Book Review: Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation, by Craig Scott (ed)

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BOOK REVIEWS

Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation
Edited By Craig Scott ........... François Larocque and Mark C. Power

Policing and Punishment in London, 1660-1750: Urban Crime and the Limits of Terror
By John M. Beattie ......................... Jim Phillips

TORTURE AS TORT: COMPARATIVE PERSPECTIVES ON THE DEVELOPMENT OF TRANSNATIONAL HUMAN RIGHTS LITIGATION EDITED BY CRAIG SCOTT (OXFORD: HART PUBLISHING, 2001) 731 pages.¹

BY FRANÇOIS LAROCQUE² AND MARK C. POWER³

In 1976, the mutilated corpse of Joelito Filartiga was found in the home of Americo Norberto Peña-Irala, the Inspector-General of Police in Asuncion, Paraguay. Upon discovering that Peña-Irala was in the United States, the Filartiga family brought a wrongful death action in the Federal District Court of New York, alleging that Peña-Irala had tortured Joelito to death. The Filartigas argued that the federal court had jurisdiction to hear the matter on the basis of the two hundred year old Alien Tort Claims Act⁴ which states that “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁵ In 1980, having found torture to be prohibited by the law of nations, the U.S. Court of Appeal for the Second Circuit recognized the jurisdiction of the federal court to adjudicate the Filartiga claim.⁶ Today, the ATCA and the more recent Torture Victims Protection Act⁷ continue to provide legal avenues for torture victims and

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⁴ 28 U.S.C. §1350 [ATCA].
⁵ Ibid.
⁶ Filartiga v. Peña-Irala, 630 F.2d 876 (2d Cir. 1980) [Filartiga].
expect will serve as a catalyst for an international dialogue on the advisability of attempting or facilitating American-style transnational adjudication. In that sense, the release of *Torture as Tort* is very timely as it coincides with increased interest in its subject matter on Canada’s law school campuses and amongst Canada’s human rights advocates, NGO community members, and legislators.

**POLICING AND PUNISHMENT IN LONDON, 1660-1750: URBAN CRIME AND THE LIMITS OF TERROR BY JOHN M. BEATTIE (OXFORD: OXFORD UNIVERSITY PRESS, 2001) 491 pages.**

BY JIM PHILLIPS

Anyone with an interest in the history of crime and criminal justice is familiar with University of Toronto Professor John Beattie’s definitive work on early modern England. Published some fifteen years ago, it remains the standard source on almost every aspect of the system by which crime was prosecuted and punished before the late eighteenth and early nineteenth-century developments which saw, among other things, the replacement of capital punishment as the principal mode of punishment, “modern” policing, and public prosecution. The principal contribution of that book to our understanding of the history of crime and criminal justice was that significant and far-reaching changes took place in the administration of the criminal law throughout the eighteenth century, changes often identified with the later, “reform” period. Most notably, it revolutionized our understanding of the history of punishment by charting the emergence and extensive use of transportation. Other developments—in prosecutorial procedure and in the nature of the trial—were informal, ad hoc, and gradual, not the result of sustained campaigns in parliament and the press, but they were highly significant nonetheless. Beattie’s work was not only important for English historians; it became indispensable reading for Canadian historians of criminal justice, for it was the English system that he so fully described and analyzed that was introduced to many North American colonies in the second half of the

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eighteenth century, including Nova Scotia, Quebec/Lower Canada, New
Brunswick, and Upper Canada.

Beginning a review of one book with a summary of another might
seem strange, but understanding *Policing and Punishment in London*
requires it. One of the central arguments in *Crime and the Courts*,
which was based on the records of the courts of Surrey and Sussex,
was that the urban parishes in the former county experienced a “crime problem”
that was greater in extent and different in nature than that of the rural
communities in both counties. And it seemed as if urban crime problems
precipitated and played a crucial role in encouraging and facilitating
innovation in criminal justice administration. In his current work, the focus
of which is the “city” of London, the old city governed by a Lord Mayor and
aldermen and the centre of what was even by then a much larger metropolis
of ever-expanding suburbs, Beattie has followed up on, and sought to test,
this insight. In his words, this book is “an effort to understand the ways in
which the influence of London shaped the changing foundations of criminal
procedure in ... a century of significant alteration in the criminal law and its
institutions.”

