Launch of

Lord Devlin

Hart Publishing, Oxford, 2020

by

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16 December 2020

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Patrick Devlin, 1905-1992, was not a typical judge. The internal life is fascinating. A young boy of Irish Catholic background was sent to remote Stonyhurst College, where he was educated by the Jesuits throughout the war. He became a novitiate, aged 16, in a Dominican monastery. He departed, abruptly, 8 months later, in circumstances never fully explained. At Cambridge his faith lapsed, he got a very ordinary degree, but he met Madeleine Oppenheimer, with whom he fell in love at their first meeting. The most striking photograph in the book is the couple on their wedding day in 1932: he unsmiling in an oversized overcoat; no bridal gown for her, instead a smart black leather jacket. I found myself wanting to know more about his wife for 60 years, raised in the Jewish tradition, wealthy from South African diamonds, one of very few female undergraduates at Oxford in the 1920s, the mother of six children, who became a magistrate and ultimately converted to the faith renounced by her husband.

But to return to the public man. Devlin was medically unfit for service in World War II (rickets contracted at boarding school), but joined the Home Guard. He practised commercial law, and was made a High Court judge aged 42, no small feat. On that same day in 1948 Denning was made Lord Justice of Appeal, and the careers of Devlin, Denning and Viscount Dilhorne intertwined over the next thirty years. Devlin served 12 distinguished years on King's Bench before being appointed to the Court of Appeal in 1960 and then to the House of Lords in October 1961. He resigned just over 2 years later, in January 1964, after fifteen years of service, to run the newly established Press Council, and to write some of the most famous works by judicial authors in our language: some well known today – the exchanges with Hart on Law and Morality – and some less so (such as "The Criminal Prosecution in England", highly influential in its time, and a 750 page biography of Woodrow Wilson). Oxford University Press published a collection of his papers in a book called, a little unimaginatively, *The Judge*. And there was *that* book, *Easing the Passing*, where as you can see Faber and Faber were very unimaginative, three years later, in their choice of cover. *Easing the Passing* is Devlin's account of the most famous trial he had presided over, the prosecution of Dr John Bodkin Adams for murdering his elderly patient, and caused a great stir at the time.

Justice John Sackar is not a typical judge. The research underlying the book is deep and meticulous. The work is based on a close familiarity with primary records – many of which have not, I suspect, been consulted by any scholar for decades, if ever. I have some idea of how painstaking and time-consuming such research is; to do so while serving as a judge is an astonishing feat. He has written a work of judicial biography bringing to bear not only a forensic precision to the surviving documentary evidence, but also – and this is one of the great strengths of this work – an insight from an experienced judge of the challenges Devlin confronted as a judge. Virginia Woolf once wrote that a good biographer required "gifts analogous to the poet's or the novelist's.[1] Biography, even legal biography, is inherently creative, with choices to be made at every sentence. I think she would agree that it is a fine thing for the world that a sitting judge has found time to write this work about one of the most influential and enigmatic judges of the 20th century.

Lord Devlin by Justice John Sackar is not a typical judicial biography. It is the biography of a man with a really interesting life, extending far beyond the law, and with an ongoing narrative arc reflecting the tension and conflict between Devlin and Dilhorne culminating in

1 V Woolf, "The Art of Biography" in *Collected Essays* vol 4, London 1967, 223; see also V Barnes, C MacMillan and S Vogenauer, "On Legal Biography" (2020) 51 *Journal of Legal History* 115.

Easing the Passing. Sackar's book lets Devlin's own voice shine through. His words are glorious. His prose – in judgment, speech or – and especially – in private correspondence is precise, crisp, playful, often with a sting.

There isn't time to survey the entire work. May I mention a few aspects with a view to illustrating how the man and his biography may appeal to an Australian audience in 2020.

