103. *Id.* at 181.

104. *Id.* at 182.

105. *Id.* at 181.

106. *Id.* at 183.

107. *Id.* at 181.

108. *Id.* at 183.

109. *Id.* at 187-89.

110. *Id.* at 189-93.

111. *Id.* at 193-95.

112. *Id.* at 196.

113. *Id.* at 206-15.

114. *Id.* at 215.

his notion of human rights beyond liberal democracies.¹¹⁵ This is somewhat understandable given that Eastern Europe appears to be embracing Western liberal conceptions of government and justice, however poorly implemented, and has not articulated an alternative coherent conception of society. Nevertheless, Elster fails to address the problem of replacing despotic government with government that respects human rights, however defined. He provides a yardstick with which to evaluate progress, but does not help us to understand how to accelerate that progress.

Despite facing challenges that range from ideological claims that human rights are not universal to horrendous acts of violence and destruction, the international human rights movement is gaining increasing public acceptance. It is gratifying to see organizations like Amnesty International sponsoring lecture series that produce such thought-provoking essays as those in *On Human Rights*. While we cannot demand that a collection of disparate essays resolve the myriad dilemmas facing human society today, we can ask that they improve our understanding of what human rights are, or should be, and how to better protect them. The essays in *On Human Rights* clearly meet this challenge. They provide a rich critical analysis that helps us to understand our human rights culture and to improve the protections it so badly needs in a world marred by the horrors of Bosnia-Herzegovina, Rwanda, and Chechnya.

115. See *supra* notes 23-27 and accompanying text (noting Rawls' belief that societies other than liberal democracies can be compatible with regime of international human rights).

U.K. MERGER CONTROL: LAW AND PRACTICE. By Roger J. Finbow & A. Nigel Parr. Sweet & Maxwell (London) 1995, 551 pp. ISBN 0-421-49710-6 hardback. £77.00 (suggested).

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The most striking aspect of international antitrust during the last several years has been the extraordinary proliferation of new statutes and strengthened enforcement of competition laws throughout the world. Today the great majority of industrialized and emergent economy countries have antitrust legislation both on the books and in actual practice. Formerly communist countries in Eastern Europe and the former Soviet Union have enacted antitrust laws as part of their shift to market-oriented economies.¹ Latin American countries have also recently enacted or strengthened their antitrust laws and enforcement.² Similarly, antitrust has mushroomed in the Pacific countries, where Japan has gradually been increasing its enforcement³ and several other countries have recently enacted or strengthened their antitrust laws, notably Korea and Taiwan. This new legislation complements the existing enforcement in Australia⁴ and New Zealand.⁵ Finally, the recent enactment of antitrust laws in Mexico and the strengthened enforcement of Canadian antitrust laws⁶ (after almost a century of relatively benign enforcement) now mark the

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1. For a discussion of the role of competition in formerly communist countries, see Anna Fornalczyk, *Competition Policy During Transformation of A Centrally Planned Economy*, 1992 FORDHAM CORP. L. INST. 385 (B. Hawk ed. 1993).

2. See, e.g., Ana Jatar, *Implementing Competition Policy on Recently Liberalized Economies: The Case of Venezuela*, 1993 FORDHAM CORP. L. INST. 79 (B. Hawk ed. 1994).

3. Akinori Uesugi, *New Directions in Japanese Antitrust Enforcement*, 1994 FORDHAM CORP. L. INST. — (B. Hawk ed. forthcoming 1995).

4. See generally Maureen Brunt, *Australian and New Zealand Competition Law and Policy*, 1992 FORDHAM CORP. L. INST. 131 (B. Hawk ed. 1993).

5. See generally *id.*; COMPETITION LAW AND POLICY IN NEW ZEALAND (Rex Ahdar, ed. 1991).

6. See generally Calvin Goldman et al., *International Mergers and the Canadian Competition Act*, 1992 FORDHAM CORP. L. INST. 217 (B. Hawk ed. 1993); J. W. Rowley & Ann Campbell, *Commonality and Divergence in Canadian and Australian Competition Law*, 1992 FORDHAM CORP. L. INST. 261 (B. Hawk ed. 1993); Howard Wetston, *Developments and Emerging Challenges in Canadian Competition Law*, 1992 FORDHAM CORP. L. INST. 195 (B. Hawk ed. 1993).

North American continent as a completed bastion of antitrust enforcement.

Western Europe has not escaped this proliferation of antitrust statutes and increased enforcement. In the last ten years, newer or strengthened antitrust statutes have been enacted in Austria, Belgium, Finland, France, Greece, Ireland, Italy, the Netherlands, Portugal, Spain, Sweden, and Switzerland.