Although this book is about criminal justice rather than crime, it
begins with an introduction to the crime problem in London, as
contemporaries saw it, because it was the problem of crime that impelled
the significant innovations in criminal justice policy that are the focus of the
book. Using the records of the Old Bailey, Beattie establishes that property
crime was prosecuted at much higher levels than anywhere else in the
country, and that it was “more visible and so much more alarming” than
elsewhere because of the large number of women brought to court. Over
the whole period some 40 per cent of those prosecuted were women—a
remarkably high figure compared to all other historical and contemporary
studies—and in some years women outnumbered men. Other features of
London crime contributed to making it seem especially threatening,
particularly the fact that petty larcenies were not prosecuted at the Old
Bailey, meaning that the large number of offences brought there contained
a higher proportion of the more serious charges, such as robbery, burglary,
and other capital property crimes. Beattie has plenty of evidence to show
that contemporaries did indeed see crime as a serious problem, at times, as
the prosecution rate rose dramatically upward, one of crisis-like
proportions. Crime was both a cause of concern in itself and a symptom of
a deeper malaise in moral standards, a symbol of the social dangers of

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3 Ibid. at vii.
4 Ibid. at 20.
freeing people, young men and women in particular, from traditional forms of restraint and social control.

The rest of the book is divided into two parts, which together cover all aspects of criminal justice administration. The first of these two parts, on "Policing and Prosecution," analyzes the roles of magistrates, constables and other public peace officers, and the private agents who came to play an increasingly large role in detection and apprehension (and sometimes the manufacture) of crime—thief takers. Here the story is essentially one of the transition from a system marked by localism and reliant on non-professional, sometimes voluntary, agents to one more regularized, bureaucratic, and professional. Policing and prosecution were always fragmented and combined public and private initiative; over time the public-private balance shifted, laying the foundations for what historians see as the "modern" system which has hitherto been seen to emerge only in the mid-to-late eighteenth century. Beattie pushes the origins of that system back half a century or more, and locates the wellspring of reform in the later seventeenth century. The principal landmarks he delineates are the creation of the first true magistrates' court in 1737, the large-scale use by the 1720s of paid and semi-professional "deputies" as constables, serving instead of those elected to do so under the customary system whereby householders were chosen for a year, and the evolution of the night watch into a paid and professional force, financed by local taxes.

The story told here is complicated, not the least because criminal justice administration was embedded in local institutions and power structures and ancient rights and privileges were thus often threatened by innovation. It is wonderfully well told nonetheless, as the author marshals a wealth of archival material not only to explain how criminal justice systems worked and changed but also to set them against a complex system of city government and developments in economic and cultural life which shaped and constrained criminal justice reform. We come to understand not only how and why change occurred, but also why it was halting and episodic and why localism, especially in policing arrangements, remained a feature of the system.

A review must necessarily concentrate on these general themes and arguments, but doing so tends to underplay the variety in this book which makes it also a splendid read. A remarkable chapter on thief takers leads us through the seamy underside of law enforcement, showing that such men were often in league with those who stole and received the goods that thief takers arranged to return to their owners, and that they incited crime for the rewards of a successful prosecution. Yet they were encouraged by authorities whose "official" police forces did little in the way of investigation and apprehension because that was still largely a matter for
the victim of crime, worked with constables, and in some sense, albeit a not very creditable sense, represented the origins of the modern detective. A similarly fascinating section on street lighting, in the chapter on policing the streets at night, shows Beattie taking a broad approach to policing, and he convincingly argues that improvements in technology and innovations in the organization of lighting had much to do with providing an enhanced sense of security to many residents.

The second major part of the book comprises four chapters on "Prosecution and Punishment" and investigates the prosecution of crime in court and the debates over penal options. Here Beattie returns to and amplifies issues he has dealt with in other work, including the composition of juries, the changing nature of the trial, the pardon system, and the search for secondary punishments, especially the emergence of transportation. But the story told is richer and more detailed than previous accounts, and the discussions of transportation before the Transportation Acts of 1718 and 1720, of objections to capital punishment, and of the enlargement of entitlement to the benefit of clergy as a punitive measure, are especially revealing of the richness and complexity of the early modern history of criminal justice.

