THE CHARTER OF RIGHTS AND THE LEGALIZATION OF POLITICS IN CANADA by Michael Mandel (Toronto: Wall & Thompson, 1989) pp. x + 368.

Professor Michael Mandel has authored an ambitious book, the purpose of which is no less than to "undermine legal politics at its source"; to "challenge the authority of the court and thereby authoritarianism in general".[1] Not unlike a vastly increasing body of work from the critical legal studies movement,[2] and the earlier efforts from the legal realists,[3] Mandel aspires to show how indeterminate language such as that found in the *Charter* (for example liberty, equality, and "reasonable limits") hand over to an unelected and unaccountable judiciary the reins of democratic politics. For Mandel, the *Charter* and its transfer of power is "fraudulent".[4] The *Charter* openly invites the judiciary to refashion social reform, defuse social welfare legislation, and liberate propertied interests. All of which works inevitably to the advantage of the elites,[5] the upper classes, of which judges and lawyers are fairly representative.[6] The author thereby seeks to undermine the authority of the courts and to shake our confidence in an entrenched bill of rights such as the *Charter*. This review will set out Mandel's description of the *Charter* problem, and his prescription for it.

I

According to Mandel, the constitutional entrenchment of a bill of rights has wrested the battle for social justice from the House of Commons to the judges'

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1. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Wall & Thompson, 1989) 311.
2. In its Canadian form see, for example, Alan C. Hutchinson and Andrew Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278; Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45 The Advocate 857; and Alan C. Hutchinson, "Charter Litigation and Social Change: Legal Battles and Social Wars" in Robert J. Sharpe, ed. *Charter Litigation* (Toronto & Vancouver: Butterworths, 1987) 357. Such observations are not the exclusive domain of critical legal studies. See, for example, Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms" (1983) 61 Can. Bar Rev. 30; and Donald V. Smiley, *The Canadian Charter of Rights and Freedoms* (Toronto: Ontario Economic Council, 1981).
3. See, for example, Roscoe Pound, "The Call for a Realist Jurisprudence" (1931) 44 Harv. L. Rev. 697; and Karl Llewellyn, "Some Realism About Realism" (1931) 44 Harv. L. Rev. 1222. The intellectual legacy of the legal realists for critical legal studies is discussed in Robert Gordon, "Critical Legal Histories" (1984) 36 Stanford Law Review 57 at 67 and in Mark Tushnet, "Post-Realist Legal Scholarship" [1980] Wisc. L. Rev. 1383.
4. *Supra*, note 1 at 308.
5. To the extent that Mandel espouses a "crude elite theory instrumentalism — the belief that lawmakers are lackeys of the dominant forces, unconstrained by legal traditions or understanding in their steadfast pursuit of their taskmasters' material advantage", he parts company with the criticial legal school. The quote is from Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge & London: Harvard University Press, 1987) at 262. However, see Michael Mandel, "Comment" in David N. Weisstub, ed. *Law and Policy* (Toronto: Osgoode Hall Law School, York University, 1976) 64 at 70-71 where the author writes that it would be "flatly absurd" to state "the impossibility of the dominant group doing anything neutral as regards its dominance . . . as there must be few people whose sole motivating factor is dominance".
6. *Supra*, note 1 at 3 and 43. The notion that the legal community is drawn generally from the ranks of the privileged class should not, by itself, appear too radical. See the quote from former Attorney-General of Saskatchewan, Roy Romanow, cited in Robert Martin, "Ideology and Judging in the Supreme Court of Canada" (1988) 26 Osgoode Hall L.J. 797 at 799. See also J.A.G. Griffith, *The Politics of the Judiciary* (Great Britain: Fontana Paperbacks, 1981) at 27 ff.

chambers. He calls this change in the locus of political conflict the legalization of politics or (with no apologies to von Clausewitz) "politics by other means".[7] Mandel is not convinced that the *Charter* has a democratizing effect or that it "transfers power to the people".[8] On the contrary, entrenchment has had the effect of obscuring power relationships in society, of strengthening the inequality of those relationships, and of making democratic politics virtually irrelevant.

