This review has only touched on some of the most interesting themes of a wide-ranging and thought-provoking book. The book avoids a general conclusion, or statement of Shakespeare's "position" on strangers, but it has a very clear, and explicit, ethical concern with the treatment of strangers, both in Shakespeare's time and the present day. One leaves the book with the sense that Shakespeare's attitude is more ambivalent: the moral high points of *The Book of Sir Thomas More* and *The Comedy of Errors* have to be set against the dispiriting conclusion of *The Merchant of Venice*. There is, similarly, little cause for optimism in the conclusion of *Measure for Measure* – things seem likely to continue, with the same hypocritical disdain for "strangers", as before (p. 40). Elsewhere, in plays that Raffield can only touch on in passing, such as *Henry V*, the portrayal of the French seems rather less sympathetic than Raffield suggests when he says that "they are never denigrated, and nor are they despised" (p. 67) – the French nobility are shown as arrogant, conceited and complacent (see for instance, III.7, IV.2, alternating with scenes showing the humility and bravery of the English army). Shakespeare was clearly alert to the processes, dynamics, dangers and, above all, the dramatic potential of "strangeness"; Raffield's study invites, and encourages, us to reflect on Shakespeare's multifaceted, opportunistic exploitation of this powerfully divisive concept.

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The Judge and the Philosopher. By David H. Moskowitz. [Bedford: Huge Jam Publishing, 2023. 264 pp. Hardback £20.00. ISBN 978-1-91124-999-3.]

In his series *The Judge and the Creative Positivist*, Moskowitz puts forward a legal theory which he has termed creative positivism. This theory, which builds on Hart's legal positivism, supplements the latter by offering a theory of judicial decision-making in common law systems. Moskowitz's thesis is that the function of judges is not simply to determine what the law is, but that they are also authorised to create law themselves – by deliberately making just and/or wise decisions which otherwise run counter to the pre-existing law. Hart's task was to provide a general account of legal systems. Moskowitz's creative positivism offers an engaging refinement of this general theory for the context of Anglo-American adjudication. In this book, volume two of his series *The Judge and the Creative Positivist*, he discusses a variety of legal philosophies, and highlights connections between these and his own creative positivism. This work will be of interest to students of adjudication in common law systems, legal positivism and those with a general interest in the philosophy of law.

Moskowitz argues that the decisions made by judges can be evaluated according to three criteria: whether they are correct (in line with pre-existing law); whether they are just; and whether they are wise. Although a decision can be incorrect by virtue of mistake, judges are also empowered by the rule of change, according to Moskowitz, to deliberately make decisions which are incorrect (inconsistent with the pre-existing law), if they are just and/or wise. Such incorrect decisions, he emphasises, are

justified if and only if they are just and/or wise. By making such decisions, which are binding as precedent, judges are creating, and not merely identifying, legal rules. Moskowitz's entire framework, therefore, is "based upon the acceptance of the possibility that judges may create new legal rules" (p. 6).

Certain significant aspects of Moskowitz's legal philosophy are left unjustified in *The Judge and the Philosopher*. For example, there is no defence of his selection of evaluative criteria. He simply states that "[t]o evaluate a decision, one should look to whether it is just or wise. These are the evaluative criteria in looking at precedents and whether they should or should not be overruled" (p. 6). But why justice and wisdom, rather than fairness or effectiveness? Further, although this cannot be described as a serious fault, it is not exceedingly clear from reading this book alone how the discussion in *The Judge and the Philosopher* stands in relation to Moskowitz's wider discussion throughout the series. Undeniably, however, the author succeeds in the objective he appears to be pursuing in this volume, namely to discuss various legal philosophies in relation to his creative positivism.

Moskowitz's discussion of what he terms the "traditional theory" and of the legal realism of Jerome Frank and Karl Llewellyn convincingly illustrates some of the weaknesses of both whilst acknowledging the "germ of truth" (p. 8) they nevertheless embody. Building on the critiques of Frank and Llewellyn, "the individuals most influential in demonstrating the inadequacies of the traditional theory" (p. 12), Moskowitz cogently argues that the traditional theory presents a false picture of how judges operate. The pronouncement of the traditional theory "that judges always resolve cases by applying laws that existed prior to the decision being made (the pre-existing law) and that the primary judicial function is to discover such laws" (p. 8) is a clear oversimplification. It disguises, he claims, the fact that very often "[t]he making of judicial decisions involves a multitude of fine distinctions and discriminations employed to construct a persuasive justification of the decision" (p. 28). Nevertheless, as Moskowitz readily acknowledges, judges generally desire to make correct decisions, and surely do not hold arbitrary legislative powers.

Though legal realism, and in particular the views of Frank and Llewellyn, are central to Moskowitz' critique of the traditional theory, he clearly distances himself from legal realism as well. Moskowitz disagrees particularly strongly with the prediction theory of law. This theory, acceptance of which he considers widespread amongst legal realists, suggests that the law is nothing more than a prediction of what future courts will decide. Referring to "Llewellyn's list of techniques in dealing with precedents" (p. 28), Moskowitz makes the accurate observation that, "underlying these techniques, and rendering such techniques comprehensible, is the understanding that each precedent has a ratio decidendi that is generally agreed to be the ratio decidendi of that case" (p. 28).