Part Two begins with a chapter on "The Old Bailey in the Seventeenth Century," which argues convincingly that juries used a substantial discretion in finding verdicts, based on their dissatisfaction with the limited penal options available. High rates of acquittals were the product of jurors' unwillingness to risk sending too many offenders to the gallows. Succeeding chapters examine state initiatives in punishment as responses to the perceived crime problem, revealing a blend of policies—increasing the number of capital offences while searching for alternative sanctions. The principal secondary punishment that emerged was transportation, and it remained the mainstay of a system otherwise based on the selective use of the terror of the gallows until late in the eighteenth century.

Beattie's major contribution here is not to take the partial displacement of capital punishment by transportation (and a few other secondary punishments) for granted, but to trace precisely why it was that

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finding an alternative punishment moved to the forefront of the parliamentary agenda. It did so, he finds, because London was influential in national politics, and London had a particular crime problem, especially a problem of crime committed by women. Transportation at one and the same time avoided the crisis that would ensue if too many people, especially too many women, were hanged, while also helping to ensure that substantial numbers of those prosecuted were not acquitted by juries squeamish about the sanction that awaited the guilty. In influencing the shape of penal options, London did much more than provide experiments that other local authorities could later follow; transportation was national policy, and the city’s innovations thus changed the entire penal landscape.

There is little to quibble about in Policing and Punishment in London, but a few points perhaps deserved more attention. For example, Beattie very effectively describes how over the first three to four decades of the eighteenth century magisterial duties were carried out by fewer and fewer men, but not until the death of the only man doing the work did the city’s Justices of the Peace get together and establish a new arrangement where they shared the duties in what became a regularized magistrates’ court. Beattie is persuasive about the complex of reasons why Justices shied away from their magisterial duties before the 1730s. In particular, he is surely correct to say that the increasingly judicial nature of the magistrates’ initial inquiry made the work much more onerous than it was when the purpose was simply to take depositions and commit the accused for trial. One of the results of this judicialization was that an increasing number of accused felons were discharged without trial. Yet the evidence in Beattie’s book includes no expressions of contemporary concern about the consequences of more process—fewer active magistrates and more accused felons discharged without a trial. Complacency cannot account for this phenomenon, for as Beattie shows so well in Chapter One these were a body of men who evinced deep concern about increasing crime. The sources may simply not be adequate to explain why the magistrates allowed the situation to deteriorate so far if indeed they were so worried about crime, and thus it remains a conundrum.

I also wondered at times about why the background chapter on prosecuted crime was restricted to property crime. Its purpose is both to show the extent and nature of London crime, and also to chart how seriously it was taken by contemporaries. Especially given that the kinds of property crime most worrying were those, like robbery, associated with violence, it would have been useful to include crimes of violence in the analysis, and comparing verdict figures for murder and property offences would also have enriched the analysis of jurors’ attitudes to capital punishment. All this is to say no more, however, than that a path-breaking
book raises questions at the same time that it informs, and this book informs constantly as it entertains throughout. Engagingly and very clearly written, based on a wealth of judiciously employed archival sources, it will surely take its place alongside *Crime and the Courts* as standard and required reading for all students of criminal justice history.
their families who seek civil redress in U.S. courts. By contrast, the current Canadian legal framework has not proved hospitable to tort claims brought in relation to extraterritorial human rights violations.

The Filartiga line of cases is at the very heart of Torture as Tort. This book is the first comprehensive analysis of the burgeoning field of U.S.-style transnational human rights litigation by non-American legal scholars and practitioners. For this reason alone, Torture as Tort represents an invaluable contribution to the international legal literature. The value of this book is not solely in the novelty of its subject matter, but also in the thought-provoking, lucid, and (sometimes) critical manner in which it deals with the myriad of issues raised by transnational human rights litigation. Comprised of twenty-six chapters, Torture as Tort is the collective effort of thirty-one contributors, including Professor Craig Scott, who is also to be credited for the thoughtful editing of the tome. The chapters are grouped into six parts, which serve as convenient topical sections for this book review.