First, royal commissions. Chapter 8 is devoted to Devlin's work on the Nyasaland commission. In the aftermath of the Mau Mau insurrection in Kenya, there was evidence of a planned general strike, civil unrest, and serious violence in Nyasaland (now Malawi). The Governor declared a state of emergency, troops were brought in from what was then known as Southern Rhodesia, hundreds were detained and many were killed or wounded. To its credit, the Macmillan government commissioned an independent inquiry on 19 March 1959, expecting an outcome sympathetic to the Governor. Devlin, then an experienced judge with 10 years' service, was appointed on 24 March, arrived with the other three commissioners on 9 April, spent 5 weeks hearing evidence from 455 witnesses, received 585 memoranda and conducted a further week's hearing in London. The inquiry concluded on 26 June. Devlin worked 15 hours a day over the next week, circulated a draft on 7 July, served the final report on 15 July.[2] Much has changed in the past half century in the way royal commissions are run. I am not suggesting for a moment that every royal commission can report so promptly; much depends on the terms of reference and the nature and purpose of the inquiry. But Devlin's capacity for hard work and swift writing will be apparent.

Devlin found, and reported in language which left the evidence to tell its own story, that there had been extensive beatings, bullying, burning and confiscation of property, not merely against supposed offenders, but against the population generally, authorised or condoned by the colonial government. The report began with Devlin's typical blunt precision:

> "Nyasaland is – no doubt only temporarily – a police state where it is not safe for anyone to express approval of the policies of the Congress party to which before 3rd March 1959 the vast majority of politically minded Africans belonged, and where it is unwise to express any but the most restrained criticism of government policy".

The government policy, of course, was the British colonial government policy.

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2 *Report of the Nyasaland Commission of Inquiry*, Cmnd 814 (London HMSO) 1959.

The report stated very pointedly:[3]

> "The Government has not at any time either before us or so far as we are aware to anyone else expressed any regret for or disapproval of what has been done. … We record this as a fact and not as indicating that any expression of regret or disapproval is necessarily appropriate; that is a matter for you."

The report did not prevent Macmillan's re-election later in 1959, and probably encouraged Macmillan's "Winds of Change" speech in 1960 and the speeding up of decolonialisation. The *Spectator* – not well known for its liberal viewpoint - said of the report that "it will rank as one of the great documents on colonial affairs" and that it has "surveyed the whole scene in Nyasaland and interpreted it with great insight and penetration".[4] In short, it made a difference.

Nor did the report prevent Devlin's elevation the following year to the Court of Appeal, and then in October 1962 to the House of Lords. This is a little poignant. Devlin – who was vain and far more concerned than he should have been at his reputation – was dreadfully concerned his prospects of promotion had been stymied by the report. Yet at the same time he was quite self-aware, and realistically feared that he would hate promotion to the appellate bench if it were offered.

Devlin liked trial work and was good at it. He disliked hearing appeals. He was years younger than any of his colleagues on the House of Lords, and his brain worked faster. Devlin's short stint in the House of Lords occurred at a momentous time. Viscount Simonds had finally retired in 1962. Lord Reid had become the senior law lord. Change was in the air.[5] In 1964 Appeal Cases may be found – if you can find it; a little like volume 194 of the Commonwealth Law Reports, it is apt to go missing because the decisions it contains are constantly cited – *Hedley Byrne v Heller*,[6] *Rookes v Barnard*,[7] *Ridge v Baldwin*[8] and *Lewis v Daily Telegraph*.[9] *Hedley Byrne* did as much as any decision to promote the imperial march of the modern law of negligence; *Ridge v Baldwin* did much the same if not more for administrative law. *Lewis v Daily Telegraph* remains a classic in a number of basic aspects of the law of defamation. A quick check shows that in this year of the pandemic, which has not favoured defamation trials, it was cited and applied by three

3 Quoted at p 138 of the work.
4 T Creighton, "The Devlin Report", *Spectator,* 7 August 1959.
5 See R Stevens, *Law and Politics: The House of Lords as a Judicial Body 1800-1976* (Weidenfeld and Nicholson, London, 1979) Part III.
6 [1964] AC 465.
7 [1964] AC 1129.
8 [1964] AC 40.
9 [1964] AC 234.

State appellate courts,[10] repeatedly by the Supreme Court of this State[11] and by the Federal Court.[12] In almost every case, the judge in 2020 has cited Lord Devlin's speech of 56 years ago, simultaneously subtle, clear, precise, and written in well drafted English prose. The sentences are so familiar they have become institutionalised aspects of a defamation trial: "For the purpose of the law of libel, a hearsay statement is the same as a direct statement, and that is all there is to it"; "A company cannot be injured in its feelings, it can only be injured in its pocket"; "A man who wants to talk at large about smoke may have to pick his words very carefully if he wants to exclude the suggestion that there is also fire; but it can be done." This memetic quotability is not necessarily a good thing. I am reminded of Robert Stevens' argument that "It is important for the law to be as boring as possible", in order to preserve its scope for dealing impartially with the divisive constitutional questions which from time to time will arise.[13] But Devlin's prose makes the book eminently readable, similarly to the enjoyment from biographies of Holmes and Brandeis and Learned Hand. There are other links with those great American judges, too, to which I shall come.