Throughout the course of the book, Mandel points to various instances where "progressive causes" have abandoned the democratic political arena for the arena of judicial politics, sometimes at the expense of the cause itself. The futile nature of this tactic is made evident by Mandel's dissection of the *Operation Dismantle*[9] litigation, where a no-nuke group sought unsuccessfully to invoke the *Charter* in order to halt cruise missile testing over Canada's north. The litigation was lost, the group's finances were depleted, and the group's cause, while making some headlines, was not much further ahead.[10] Mandel illustrates how Dismantle, as well as many others on both the right and the left, have been swept up into a *Charter* frenzy. Often, they have done so with little regard for the broader implications of their positions for future *Charter* litigation.[11] For Mandel, this type of behaviour exhibits a naivete about *Charter* judicial review which he endeavours to set straight by this book.

The greater, and more effective, part of the book is devoted to analyses of *Charter* jurisprudence as they reflect the phenomenon of the law as politics by other means. The author's task is to unmask the political process that is constitutional law. To this end, Mandel focuses on the *Charter*'s effect on the traditionally disenfranchised: the francophone minorities, the accused in the criminal process, the trade union movement, women, and aboriginal peoples. Mandel argues that the *Charter* has done little to advance the cause of social justice for any of them and, that in some cases, the *Charter* has been downright harmful. On the right, the National Citizen's Coalition were initially successful in their assault on trade union financing of the New Democratic Party in *Lavigne*.[12] On the left, the British Columbia Public Interest Advocacy Centre, in *Silano*,[13] successfully challenged welfare regulations that arbitrarily provided greater benefits to those age 26 and over compared to those under the age of 26. The British Columbia government responded by splitting the difference, and in the result, lowered benefits for those 26 and over.

Even those decisions that could possibly have benefited women, such as *Morgentaler*,[14] or *bona fide* refugees, such as in *Singh*,[15] are, according to this thesis,

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7. *Supra*, note 1, at ix.
8. *Supra*, note 1 at 3, quoting from the Government of Canada document *The Constitution and You* (Ottawa: Government of Canada, 1982) at 12.
9. *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441 (SCC).
10. *Supra*, note 1 at 64-70.
11. Referring to the labour movement's uncoordinated Charter litigation discussed at the "Charter of Wrongs" conference, London, Ontario, and mentioned in *supra*, note 1 at 212 n.1.
12. *Re Lavigne and O.P.S.E.U.* (1986), 55 O.R. (2d) 449 and (No.2), (1987) 60 O.R. (2d) 486 (Ont. H.C.J.) reversed (1989), 67 O.R. (2d) 536 (Ont.C.A.), application for leave to appeal to Supreme Court of Canada filed February 28, 1989.
13. *Silano* v. *British Columbia*, [1987] 5 WWR 739 (BCSC).
14. *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.
15. *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177.

more harmful than beneficial in the long run.[16] That is, those decisions which had the effect of imposing the judicial will upon the legislative will inevitably lead to a legislative counter-reaction. How one quantifies the impact of *Charter* decisions deserves careful consideration. However, for these purposes, it is enough to show how this thesis plays itself out with respect to these two Supreme Court of Canada judgments.[17]

In *Singh*, it will be recalled, the Supreme Court of Canada declared that persons within Canada claiming to be refugees could have the benefit of s.7 of the *Charter* and struck down regulations which permitted immigration adjudicators to deny hearings to refugee claimants. This decision greatly accelerated an administrative crisis in the refugee determination process which led to the passage of two pieces of legislation: one, Bill C-55,[18] an Act which has the effect of restricting the flow of refugee applications, and thereby, those who could avail themselves of *Singh*; the other, Bill C-84,[19] an Act which, among other things, permits the detention of persons whose papers may not be in order and criminalizes certain activities of those who assist refugee claimants.[20]

In *Morgentaler*, the Supreme Court struck down *Criminal Code* provisions regulating access to abortion. Immediately, numbers of provinces moved to restrict provincial funding of abortion through the provincial medicare schemes. A motion to restrict free access to abortion was introduced in the House of Commons and new legislation looms on the horizon.[21] Taking his cue from the pressures generated by the pro-life movement in the United States, Mandel does not see good times ahead for the pro-choice movement.