I. FRAMES AND FOUNDATIONS

As its title suggests, the first section of Torture as Tort introduces the reader to the conceptual, lexical, and normative framework of the transnational human rights litigation phenomenon. “Translating Torture into Transnational Tort” by editor Scott is particularly noteworthy in this respect. Through a theoretical discussion—only one footnote cites other literature—Scott addresses various problems relating to the translation of the international prohibition of torture into a domestically enforceable tort, paying particular attention to the transnational tort liability of corporate actors. Scott’s chapter exposes various dichotomies and polarities regarding the translation of torture into tort including direct versus indirect responsibility, vertical versus horizontal axes of accountability, international versus national law, public versus private law, and legislative versus judicial normative development. Drawing on an analogy from the literary context, Scott ultimately suggests that the normative space between torture and tort should emerge not as a unidirectional rendering of one juridical realm into the other, but rather as mutual translation in which each sphere modifies

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8 On the most recent such case at the time of writing, see David Gonzalez, “Torture Victims in El Salvador are Awarded $54 Million” New York Times International (24 July 2002) A8.

9 See Bouzari v. Iran, [2002] O.J. No. 1624 (Sup. Ct.) QL., in which an action was brought by the plaintiffs against the Islamic Republic of Iran, claiming damages for torture which allegedly occurred in Iran in 1993 and 1994.
our understanding of the other, thereby creating an opportunity for greater insight in the respective discourses of torture and tort. This chapter, though somewhat hermetic, constitutes a valuable analytical backdrop for the rest of the volume.

Michael Swan’s chapter, “International Human Rights Tort Claims and the Experience of United States Courts,” is also an important piece of the Torture as Tort framework as it provides an (understandably cursory) overview of how civil claims for transnational human rights violations have been processed by the U.S. legal system since the Filartiga case. Intended as a reference point for the other chapters of the book, Swan’s chapter contains very little analysis or critique of the U.S. phenomenon. Rather, it merely seeks to introduce a presumably non-American reader to the statutes, cases, and doctrines that govern international human rights tort claims, and does so very well.

The first section of Torture as Tort ends with two chapters that touch on the desirability of U.S.-style transnational human rights litigation. John Terry states his position in the title of his chapter: “Taking Filartiga on the Road: Why Courts Outside the United States Should Accept Jurisdiction Over Actions Involving Torture Committed Abroad.” Terry’s proposition is that while specific legislation empowering courts to assert jurisdiction in tort claims for torture committed abroad would be preferable, courts can now properly assume jurisdiction in such matters in accordance with long-standing principles of private international law. Providing civil redress for torture would constitute a complementary mechanism to the universal criminal remedy and, more importantly, afford meaningful personal vindication for survivors of gross human rights violations.

Malcolm Evans and Rod Morgan, long-time collaborators in the field of torture prevention, take issue with the effects of this corrective justice-oriented civil redress phenomenon in their chapter entitled “Torture: Prevention versus Punishment?” The authors present a balanced view of the advantages and shortcomings of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26 November 1987, ETS No. 126 [ECPT].
event, unlikely to ratify a convention such as the ECPT that allows for intrusive inspections of their prisons and holding facilities. Nevertheless, lawmakers must remain attuned to the competing dynamics that exist between international initiatives aimed at punishing torture and those aimed at preventing it.

II. JURISDICTION AND IMMUNITY

The second section of Torture as Tort centres on the preliminary steps of any conflict of laws analysis: jurisdiction, forum non conveniens, and immunity defences. Anne C. McConville's chapter, "Taking Jurisdiction in Transnational Human Rights Tort Litigation," is probably of limited interest to international jurists as it is largely based on Ontario's statutory and jurisprudential framework. Fortunately, the author provides insightful analysis of the Supreme Court of Canada's private international case law, which should be widely relevant in common-law jurisdictions around the world. Essentially, McConville concludes, much as Terry does in Chapter Four, that Ontario courts could properly assume jurisdiction in transnational human rights litigation, provided they find that claims based on international human rights properly belong in the realm of private law. Indeed, "once public international values are required to justify a court's jurisdiction, the private nature of the dispute may be difficult to sustain."11

