D DYZENHAUS, M HUNT and G HUSCROFT (eds), *A SIMPLE COMMON LAWYER: ESSAYS IN HONOUR OF MICHAEL TAGGART* (Oxford: Hart Publishing, 2009), IX + 334, £45.

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Bracketing his scholarship on administrative law and legal history, Michael Taggart is probably best known as the champion and chronicler of that genre of legal (and, more generally, scholarly) literature known as the '*festschrift*'.[1] Despite the fact that this volume marks Mike's very early retirement, because of ill-health, as Alexander Turner Professor of Law at the University of Auckland, the publication of a *festschrift* for the scholar who has done most to bring the genre out of the shadows is an event the reflexivity of which I am sure the honorand himself — being a man of wit and irrepressible *joie de vivre* — has found pleasing and amusing. The very title of the volume — a deprecatory self-description, we are told — echoes Mike's interest in exploring the *common law* species of a genus which was, until recent years at least, much more popular in civil law than in common law countries.[2]

According to Lilly M Roberts (cited by Taggart),[3] a festschrift is a published collection of legal essays by different authors, specifically written to honour an individual, institution or event. *A Simple Common Lawyer* meets the definition. But it is more than that. The Dutch edition of Wikipedia (which, fortunately, offers an 'automatic' — but slightly clunky — English translation) defines a *liber amicorum* as a 'collection of mostly personal lyrics and artwork by friends and/or colleagues offered on the occasion of an anniversary or retirement'. The volume under review offers artwork: the engaging painting on the cover showing Mike hard at work in the library is the handiwork of Richard, one of Mike's four children. We see the honorand only in profile, from some distance, and I personally regret that the cover is not supplemented by the sort of face-on photograph of the subject found in many *festschriften*. (In a different mood, the honorand is cast as action man over the caption 'Adventures in Common Law' in a painting, also by Richard, presented on the occasion of Mike's retirement function in November 2008).

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1 See especially Michael Taggart, 'Gardens or Graveyards of Scholarship? *Festschriften* in the Literature of the Common Law' (2002) 22 *Oxford Journal of Legal Studies* 227; Michael Taggart (ed), *An Index to Common Law* Festschriften (2006); <http://magic.lbr.auckland.ac.nz/festschrift/>.

2 Although whether this is the sense of 'common law' in play in the title is unclear.

3 Taggart, above n 1, 228.

On the other hand, despite the eloquence of the contributors to *A Simple Common Lawyer*, it would not be quite accurate to describe the fourteen scholarly essays in this book as 'lyrical'. Nevertheless, the inside front flap describes the volume as a 'book of essays dedicated…by a group of friends', and this strikes me as a fair translation of '*liber amicorum*'. I commend to Mike the thought that the *liber amicorum* should be recognised as a distinct sub-species of the *festschrift* characterised by the special affection felt for the honorand by the contributors. We may note in support that the *Index to Common Law* Festschriften lists several volumes (in honour, for instance, of Lon Fuller, Jack Grunawalt and AJ Thomas) that are described in this way.

The friends who contributed to this volume can be rightly proud of their achievement, especially since the project was conceived and brought to publication in an impressively short time. Most of the essays fall into one of two groups, highlighting Taggart's interests respectively in administrative law and legal history. (The gift also includes an intimate dedicatory Foreword by Richard Hart, and a warmly appreciative Introduction by the editors).

Two of the essays respond to the published version of Mike's 2007 Geoffrey Sawer Lecture, delivered at the Australian National University under the title '"Australian Exceptionalism" in Judicial Review'.[4] In this immaculately researched *tour de force* Taggart explored respects in which the High Court of Australia has placed (or kept) Australian administrative law outside the mainstream of developments elsewhere in the common law world. In his discussion of variable standards of review in Australian law Mark Aronson casts Taggart as an '*agent provocateur*'.[5] The provocation apparently arises not from Taggart's analysis of the Australian situation but from the normative assumption — underpinning what Aronson calls Mike's enthusiasm for 'variability'[6] — that in certain contexts, courts should concern themselves more with the 'merits' of administrative decisions than the High Court has been willing to do. In his short contribution, Sir Anthony Mason, like Aronson, does not seem inclined to challenge Mike's analysis but argues instead that he 'does not appreciate how deep-seated are some of the considerations that led to the present state of Australian administrative law'.[7] One explanation for the High Court's caution about engaging in 'merits review' is that the establishment of the Administrative Appeals Tribunal (created to give effect to proposals of the Kerr Committee, of which Mason was a member) has discouraged the sort of broadening of the grounds of judicial review that has taken place in England, for instance. Mason unapologetically rejects this suggestion and attributes more significance to 'Australia's non-adoption of a charter of rights and the attitudes that underlie that non-adoption'.[8]

