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Book Notes

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IMAGES OF A CONSTITUTION
BY WILLIAM E. CONKLIN
(Toronto: University of Toronto Press, 1989) 365 pages

THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA
BY MICHAEL MANDEL
(Toronto: Wall & Thompson, 1989) 368 pages

Canadian constitutional law continues to develop apace. Invigorated by *Charter* litigation, the courts are at the centre of contemporary Canadian politics. Struggling to keep up, academics have published a raft of books and articles that seek to explain and come to grips generally with this flurry of judicial activity. The assessments are far from uniform and travel the whole spectrum of political views; brickbats and bouquets are in abundant competition. These two substantial offerings are some of the best to hit the bookshelves. Each provides a very different, but very thoughtful insight on the functioning of the nation's courts. Whereas Conklin opts for an account that is philosophical in method and teleological in object, Mandel is decidedly political in method and popularistic in objective.

Conklin sets his intellectual sights on much more than the *Charter*. In an ambitious undertaking, he surveys the whole of constitutional law up to and including its modern preoccupation with the elaboration of *Charter* rights. Somewhere between rhetoric and reality, a constitution is an evolving image that reflects the aspirations and activities of political rule. As a discursive enterprise, judge-made law and academic commentary are attempts to identify and isolate a coherent and cogent image of consciousness. Eschewing the dominant rationalistic tradition of Canadian law, Conklin champions a teleological vision of constitutionalism. This

will better suit the demands of contemporary society and will allow judges to embrace issues of socio-political theory and practice. It is a book that is optimistic about the capacity and will of the courts to work on behalf of the have-nots.

In contrast to Conklin's reflections, Mandel provides a gritty and less precious account. Portraying the legislation of politics under the *Charter* as a betrayal of any truly democratic aspiration, he is an unmitigated critic of current developments. This passion is undisguised and runs through every line of this committed piece of scholarship. For Mandel, *Charter* litigation offers no prospect of the courts ameliorating the lives of ordinary Canadians: the courts have been the historical foe of social justice, not its friend.

Both books have something important and special to tell. While their favoured methodologies are very different, they are most divided by their ideological optimism and vision of social justice. Each confirms that the *Charter* will remain a contested terrain for years to come and that, for better or worse, the courts will play an increasingly central role in social life. These important books enhance the level of academic debate and confirm that the constitutional stakes are high.

DISSENT AND THE STATE

C.E.S. FRANKS, ed.

(Toronto: Oxford University Press, 1989) 288 pages

This is a timely and provocative book. In any democratic society, there is a fragile line between official action to suppress violent insurrection and that to deny civil dissent: the state cannot always be guaranteed to be on the side of democratic justice. In this fine collection of essays, thirteen authors grapple with this intellectually fascinating and politically charged topic. Although they spread their sophisticated web wide, their implicit focus is on the operation of the Canadian Security Intelligence Service – How should it distinguish between legitimate and illegitimate activity? How should it respond to illegitimate behaviour? And how should such an agency be monitored and controlled? The offerings are comparative, multi-disciplinary and work at different levels of analysis. The conclusions are understandably mixed and tentative,

but the general tenor is that there is little cause for complacency in Canada: the workings and management of CSIS require rigorous scrutiny and robust surveillance. In such matters, Juvenal's question remains pertinent and its answer elusive – *Quis custodiet ipsos custodes*?

CANADIAN PERSPECTIVES ON LAW AND SOCIETY: ISSUES IN LEGAL HISTORY

By W. Wesley Pue & Barry Wright

(Ottawa: Carleton University Press, 1988) 353 pages

This is an important volume. It marks the coming of age of Canadian Legal History. While some of the leading lights are missing, the strength of the publication lies in its itemization of the depth and sophistication of the younger scholars' work. Representing different disciplines and traditions, the fifteen essays touch on many interesting and important aspects of the growing efforts to locate the historical development of law in a broad social and economic context. From feminism in the 1920s, to Court Martials in the 1830s, the book offers an array of insights of the role of law in forging the distinctive identity of Canadian society. While an achievement of considerable significance in its own right, the collection is an exciting primer for even better things to come.