If you are interested in the sausage-making that goes on in some appellate courts behind the scenes, Sackar gives a fascinating account, deriving from Reid's surviving notebooks, of some of the appeals in 1964 Appeal Cases. The junior law lord, a decade younger than the next youngest, appears to have shaped some of their outcomes. After the first hearing in *Rookes v Barnard*, Devlin was in a minority of one or possibly two favouring the appellant, but the entire bench eventually allowed the appeal, leaving it to Devlin to write a restatement of the law of exemplary damages. Reid merely agreed. He ultimately, and very publicly, regretted doing so.[14]

This was also a momentous time for the relationship between the Australian legal system and the role of the House of Lords. Lord Devlin's reformulation of exemplary damages in

10 *Brien v Mrad* [2020] NSWCA 259 at [58]; *Aldridge v Johnston* [2020] SASCFC 31 at [110]; *Dent v Burke* [2020] ACTCA 22 at [11].

11 *Bailey v WIN Television NSW Pty Ltd* [2020] NSWSC 232 at [31]; *Feldman v Nationwide News Pty Ltd* [2020] NSWSC 26 at [136].

12 See for example *Webster v Brewer (No 3)* [2020] FCA 1343 at [45], *Hayson v The Age Company Pty Ltd (No 2)* [2020] FCA 361 at [46] and *JWR Productions Australia Pty Ltd v Duncan-Watt (No 2)* [2020] FCA 236 at [383].

13 R Stevens, "Torts" in L Blom-Cooper et al (eds), *The Judicial House of Lords 1876-2009* (Oxford University Press), 629 at 652. He compares *Sprint Communications Co v APCC Services Inc*, a decision of the United States Supreme Court bitterly divided *on the question of the standing of an assignee of a contractual* right, a point also made in M Leeming and G Tolhurst, "'When You Got Nothing, You Got Nothing to Lose': Assignments of Choses of Action and Standing in the United States Supreme Court" (2009) 8 *Oxford University Commonwealth Law Journal* 237.

14 *Broome v Cassell & Co Ltd* [1972] AC 1027.

Rookes v Barnard led to a response by the High Court, notably by Windeyer J, in *Uren v Australian Consolidated Press Pty Ltd*,[15] at a time when it was still bound by the Privy Council and was expected to adhere to decisions of the House of Lords. Following what had been said by Dixon CJ in *Parker v The Queen*,[16] Windeyer J had pushed back against this in his eloquent exposition of the dynamism of the common law in *Skelton v Collins*.[17] That in turn led to the important statement by the Privy Council on further appeal endorsing the separateness of the common law of Australia from that of England.[18] And it led to what was perhaps the most famous statement of the unwisdom of joint judgments in important appeals in areas where the law was developing, a few years later, in *Broome v Cassell*, an echo of which may perhaps be seen in last month's decision of the High Court of Australia in *Calidad Pty Ltd v Seiko Epson Corporation*,[19] and many decisions in the Court of Appeal in the (relatively rare) cases where the Court is not unanimous. Of course, there are also occasions when important decisions should be unanimous; the error is thinking that there is a one-size-fits-all approach, or at least that is how it seems to me.

Devlin's career coincided with the twilight of the trans-Atlantic legal partnership, to which Pollock, Holmes and Learned Hand had contributed so fruitfully, and which led to the mirroring of many House of Lords decisions with those of the New York Court of Appeals or the United States Supreme Court associated with Holmes and Cardozo.[20] In 1958, while at the Library of Congress working on his monumental biography of President Wilson *Too Proud to Fight: Woodrow Wilson's Neutrality*,[21] Devlin met Frankfurter and by that means met the latter's former student Dean Acheson, at that time in private legal practice after having served as Truman's Secretary of State. Chapter 6, aptly titled “Friends Across the Atlantic”, reproduces extensive correspondence between the three men.

