



1-1-1991

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Santa Clara Law Review

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### Recommended Citation

Santa Clara Law Review, Other, *Books Received*, 31 SANTA CLARA L. REV. 561 (1991).

Available at: <http://digitalcommons.law.scu.edu/lawreview/vol31/iss2/7>

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## BOOKS RECEIVED

**The Enterprise of Law: Justice Without the State.** By Bruce L. Benson. San Francisco, CA: Pacific Research Institute for Public Policy. 1990. Pp. viii + 397. Paperback. \$14.95.

*The Enterprise of Law* is a study devoted primarily to questioning the notion that law and law enforcement must be provided by the state. This study is based on economic theory which the author uses to compare institutions and incentives that influence public and private provision of law and its enforcement. The author attempts to demonstrate that private sector institutions are capable of establishing strong incentives that engender effective law making and law enforcement. He contrasts this with an examination of public sector institutions which tend to create perverse incentives that lead to substantial inefficiencies relative to private sector institutions.

The book begins by tracing early legal systems based on voluntary and customary law. The author explains that authoritarian (state-provided) law began to replace customary law as governments were able to centralize power and use that power to extract wealth from the population. The author views the rise of powerful, centralized governments as a negative historical development because they take wealth from some groups of individuals and transfer it to other groups. The government's choice of the groups affected and the extent of the transfer depends upon each group's relative political power. Further, since the government defines all aspects of the legal order necessary to effectuate these involuntary transfers, it will often be unresponsive to the needs of individual citizens who are powerless relative to large special interest groups. This is the central problem when the government controls law enforcement. It tends to choose patterns of enforcement that are

based on bureaucratic incentives and the needs of powerful interest groups.

To substantiate his claim that the enterprise of law should become more privatized, the author examines in detail modern public law enforcement; the behavior of public police, prosecutors and judges; and political corruption. The book also explores current trends in government contracting with private firms for police and prison services, and trends in private sector arbitration, mediation and crime prevention. The recent phenomenon in looking to the private sector for law is explained by noting that private sector institutions, which are constrained by the demands of a competitive market economy, must meet the needs of citizens in order to survive. The author suggests that the market for law and order is similar to the market for most normal goods and that efficient provision of law and its enforcement can be reached through voluntary cooperation and contractual arrangements.

*The Enterprise of Law* provides an excellent look at private sector alternatives to the current public system of law enforcement. The publishers of the book, the Pacific Research Institute, publish studies in three series, Urban and Social Policy, Economic Policy, and Resource and Energy Policy.

**A Guide to Critical Legal Studies.** By Mark Kelman. Cambridge, MA: Harvard University Press. 1987. Pp. vi + 360. Paperback. \$14.95.

Critical Legal Studies (CLS) is a movement that is difficult to define. Its partisans hold diverse views in many areas, but there are recurring themes which distinguish these writers from their mainstream (CLS writers use the term "liberal") counterparts. *A Guide to Critical Legal Studies* attempts to identify these recurring themes and to explain the thrust of CLS arguments.

The book begins by identifying the central structural characteristics of liberal thought. Liberal thought is described as being plagued by three central contradictions and the systematic repression of these contradictions. Each contradiction involves a choice between two possible positions which could resolve a dispute in any particular case. The three central contradictions involve 1) the choice between rules or standards, 2) viewing values as objective or subjective, and 3) whether human conduct is intentional or determined. The Critics try to

demonstrate that in any controversy either of the contradictory impulses could govern the dispute.

The book then suggests that one term in each set of contradictory impulses is privileged by liberals in the sense that it is presumptively entitled to govern a case. Liberal thought privileges the rules form, views values as subjective, and sees human conduct as being the result of intentional choice. The Critics argue that these privileged positions make up a right-wing, quasi-libertarian political program based on individualism. The Critics are hostile toward individualism and prefer a legal order based on "collective self-determination."

The book also devotes two chapters to an examination of the Law and Economics movement. CLS writers believe that Law and Economics has adopted a theory of the state and law consistent with the privileged liberal positions. In addition to examining some of the CLS critiques of the central Law and Economics positions, the author also criticizes the economic theory supporting the beneficence of private property and the efficiency of competitive markets.

