BOOK REVIEWS

IMAGES OF A CONSTITUTION
By William E. Conklin (Toronto: University of Toronto Press, 1989) pp. xii + 365.

Canada's legal academy is sometimes criticized for the modesty of its ambitions and the poverty of its production.[1] This state of affairs is generally attributed to the academy's continuing enthralment with legal positivism. Canadian legal academics, it is said, have been intellectually unscathed by the major jurisprudential disruptions — realist, sociological and critical — that have occurred elsewhere and have, in consequence, continued to model their scholarship on "classical late-nineteenth century forms."[2]

Professor Conklin agrees with this diagnosis (we are, he repeatedly says, entrapped by a variety of forms of positivism)[3] and he aims both to free us and to recommend a theoretic alternative at least as regards constitutional law. In this review, I will discuss both *how* he proposes to liberate us and *why* he thinks we ought be freed. The two inquiries are interrelated and have much to do with his project's ultimate theoretic fragility and, despite his manifest commitment and good intentions, its final moral blindness.

The most elemental question in any discourse — scientific or other — is the meaning of meaning. Every undertaking, that is, must come to some understanding concerning whether its practice discovers or invents meaning. Generally, understandings of this sort take the form of assigning a *locus* for meaning — meaning will be said to reside either in the world/text or in the investigator/reader.[4] If meaning is somehow out there in the world, then a discipline's practice is one of discovery — its practitioners will seek out the meaning that exists independently from them. On the other hand, if meaning is in here, then a discipline's practice

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1. See for instance: Baker, "The Reconstruction of Upper Canadian Legal Thought in the Late-Victorian Empire," (1985) 3 Law & Hist. Rev. 219; and *Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada by the Consultative Group on Research and Education in Law* (1983, H.W. Arthurs, chair) esp. chps. 5, 6, 7 and 10.

2. Baker points to the nature of Canadian legal academic production as evidence of "the enigmatic and unparalleled longevity" of positivism in Canada:

   > One sign of this persistence is the recent production by Canadian legal academics of small and modest treatise literature which, revealingly, is modelled closely after classical late-nineteenth century forms and is based largely on English decisional law. . . . there has not yet been a coherent functional, empirical, or ethical assault on the imported late nineteenth century Canadian version of legal conceptualism. (*Ibid.* at 276-7)

   See also, Monahan, "Judicial Review and Democracy: A Theory of Judicial Review" (1987) 21 U.B.C. L. Rev. 87 at 88 describing "one of the central components of Canada's legal creed" as "a belief in the continued viability of the distinction between the realms of law and politics".

3. W.E. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989) at xi, 5, 216-217, 268 (Hereinafter, *Images*).

4. For a convenient summary of the different theories of assignment, see, P.D. Juhl, *Interpretation: An Essay in the Philosophy of Literary Criticism* (Princeton: Princeton University Press, 1980) at 3-10.

   This, incidentally, is not to say that each discipline clearly assigns itself to one camp or another — they do not because neither the question of location nor the answers given are that simple. It is merely to say that the answers may be classified in terms of the direction they tend toward; they may be categorized as well in terms of the assessment each direction defines. Those answers which think meaning in the text tend to assess meaning in terms of truth and correspondence, while those that think it resides in the reader are at least less likely to assess meaning in that fashion.

is constitutive because it creates or invents — and does not merely encounter — meaning. This debate, Conklin realizes, carries great resonance in legal theory. For it at least[5] determines whether positivism is sustainable as theory. Legal positivism minimally declares that there are two categorically different kinds of legal work — there is the work of positing law in legal texts (legislative work) and there is the work of following the law so posited (minimally judicial and law profession work). These forms of law practice are different, according to positivists, precisely because it is possible for courts to follow the rules laid down; and it is possible for courts to follow rules, they claim, because the meaning of rules exists out there in the legal text. Professor Conklin proposes to free us from positivism by dissenting from this positivist view with respect to the location of legal meaning.

His central claim is that legal meaning is not, as positivists would have it, simply out there awaiting discovery by judicial interpreters. Just the contrary: to some degree at least,[6] what is out there is created by them; and to that extent, judicial discovery is really judicial invention. He supports this view first by situating himself on the appropriate side of the debate about the location of meaning and then by offering a reading of Canadian constitutional literature, both judicial and academic, which seeks to reveal it as an expression not of what the texts require, but of what the judicial and academic readership require of the texts.[7]

Conklin, of course, locates meaning in the reader. Meaning, he says, cannot be out there in the (legal) text because it is (again, to some extent) in here in the (legal) reader; and it is in-here because the meanings which judges and academics think they discover in texts are instead constituted by their prior understanding of, and expectations for, the world. He calls these understandings and expectations "images", by which he appears to mean something like what Kuhn calls "paradigms"[8] and what Stanley Fish calls "interpretive communities".[9] That is,

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5. But this, as we'll presently see, is not all that it does. For once positivism is set aside as being premised upon an unsustainable theory of meaning, the conclusion that legal meaning, therefore, resides in the legal reader has also many profound political implications.