Moskowitz' theory is built upon Hart's legal positivism, which Moskowitz claims "forms the basis for contemporary jurisprudence" (p. 45). Creative positivism nevertheless diverges from Hart's legal positivism in several important respects. Chief among these is that, whilst Hart's legal theory aims to offer an account of what law is, Moskowitz's legal theory is focused instead on judicial decision-making – on how judges determine what the law is. Perhaps as a consequence of this, Moskowitz's theory is narrower than Hart's. Focusing on adjudication has meant that Moskowitz's study is concentrated on common law jurisdictions, in

contrast to Hart's aim of providing a general theory of law – a theory that is applicable to all central instances of legal systems and not just certain jurisdictions.

Moskowitz seems at certain points to criticise Hart's approach. He claims that "[f]or Hart's structure to be useful, it is fair to point out that the complexity and variability of the parts of the legal system that he provides do not give us the equivalent of the foundation (and some other essential parts of the building), and, therefore, his structure is not adequate to support his description of the legal system" (pp. 64–65). His criticism of Hart is clearly misplaced. Hart did not provide a detailed account of adjudication precisely because he believed that doing so would require a narrower theory than he wished to provide. By contrast, in providing more detailed guidance, Moskowitz has had to focus not simply on adjudication in a theoretical sense, but on adjudication specifically in Anglo-American, common law legal systems.

Moskowitz also takes issue with Hart's portrayal of the discretionary powers held by judges. According to Moskowitz, Hart claimed that judges could exercise discretion only insofar as there was some indeterminacy in the law. Moskowitz, on the other hand, holds that judges are authorised to exercise discretion even in cases where the law is clear. He qualifies this statement by contending that such an incorrect decision would be justified if and only if the correct decision would be unwise and/or unjust. This discretionary power held by judges is constrained only by legal culture and customary norms of adjudication, including a norm to accept that the correct decision is presumptively justified. Moskowitz does not, however, discuss these constraints in detail. He also does not address the fact that Hart surely would not have denied that the discretionary power of judges could extend in this way in certain legal systems. Such details are contingent matters and are jurisdiction specific.

This approach demands a modification of the rule of recognition insofar as it is first set aside when a judge makes an incorrect decision (in accordance with a rule of change that empowers him to do so), and then recognises the new rule when it is used in deciding a future case. Though Moskowitz disagrees with Hart's take on the discretionary theory, he is mostly in agreement with him regarding the pedigree theory, noting only that "[i]t is important to distinguish the sources of the law, which is primarily the concern of the pedigree theory, and the sources for judicial decisions" (p. 68). This is what allows Moskowitz to affirm the separation theory, which holds that law and morality are separable, and which is central to positivistic theories of the law. In emphasising the difference between the sources of law and the sources of judicial decisions, Moskowitz is able to assert that justice and wisdom can be legitimate sources of judicial decisions whilst maintaining that they do not constitute sources of law. Indeed, he denies entirely that legal principles can be admitted into law-ascertainment.

Moskowitz's partial critique of Hart is not entirely apposite, though the refinements he makes to Hart's secondary rules are fitting for his aim: to provide a theory of adjudication in common law systems. Indeed, he does not offer his account as an alternative to Hart's. He suggests, rather, that his theory "should be viewed as a supplement to Hart's basic legal framework of the legal system and a modification of his legal philosophy in regard to how adjudication should be studied, analyzed and evaluated" (p. 45). As a result, his refinements of certain elements of Hart's theory are far from redundant. He provides an insightful

theory of judicial decision-making in common law legal systems, and those interested in the functioning of such systems would do well to engage with the propositions of Moskowitz's creative positivism.

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The Sentimental Life of International Law: Literature, Language, and Longing in World Politics. By Gerry Simpson. [Oxford University Press, 2021. viii + 226 pp. Hardback £29.99. ISBN 978-0-19284-979-3.]

How does international law speak and write itself, and, in doing so, constitute the world? And how might reconsidering its narratives, idioms and discursive categories help bring about a more decent international society? These are the questions at the core of *The Sentimental Life of International Law*. Gerry Simpson posits that international law can be regarded as a prose form, and by taking seriously the idea of law as language, he boldly, and compellingly, offers a thorough reconceptualisation of international law scholarship.

In the introduction, Simpson contends that "to speak of the world is to speak international law" (p. 16). He points out that language has power, in that it determines the way we approach law, international relations and the world. The problem, he continues, is that the governing idioms of international lawyering are becoming inadequate for grasping the increasing complexity of the world. The aim of the book is to break out of the prison house of language in which international lawyers are trapped, to come up with new vocabularies and new modes of expression, so that we can be "speaking different sorts of international law", or "speaking international law in different sorts of ways" (p. 2). Another way of putting this idea, as the book does in its postscript, is that we need to defamiliarise international law, to make strange the ways in which it imagines reality.

The second chapter constitutes a meditation on the languages of international law scholarship. Why, Simpson asks, do international law scholars insist on dispassion and distance in their work, and what prompted the recent turn in the opposite direction, towards scholarship in a more personal, autographical mode? His answer is that international law scholars are navigating between two extremes: the register of "too-cool dispassion" on the one hand, and overly emotive responses that reek of "cheap sentimentality" on the other. The chapter then returns to debates around Sentimentalism in eighteenth-century literature and philosophy to shed light on the main problems with sentimentality in our own time, such as sentimental excess, moral simplicity, solipsism, and depoliticisation and disengagement. Simpson proposes a path between the two extremes of complete dispassion and unbridled emotionalism by arguing for a "hard-boiled, unillusioned sentimental life" (p. 52), whereby international law scholars take the "emotional pulse" of their work, while at the same time maintaining a sense of irony that places a distance between them and their subject. The middle path the chapter proposes, then, is one of both sentiment and rationality, involvement and detachment.