Finally, the book examines CLS views on the role of law. Probably the most often quoted CLS phrase is that "law is an instrument of social, economic and political domination, both in the sense of furthering the concrete interests of the dominators and in that of legitimating the existing order." The author discusses how this domination is achieved with the use of legal rhetoric and the "reification" of legal concepts. These devices are used to legitimate the existing order and make it more difficult to think about alternative or non-privileged positions.

*A Guide to Critical Legal Studies* is an interesting book, but it may be a somewhat difficult read for the reader unacquainted with CLS. CLS writers employ a distinctive jargon and present many ideas with no clear focus. The book is valuable, however, because it is a good summary and synthesis of CLS work.

**Raising Capital: Private Placement Forms & Techniques, Second Edition.** By Herbert B. Max. Englewood Cliffs, NJ: Prentice Hall Law & Business. 1989. xiii + 928. Looseleaf. \$95.00.

*Raising Capital* provides an extensive compilation of forms which illustrate techniques which will attract investors and facilitate financial backing of developing firms. The forms illustrate a variety of techniques and approaches to raising capital

and suggest ways to accommodate the investor's demands for protection while maintaining the flexibility necessary for the successful operation and growth of a business. Each of the forms used in the book has actually been used in a transaction.

The book includes forms dealing with transactions involving debt, preferred stock, convertible stock, warrants, options, and common stock. Special provisions dealing with secured loans, subordination, registration rights, co-sale rights, stockholders' agreements, guarantees, and puts and calls are also included, as well as participation agreements among investors, brokerage agreements, forms of opinion of counsel and other specialized materials. Information can be taken from these forms and used in almost any private placement transaction.

The book also provides an introductory overview of how private placements relate to the federal securities laws. In addition, the book contains a thorough analysis of Regulation D, reviewing the most important rules in great detail.

The real strength of *Raising Capital* is its tremendous scope. It contains such an extensive amount of forms and accompanying information that an attorney faced with a complex factual situation can draw from many parts of the book to fit his capital raising plans.

**Takings: Private Property and the Power of Eminent Domain.** By Richard A. Epstein. Cambridge, MA: Harvard University Press. 1985. xi + 362. Hard Cover. \$25.00.

The author describes this book as an extended essay about the proper relationship between the individual and the state. He examines this relationship in the context of the eminent domain clause of the Constitution and the basic theory of government advanced by John Locke.

The author argues that the inclusion of the eminent domain clause in the Constitution as well as its meaning can be explained by reference to the heavy influence of Locke on the Founding Fathers. The author asserts that the Constitution, and in particular the eminent domain clause, draws on the basic theory developed by Locke.

According to Locke's theory, the government derives all of its rights and powers from the individuals whom it governs. All arrangements between the state and private individuals are therefore properly analyzed as a network of relationships

among different individuals. Since the rights of the state can never rise above the rights of the individuals it represents, the payment of just compensation by the state under the eminent domain clause is required for a taking just as payment by a private defendant is required where a defendant interferes with another's property rights.

The author also explains that the only legitimate reason a state has the power to take private property is that it is beneficial in certain instances to force transactions which benefit everyone and do not impose any costs on anyone. Allowing the state to take private property to provide public goods, for example, is beneficial because everyone is better off, no one is worse off, and the transaction would otherwise be impossible given problems of holdouts, free-riders and high transaction costs.

The book examines all facets of the eminent domain clause. Subjects addressed include what constitutes a taking, police power justifications for takings, the public use requirement and the amount of compensation which must be paid when a taking has occurred. The book also presents a powerful defense of interpreting the Constitution with reference to the explicit text and interpreting this text by referring to the underlying theory of the state that it embodies.

Based on the theoretical framework developed by Locke and the clear text of the eminent domain clause, the author argues that many modern regulatory-welfare state laws such as zoning, rent control, workers' compensation, transfer payments and progressive taxation are constitutionally suspect.

*Takings* is persuasively argued and is valuable both as an explanation of the eminent domain clause and the basic theory of government advanced by John Locke.