Devlin was delightfully pointed and it must be said downright rude in his private correspondence and his public work. The book contains superb, often caustic, portraits of judicial figures. Devlin wrote to Frankfurter of Lord Denning:[22]

> “[H]e was not an effective advocate, taking all points, good and bad, and cut no figure at the Bar. When in 1944 Simon decided to enlarge the divorce judiciary and

15 (1966) 117 CLR 118.
16 (1963) 111 CLR 610.
17 (1966) 115 CLR 94 at 133-136.
18 *Australian Consolidated Press Ltd v Uren* (1967) 117 CLR 221 at 241.
19 [2020] HCA 41 at [113] (“[i]n deference to the closely reasoned dissent of Nettle, Gordon and Edelman JJ, I feel the need to explain in my own words why I cannot accept the reasons their Honours advance ...”)
20 See Stevens, ibid, p 630.
21 Oxford University Press, 1974, 750pp.
22 Devlin to Frankfurter, 21 May 1962, reproduced in the work at pp 178, 179.

> knew that he would have to recruit from the common law Bar and could probably not attract the highest, he offered a place to Tom who had impressed him doing a poor person's case in the House of Lords. It at once became apparent that Tom was outstanding as a judge and that he could not be left in divorce; and he was speedily moved to the KB. … Of course Tom is very unorthodox and frequently seems to regard legal principles as a means to an end. But a very little of that sort of thing is not bad for the law of England and Tom has great qualities to go with it."

Of the newly appointed Lord Pearce – whom you may not have read or cited recently – but who replaced Denning in the House of Lords, Devlin wrote to Frankfurter:[23]

> "He and I were appointed to the Bench on the same day, he going to Divorce and I to the KB. He is a really nice and delightful man of no particular ability, I was surprised when he was made a judge, astonished when he was moved to the KB, flabbergasted when he was appointed to the CA and it never so much as crossed my mind that he would be considered for the Lords. But as I have now been proved wrong at all these four stages you will understand that he must be highly esteemed in quarters that matter and you would do much better to accept their valuation."

And then there is *that* book. "Easing the Passing", first published in 1985, is a fascinating account of a highly unusual murder trial, written by the presiding judge almost three decades later, after the deaths of most of the actors. Part of its fascination is the insight given to the reader of what the judge was thinking: what he inferred from the conduct of the Crown and the defence, how he thought authority required him to direct the jury, and so on. For example there is this passage:[24]

> "[The defence has] now to ask themselves and answer a crucial question. Had Reggie missed the point or was he keeping it in reserve to ask at the deadliest moment of cross-examination? If the latter, Adams must not be called. … I am sure the defence counsel took the right course in keeping the accused out of the box and risking the consequences. It was a courageous decision. Insofar as it was a gamble it came off. Reggie had not got the point."

And there is a marvellous recreation of what would have occurred if the accused had been cross-examined:[25]

> Counsel and witness would have been fighting with weapons as different as those of the gladiator with his sword and the retiarius with his net in the Roman amphitheatre. Reggie with a sabre, for he would be a slasher rather than a fencer, would score many hits. But an advocate does not get a verdict for murder by winning on points. To win he must capture, hold and convince the mind of the jury. For that the net is the more potent weapon. … Reggie was not an artist like Lawrence [counsel for the defence]. He would not even remotely have understood the mental processes of Dr Adams. If Adams was a murderer, he was not the crude sort that Reggie believed him to be."

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23 Id.
24 Reproduced at pp 216-217.
25 Reproduced at p 146.

"Reggie", of course, was the Attorney-General, Sir Reginald Manningham-Buller, later Viscount Dilhorne. The put-downs display Devlin's mastery of language. They include:[26]

> "He was neither a saint nor a villain. But since most of his convictions were wrongheaded, he was ineluctably a do-badder, by which I man a person whose activities bear the same relationship to villainy as those of a do-gooder to sanctity".