In "Geographies of Injustice: Human Rights at the Altar of Convenience," Upendra Baxi advances a sulphuric criticism of contemporary private international law, obsessed as it is with the values of decisional uniformity, certainty, and predictability, too often at the expense of justice and fairness. Baxi argues that the epistemic constructs of private international law are "coated in a historical and dogmatic opacity" repugnant to the protection and promotion of transnational human rights. Taking aim at the doctrine of forum non conveniens, the author states that it is "configured in terms of that peculiar combination of balancing public and private interest aggregations, a mode of analysis that facilitates denial of jurisdiction in part by totally avoiding an assessment of comparative societal responsibility for ensuring civil transnational justice."12 While Baxi does not cite Canadian examples, support for this position can be found in the Supreme Court of Canada's decision in Tolofson v. Jensen, where Justice LaForest emphasized the pre-eminence of decisional harmony over fairness: "While no doubt, as was observed in Morguard, the underlying

11 Torture as Tort, supra note 1 at 196.
12 Ibid. at 207.
principles of private international law are order and fairness, *order comes first*. Order is a precondition to justice."\(^{13}\)

Baxi's chapter is consonant with the themes explored in "The Commercial Activity Exception to Sovereign Immunity and the Boundary of Contemporary International Legalism," in which Robert Wai argues that the bright-line distinction in immunity doctrine between commercial and non-commercial activities is not justified at the policy level. Accordingly, the doctrine of state immunity ought to be revised, especially where human rights are concerned. Wai warns, however, that we should not be too quick to assimilate non-commercial and commercial activities, thereby further reducing the scope of sovereign immunity, as this might contribute to a dangerous form of international legalism based on adjudication. Internationalized, this legalism tends to espouse parochial neo-liberal (Western) ideals, contends Wai, and is notoriously unresponsive to other regional interests. If the author is correct, as we believe him to be, an unmitigated abolition of the doctrine of sovereign immunity where human rights torts are concerned might result in the litigation of questions of social policy in foreign tribunals, questions that would "best be left to the domestic processes of different state-communities around the globe."\(^{14}\)

Immunity doctrine resurfaces in Wendy Adams' chapter, "In Search of a Defence of the Transnational Human Rights Paradigm: May Jus Cogens Norms Be Invoked to Create Implied Exceptions in Domestic State Immunity Statutes?" Adams presents a clear analysis of the principles governing the domestic reception of international law. She concludes that, at least in transformationist states (such as Westminster parliamentary systems), judges are likely precluded from reading in an implied exception to sovereign immunity on the basis of *jus cogens* norms in the absence of express legislative authority.

Part II ends with the joint contribution of Peter Burns and Sean McBurney entitled "Impunity and the United Nations Convention against Torture: A Shadow Play Without an Ending," in which the authors question whether a state's refusal to extradite or prosecute an alleged torturer on the basis of immunity or amnesty constitutes a violation of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.\(^{15}\) They emphatically conclude that the refusal to extradite or prosecute in the face of an immunity claim runs afoul of both CAT

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\(^{13}\) [1994] 3 S.C.R. 1022 at 1058 [emphasis added].

\(^{14}\) *Tort as Torture*, supra note 1 at 245.

obligations and principles. Amnesties, however, warrant a more qualified approach. The CAT may not be violated where amnesty is granted in the course of a legitimate truth and reconciliation process, so long as the process includes adequate vindication and compensation measures for victims.\textsuperscript{16}

III. CHARACTERIZATION, CHOICE OF LAW, AND CAUSES OF ACTION

The first three chapters in the third section address questions of private international law related to the civil litigation in Canada of extraterritorial torture. In “Torture, Tort Choice of Law and Tolofson,” Jennifer A. Orange invites the reader to consider the danger of applying an absolute \textit{lex loci delicti} rule to international torts, a necessary reflection given Justice LaForest’s holding in Tolofson that the rule should apply both to the interprovincial (at issue in Tolofson) as well as international arenas. Justice LaForest did nevertheless allow for the exceptional possibility of international claims in select instances, and it is this sliver of opportunity that Orange explores. She concludes that the door is open “for the application of Canadian tort law—where the \textit{lex loci delicti} is tangibly repugnant to overriding international human rights norms.”\textsuperscript{17} Echoing Baxi, the author argues convincingly that “when confronted with a human rights violation such as torture, the considerations and responsibilities of the Canadian judiciary change”\textsuperscript{18} in light of the basic tenets of public international law such as the CAT. Perhaps most interesting is Orange’s conclusion regarding the desirability of legislating rules for choice of law in tort at the federal level, and it is unfortunate that it was beyond the scope of the chapter to explore this matter further.

