

will surely stand for a long time as the leading work on that area. For the *aficionados*, there is an important paper on competing theories of constitutional interpretation, and (returning to a lifelong love) two papers by Heydon providing close analysis of tricky aspects of the law of evidence. And while you might have come for the law, why not stay for the guilty pleasure of re-reading two cracking speeches – *Judicial Activism and the Death of the Rule of Law* and *Four Great Australian Legal Disasters*. For those interested in the life of the bench and bar there are some excellent judicial biographies, some delivered in eulogy, others (occasionally cheesy) delivered as tributes to retiring judges. There is even an irreverent 15 Bobber speech given upon the elevation of Bill Gummow to the High Court.

OK, it would be wrong to overstate it and say there is something here for everyone – but there is plenty here to attract the thoughtful lawyer, practitioners, academics and gossips alike.

One of the best features of extra-judicial writing is that it allows the reader to discern some of the political and social views of the otherwise inscrutable judge. A full reading confirms that which was already known – Heydon is naturally and irredeemably conservative. This is not a conservatism in a nasty or reactionary sense; rather, conservatism in a careful sense. His mind is one which automatically respects the status quo, but he will also (occasionally) question it. I confess that there are some (maybe quite a few) opinions with which I cannot agree – but Heydon's views always cause one to think. I read this book, cover to cover, and not one minute of my time was wasted.

This book will stand as a testament to Heydon's writing style. This is more important than it sounds. Reading the book in full immerses one in the Heydon groove. Yet even at the end I still have a difficulty putting a finger on why it works so well: his writing is solemn, yet constantly engaging; it is literary and learned, yet unpretentious. It took me some time to recognise the strength of the rhetoric – while individual propositions are understated, the cumulative force is compelling. I would suggest that Heydon is the best legal writer to have served on our High Court; only Sir Victor Windeyer could challenge him. This book proves that.

Digesting all of the works also reveals another side to Heydon. Despite his dour mien, each chapter is littered with genuinely funny anecdotes. That is right: a lawyer telling jokes – re-tellable jokes – in a successful fashion. A unique achievement.

It is telling that there is a dearth of comparable collections of extra-judicial writings of the great Australian judges. I can think of only four of value – Jordan's *Select Legal Papers*, Dixon's *Jesting Pilate*, Spigelman's *Speeches 1998 – 2008*, and now we have Heydon's *Selected Speeches and Papers*. The absence of books in this genre is not due to a want of demand, it is because of a lack of supply. Heydon's book

will be a point of reference for legal thinkers, and this will continue for many, many years. I repeat – this is an important book.

I praise the work of the editors – Justice John Sackar and Thomas Prince. It is through their industry that this book exists. Theirs was a labour of love, not inspired by money. I hope they retain sufficient vigour to consider a second volume. Finally, the support for the publication of this book cements the position of The Federation Press as one of the leading Australian publishers of legal texts.

Reviewed by Geoffrey Watson SC



BOOK



PODCAST

Summer reading and listening

A review of Philippe Sands QC's book *East West Street* and podcast *Intrigue: The ratline*, plus the podcast *Capital*

By Anthony Cheshire

My wife tells me that the British have an unhealthy obsession with the Second World War and she raises her eyebrows when my parents tell us (again) that rationing continued for some years after the war and that you couldn't get bananas.

Whether she is right or not, it does cause me to question my interest in the War. Is it a fascination with what I would do (or, more accurately now, would have done) in a war situation; or is it some sort of macho blood-lust? Can reality TV be seen through the same lens? One of those questions surrounds capital punishment: is my opposition based more on the need for absolute certainty in the verdict, which can so rarely be guaranteed; or is there some moral, religious or humanist instinct against taking a life? Could I justify an exception for Hitler, especially if his death would have saved many lives? What then of the Nuremberg trials and the subsequent executions of many Nazis?

Timothy Spall gave a wonderful performance in the title role of the film *Pierpoint: The Last Hangman*. Pierpoint prided himself on not adding to the suffering of the condemned by ensuring that the length of rope was just the right length to ensure immediate death without decapitation; and by reducing the time from his arrival in the cell to execution to less than ten seconds. He executed about 200 Nazis as a result of the Nuremberg trials, often several at a time on specially constructed gallows, but it was this experience of turning the process into a production line that led him

finally to question himself and to the conclusion that capital punishment was driven only by an antiquated desire for revenge and solved nothing.