6. Conklin provides numerous different descriptions of images. They are variously "a shared consciousness" (*Supra*, note 3 at 3, 97, 99, 174, 268), "prejudgments" (*ibid.*, 9, 11, 217), "prior expectations" (*ibid.*, 9), "a shared social outlook" (*ibid.*, 10), "a cultural construct" (*ibid.*), "the ideology of the community" (*ibid.*) "re-censors" (*ibid.*, 236, 251) and "psychosocial prisms" (*ibid.*, 44, 67, 99).

7. His reading of constitutional texts comprises the vast majority of his text. Indeed, with the exception of fifty-three pages (thirteen at the beginning and forty at the end) which he devotes to theory, the remainder of the book is committed exclusively to his reading.

8. T.S. Kuhn, *The Structure of Scientific Revolutions* (Chicago, Ill.: University of Chicago Press, 1970, 2nd ed.). (Hereinafter, *SSR*).

   Indeed at one point he describes images in terms very reminiscent of Kuhn's description of paradigms. An image, he says, is a "cluster of expectations, aspirations, dispositions, attitudes and commitments and the like" (*Supra*, note 3 at 11). Kuhn describes a paradigm as "the entire constellation of beliefs, values, techniques, and so on shared by the members of a given community" (see: *SSR*, 175).

9. S. Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge, Mass.: Harvard University Press, 1980) at 14.

   > [I]t is interpretive communities, rather than either the text or the reader, that produce meanings. . . . Interpretive communities are made up of those who share interpretive strategies not for reading but for writing texts, for constituting their properties.

   Professor Conklin uses Fish's term at at least one point in his inquiry (*Supra*, note 3 at 100).

   I should mention here that Conklin canvasses neither Fish nor Kuhn — nor, for that matter, any of the rest of a rich conventionalist literature — during his argument. This is a surprising omission and, as we'll see, it seriously weakens his enterprise both theoretically and morally.

he appears to think meaning resides in the legal reader *as* a member of a legal community which is itself defined by "a shared consciousness" concerning the interpretive enterprise.[10] Meaning, or at least constitutional meaning,[11] is in consequence, a contingent convention: it neither is nor can it be encountered in the world (of-the-text). And "what has hitherto been called a constitution" consists of conventions of this sort: "constitutional reality lies embedded within the consciousness of the legal community" and "constitutional law is the expression of the shared images within a legal community's consciousness over time."[12]

As I indicated, Professor Conklin seeks to demonstrate his image hypothesis — he calls it his "descriptivist thesis"[13] — by a reading of Canadian constitutional literature. This reading is meant to reveal two things. First, the images which Canadian judges and scholars have shared; and secondly, that what they have taken to be the constitution are those images. It is from this inquiry that his prescription about the need for, and the form of, our liberation arises. The record of our discourses reveals, he claims, that we have shared three such images which he designates rationalist, historicist, and teleological. The rationalist image is a positivist image according to which legal reality, or at least constitutional reality, consists of posited rules or values or an amalgam of both.[14] The historicist image he presents as a traditional common law version of law according to which the constitution consists of the principles embedded in institutional history.[15] The teleological image is, he says, categorically different from the other two because it is "a forward-looking image" according to which a constitution consists of an interrelated set of issues concerning both theory (particularly moral and political theory concerning the *telos*, or good, towards which a society is evolving) and practice (the actual social and cultural practices of society).[16] The rationalist image has, he claims, been the dominant image in Canadian constitutional discourse and it is from it — and from the less important, but equally objectionable historicist image — that his theory of constitutional law as images seeks to free us. We *will* be free if we take his instruction that our understanding of the constitution is contingent because image dependent; and we *must* be freed, he tells us, because the teleological image alone permits the legal community to direct its interpretive practice to the teleological

10. *Supra*, note 3 at 3 and 163 (an image's "boundaries pre-censor how [one] interprets the text").

11. I say "at least" because, as we'll discover, it is not entirely clear whether Conklin thinks his theory of law as images explanatory of all law and not just of constitutional law.

12. *Supra*, note 3 at 3, 4 and 13.

13. *Ibid.* at 4.