Graham Virgo dissects questions of private international law related to the transnational litigation of torture in England in his chapter, “Characterisation, Choice of Law and Human Rights.” Readers will be most interested in his conclusion that “it should soon be possible to say, without fear of contradiction, that, in England, torture is a tort.”\textsuperscript{19} Virgo is methodical in his treatment of the issues. Those who may be put off by his style of writing should not overlook the breadth of his ideas, notably the

\textsuperscript{16} To be distinguished from the dubious “self-amnesties” of departing tyrannous governments; see Chapter 22 by Llewellyn.

\textsuperscript{17} \textit{Tort as Torture}, supra note 1 at 321.

\textsuperscript{18} \textit{Ibid.} at 301.

\textsuperscript{19} \textit{Ibid.} at 342.
potential impact of the *Human Rights Act* and the importance of a nominate tort of torture (as opposed to the characterization of torture as battery, for instance) in the effective litigation of extraterritorial torture.

Martin Bühler's "The Emperor's New Clothes: Defabricating the Myth of 'Act of State' in Anglo-Canadian Law" is well-researched. It is nothing less than a direct challenge to the soundness of the reasoning of many law lords who, through the landmark *Pinochet* cases, have apparently accepted that English law encompasses an Americanized "act of state" doctrine. The problem is that "the phrase 'act of state' has been used indiscriminately to refer to concepts that operate in the same field of law—conflict of laws—but that are very different in their underlying premises." The author insists that Anglo-Canadian courts, through rules of conflict of laws, have rarely refrained from assessing the validity of "acts of state," and he deconstructs both Canadian and English jurisprudence and contrasts his findings with American case law. Such an analysis will surely help to frame future attempts at convincing the courts of other jurisdictions to distinguish, or distance themselves from, their English counterparts.

In "Grounding a Cause of Action for Torture in Transnational Law," Sandra Raponi contends that "it is conceptually more appropriate to formulate and conceptualise an action that is based on international human rights law within a framework of 'transnational law'" as opposed to within a traditional "conflict of laws" framework. Raponi makes this assertion despite the significant hurdles awaiting the latter in the Canadian context. The author discusses these hurdles at some length. Essentially, transnational law lends more legitimacy to domestic courts sitting in judgment of alleged foreign human rights violations precisely because it is the domestic embodiment of internationally agreed upon norms.

Lastly, Edward M. Hyland's excellent chapter, "International Human Rights Law and the Tort of Torture: What Possibility for Canada?" surveys several issues which have given rise to this book, including the development of international law's prohibition of torture, torture litigation in the United States, and, perhaps most effectively, the intersection between international and Canadian law. Unfortunately, the author seems to shy away from discussing more practical considerations (and potential solutions) pertaining to the adjudication of torture claims in Canada which may be of interest to litigators. Practising lawyers should read Hyland's

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21 *Tort as Torture*, supra note 1 at 370.
22 Ibid. at 374.
contribution in tandem with the other chapters of this section.

IV. EVOLVING INTERNATIONAL LAW OF CIVIL RECOURSE AGAINST NON-STATE ACTORS

The fourth section of *Torture as Tort* opens with “Holding Leaders Liable for Torture by Others: Command Responsibility and *Respondeat Superior* as Frameworks for Derivative Civil Liability,” a joint piece by Valerie Oosterveld and Alejandra Flah, which examines the potential usefulness of these doctrines (and their specific application to enterprise liability) in holding superiors accountable in Canadian courts for the actions of their subordinates. While drawing heavily on the experiences of the United States, the authors succeed in illustrating the relative advantages of both doctrines as an analytic framework in Canada, applying them to the hypothetical scenario of a Sudanese anti-government activist who, having survived torture in her homeland, launches a tort claim against her torturer’s superior whom she discovers also to be living in Canada.

