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Law and the Community: The End of Individualism?

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Law and the Community: The End of Individualism?
A.C. Hutchinson & L.J.M. Green, eds.
Ontario: Carswell, 1989, pp. 297

Liberalism is under siege within the hallowed halls of legal academia. This is not surprising, for the legal and judicial systems are perhaps the only areas of social organization in which liberalism has (at least in the North American context) maintained its ideological hegemony. Accordingly, the attack on liberalism has been waged from the right and the left: both question the perceived atomism alleged to be a function of the liberal insistence upon personal autonomy. As Michael Sandel writes:

Liberalism teaches respect for the distance of self and ends, and when this distance is lost, we are submerged in a circumstance that ceases to be ours. But by seeking to secure this distance too completely, liberalism undermines its own insight. By putting the self beyond the reach of politics, it makes human agency an article of faith rather than an object of continuing attention and concern, a premise of politics rather than its precarious achievement. This misses the pathos of politics and also its most inspiring possibilities. It overlooks the danger that when politics goes badly, not only disappointments but also dislocations are likely to result. And it forgets the possibility that when politics goes well, we can know a good in common that we cannot know alone.¹

The panacea often offered by both sides is communitarianism, which is roughly explained as the insistence upon the importance of shared values in constituting systems of government and other forms of social organization. Predictably, conservatives and critics part company on what exactly constitutes these values: the former insist upon the supremacy of the state and the importance of conceiving it as an organic entity, while the latter emphasize the utility of shared values as a means of increasing the overall welfare of society. Within a theoretical context, the writings of Alasdair MacIntyre, Michael Walzer, and Michael Sandel have been influential in supporting the 'new' communitarian critique.

This collection of eleven essays, edited by Allan Hutchinson and Leslie Green of York University, sets out to explore the ramifications of the communitarian critique from a variety of perspectives. The contributors are drawn from a variety of disciplines and ideological positions, all of whom seek to come to terms with the theoretical and practical differences between communitarian and liberal views. All of the pieces merit reading; the following summarizes the highlights of the book.

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The first essay is by legal academic Richard Baumann, who sets out to examine the Critical Legal Studies (CLS) vision of communitarianism. Baumann suggests that the movement's theoretical construct is stricken by a noncommittal stance toward fundamental political questions. Specifically, he asserts that CLS scholars omit, in their presentation of communitarianism (he uses the writing of Roberto Unger as a foil) the basic political issues of obligation, legitimacy, and authority. He also correctly points out the tendency amongst CLS scholars to lump all liberal theorists together, inclusive of classical and redistributive liberals. His discussion is useful in presenting the importance of the CLS communitarian critique, though at the same time paying close attention to its flaws; in particular, one leaves Baumann's piece with the thought that it demonstrates the inconsistency of the CLS program with regard to exactly which vision of community is desirable.

Political scientist Ronald Beiner considers the efficacy of the communitarian critique by concentrating on the faults of liberalism as identified in the writings of Sandel, MacIntyre, and Walzer. After describing the fundamental paradox besetting liberalism as the simultaneous tendency toward pluralistic fragmentation and homogenization, Beiner pursues his thesis that while liberalism ostensibly attempts to remove the dominance of any one conception of the good, it does in fact possess such a conception: namely, that choice itself is the highest good. The example used to highlight the problems that this entails is the classic liberal dilemma over pornography. Yet, having said this, Beiner resignedly concludes that "liberal pluralism is our fate, and it would require either ignorance of or blindness to historical realities to yearn for some radically different dispensation".²

Donna Greshner explores feminist concerns with the stream of new communitarian thought. In particular, she considers how feminist legal and political theory fits into the debate between liberals and 'new' communitarians. Her conclusion is that neither theory answers satisfactorily feminist purposes, given the needs and requirements of women, but that on a balance of considerations, liberalism may be slightly more compatible than communitarianism. Conversely, Jennifer Nedelsky in a separate article argues that feminism requires a new conception of autonomy that liberalism is unable to provide. She asserts that the value of autonomy is central to feminism, but that its liberal incarnation must be rejected.

Finally, in characteristically exuberant fashion, Allan Hutchinson, in an essay decorated with references to Umberto Eco, Wallace Stevens, and obscure Welsh proverbs, presents a critique of what he terms the half-hearted liberal approach to community. Hutchinson particularizes his argument by deconstructing (in the lay sense) the position of Owen Fiss on free speech. Fiss, who presents a revisionist conception of free speech inclusive of the possibility of state intervention, is considered by Hutchinson to be restricted by the fetters of liberalism. Hutchinson's proposed model purports to transcend such confines by reconstituting the debate over free speech through reliance upon 'democratic conversation' between citizens.

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As the above thumbnail summaries suggest, there is no ready convergence on the part of the contributors with respect to the efficacy of the communitarian critique. This divergence of opinion stands as being a bit of a chimera; while the essays are well written and forcefully argued, the reader is left with the distinct impression that the task set by the editors in the foreword has been only partially completed. Although this is to a certain extent symptomatic of any collection of essays, one cannot but suspect that had the choice of theme been honed to a greater degree of precision, a conclusion superior to “communitarianism is not a substantial alternative” (as suggested by the editors) could have been reached.

There are also significant questions left unanswered by this volume. Nothing, for example, is made of the all-important difference in content between the conservative and critical variants of communitarianism. Indeed, very little is said about the actual content of this school of thought, apart from cursory references to obvious sources such as Sandel or Walzer. Furthermore, though the liberal strawman is dutifully aired and burnt by a number of writers, the only consistent result gleaned from the process is a vague assertion that liberalism is problematic. Regardless of the merits or deficiencies of this position, it would be preferable either clearly to lay out the foundations of a proposed alternative or to perform a detailed scrutinization of liberalism’s faults, rather than hovering in ambiguity.

These quibbles excepted, the volume is, as a whole, a useful companion to the corpus of the ‘new’ communitarianism and, as a Canadian tome, *Law and the Community* effectively demonstrates that the study of legal and political theory continues to across the nation.

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¹ M. Sandel, *Liberalism and the Claims of Community*, (Cambridge: Cambridge University Press, 1982) at 183.

² at 55.