The theme of variable standards of review is taken up in several of the other essays. Dame Sian Elias examines the impact of New Zealand's statutory bill of rights on administrative law. Her conclusion is that proportionality — which she describes as the 'methodology' of human rights and also as 'rationality in operation' — 'is

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4 (2008) 36 *Federal Law Review* 1.

5 Mark Aronson, 'Process, Quality, and Variable Standards: Responding to an *Agent Provocateur*' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 5.

6 Ibid 7.

7 Anthony Mason, 'Mike Taggart and Australian Exceptionalism' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 179, 179.

8 Ibid 179.

appropriate to administrative law more generally'[9] and not just to cases involving human rights issues. Murray Hunt agrees in his pithily titled essay 'Against Bifurcation', rejecting Taggart's view that the more searching review commonly associated with proportionality, as opposed to *Wednesbury* unreasonableness, should be restricted to cases involving alleged infringement of human rights and should not be applied to other types of judicial review applications.[10] Hunt appreciates the reservations about aggrandisement of judicial power that underlie Taggart's approach, but attempts (not entirely persuasively in my opinion) to draw their sting by stressing the importance of variability as a technique for protecting individual rights and restraining executive power, and by de-emphasizing the consequential broadening of judicial discretion.

The power of the courts vis-à-vis the legislature — as opposed to the executive — is the concern of Grant Huscroft and Paul Rishworth. [11] They take as their starting point Taggart's various reflections on the New Zealand *Bill of Rights Act 1990*, which is the legal foundation of the so-called 'New Zealand model' of human rights protection. The distinctive feature of this model is that it does not give courts the power, assumed by the US Supreme Court in *Marbury v Madison*, to invalidate primary legislation. Huscroft and Rishworth approve of this feature of their (and Mike's) country's constitutional arrangements. It would be a sad and unwarranted conclusion, they argue, that protection of human rights requires the change to the 'very fundamentals of New Zealand constitutionalism' that a 'supreme law bill of rights' would represent.[12]

Recurring and related themes of Taggart's scholarship are 'the province of administrative law'[13] and 'the changing nature of the state'.[14] Such issues are taken up in several of the contributions to *A Simple Common Lawyer*. The conventional wisdom is that Thatcherism, Reaganism, managerialism and any number of other isms of the late 20th century have 'hollowed out' the state and significantly shifted power from the public sector to the private sector. In her incisive essay, Carol Harlow turns this orthodoxy on its head by arguing that 'colonisation of the private by the public is the true characteristic of contemporary government'.[15] However, Harlow shares the suspicion of the state (or of the executive, at least) common among administrative law scholars, and contends that even if the state has been refigured it has not been reformed but remains 'profoundly interventionist, regulatory and often verges on the despotic.'[16]

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9 Sian Elias, 'Righting Administrative Law' in Dyzenhas, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 55, 72.

10 Murray Hunt, 'Against Bifurcation' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 99.

11 Grant Huscroft and Paul Rishworth, '"You Say You Want a Revolution": Bills of Rights in the Age of Human Rights' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 123.

12 Ibid 150.

13 Michael Taggart, 'The Province of Administrative Law Determined' in Michael Taggart (ed), *The Province of Administrative Law* (1997), 1.

14 Michael Taggart, 'The Nature and Functions of the State' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003), 101.

15 Carol Harlow, 'The "Hidden Paw" of the State and the Publicisation of Private Law' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 75, 77-8.