Philippe Sands QC is a practising barrister at Matrix Chambers in London, specialising in international and human rights law. His book *East West Street* is ostensibly a tracing of the history and survival of his family back to his Jewish grandparents. Sands examines how, following their wedding in Vienna in 1937 and his mother's birth the following year, his grandfather moved to Paris in 1939. For reasons that he seeks to identify, his grandmother and mother managed to survive, but did not follow until 1941.

The real story of the book, however, interwoven with the family history, concerns the attempts by two Polish lawyers to have crimes against humanity and genocide recognised and prosecuted at the Nuremberg trials. Hersch Lauterpacht, who found refuge in England, believed that 'the individual human...is the ultimate unit of all law', which was best recognised by the focus of crimes against humanity on the killing of individuals on a large scale; whereas Rafael Lemkin, who found refuge in America, believed that 'attacks upon national, religious and ethnic groups should be made international crimes', which also had the advantage that it could extend to acts that occurred before the war began.

Many Nazis were convicted at Nuremberg of crimes against humanity, but the judges rejected attempts to pursue charges of genocide. Both crimes were, however, recognised and adopted by the United Nations General Assembly in late 1946, a few weeks after the end of the Nuremberg trials. They have continued to develop side by side, reflecting the impact of many actions upon both the individual and the group.

Sands concludes with a brief discussion in which he expresses concern that a hierarchy has developed in which genocide is regarded as the 'crime of crimes'; and that a focus on the group may do more to reinforce the conditions that it sought to address and thus make reconciliation less likely.

This is most definitely not a dry legal treatise or history: it is much more a tale of individuals, brilliantly brought to life by Sands. Thus he starts in the court room at Nuremberg with the son of Hans Frank, who as governor-general of Polish territories was responsible for the extermination of the local Jewish population, and who was convicted in that room of crimes against humanity and executed; and finishes with the son declaring: 'I am opposed to the death penalty, except for my father'.

Sands is not only an intelligent and extraordinary story-teller, but rather than adopting a cross-examiner's tone, he is able to put his subjects at ease and tease out revealing statements and admissions from them.

He also clearly has an interest in the children of Nazis. Thus in the podcast *Intrigue: The*

Ratline, he follows the escape and subsequent death in Rome of Otto Wächter, lawyer and Governor of the district of Krakow and Galicia during the Second World War (answerable to Hans Frank, whose son was one of the subjects of *East West Street*) and responsible for creating the Krakow Ghetto and implementing the Final Solution in the areas for which he was responsible.

This is in part a love-story derived from letters between Wächter and his wife Charlotte (read by Stephen Fry and Laura Linney), but also the story of how Wächter escaped Poland after the war, living in the mountains for several years before escaping to Rome, where he was protected by the Catholic Church and, it would seem, accepted as an agent by the Americans (on the basis that Nazis, as enemies of their enemy (Russia), were their friends) and possibly also the Russians. He died in Rome, in potentially suspicious circumstances, before he could be spirited away on the ratline to South America.

There are conversations between Sands and Wächter's son Horst (in a draughty, old castle in Austria), which are similar to the discussions with Franks' son in *East West Street*, save that Horst, in the face of all evidence, refuses to accept that his father had any responsibility for what occurred.

Sands clearly likes Horst, but does not shirk exposing him to the full horrors of his father's conduct. Sands continues to unearth evidence throughout the podcast, but Horst remains unshaken.

The detail of the ratline and how some of the Nazis escaped justice was something of which I was aware, but the format of a podcast over ten twenty-minute episodes allowed Sands to develop why and how it operated by reference to the detail of one particular case, whilst exposing the ordinary, human side and occasional tenderness of the individuals involved, even where they had been guilty of the most heinous of crimes against humanity and genocide. The involvement in protecting the Nazis and the ratline of the Catholic church and the Americans was shocking. I was captivated. Sands presents the evidence and the results of his inquiries in an apparently objective way, but his views are clear and, in the best traditions of the bar, he made it impossible to come to any different conclusions.