The prose is lively; I cannot resist quoting the first sustained description of the man. Referring to Birkenhead's famous and rather shallow address about the glittering prizes offered to those who have stout hearts and sharp swords, Devlin wrote:[27]

> "Reggie never learnt swordsmanship but he was effective with a blunt instrument and certainly had a stout heart. What was almost unique about him and makes his career so fascinating is that what the ordinary careerist achieves by making himself agreeable, falsely or otherwise, Reggie achieved by making himself disagreeable. Sections of the press, which he permanently antagonized, liked to parody his name by calling him Sir Bullying Manner. This was wrong. He was a bully without a bullying manner. His bludgeoning was quiet. He could be downright rude but he did not shout or bluster. His disagreeableness was so pervasive, his persistence so interminable, the obstructions he manned so far flung, his objectives apparently so insignificant, that sooner or later otherwise, you would be tempted to ask yourself whether the game was worth the candle; if you asked yourself that, you were finished."

Devlin went on to compare the Attorney to Widmerpool, in many respects the star of *A Dance to the Music of Time*, noting that "The reappearance of Widmerpool in successive volumes of the novel sequence "each time surprisingly on a higher rung of the ladder, are glimpses of how Reggie's climb in real life appeared to his contemporaries".[28] And indeed the photograph of Sir Reginald Manningham-Buller in the volume strangely recalls Simon Russell Beale's portrait of Widmerpool in the mini-series.

Then, to add to the drama in Sackar's story, is the fact that Devlin was far from altruistic in his criticism of Reggie. While the Bodkin Adams trial was being heard, both Devlin (the judge) and Manningham-Buller (the Attorney prosecuting for the Crown) were the leading candidates for the soon-to-be-vacant office of Lord Chief Justice of England. There were stories in the press.[29] There is no reason to doubt that each was aware of the other's ambition. Devlin was the most capable judge on King's Bench and favoured by Lord Goddard. Manningham-Buller sought to invoke the ancient, highly dubious right of the Attorney-General to any of the four great judicial offices which chanced to become vacant during his tenure. As it happens, Lord Parker was appointed instead.

26 *Easing the Passing*, pp 39-40.
27 *Easing the Passing* p 39.
28 *Easing the Passing* p 40.
29 For example, *Sunday Express* 24 February 1956, reproduced at p 85.

There has been much speculation about Devlin's early retirement from the House of Lords in 1964. One distinguished commentator linked it with a despair at the continued vitality of the common law to keep the executive in check.[30] Certainly Dilhorne's elevation as Lord Chancellor later in 1962 made the office less attractive to Devlin. But the correspondence with Dean Acheson reproduced in this book shows that early retirement was far from unforeseen. In August 1960 he told Acheson that while he expected to receive the next common law vacancy in the lords, he doubted he would stay past his 15 years service:[31]

> "I do not find appellate congenial and cannot contemplate another 20 or 25 years of it. Our methods are so tedious compared with yours. We spend hours sitting in Court listening to evidence, documents and law reports being mumbled at a pace that suits the very slowest mind and leaves anybody who is not ritualistically disposed with eternities that decorum forbids him to occupy."

It was even worse in the House of Lords. A letter to Frankfurter states that he thought it would be enjoyable to hear and determine appeals in the same way as the United States Supreme Court did:[32]

> "I find our practice of going into the case with a blank mind and listening to days and days of argument quite intolerable. If it were all genuine argument, it would be bad enough. For after all, if a man cannot get at the point that really matters much more quickly than the average counsel he ought not to be sitting on the Supreme Appellate Tribunal. But it is not even all irrelevant argument. Days – literally days – are occupied with reading out loud the records of evidence and the judgments in the relevant authorities. You cannot even pick up a Law Report and read the parts that you think matter instead of the parts that counsel thinks matter, because there are never enough copies to go round and you have to look over your neighbour and exchange polite glances when the time comes to turn the page. The real vice of the thing is that, while days and days are wasted in this sort of activity no time or facilities are given for what I really think matters – that is some independent research, through discussion with colleagues and a careful preparation of drafts of the judgment."

