

## Book Notes

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## BOOK NOTES

DECONSTRUCTION IN CONTEXT: LITERATURE AND PHILOSOPHY. Edited by Mark C. Taylor. University of Chicago Press. 445 pp. \$45.00 (cloth); \$16.95 (paper)

'Deconstruction' is a term that is very much in vogue in the more critical circles of the legal academy. A very particular mode of philosophical critique, it has lost much of its singularity as its popularity has grown and it has become a ubiquitous term for all types of vaguely 'left' critiques of a theoretical stripe. This collection of readings situates deconstruction within its rich philosophical tradition and restores to it its specialised meaning and force. Tracing a context from Kant to Derrida, the extracts emphasize the perennially problematic character of interpretation. This is not a "Deconstruction Made Easy". In his introduction, Mark Taylor provides a dense, but lucid account of deconstruction's enigmatic thrust and ambition. He explains how it challenges the whole Western metaphysical tradition, especially the post-enlightenment tendency to privilege the creative subject as the locus of Truth and Knowledge. By decentering the subject and its constituting structure, deconstruction underlines how there is nothing beyond interpretation, but more interpretation. It is not so much that deconstruction bites the metaphysical hand that feeds it, but acts as an antidote to the paralysing snakebite of that metaphysics. Although difficult reading, this book is an advanced primer and warrants serious consideration; it is an illuminating and provocative text that retains the subversive throat of deconstruction as it manages to explain it in familiar philosophical terms.

ON HISTORY OF OTHER ESSAYS. By Michael Oakeshott. Oxford University Press. \$14.95

In this collection of original essays, Michael Oakeshott displays the full range of his 'conservative' erudition and elegance. While his thoughts on the logic of historical understanding and the Tower of Babel myth are never less than stimulating, his reflective study of the Rule of Law ought to be of special interest to lawyers. In direct contrast to much contemporary writing, he rejects the tendency of writers like John Rawls, Bruce Ackerman and Ronald Dworkin to connect up the Rule of Law

with an instrumental conception of substantive fairness. For him, it is a formal moral mode of human relationships; "the recognition of the authority of known, non-instrumental rules . . . which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction." (at 136) In so far as Oakeshott's ideas resuscitate a style of Jayekian thinking on the correct form of constitutional government, but without any commitment to any Bill of Rights, this essay offers a thoughtful statement of 'conservative liberalism'.

TOWARD A GENERAL THEORY OF SOCIAL CONTROL, Vol. 1 (Fundamentals) and 2 (Selected Problems). Edited by Donald Black. Academic Press, Inc. 1984. 363 and 310 pp.

This eclectic collection of twenty-two essays by sociologists, lawyers, anthropologists, and political economists addresses the whole range of social practices which define and control deviant behaviour. In the twentieth century, national communities have become lexocentric; little attention has been paid to the non-state forms of social control that flourish. The essays consider responses as varied as hostage-taking, negotiation, ostracism, and restitution. If that is a thematic thread, it is that the adoption of particular modes of control is dependent on the politico-historical development of a society. A sub-theme is the marginality of law to social life and the indirect impact of legal regulation on patterns of social behaviour. It is a stimulating and provocative study of the soft underbelly of social control. It challenges and exposes some of the basic assumptions about the politics and sociology of law. It is iconoclastic scholarship at its most productive.

JUSTICE OLIVER WENDELL HOLMES AND UTILITARIAN JURISPRUDENCE. By H.L. Pohlman. Harvard University Press, 1984. 223 pp.

In this punchy volume, H.L. Pohlman, a professor of political science, offers a revised and mildly iconoclastic account of Holmes' legal theory. With considerable evidence and analysis, he explains how Holmes' seemingly disparate ideas are tied together by a strong thread of utilization logic and justice. In challenging some of the traditional characterizations of Holmes' ideas, Pohlman is at his best when tracing the historical and intellectual roots of Holmesian jurisprudence. However, in the latter stages of the book, his ambition overstretchs his reach; he attempts to defend Holmes utilizationism as a valid descriptive account of and prescriptive

model for the contemporary adjudicative process. Pohlman's notes are too impressionistic and unsupported to be convincing. Nevertheless, the book makes for easy reading with its uncluttered style and its restrained controversiality.