16 Ibid 97.

Janet McLean (an adherent to the orthodoxy, it seems) intriguingly argues that statutory provisions which define the scope of human rights protection in terms of 'public functions' may be read as an attempt to reverse some of the effects of 'privatisation' (broadly understood) by 'spreading public law norms into the private sector'.[17] However, she is sceptical of the viability of this approach and argues that a more 'fruitful' way forward would be to '[start] with the rights themselves'[18]. It is to be hoped that McLean will elaborate this inchoate suggestion in future work.

Taggart's scholarship is pervaded by a sense of history and much of it has an explicitly historical orientation or purpose. This is one reason, I suspect, why Mike is so strongly identified (and self-identified) with the common law, which has a temporal element that legislation lacks.[19] In a significant sense, the common law is an historical phenomenon. Over many years, Taggart has been working on the history of modern administrative law, and it is a cause for the greatest regret that he has been robbed of the opportunity to complete it. For this reason, the historically alert contributions to *A Simple Common Lawyer* are especially worthy of note.

Martin Loughlin's argument is that it is AV Dicey's fault that the history of 'English administrative law' has not been written.[20] Loughlin unfavourably contrasts Dicey's doctrinal and ideological approach to the subject with Maitland's 'rigorous, empirically grounded historical' methodology.[21] Loughlin believes that the historical task cannot and will not commence until agreement is reached about the meaning of 'administrative law' — a term used by Loughlin himself in a confusing variety of senses. Loughlin — as he surely must — exempts Taggart from the charge of Diceyan a-historicism; but even so, I am sceptical of the theoretical strength of the distinction between legal normativity and historical empiricism, and wonder whether the lack of a history of modern English administrative law (and, for that matter, of modern English tort law or contract law) may not largely be explained in more mundane ways.

Nevertheless, the distinction between what David Ibbetson calls 'internal' and 'external' legal history[22] is also a theme of PG McHugh's essay, 'A History of the Modern Jurisprudence of Aboriginal Rights'.[23] Despite the slightly defensive tone of the discussion, later in the essay, of Mark Walters' reaction to McHugh's *Aboriginal Societies and the Common Law*,[24] the chapter makes a contribution to the history of ideas of just the sort that Mike Taggart does so well. An intriguing aspect of the essay is that McHugh figures as both participant and observer in the historical story he tells. Stephen Sedley also offers some raw material for the historian of administrative law in a short account of his own role and involvement in the development of judicial review

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17 Janet McLean, 'Public Function Tests: Bringing Back the State' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 185, 186.

18 Ibid 200.

19 Which is not to say that legislation has no temporal dimension.

20 Martin Loughlin, 'Why the History of English Administrative Law is Not Written' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 151

21 Ibid 175.

22 David Ibbetson, 'Historical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (2003) 863, 864.

23 P G McHugh, 'A History of the Modern Jurisprudence of Aboriginal Rights: Some Observations on the Journey So Far' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 209.

24 (2004).

in England in the 1970s and 1980s, culminating in the 'landmark' case of *M v Home Office*.[25]

Mike's legal historiography has been much influenced by AWB Simpson. In addition to large-scale historical studies of the common law of contract and, more recently, of detention without trial in Britain and Britain's involvement in the genesis of the European Convention on Human Rights, Simpson is famous for his smaller scale, historically and socially situated studies of leading cases of the common law. Mike, too, has made significant contributions to the latter genre, most particularly in his magisterial *Private Property and the Abuse of Rights in Victorian England*.[26] The focus of Simpson's contribution to *A Simple Common Lawyer* is not a leading case, but a single incident in the history of English warfare: the killing of French prisoners by the English at the Battle of Agincourt in 1415.[27] In Simpson's masterly analysis this moment in history provides a counter example to Henry Maine's thesis of the legal transition from status to contract: at the time of Agincourt, Simpson shows us, the rights of prisoners of war were a matter of contract, whereas now they are based on status.