Given this broad acceptance of antitrust principles and enforcement, it is fair to conclude that the United States is no longer the Lone Ranger in world antitrust enforcement. The United States, however, does remain the most vigorous jurisdiction in applying its own antitrust laws outside its territory.⁷

The proliferation of antitrust statutes and enforcement has also included merger control. The number of antitrust laws providing for notification and approval of mergers, acquisitions, and joint ventures has increased enormously during the last decade. Today, there are well over thirty different antitrust merger controls that might apply to a given transaction, depending upon the scope of the parties' international operations and the structure of the transaction, among other factors. These antitrust merger controls include not only jurisdictions with long-standing antitrust controls, such as Germany, the United Kingdom, and the United States, but also jurisdictions that have enacted merger regulations only in the last several years, such as Austria, Belgium, Bulgaria, the Czech Republic, the European Union, France, Greece, Hungary, Italy, Latvia, Poland, Portugal, Russia, Slovakia, Spain, Sweden, and the Ukraine, among others. In Western Europe alone, mandatory preclosing notification requirements now exist in nine jurisdictions:⁸ Austria, Belgium, the European Union, Germany, Greece, Ireland, Italy, Portugal, and Sweden.⁹ In Western Europe, voluntary preclosing notification requirements exist today in France, Spain, and the United Kingdom. Of the fifteen member states of the European Union,

7. *See, e.g.*, *Hartford Fire Insurance Co. v. California*, [1993] 1 Trade Cas. (CCH) ¶ 70,280 (U.S.). *See generally* 1 BARRY HAWK, UNITED STATES, COMMON MARKET & INTERNATIONAL ANTITRUST 96-152 (2d ed. Supp. 1993).

8. In Eastern Europe, mandatory preclosing notification requirements exist in at least a further seven jurisdictions, namely: the Czech Republic, Hungary, Latvia, Poland, Russia, Slovakia, and Ukraine.

9. *See generally* 3 HAWK, *supra* note 7, ch. 15.

only Denmark, Finland, Luxembourg, and the Netherlands do not have antitrust merger control laws.

Against this contemporary background of a world forest of antitrust merger controls, three jurisdictions stand tall as having several decades of actual enforcement of antitrust merger control: Germany, the United Kingdom, and the United States. In all three jurisdictions there is an extensive body of administrative practice or case law.

The United Kingdom, however, differs from Germany and the United States in two respects. First, the U.K. competition authorities have not issued substantive guidelines, unlike the merger guidelines issued by the Bundeskartellamt and the U.S. agencies. Second, there is no authoritative treatise devoted to U.K. antitrust merger control. Both of these differences make for greater uncertainty for antitrust and corporate advisers about U.K. merger control than is the case for German and U.S. merger control, where there are published substantive guidelines and many learned commentaries.

Very fortunately for lawyers and other advisers, the lack of substantive guidelines and comprehensive commentary on U.K. merger control has been remedied by the publication of what will unquestionably be the bible for U.K. merger control: Roger Finbow and Nigel Parr's *U.K. Merger Control: Law and Practice* ("*Finbow & Parr*"). *Finbow & Parr* certainly fills the need for a comprehensive analysis and description of the U.K. merger control system. *Finbow & Parr* also goes a long way in providing substantive guidelines, although obviously as private practitioners the authors cannot speak for the U.K. authorities.

Finbow & Parr describes comprehensively the rather byzantine institutional structure of U.K. merger control, which like Gaul, is divided into three parts: the Office of Fair Trading ("OFT"), the Secretary for Trade and Industry ("STI"), and the Monopolies and Mergers Commission ("MMC"). This very helpful description of the institutional structures complements the authors' analysis of the U.K. procedures, which also are more complex and multifarious than procedures in other jurisdictions. For example, the authors analyze the three types of voluntary notification procedures with considerable emphasis on the practical advantages and disadvantages among the three procedures. This analysis will be extremely helpful to parties and their

advisers, particularly as the authors have the considerable courage of providing specific advice and taking positions in recurrent hypothetical situations. Their pragmatism and sophisticated advice strikes at least this reviewer as perhaps exceptional in a world where often it appears that counsel take a more formalistic approach to the decision to notify a contemplated transaction. For example, the authors state that: "In practice, only a very small proportion of mergers qualifying for investigation are referred to the MMC" and "advisors may be unlikely to recommend [voluntarily] seeking clearance in advance of completion if in their opinion there is no risk in practice of a reference."¹⁰

This quotation should not distort, however, the general thrust of the authors' analysis. The book is truly superb in its discussion of the pros and cons of notification (and the different ways of notifying) in specific common situations. Indeed, this discussion, together with the analysis of the substantive criteria employed by the OFT and MMC, should prove to be the two most valuable sections of the book to practitioners and merger parties.