One can reasonably differ with Mandel's cost-benefit analysis of these developments. We are not certain, for example, whether *Singh*, minus Bills C-84 and 55, leaves no residual benefit to refugees in particular, and immigration law in general. Nor do we know whether *Morgentaler*, minus troubled health care funding in some provinces[22] and a new abortion bill, results in an overall negative impact for the

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16. Mandel writes, in respect of *Singh*, that "in quantitative terms, the reaction to Singh will wipe out some of its benefits, and there might even be a net loss in the long run" *supra*, note 1 at 182.

17. The analysis which follows could be applied equally to *Silano*, *supra*, note 11. There, the litigation succeeded in ridding the British Columbia welfare scheme of one of two wrongs, an unequal and arbitrary distinction according to age. The second, and far more serious, wrong, the amounts paid to welfare recipients, remains to be fought in the political arena. I am grateful to Joan Vance, counsel for the B.C. Public Interest Advocacy Centre, for drawing this distinction to my attention.

18. *An Act to amend the Immigration Act, 1976 and to amend other Acts in consequence thereof*, S.C.1988, c.35.

19. *An Act to amend the Immigration Act, 1976 and the Criminal Code in consequence thereof*, S.C.1988, c.36.

20. See a short discussion of these two Bills in James C. Hathaway, "Postscript — Selective Concern: An Overview of Refugee Law in Canada" (1989) 34 McGill L.J. 354.

21. Bill C-43, *An Act Respecting Abortion* was introduced for First Reading on Friday November 3, 1989. See "Abortion Bill draws hail of criticism", *Globe and Mail* (4 November 1989) A1.

22. We do know that in the province of Ontario, new legislation that will permit licensing of independent health facilities, such as the Toronto Morgentaler clinic, is presently at second reading before the Ontario Legislature. See Bill 147, *Independent Health Facilities Act*, 1st Sess., 34th Leg. Ont., 1988. See *supra*, note 1 at 295 for Mandel's argument that, in any event, ease of access is a privilege afforded only in the "have" province of Ontario.

pro-choice movement in particular[23] and women's rights in general. It might be fair to conclude that it is too early to determine with certainty how these counter-reactions will play themselves out, in which case, it would be fair to say that Mandel has prematurely determined the *Charter*'s beneficence at least in these areas.[24]

Even discussing these matters in quantitative terms, as Mandel does, is to simplify greatly the dialogue between the courts and the legislatures in an entrenched-rights regime. The unfairness and illogic of the 1976 refugee determination process was apparent long before *Singh*,[25] although *Singh* may have contributed greatly to the ensuing crisis.[26] Once restrictive legislative amendments were introduced after *Singh*, they were fought vigorously by a variety of public interest and refugee support groups at the committee stage in both the House of Commons and Senate, with limited results.[27] The ultimate effect of *Singh* has yet to be played out in pending *Charter* challenges to the new legislation.[28]

Recent developments in the United States as a result of *Webster* v. *Reproductive Health Services*,[29] a Supreme Court decision which invites States to legislate restrictions on access to abortion, suggest that this retrenchment of constitutional rights has led to an increasing intensity of effective political pressure by the pro-choice movement.[30] The political mobilization around abortion has been so effective that it is credited for having elected the country's first black governor in Virginia, and another gubernatorial candidate in New Jersey, who both waged their

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23. See Sheilah L. Martin, "*Morgentaler* v. *The Queen* in the Supreme Court of Canada" (1987-88) 2 Can. J. Wom. Law 422 at 431. To the equation might be added the ordeal of Chantal Daigle during the summer of 1989. See *Tremblay* v. *Daigle* (1989) 59 D.L.R. (4th) 609 (Que. C.A.), reversed [1989] S.C.J. No.79 (S.C.C.).

24. In fairness, Mandel acknowledges that the "likelihood, extent, and impact of Canadian backlash to the Morgentaler decision is difficult to assess" *supra*, note 1 at 290 ff. However, he goes on to conclude that whatever benefits may flow to the pro-choice movement would have come in any event, and much more quickly, without the Charter.