**LAW, POLITICS AND JUDICIAL PROCESS IN CANADA.** Edited by F.L. Morton. The University of Calgary Press, 1984. 348 pp.

This book makes an important attempt to put together a pertinent and indigenous collection of materials on the Canadian judicial process. As a political scientist, the author charts the controversial territory on the boundaries of law and politics. His study strives to be to less legalistic in its scope and more critical in its ambition than earlier publications. The writings of Peter Russell and Paul Weiler play an expectedly substantial role. Also, a central focus is on the impact of the *Charter of Rights* on prevailing constitutional arrangements and judicial attitudes. The book is a useful and comfortable primer on Canadian jurisprudence and scholarship.

**LAW, SCIENCE AND MEDICINE.** By Judith Areen, Patricia A. King, Steven Goldberg and Alexander Morgan Capron. University Casebook Series, 1984. 1494 pp.

One of the greatest challenges facing society is the urgent need to harness the power of technology and to curb its detrimental effects. The legal process has an important contribution to make in this crucial process. Yet many lawyers remain ignorant of modern technology and lack the necessary sophistication to play an adequate role in formulating and enforcing appropriate responses. Although this book is designed for use as a teaching tool, it represents a superb primer on law and technology. Focusing on genetic engineering and nuclear energy, the authors explore their nature, development and control. They introduce a variety of perspectives, from the scientific through the political to the philosophical. It is a stimulating book that deserves to be read by the legal community.

**LIABILITY IN NEGLIGENCE.** By J.C. Smith. Carswell Legal Publications, 1984. 273 pp.

Building on his many earlier writings, Professor Smith attempts to articulate a coherent theory of negligence liability. A survey of existing doctrine leads Smith to propose a revised 'foreseeability' test as the fulcrum of liability: "damage is not too remote when it is either foreseeable in

the particular, or falls within a foreseeable class of possible damages . . . although any particular event falling within the class may not satisfy that condition" (at 138). Smith claims that this test accurately accounts for 90% of all decided cases. For many, the introduction of such a quasi-scientific test will be deeply troubling, but it will at least serve to focus debate and engage the attention of tort lawyers. Professor Smith has produced a controversial and timely monograph.

**RAWLS AND RIGHTS.** By Rex Martin. Kansas: University Press of Kansas, 1985. 244 pp.

This book does not treat both Rawls *and* rights, but only Rawls *on* rights. After some preliminaries about utilitarianism, Martin suggests that rights are institutionally guaranteed expectations of divisible goods. He analyzes Rawls' ideas of 'equal basic liberties' and 'fair equality of opportunity' in that light. An especially interesting (though difficult) fifth chapter offers a new interpretation of the difference principle, detaching it from the maximin criterion, and portraying it instead as a requirement of efficiency constrained by egalitarianism. He argues that this is equivalent to the more familiar formulation, but offers a more plausible ground for the difference principle. So understood, the difference principle establishes a right to welfare transfers. Chapter 6 presents the priority of liberty as the priority of the distributive considerations of a system of basic rights over the aggregative aspect of the difference principle. He concludes by considering problems of conflicts of rights, of economic justice and the right to property, and of the right to welfare. The book is particularly welcome for its consideration of Rawls' latest writings. But it will not help the student with the complexities of Rawls' method nor does it provide any account of competing theories of rights. In scope and pitch, it is better suited to the specialist than the beginner or general reader.

**THE FEDERAL COURTS; CRISIS AND REFORM.** By Richard A. Posner. Harvard University Press, 1985. 364 pp.

Love him or hate him, Richard Posner has been the most influential legal scholar of his generation. Although this book is devoted to an analysis of the 'crisis' that faces the American federal courts, there is much here to please or anger his many readers. Combining his academic ideas (as a Chicago law professor) and his practical experience (as an appellate judge), he makes several important suggestions for fundamental reform that are stimulating and could be adapted to fit most jurisdictions. There

are valuable and provocative chapters on the possibilities and limits of judicial self-restraint, the prerequisites of judicial craft, a 'new' theory of statutory interpretation and the implications of all this for legal education and scholarship. With characteristic fluency and in his deceptively simple style, the prolific Posner has added another notch to his legal belt.

COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY. By Donald Harris *et al.* Oxford University Press, 1984. 412 pp.