Another very interesting procedural analysis concerns the de facto time limits for decisions by the OFT/Department of Trade and Industry ("DTI") and the MMC. Finbow and Parr essentially advocate shortening the OFT/Secretary of State's time while maintaining the MMC's time to reach decisions. This seems correct given that the OFT/DTI have up to six months (proposed to be reduced to only four months) from the date of announcement or completion of a transaction to decide whether an MMC referral should be made, while the MMC has typically three to four months (and there is pressure to reduce this period) to complete its much more detailed investigation that might be roughly compared to a "second phase" EEC Merger Regulation proceeding. Certainly, the U.K. time periods are out of line with deadlines and time periods in other jurisdictions, especially the first phase period for the OFT/DTI.

The authors also score a number of good points in discussing notification fees. They find the U.K. fees burdensome. The U.K. fees, however, compared with the U.S. fees under Hart-Scott-Rodino (now US\$45,000 per notification), are quite mod-

10. ROGER J. FINBOW & A. NIGEL PARR, U.K. MERGER CONTROL: LAW AND PRACTICE 5, 7 (1995) [hereinafter FINBOW & PARR].

est. The unfortunate reality in the world today is that governments are beginning to appreciate the cash cow value of merger control notification fees which raise considerable revenues even though the great majority of transactions raise no competition concerns whatsoever.

Finbow & Parr also contains a helpful analysis of the kind of transactions that qualify under the U.K. legislation. For example, they devote considerable attention (and rightly so) to issues like control and material influence over the target such as to qualify a transaction as a "merger" under the U.K. legislation. In doing so, they compare the U.K. tests for acquisition of minority shareholdings with the approach under the EEC Merger Regulation. For example, they assert that "[t]he decisions taken by the Commission so far in relation to the concept of decisive influence suggest that a higher degree of involvement in an undertaking's affairs is required than that which would give rise to material influence under the Fair Trading Act."¹¹ Although this may have been true two years ago, more recent cases under the EEC Merger Regulation suggest that there has been a strong convergence between the U.K. approach to acquisition of minority shareholdings and the approach under the EEC Merger Regulation.¹²

In a somewhat similar vein, the authors' discussion of the concentrative-cooperative joint venture distinction under the EEC Merger Regulation reflects a two-year old perspective and does not take entirely into account more recent Commission practice nor the recently revised Commission notice on that subject.¹³ Of course, these minor caveats detract in no way from the authors' principal goal of analyzing U.K. merger control, but only suggest some caution about their comparison of the U.K. system with the EEC Merger Regulation practice.

As mentioned above, the U.K. authorities have not seen fit to issue substantive merger guidelines, unlike their counterparts in Canada, Germany, and the United States. *Finbow & Parr* goes a long way, however, in providing the practitioner and merger

11. *Id.* at 39.

12. *See, e.g.*, Commission Decision, Case No. IV/M.526 (Eur. Comm'n Dec. 14, 1994) (DLJMB/UBS/Sappi/Warren) (not yet reported).

13. Commission Notice, O.J. C 385/1 (1994) (on distinction between concentrative and cooperative joint ventures under Council Regulation No. 4064/89/EEC of December 1989 on control of concentrations between undertakings).

adviser with a private substitute for official substantive U.K. guidelines. They note generally in the overview chapter that the U.K. voluntary notification system and enforcement history reflect the basic "presumption" underlying the Act that a merger should be allowed absent a "real expectation" of significant adverse effects on the public interest.¹⁴ In later chapters they proceed to analyze in some detail the various facets of a substantive merger analysis.

There is an excellent summary of relevant product and geographic market definition. The authors first describe how the OFT largely follows the analytical framework set forth in the U.S. Merger Guidelines, despite acknowledged differences with the approach under the EEC Merger Regulation.¹⁵ The analysis of relevant product and geographic market definition is again practitioner-oriented. The authors identify various factors and evidence typically taken into account by the OFT and MMC in their analysis of market definition¹⁶ Market share and non-market share factors are also analyzed in considerable detail and one finishes the book with the strong impression that one has obtained intimate familiarity with the actual analysis employed by the U.K. competition authorities.

Theoreticians, as well as practitioners, also will benefit considerably from the authors' discussion of collusion/oligopoly coordination. Their suggested analytical framework for examining mergers in oligopolistic industries is exceptional in both its brevity and thoughtfulness.

In sum, *Finbow & Parr* should immediately become the indispensable treatise on U.K. merger control. It will prove invaluable to practitioners and business advisors, as well as providing provocative thoughts to academics and others interested in comparative merger control. No advisor to parties engaged in international transactions can afford not to have *Finbow & Parr* on their bookshelf close at hand.

14. FINBOW & PARR, *supra* note 10, at 1.

15. *See id.* at 174-78.

16. *See id.* at 178-201.