25. See, for example: *The Refugee Status Determination Process: A Report of the Task Force on Immigration Practices and Procedures* (Ottawa: Minister of Supply and Services, 1981); the special advisory reports of Ed Ratushny, *A new refugee status determination process for Canada* (A Report to the Honourable John Roberts, Minister of Employment and Immigration) (Ottawa: Minister of Supply and Services Canada, May, 1984); and W. Gunther Plaut, *Refugee determination in Canada* (A Report to the Honourable Flora MacDonald, Minister of Employment and Immigration) (Ottawa: Minister of Supply and Services Canada, April 17, 1985); and Canada, House of Commons, *Minutes of Proceedings and Evidence of Standing Committee on Labour, Employment and Immigration*, December 2 & 15, 1985 (No.50: Sixth Report to the House). See also Julius H. Grey, "Refugee Status in Canada" in Alan E. Nash, ed. *Human Rights and the Protection of Refugees Under International Law* (Nova Scotia: Canadian Human Rights Foundation, Institute for Research on Public Policy, 1988) at 299.

26. See Barbara Jackman, "Canada's Refugee Crisis: Planned Mismanagement?" in Alan E. Nash, ed. *ibid.* at 321.

27. See David Matas with Ilana Simon, *Closing the Doors: The Failure of Refugee Protection* (Toronto: Summerhill Press, 1989) c.10.

28. See, for example, *The Canadian Council of Churches* v. *Her Majesty the Queen and Minister of Employment and Immigration*, unreported, Federal Court of Canada-Trial Division, No. T-2-89, Rouleau, J., April 26, 1989 where the Plaintiff Church Council was granted standing to challenge the constitutionality of the new refugee legislation.

29. (1989), 106 L. Ed. (2d) 410.

30. See "U.S. pro-choice groups flex newly found muscle", *Globe and Mail* (23 October 1989) A3. See Julie George, "Political Effects of Court Decisions on Abortion: A Comparison between the United States and the German Federal Republic" (1989) 3 Int'l. J. Law & Family 106 for a discussion of similar reactions by the pro-life movement after *Roe* v. *Wade*.

election campaigns on behalf of the pro-choice side.[31] This suggests that the interplay between judicial decisions and their legislative reactions may not be as unidirectional as Mandel suggests. In fact, it could be said that the judicial determination of constitutional rights may sometimes re-invigorate the democratic process.[32]

Aside from the inherent illegitimacy Mandel sees in courts deciding these cases in the first place, he bemoans these developments for another reason. They do not go far enough in altering the balance of power. That is, the *Charter* does not address the fundamental power relationships in society, those between the haves and the have-nots. The *Charter* dims the relationship between private power and the public good and highlights the individual's relationship with the state.[33] For Mandel, the matter of state power is of secondary importance to the matter of how private power is wielded. But by virtue of the *Charter*'s presence, the attentions and resources of community groups, trade unions, and social activists are being diverted from the real issues that govern the "matrix of social power".[34] According to Mandel, the *Charter* obscures these relationships "so that those questions that do not threaten social power can be dealt with [under the *Charter*] and those that do can be **forever postponed**".[35]

Professor Mandel unnecessarily overstates his own case and underestimates the intelligence of those engaged in fights for social justice. Logic and the experience of the *Charter* demonstrates that all one's eggs should not be put into the *Charter* basket. Operation Dismantle's misadventure need not represent the sole repertoire of pressure-group tactics. The women's movement, for example, understands that they do not have the luxury of choosing the legal over the political forum. Women are admonished to "press for changes in both arenas" by the authors of a recent report prepared for the Canadian Advisory Council on the Status of Women.[36] Similarily, Canadian Civil Liberties Association General Counsel, A. Alan Borovoy urges us that, while the *Charter* can be used as a weapon to promote civil liberties, we must continue looking to the elected legislatures to resolve social

31. See "Backlash at the Polls", *New York Times* (9 November 1989) A18.

32. See a discussion of groups invoking rights rhetoric and the subsequent community discourse it provokes in Martha Minow, "Interpreting Rights: An Essay for Robert Cover" (1987) 96 Yale L.J. 1860 at 1871 ff.