Empirical studies in law are few and far between. Apologists and critics of the law alike are too often content to operate at an abstract level. The actual performance of the law and reform measures is neglected. In this thorough study, the members of the Oxford Centre for Socio-Legal Studies have compiled, collated, and critiqued a full set of data on the different systems of compensation and support for the injured and ill in England. The perspectives are varied and the conclusions are stimulating. The main proposals seem incontrovertible: the greater integration of the different systems and the abolition of the difference in response to the injured and the ill. Although the nature of the project means that the book is not effortlessly readable, the extra effort needed is worthwhile. On even a modest assessment, the book provides a healthy dose of scepticism to counterbalance the unthinking but widespread tendency to attribute to the law a natural and intended instrumentality.

DISEASE AND THE COMPENSATION DEBATE. By Jane Stapleton. Oxford University Press, 1986. 190 pp.

Our ingenuity to devise ways to swell the ranks of the disabled seems undiminished. Confronted with the devastation of asbestos, tobacco, pharmaceutical products, chemical additives, and the like, we seem unable (or unwilling) to make a humane and coherent response. In this compelling text, Jane Stapleton provides a cool, clinical, and calculated condemnation of present arrangements for compensating the disabled. Demanding a fundamental re-appraisal of our approach and response to human induced disease, she offers a relentless and cogent critique of the tragic absurdity of a tort-based, accident-focused system. By concentrating on the plight of the disease victim, she exposes the frailties of the doctrinal wisdom on time, causation, and fault; rejects any proposed reforms of the tort system; discredits any claim for the purported deterrent effect of tort; and insists on a wholesale rethinking of compensation issues. It is a critical *tour de force* that puts a full range of analytical skills to work

in the service of a deserving topic of public policy. As such, Stapleton's monograph sets an enviable standard of rigour, clarity, relevance, sensitivity, and commitment that other contributors to the field can only hope to achieve.

**THE CRITICAL LEGAL STUDIES MOVEMENT.** By Roberto Mangabeira Unger. Harvard University Press, 1986. 128 pp.

This is a reprint, with minor stylistic revisions, of his 1982 essay in the *Harvard Law Review*. The text provides a full introduction to the central ideas of Unger's social and political theory as applied to law. He blends high theory and detailed doctrine: his deconstruction of contract is a classic piece of Critical scholarship. He offers a manifesto for 'Super Liberalism' as a radical alternative to Marxism. By connecting philosophical criticism with ideological commitment, he shows how legal doctrine, presently repressed and stunted, can become a vehicle for the debate, transformation, and implementation of the terms and conditions for collective life. Instead of seeking ways to stem the irrepressible contingency of social history as most traditional and non-traditional scholars do, he turns it into the normative force and authority of his radical challenge to established social orders. Routine legal argument would be imbued with revolutionary significance. Without wanting to detract from its potency, it must be emphasized that this monograph, despite its sweeping title, offers only one, albeit central, account of the work and ambitions of Critical Legal Studies. It is a difficult and demanding text, but one that more than repays the effort in its rewards.

**LYING DOWN TOGETHER: LAW, METAPHOR, AND THEOLOGY.** By Milner Ball. The University of Wisconsin Press, 1985. 198 pp.  
**HERACLE'S BOW.** By James Lloyd White. The University of Wisconsin Press, 1985. 251 pp.

As two of the opening salvos in the University of Wisconsin's series on "The Rhetoric of the Human Sciences," these two books examine the possibilities of law as a discursive medium for constituting and re-constituting ourselves. Both eschew the search for a grounding on which to stand for moral security and guidance. Instead, they prefer to view knowledge as a product of the reciprocal making and re-making of the world and ourselves through institutional media like law. In their different ways, they both view law as the best available means to establish improved communal solidarity. Whereas Ball incorporates a theological dimension into his metaphorical reflection on law, White draws on his rich literary

experience. Each book is written in a refreshingly elegant and graceful style that stands in sharp contrast to the plodding prose of much legal writing. Yet their desire to emphasize the strengths of law as a unifying force and vehicle for social justice makes them overlook the constraints and weaknesses of law in achieving social justice. If the story of law is one of freedom and justice, it is surely also one of oppression and inequality.