Chanaka Wickremasinghe and Guglielmo Verdirame’s contribution studies the “Responsibility and Liability for Violations of Human Rights in the Course of UN Field Operations.” The subject is timely and the undertaking significant given the increasing complexity and diversity of UN field operations. The authors review the categories of such operations before considering in turn the international responsibility and the civil liability of the UN, as well as the liability of the host state and of individual operatives. Perhaps as a result of the breadth of the subject, the chapter’s analysis is general and readers may be disappointed by a comparatively superficial treatment of the UN transnational tort liability issue.

Unlike the first two chapters of Part IV, corporate responsibility is at the heart of Muthucumaraswamy Sornarajah’s “Linking State Responsibility for Certain Harms Caused by Corporate Nationals Abroad to Civil Recourse in the Legal Systems of Home States.” The piece is both original and refreshing because it addresses corporate and state responsibility in the context of developed/developing state relations where the focus appears to be squarely on the protection of the assets of multinational corporations, often at the expense of the protection of the people of the host state. Grappling with such issues as universal jurisdiction, nationality, morality, human rights, and failure to act, the author concludes that there is no sound public policy or legal reason why the home state of a multinational corporation should not incur responsibility for the conduct of the corporation in a (usually developing) host state.

The last two contributions to this section consider whether and to
what extent there is an obligation at international law to provide civil remedies to victims of egregious human rights violations. In "Revisiting Human Rights in the Private Sphere: Using the European Convention on Human Rights to Protect the Right of Access to the Civil Courts," Andrew Clapham explores "what arguments might be used, in the context of evolving international human rights law, to show that there is an international legal obligation on a State to allow the victims of foreign torture to bring a suit in that State’s national courts," be it a claim in negligence against State authorities or a claim in tort against individual torturers.

While Clapham focuses on the European Convention on Human Rights, Andrew Byrnes limits his analysis of what is essentially the same issue to the CAT in his chapter, entitled "Civil Remedies for Torture Committed Abroad: An Obligation under the Convention Against Torture?" Byrnes concludes: "the better view is that the CAT does not require that the resources of a State party’s civil law system be made available to persons who wish to pursue actions or other remedies for acts of torture which occurred outside that State." While this conclusion may be disconcerting to some human rights advocates, it must be heeded by anyone seeking to have Canada emulate the American litigation model.

V. LEGITIMACY, INTERVENTION, AND THE FORGING OF NATIONAL HISTORIES

The penultimate part of Torture as Tort invites the reader to reflect on the legitimacy and appropriateness of transnational litigation as a means of enforcing international human rights. In "Doing the Right Thing? Foreign Tort Law and Human Rights," Jan Klabbers adopts a theoretical framework "loosely based on a mixture of Arendtian republicanism and insights deriving from critical legal studies and critical social theory." He concludes that transnational public law litigation is an unjustified intervention into other societies. While it would seem that this contribution is out of place given the overall ideological bent of this volume, Klabbers

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23 See also "Revisiting Human Rights in the Private Sphere, Postscript: Developments Related to Pinochet as of January 2001."

24 Torture as Tort, supra note 1 at 515.


26 Torture as Tort, supra note 1 at 539.

27 Ibid. at 555.
does ask some difficult questions that surface regularly in the American transnational litigation literature.

Amnesties within the context of restorative justice are the subject of Jennifer Llewellyn's very well-researched "Just Amnesty and Private International Law." The author compellingly argues that it is important to distinguish between different kinds of amnesties: "[t]he mere absence of either criminal law prosecution or civil liability should no longer stand as the mark of injustice crying out for remedy from the international community. Instead, one must attend to the context at issue and ask whether the interests of justice are being served." Based on the experiences of post-apartheid South Africa, the author highlights the role played by "just" amnesties in transitional contexts, thereby challenging widely held beliefs. Perhaps most interesting is Llewellyn's discussion of when and why amnesties should be recognized by foreign courts entertaining transnational tort actions.