33. This "mystification" thesis, that the law mystifies hierarchical relationships and inequalities, is a common theme among critical legal scholarship. See Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Legal Dogma" (1987) 54 Univ. Chi. L. Rev. 462 at 467-69.

34. *Supra*, note 1 at 201.

35. *Supra*, note 1 at 310.

36. Gwen Brodsky & Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, September 1989) at 4.

conflict.[37] That is, *Charter* litigation can be a tactic used as part of a larger strategy, but should not be, as was the case in *Dismantle*, the strategy itself.[38]

Even if there were benefits to be gained by the *Charter*, Mandel would argue that the process of giving effect to the *Charter* diverts attention from systemic class distinctions which "forever" remain unaddressed. Therefore, anyone who uses the *Charter*, not only legitimates the existing power structures, but advances the "cause of expanded repression".[39] He calls to task those collaborators[40] (legal counsel) who try to win a case using the *Charter*. Thus, lawyer Mary Eberts is admonished for having pleaded the case of fellow lawyer Beth Symes. Symes challenged the limits on child care deductions available under the *Income Tax Act*, claiming that she should be entitled to deduct the costs of child care as a business expense. Eberts argued, *inter alia*, that denial of Symes' claim for a deduction offended s.15(1) of the *Charter* as women were disproportionately affected by the Minister's categorization of deductible business expenses which excluded child care costs. Justice Cullen of the Federal Court Trial Division accepted Eberts' arguments, holding that "an interpretation [of the *Income Tax Act*] which ignores the realities that women bear a major responsibility for child rearing and that the costs of child care are a major barrier to women's participation" in the marketplace offends s.15 of the *Charter*.[41] Mandel admonishes them for not having pleaded that all women, not only those in business, were discriminated against by the operation of the childcare deduction: that is, they are censured for having argued the case on the grounds of sex discrimination and not on the grounds of class discrimination. Mandel correctly surmises why they did not plead class discrimination: "It would have doomed their case to failure because it would have called into question the whole basis of the tax. The only way to win was to align themselves with their class at the expense of their gender".[42] One would have thought that their strategy had the advantage of not only winning the case but of also advancing the

37. A. Alan Borovoy, *When Freedoms Collide: The Case for our Civil Liberties* (Toronto: Lester & Orpen Dennys, 1988) at viii and 216.

38. See Judy Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of Charter Litigation to further Feminist Struggles" 25 Osgoode Hall L.J. 485 at 548 citing Mark Tushnet, *The NAACP's Legal Strategy Against Segregated Education, 1925-1950* (Chapel Hill: University of North Carolina Press, 1987) at 164. Tushnet describes the NAACP litigation as a "social process" which does not end when a court renders judgment, but carries on as the locus of controversy shifts from the courts to the legislatures (at 143). In the same vein, Martha Minow writes that legal rights "should be understood as the language of a continuing process rather than the [sic] fixed rules" in *supra*, note 30 at 1876.

39. *Supra*, note 1 at 167.

40. A word Professor Mandel has used in this context in an earlier piece written with Harry J. Glasbeek, "The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies 84 at 115.

41. *Elizabeth C. Symes* v. *Her Majesty the Queen*, [1989] 1 C.T.C. 476 (Fed. Ct. T.D.) at 490, (under appeal).

42. *Supra*, note 1 at 303.

cause of their gender.[43] Nonetheless, according to the author's view, gaining half a loaf is no better than starving. He makes virtue of deliberate forfeiture, thereby losing not only *Charter* litigation, but bargaining power in the subsequent flow of political events.

Mandel rebukes other legal counsel for their apparent lack of ideological integrity. Morris Manning (Mandel's favorite whipping-boy) is scolded for representing, on the one hand, clients like Dr. Henry Morgentaler and, on the other hand, strike-breakers, union-busters, and a rapist. Trade union counsel Jeffrey Sack is chided for invoking the *Charter* on behalf of a union in order to challenge mandatory retirement, an argument which, if successful, could alter the structure of the labour movement. We are advised that the appointment of Justice Louise Arbour "should not give women much comfort" for she acted as special counsel for the Canadian Civil Liberties Association in *Seaboyer* v. *Gayme*,[44] a case which challenged *Criminal Code* restrictions on the cross-examination of complainants in sexual assault cases. On the whole, one is left with the impression that Mandel gives no credence to the adversarial process, and is sometimes needlessly personal when it is the institutions of legalized politics that he means to critique.