Returning to capital punishment, the podcast *Capital* provides a wonderfully entertaining series, the pity of which is that it is difficult to see scope for a second series.

A government has been elected on an election promise to hold a referendum to reintroduce capital punishment; and when it is held, it results in a 51 per cent majority (described by the Minister of Capital Punishment as 'a strong popular mandate') in favour. Four civil servants are then tasked with implementing the vote, at least one of whom is implacably opposed.

An effective disguise in popular culture

suggests an interesting character both with and without the mask underneath: thus Batman is the caped crusader and the troubled loner and Zorro the dashing vigilante and the nobleman seeking vengeance. There has always been a sizeable portion of the population that is in favour of capital punishment and *Capital* is a hilarious, but disturbing, look at what might occur if a referendum were held on the issue. Underneath, it is a withering satire on Brexit and the chaos it has unleashed.

The similarities are not limited to the set-up of the referendum, but extend to the inability of the politicians and the civil servants to deliver a sensible response, seeking refuge in modern meaningless management-speak at every turn.

For each half-hour episode, the cast of four main characters improvised around a 'beat sheet' for about ten hours, but the editing is tight and it continues to hit the target without dropping the pace.

There is a team-building exercise where the four each get to nominate what would be their last meal if they were about to be executed, which includes discussion as to whether there is a vegan option.

Then, in debating what method is to be adopted, hanging is characterised as a hard capital punishment with lethal injection being soft. A suggestion that 'national treasure David Beckham kicks their head in' is not adopted and the guillotine is decided to be 'too French' when what is wanted is 'a British punishment for the British people'.

There is a search for an executioner, which ends with the team's pizza delivery guy Mario accepting the offer; and a search for a sufficiently unsympathetic character to be the first victim or 'service user', which includes a suggestion that 'horse botherers, bankers and fake vicars' should be executed and a rush to the airport to prevent the deportation of an ideal candidate.

An intended meaningless soundbite from the incompetent Minister that 'It'll all be over by Christmas' is taken as a policy decision on when the first execution is to occur. The end of the series, which takes place on Christmas day, is arresting, disturbing and thought-provoking.



PODCAST

Season 3 of the *Serial* Podcast

'One courthouse told week by week'

The justice centre in Cleveland Ohio takes up a whole city block downtown. It's a cluster of concrete towers built in the 1970s. I could hedge here, but I'm just going to say it. The buildings are hideous. But practical. ... Roughly speaking the building functions like most hierarchies. Vertically. In this case from the bowels up. The main court tower is 26 stories high. So the elevator really runs the place.

So begins Sarah Koenig in the third and latest season of the *Serial* podcast. And in those opening minutes, as Koenig describes suspects being escorted from the underground carpark by 'weary cops', the 'courteous stenographers' dragging their 'squat wheelie bags' into the elevators and the defence attorneys 'riding up and down ... muttering to each other, griping about judges, who have their own judge elevator, so they're not overhearing', you can't help but think that Koenig's lyrical sketch could be of any Australian criminal courthouse. It could be the Downing Centre; it could be the Parramatta court complex; it could be the Supreme Court in Queens Square.

For those of you not (yet) addicted, *Serial* is an investigative journalism podcast hosted by Sarah Koenig, a producer and journalist of *This American Life*. When *Serial* first launched in 2014, the podcast became an overnight success. The first season of *Serial* won a Peabody award in April 2015 for its innovative telling of a long-form non-fiction story. The first two seasons of *Serial* have been downloaded more than 340 million times, establishing an ongoing world record.

In the first season of *Serial*, Koenig narrated an investigation into the 2000 conviction of Adnan Syed for the murder of his girlfriend, Hae Min Lee, in Baltimore. (The show led to the grant of a retrial for Syed, which is still pending.) The second season of *Serial* documented the story of Bowe Bergdahl, a U.S. soldier who was captured by the Taliban.

The third season takes a different approach. As Koenig says, Syed's case does not tell us much about the criminal justice system. It was an unusual case, not least because most cases do not go to trial, and because it concerned murder, the most serious of criminal offences. Koenig states 'I don't think that we can understand how