Three of the plants in this luxuriant garden of scholarship remain to be noticed. Cheryl Saunders appropriately analyses the complex and subtle constitutional relationship (or perhaps, better, set of relationships) between Australian and New Zealand, offering illuminating insights into federalism, inter-governmental cooperative arrangements, and trans-national and supra-national structures.[28] David Mullan picks up on Mike Taggart's long-standing interest in 'the role of findings and reasons as core values of judicial and administrative processes'.[29] He carefully explores the relationship between reason-giving and rationality, process and substance; the approach of courts to reviewing reasons; and the appropriate scope of the common law duty to give reasons.

The issue of justification that lies at the heart of the practice of reason-giving is pursued in a different direction in David Dyzenhaus's sophisticated discussion of the rule of law.[30] He rejects what he calls a 'rule-of-recognition position' according to which 'rule-of-law principles' are designed merely 'to serve the transmission of the content of positive law'[31] in favour of his own view that 'government under the rule of law is always to some significant degree legitimate.'[32] Under the transmission account 'valid law by definition is law that lives up to the ideal of the rule of law'.[33] By

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25 [1994] AC 377; Stephen Sedley, 'Early Days' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 281.

26 (2002).

27 AWB Simpson, 'The Killing of the Prisoners at Agincourt and a Movement from Contract to Status' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 293.

28 Cheryl Saunders, 'To Be or Not to Be: The Constitutional Relationship Between New Zealand and Australia' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 251.

29 David Mullan, '"Because I Said So!" Is That Ever Good Enough? – Findings and Reasons in Canadian Administrative Law' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 233, 233.

30 David Dyzenhaus, 'The Legitimacy of the Rule of Law' in Dyzenhaus, Hunt and Huscroft (eds), *A Simple Common Lawyer* (2009) 33.

31 Ibid 53.

32 Ibid 34.

33 Ibid 53.

contrast, under Dyzenhaus's approach, 'immanent in particular legal orders are moral resources on which judges may and should rely in deciding hard cases'.[34] Dyzenhaus tells us that Taggart is 'both attracted to and deeply sceptical of' the proposition that law necessarily contains moral resources.[35] Such ambivalence between law as authority and law as reason is surely just the posture one would expect of a scholar so deeply immersed in the common law as Mike Taggart.

So much for the contributions. But to be fair, I cannot end without assessing my own work as reviewer against the criteria Mike suggests in his perceptive discussion of the thorny question of how one should review a *festschrift*.[36] This piece is offered as a review, not a review essay. According to Mike, I am, therefore, relieved of the obligation of originality. Contrary to the normal expectation, Leighton McDonald had no difficulty in persuading me to review the book; and I have found it a pleasure rather than an act of 'generosity or public service'. I did read the book carefully;[37] and I hope that what I have written does not reveal me as an inmate of the 'menagerie…[of] axe-grinders…nitpickers…sadists…back-scratchers…duellists…and so on' — although of this the honorand, the contributors and the reader must be the judge! I have tried to avoid the easy option of being 'overwhelmingly negative in tone'. The contributors to *A Simple Common Lawyer* certainly constitute 'an array of luminaries', but sticking my neck out to review their work has not required the courage of the 'lion-hearted'; and I trust that is does not reveal me as 'malevolent'. This review falls into the 'full Monty' category, although, unlike Max Rheinstein, I have not burdened the reader with a page-long discussion of each essay — if only because, as Mike delicately points out, 'the reviewer may not feel competent' to comment on all the contributions in that sort of detail. At the same time, although I know Mike, most of the contributors and the publisher (in some cases, very well), I hope I have not fallen into the trap of being uncritical or undiscriminating.

Lastly, there is the question of the impact of a review on the 'visibility' of the *festschrift*. I am confident that this fine example of the genre will not need to be 'rescued from oblivion'. But if this review has the effect of increasing its sales and readership and encouraging people to deepen their acquaintance with Mike's many contributions to administrative law scholarship, no-one will be more pleased than I.

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34 Ibid 34.
35 Ibid 33.
36 Taggart, above n 1 233-6.
37 In the nick of time I noticed the trap craftily set for the lazy reviewer in the running heading of Chapter 9.