14. *Ibid.* at 6-8 and 169-214. Conklin associates this image in its various forms with Pigeon and Beetz (rule rationalism), Laskin (policy rationalism) and Dickson and Wilson (orthodox rationalism).

15. *Ibid.* at 5-6, 74-81 and 124-128. He associates this view with Martland and Ritchie.

16. *Ibid.* at 8, 219-235 and 266-276. Conklin draws this image from the judicial and other writing of Ivan Rand.

issues to which the *Charter*, as he puts it, "arguably" directs us.[17] It is only, note, because of this that we ought to be free. His position with respect to positivism is, therefore, text-bound and expressly "instrumental": the teleological image is "better to the extent that its boundaries entertain what the horizons of the other images deny" and that is important because the *Charter* requires such an expansion of horizons.[18]

Now both this interpretive strategy and this easy calculation would strike any conventionalist as surprising and, without more, as unwarranted. That is, if, as Conklin at one point admits, "an image is a network of prejudgments which we cannot consciously choose because they are prejudgments", then the identification and certainly the selection of an image is a deeply troubling matter.[19] This is so because once we admit that meaning is created by the communally defined world view of the interpreter, we must also admit that we too are constituted conventionally.[20] Simply, we cannot have it both ways. If meaning is contingent, so too are we; and we cannot then claim some transcendent point beyond the interpretive community in which we are situate to assay and select points of view. If the text is not constant, then neither are we.

Both Fish and Kuhn, as good conventionalists ought, address this matter directly. Fish, in fine Fishian fashion, deals with the question summarily. We are, he says, stuck in practice because our practices *define* us;[21] and while our practices will

17. He puts it this way (*Ibid.* at 237, 259 and 274):

> The issues entertained by an image [are] crucial. If the issues are ethically, socially, or politically significant for lawyers to consider, then one image becomes instrumentally better to the extent that its boundaries entertain what the horizons of other images deny. If I can show how a particular text, such as the Canadian Charter of Rights and Freedoms, arguably triggers such a set of questions, then I can make the minimal claim that a practical lawyer should reconsider the boundaries of her/his own image of a constitution if s/he wishes to make sense of the text of the Charter or, more correctly, if s/he wishes to better understand the text. . . . I shall identify such a set of issues and, in the final chapter, I shall reconsider the boundaries of an image of a constitution which entertains the latter questions.

18. *Ibid.* at 237.

19. *Ibid.* at 11.

20. Richard Rorty has put this as succinctly as anyone. "There is," he says, "nothing deep down inside us except what we have put there ourselves, no criterion that we have not created in the course of creating a practice, no standard of rationality that is not an appeal to such a criterion, no rigorous argumentation that is not obedience to our own convictions." See: R. Rorty, *Consequences of Pragmatism* (Minneapolis: University of Minnesota Press, 1982) at xlii.

21. Fish, *supra*, note 9 at 14 ("since the thoughts an individual can think and the mental operations he can perform have their source in some or other interpretative community, he is as much a product of that community (acting an an extention of it) as the meanings it enables him to produce"); "Anti-Professionalism", (1986) 7 Cardozo L. Rev. 645 at 675 ("the context of purposes, motivations and possibilities define him"); and "Change" in *Doing What Comes Naturally: Change Rhetoric and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1988) at 141 ("the idea of an interpretive community [is] not so much a group of individuals who share a point of view, but a point of view or way of organizing experience that share(s) individuals in the sense that its assumed distinctions, categories of understanding and stipulations of relevance and irrelevance [are] the content of the consciousness of community members who [are] therefore no longer individuals but, insofar as they [are] embedded in the community's enterprise, community property").

change,[22] change is not subject to theory-based direction or guidance by us.[23] Unlike Fish, Kuhn refuses to replace the tyranny of positivist objectivity with a tyranny of interpretive situation — to say that meaning is community property because created by us, is not, he claims, to admit that we too are, for that reason, always community property. But — and this is the lesson — he accounts for change and indeed for paradigm displacement theoretically by allowing for what he terms abnormal discourse.[24]

Conklin pleads neither Fish's confession nor Kuhn's avoidance and seeks, instead, to bypass the problem of situation entirely. This he can do because, unlike either Fish or Kuhn, he does not take his conventionalism fully seriously. Conklin's images are less than Fish's interpretive communities and less than Kuhn's paradigms because, unlike either, images do not define us as practitioners, at least not fully. True, they do define "our image of the other and of our self," but that definition is circumspect because limited to matters having to do with the legal enterprise.[25] And those matters are matters somewhat distant from us as persons: they concern ontological claims with respect to the nature of legal reality and epistemological claims with respect to the nature of legal practice, claims which together both define and render legitimate a practice *as* legal.[26] Conklin's convention is, in this light, a very positivist convention about the legitimate sources of legal knowledge. And because it is a convention of this sort and defined in this way, we are not implicated *as* persons and can, in consequence, readily escape from it. Because images are in this important aspect "artificial",[27] there is always something of us — especially our values[28] — which survives practice; and because this is so, we can transcend and select from among practices.