Part V ends with two fascinating case comments. In "Cultural Challenges: Injunctions in Australian Courts and the Right to Demand the Death Penalty under Saudi Arabian Law," authors Belinda Wells and Michael Burnett reflect on international comity and inconsistent cultural norms that may be at issue in some transnational human rights litigation. The authors comment on a case in which proceedings were launched in Australia in the hope of preventing the family of an Australian murdered in Saudi Arabia from demanding the imposition of the death penalty (as per Saudi Arabian law) against two British women found guilty of the murder. Despite the case having been settled before going to trial, the authors (Burnett represented the two British women in Australia) skillfully dissect some of the thorny legal, moral, and cultural issues in the case.

Amnon Reichman and Tsvi Kahana assess the 1999 GSS case in "Israel and the Recognition of Torture: Domestic and International Aspects." This is an intriguing snap shot of Israel's state practice regarding torture: the Israeli apex court, while holding that the use of torture by the security service is illegal under Israeli law, nevertheless stated that in certain "ticking bomb" situations, a defence of necessity is available to a security agent. The authors offer two very different readings of the case before commenting on its potential international impact and considering questions of immunity, comity, universal jurisdiction, and private

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28 Ibid. at 600.
30 Public Committee against Torture in Israel v. State of Israel and General Security Service, 1999 HC 5100/94 (Sup. Ct.).
international law in these times of increased transnational human rights litigation.

VI. ON THE BORDERS OF TORT THEORY

The last section of Torture as Tort serves as a fitting conclusion to this thought-provoking book. First, Mayo Moran urges the reader to reflect on the meaning and consequences of the transnational adjudication of human rights in "An Uncivil Action: The Tort of Torture and Cosmopolitan Private Law." Moran's consideration of so-called "new" private law actions (including, for instance, Holocaust-related litigation) allows the reader to grasp the significance of this legal frontier. This case law then serves "as a useful point of departure for examining how the changing geography of legal argument forces a fundamental reconsideration of the way that we think about law, the state and the relations between them." Simply put, these cases highlight the increasing "anachronism of our traditional separate-spheres model of law." Moran does an admirable job in exposing the extent to which the binding law model's insistence on a clear-cut division between the domestic law norms and those of international law is problematic.

Second, Oliver Gerstenberg, in "Private Law, Constitutionalism and the Limits of the Judicial Role," explores diverging views on the relationship between private law and constitutional law as a backdrop for his outline of a "generalisable model for the concomitant constitutionalisation and democratisation of private legal relationships." Drawing heavily on German and other European law and theory, Gerstenberg's understanding of private law also succeeds in putting into context many of the issues confronted by the previous chapters.

VII. CONCLUSION

It is no exaggeration to state that Torture as Tort is now the reference point of any inquiry by a non-American common-law lawyer seeking to make sense of the explosion of transnational tort litigation in the United States. The book's contributors have discussed the gamut of issues raised by such actions from diverging ideological stances. Professor Scott is to be congratulated for his Herculean accomplishment, one which we

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31 Torture as Tort, supra note 1 665.
32 Ibid. at 665.
33 Ibid. at 690.
expect will serve as a catalyst for an international dialogue on the advisability of attempting or facilitating American-style transnational adjudication. In that sense, the release of *Torture as Tort* is very timely as it coincides with increased interest in its subject matter on Canada's law school campuses and amongst Canada's human rights advocates, NGO community members, and legislators.


BY JIM PHILLIPS

Anyone with an interest in the history of crime and criminal justice is familiar with University of Toronto Professor John Beattie's definitive work on early modern England.\(^2\) Published some fifteen years ago, it remains the standard source on almost every aspect of the system by which crime was prosecuted and punished before the late eighteenth and early nineteenth-century developments which saw, among other things, the replacement of capital punishment as the principal mode of punishment, "modern" policing, and public prosecution. The principal contribution of that book to our understanding of the history of crime and criminal justice was that significant and far-reaching changes took place in the administration of the criminal law throughout the eighteenth century, changes often identified with the later, "reform" period. Most notably, it revolutionized our understanding of the history of punishment by charting the emergence and extensive use of transportation. Other developments—in prosecutorial procedure and in the nature of the trial—were informal, ad hoc, and gradual, not the result of sustained campaigns in parliament and the press, but they were highly significant nonetheless. Beattie's work was not only important for English historians; it became indispensable reading for Canadian historians of criminal justice, for it was the English system that he so fully described and analyzed that was introduced to many North American colonies in the second half of the

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