This is no exaggeration. Returning to 1964 Appeal Cases, *Ridge v Baldwin* was an 8 day appeal. *Rookes v Barnard* was a 15 day appeal – 10 days in July followed by 5 days in November. *Hedley Byrne & Co Ltd v Heller* was an 8 day appeal. *Lewis v Daily Telegraph* was a 9 day appeal. Even *Pilkington v Internal Revenue Commissioners* on the power of advancement in the law of trusts (in which Devlin simply agreed with Radcliffe) took three days.[33] The apogee – or perhaps the nadir, depending on one's viewpoint – may have been junior counsel for the respondent, on either the 5th or 6th day of an appeal about the

30 K J Keith, "Ridge v Baldwin – twenty years on" (1983) 13 *VUWLR* 239 at 240.
31 Devlin to Acheson 11 August 1960, reproduced at p 169.
32 Devlin to Frankfurter 31 March 1964, reproduced at p 195.
33 [1964] AC 612.

reasonableness of a notice to terminate a licence, who resorted to the second book of the Iliad to rouse the bench.[34] I have to say, I personally regarded those statistics with mounting horror and a profound sense of relief that things have changed. But if you pick up volume 113 of the Commonwealth Law Reports, in 1964, when Dixon retired and was succeeded by Barwick, *Latec Investments Ltd v Hotel Terrigal* was heard over 4 days, while the first *Airlines of NSW* case was heard over 7 days; Sir Anthony Mason has stated how the sharpening of oral advocacy was the greatest change, and wholeheartedly for the better.[35] But for the quick-thinking and quick-reading Devlin – denied even the marginal pleasure of perusing the balance of the law report by the slowness of his more senior appellate colleague – it must have been agony.

Sackar lets Devlin's own voice shine through, accompanying it with occasional insights from the author's own judicial experience. I found it the best judicial biography I have read for years. Time prevents me from attempting to summarise all of the delights of this book, and in any event there should be some surprises (one is Macmillan's private diary entry when first learning of Devlin's Nyasaland report – see p 141). But may I conclude with these three.

First, there is an insightful foreword by Lord Phillips of Worth Matravers, who tells readers that his clerk, who had also clerked for Devlin, used to compare his barristers unfavourably to Devlin when – apparently not infrequently – they did not measure up to his standards.

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34 *Winter Garden Theatre (London) Ltd v Millennium Productions Ltd* [1948] AC 173 at 185. Bear in mind that the *sole issue* in the appeal was whether a licensor had given reasonable notice of termination. The Appeal Cases record the following of junior counsel, Michael Albery, who as well as being an outstanding chancery silk, classicist and chess player had personal involvement it the theatre (see *The Times*, 25 September 1975, p 16), the latter put to good use:

> *Albery* following. After so long a discussion further argument might serve only to remind their Lordships of the Homeric lines (2):
>
> ἄλλοι μέν ῥ' ἧντο, ἐρήτυθεν δὲ καθ' ἕδρας,
> Θερσίτης δ' ἔτι μοῦνος ἀμετροεπὴς ἐκολῴα.
>
> ("The others sat down and were ranged in their places, but "Thersites alone still chattered like a jackdaw without restraint "of language.") If, therefore, their Lordships should revoke counsel's licence to address them he would only ask for a reasonable time to remove himself from the bar of the House.

Is there better self-referential advocacy in the Appeal Cases?

35 See A Mason, "The Role of Counsel and Appellate Advocacy" (1984) 58 *ALJ* 537 especially at 539 ("The lengthy reading of passages from decided cases is discouraged. … Judges can and do read judgments for themselves – even judgments written by other members of the Court – once the authority is identified as one which offers guidance. Counsel's practice of reading lengthy passages from our decisions suggests the existence of a belief that we are ravaged by Alzheimer's disease. The belief is unfounded.")

Secondly, there is an eighteen page appendix of biographical details of some 70 of the main actors in Devlin's life. I found these short sketches, each a substantial paragraph of a hundred words of so, immensely useful, and future readers – for I am confident that this book will be read for many years – will increasingly benefit from it.

Thirdly, the book is a beautifully produced 260 pages, with 19 well reproduced black and white photographs, and a jacket with a marvellous charcoal sketch by Ronald Searle, perhaps more famous for his illustrations for St Trinian's comics. The production values have immensely improved since the paperbacks of the 1970s and 80s. It is a delight to read, and also delightfully well-priced by a publisher who has, I expect, rightly anticipated a large print run.

In short, an Australian judge has written an eminently readable, thoughtful and nuanced biography of one of the more famous English judicial figures of the 20th century. It is a pleasure to read, and it will solve a perennial problem in this month – what to give for Christmas for that that hard to shop for lawyer spouse or relative. I am delighted to commend Lord Devlin by Justice John Sackar to you.