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22. "Change", *ibid.* at 146-151.

23. Theory, he says,

> is entirely irrelevant to the practice it purports to critique and reform. It can neither guide that practice nor disturb it. Indeed, the insight that interpretive constructs underlie our perceptions and deductions cannot do anything at all. It cannot act as a direction to seek something other than interpretive constructs, because there is no such other thing to be found; and it cannot act as a caution against the influence of interpretive constructions now in place because that influence will already be at work contaminating any effort to guard against it.

See: "Denis Martinez and the Uses of Theory," (1987) 96 Yale L.J. 1773, 1797. Elsewhere (see: *Doing What Comes Naturally, supra*, note 20, 583-584 n47), Fish describes theory as the "lard" of practice.

24. See: Kuhn, *SSR*, 52-65, 92-143.

According to Kuhn, abnormal discourse occurs when a paradigm — that amalgm of beliefs, values and techniques by which communities are constituted — becomes for whatever reason compromised. Abnormal discourse results either in paradigm change (which is to say the abnormal discourse becomes normalized) or in revolution (which is to say the constitution of an alternate paradigm).

25. See: *Images*, 12.

26. See, for instance, *ibid.*, 6-9, 15, 99, 164, 167, 174-175, 216, 250-253, 266.

Elsewhere, Conklin identifies four "elements" as constitutive of a constitutional image — "the resource material of constitutional law, the role of courts, the source of constitutional obligation and the (a) political character of constitutional law" See: *ibid.*, 65, 68, 98, 171. These elements, of course, are positivist in the sense that they seek to separate legal discourse in terms of both its subject matter and its actorship.

27. *Ibid.*, 10.

28. *Ibid.*, 11-12.

It is on basis alone of this thin notion of practice that Conklin can presume to present us images of images;[29] and it is on this basis alone that he can recommend one such image as meeting the requirements which the *Charter* as a text arguably defines. If he took his conventionalism seriously, he could, of course, do neither. For he would then admit that no such images are possible (or that if they are, it is because they are already contained in practice, in which case his project is beside its point); and he would then know that the *Charter* as a text requires nothing at all.[30]

Conklin's strategy is unconvincing for just these reasons. If one adopts a conventionalist attitude to meaning, one must account fully for our situatedness and either — as does Fish — declare conscious change impossible because transcendence foreclosed or — as does Kuhn — account for change theoretically. It will not do — as does Conklin — simply to define away the significance of situation in order to make it manageable. This is a profound theoretic weakness in Conklin's enterprise. But, in my view, the matter does not end there because his view of practice and the strategy it informs also, I think, render his enterprise theoretically misleading and morally myopic.

It is misleading because it tends to present constitutional texts like the *Charter* as special cases. His entire strategy for liberation is his case that the *Charter* raises issues which demand an image of a constitution different from the positivist image. Now the whole point of conventionalism — and this Conklin at one point admits[31] — is that every text raises the same issues, not as he would have it, because they arguably trigger such issues, but because our interpretation of texts is always a matter of our commitments and values and aspirations for the world. Interpretation, positivist or otherwise, necessarily, therefore, implicates both practice and theory and questions about the good. It is just this lesson that his strategy tends to obscure.

More significant, however, is the moral myopia which his strategy for ridding us of positivism produces. The problem with positivism is *not* that it happens not to fit what are "arguably" the requirements of constitutional texts like the *Charter*; the problem with positivism is that, for a democrat at least, it has unacceptable moral and political consequences. The consequences are these: positivism separates officials from citizens in terms of how each relate to law *and* it relieves officials, lawyers and especially judges, of moral responsibility for the social production of legal

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29. He does, however, sometimes equivocate ("academic commentaries", he says at one point, "neither describe 'the law' nor analyze 'the law' nor prescribe what ought to be 'the law' ": *ibid.*, 172). And at other times, he gets down right mystical with respect to the meaning of interpretation of this sort. At one point, for instance, he offers the following description of his interpretive practice (*ibid.*, 14):

> I converse and interpret the texts through our shared understandings, the latter of which I call images. The image magnetically draws my Being into the past and into the future, notwithstanding my old subjective desire, as an independent and impartial spectator, to construct an historical rational order which can rationally cause future events independent of the past and present. The image opens up as much as it forecloses communication. At last, law becomes a lived experience in contrast to the dead abstractions of the noumenal lawyer.