FREEDOM OF SPEECH

By Eric Barendt

(Oxford: Clarendon Press, 1985) 314 pages

Few will need convincing that "free speech" is something of an academic black-hole that seems to suck all theories and proposals into its insatiable void. In Canadian legal writing, discussion of free speech has been relatively muted, but, like many issues, it will occupy the increasing attention of lawyers now that Charter litigation is in full flow. Using English law as his focus, Eric Barendt provides an interesting tour through the "free speech" jungle. His analysis of the British, American, German and European legal protection of speech not only exposes the varied response to the "free speech"

conundrum, but highlights the fact that, at the least, its solution can only be attempted with an informed understanding of the supporting political and moral arguments. Judicial attempts to insulate the law from political principle is "intellectually futile and disingenuous." The strength of the book for Canadians is that it offers a critical discussion that is not centred on the American experience. Its weakness – apart from the fact that Britain has no entrenched constitutional guarantee of free speech – is that Barendt does not place his account in a particular socio-economic context, or examine the concrete exercise of free speech nor the substantive content of prevailing speech.

THE ECONOMIC STRUCTURE OF TORT LAW

WILLIAM M. LANDES & RICHARD A. POSNER, eds
(Cambridge, Mass.: Harvard University Press, 1987) 329 pages

MORAL ARGUMENTS AND SOCIAL VISION IN THE COURTS: A STUDY OF TORT ACCIDENT LAW

BY HENRY J. STEINER
(Madison, Wisconsin: University of Wisconsin Press, 1987)
230 pages

Although very different in style and ambition, both of these books make important contributions to the already burgeoning literature on the theory of tort law. Whereas one develops a popular line of economic analysis in a more rigorous and sustained way than has previously been available, the other seeks to place that academic tendency and similar, though antagonistic, projects in a broader framework of moral understanding. Landes and Posner's text examines and explains tort law as an institutional attempt to achieve an efficient allocation of resources and optimal investment in safety. Although it does utilise and rely on formal economic theorising, the book is accessible to the patient and determined non-economic lawyer. Furthermore, it stands as either a focused introduction to the major concerns, *modus operandi*, and insights of the law-and-economics movement or a concentrated and provocative reminder of the strengths and weaknesses of this imperialistic brand of contemporary legal scholarship.

Henry Steiner's excellent monograph is more critical and comprehensive in sweep and objective. He takes seriously Prosser's belief that tort law is "the battleground of social theory" and proceeds to recount and grasp more profoundly the tactics, strategies and dynamics of that intellectual encounter. Locating law-and-economics in a broader "warscape," Steiner plots the shifts and trends in American tort doctrine and academic apologetics over the past few decades. With clarity and incisiveness, he shows how doctrinal developments are justified by a series of moral arguments which themselves are located within deeper social visions. Steiner sketches the subtle process through which these different levels of reasoning interact and sustain each other. Furthermore, he makes a forceful contribution to the critical insight that the same traditional justifications for the imposition of tortious liability can be deployed to support both a negligence regime and a stricter standard of fault. It is to be hoped that Steiner will push his structural ideas about legal reasoning beyond the confines of an extended essay and into other fields of law. It is not less, but more visionary and challenging work of Steiner's kind that is needed.

REMEDIES IN CONTRACT AND TORT

BY DONALD HARRIS

(London: Weidenfeld and Nicolson, 1988) 411 pages

This book gives an old subject a new twist. Harris examines the rules for contract and tort remedies by reference to empirical study, extra-curial situations and economic analysis. Although he treats the two sets of remedies as productively related, he does believe that there are sufficient conceptual and socio-economic differences to warrant separate exposition. The treatment is suggestive and helpful to the inquiring student of primarily English law, although its ambitions are modestly descriptive. Harris, an Oxford scholar, writes in a very uncluttered and direct style. While it is a way of writing that many would do well to emulate, it has a tendency to render some ideas and arguments rather more simple and straightforward than they actually are. Nonetheless, this observation is more a quibble than a criticism and ought not to detract from the crisp and insightful analysis that Harris presents.