30. His arguments for the requirements of the *Charter* are, incidentally, curious. Throughout the piece, he deploys the very positivist-interpretive strategies of intent and lexical meaning (*ibid.*, 238-248) and, at one point, he even cites Driedger, Edgar, and Maxwell on interpretation (*ibid.*, 394n12).

31. Very near the end of the book (*ibid.*, 270), he declares that "a text, such as a statute, a judgement, or a self-named document called the Charter, states hypotheses about Goodness on the one hand and social/cultural practice on the other."

process. Hart's variety of positivism most easily illustrates both.[32] According to Hart, officials are different from citizens precisely because officials alone need relate to the law normatively; citizens, on the other hand, need — and typically will — only obey and they are, in consequence, assigned mere spectatorship to the legal affairs of polity.[33] Hart also relieves officials of moral responsibility just because, under the positivist view, any moral engagement by officials in the moral results of their practice is purely accidental. This is so because legal results follow syllogistically from the meaning that inheres in legal rules and not from any choice on behalf of the official.[34]

Now, a conventionalist view of legal meaning does not — at least not automatically — avoid these consequences. But a conventionalist view does permit one the opportunity to challenge them theoretically because it permits one to account theoretically for a widened community. This is so by definition: if meaning is not necessary and is, instead, a matter of the commitments of interpretive communities, then meaning can be democratic to the extent that all members of polity can be assigned interpretive membership. Conklin does not take full advantage of the moral possibilities his conventionalism in this fashion provides, perhaps because he fails to take full account of conventionalism in the first place. Each of his images maintains the cleavage between officials and citizens because each is a privileged discourse. This is so intractably not only because he defines images as the consciousness of a distinctively legal community, but more significantly because he defines consciousness in terms of the legal community's self-understanding of its own privilege and legitimacy.[35]

The teleological image he espouses and commends changes none of this. It differs not in terms of privilege (privilege is its definitional given), but in terms of the attitude the privileged — the legal community — take towards others, that is, towards the citizenry. The attitude they are to take is responsibility *for* them.[36] The citizen-other remains, however, dispossessed and disempowered. Indeed, at one point, Professor Conklin argues for a responsible legal privilege under the *Charter* in terms of the historic disempowerment of citizens[37] — under the new teleological regime, lawyers are somehow to relieve citizens of "the pain and suffering" this disempowerment has caused them.[38]

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32. See: H.L.A. Hart, *The Concept of Law* (1961) 112-114, 144, 200.
I do not mean to infer, nor do I believe, that these consequences are unique to Hart. Dworkin, too, for instance, both separates citizens from officials (judges, after all, are the "princes" of law's empire) and relieves officials of moral responsibility inasmuch as their interpretive commitments are, at critical stages, separate from their moral personalities. See: R. Dworkin, *Law's Empire* (1986) 407, 105-111.

33. See: *Concept, ibid.*, 113.

34. This is also the case in Hart's penumbra since even there, the judge is to deny himself personal choice by emulating the virtues and the styles of reasoning characteristically displayed by other officials in like circumstances: see, *ibid.*, 144, 200.

35. See: *Images*, 6-9, 99, 164, 236.

36. *Ibid.*, 244, 272, 276.

37. *Ibid.*, 243-244.

38. *Ibid.*, 276.

This attitude and this form of responsibility amount, I think, to what Michel Foucault terms "pastoral power".[39] It is a power which is "for the benefit" of others — "in their interest, for the sake of the proper and complete conduct of their life business."[40] But it is power nonetheless, and the responsibility which Conklin would visit on officials under his alternate image is morally insignificant for just that reason. It is a responsibility framed in terms of privilege and it would continue to produce disempowerment for the many because it is premised upon — and, indeed, aggravates — the distinction between the power of the legal and the impotence of the other.

Nor, of course, will this do. The challenge to legal theory is a democratic one — a challenge to re-envision law as a medium of human solidarity, not to continue law as a practice of popular estrangement whether pastoral or Austinian. And while Conklin's enterprise may serve the challenge inasmuch as it intends to relieve us of positivism, it is yet misdirected because he so underappraises positivism's power both as an interpretive sense and as a moral sensibility. His project is at once a step up and a step in the wrong direction.

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39. See: Foucault's "Afterword" to H.L. Dreyfus and P. Rabinow *Michel Foucault: Beyond Structuralism and Hermeneutics* (1982) 213-215.

40. See: Z. Bauman, *Legislators and Interpreters: On Modernity, Post-Modernity and Intellectuals* (1987) 19-20.