Mandel exhibits hostility not only towards the role of counsel, but also towards the legal process in general. He characterizes the quantum of proof in the criminal law (beyond a reasonable doubt) as pure symbolism designed to resolve doubts about the system so as to ensure that those who are convicted have nothing to complain about on the score of their guilt or innocence.[45] He argues that the distinction between crimes and regulatory offences is "completely ideological".[46] While throughout much of the book Mandel elucidates counter-arguments, here he does not address alternative interpretations[47] and dismisses the legal rights enshrined in the Charter as merely "formal" rights which lead to judgments that could not "alter

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43. While it is true that the case went no further than advancing the rights of women "whose biography somewhat approximates the male norm" (Catherine MacKinnon, *Feminism Unmodified* (Cambridge and London: Harvard University Press, 1987) at 37) it may also have the effect of loosening women's economic dependence on men, expanding the career options available to women, and increasing salaries and advancement opportunities for certain groups of women (paraphrasing Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983) 96 Harvard L. Rev. 1497 at 1551). And, the strategy chips away at the divide between the value of work that represents the "male norm" and "women's work": "it undermines the idea that all work has a natural gender". See Ann Snitow, "Pages From A Gender Diary" *Dissent*, Spring 1989, 205 at 224 n. 20.

44. *R.* v. *Seaboyer*; *R.* v. *Gayme* (1987) 37 C.C.C. (3d) 53 (Ont.C.A.). Mandel describes the case as having "pitted the women's intervenor group, LEAF, arguing in defence of the law on the side of the government, against the Canadian Civil Liberties Association, arguing against the law on the side of those accused of sexual assault", *supra*, note 1, 260-61. However, according to the then head of LEAF's national legal committee, their position was not the same as that of the Attorney-General of Canada and only partially the same as that of the Attorney-General of Ontario. See Mary Eberts' letter to the Editor, *Globe and Mail* (12 January 1987) A6.

45. *Supra*, note 1 at 146.

46. *Supra*, note 1 at 172.

47. For example, the quantum of proof serves to limit the possibility that the innocent are wrongly found guilty. And regulatory offences are distinguishable from true crimes not only by the range of penalties that may be reasonably attached to each, but also by the requirement of *mens rea*, which may not be necessary for regulatory offences. See Glanville Williams, *The Proof of Guilt*, 2nd ed. (London: Stevens & Sons Limited, 1958) at 54-58 and Eric Colvin, *Principles of Criminal Law* (Toronto, Calgary and Vancouver: Carswell, 1986) 142-45.

the balance of power in criminal justice".[48] The spirit of Mandel's analysis is summed up succinctly in an old English rhyme:

You prosecute the man or woman
who steals the goose from the common,
But leave the larger felon loose,
Who steals the common from the goose[49]

Professor Mandel does not elaborate upon a scheme that would alter the balance of power. In the meanwhile, he should be made to explain how doing away with the criminal standard of guilt, beyond a reasonable doubt, and replacing it with the less onerous civil standard of a balance of probabilities might alter the balance of power? Or, how undermining the right to counsel upon arrest or detention might tip the scales of power in favour of the downtrodden?

II

As Mandel is not willing to accommodate modest improvements in society through use of the *Charter*,[50] his prescription is to neutralize it. To this end, he quotes approvingly the tactics espoused by Professor Andrew Petter: to assist in "debunking and demystifying the *Charter*" so as to "lay the political groundwork for the progressive use of the section 33 override".[51] Mandel advocates that "progressive causes" avoid invoking the *Charter* "offensively", because, "if you legitimate the *Charter* by using it, you cannot claim foul when it is used against you".[52] However, he understands that it may have to be used "defensively", like a shield, but then, once in court, only to expose the illegitimacy of legalized politics. Mandel describes the *Charter* litigation process as "a game plan that depends on progressive causes committing suicide when they get to court".[53] Mandel's prescription of *Charter* debunking in court is intended to make that result less likely.

Assuming the *Charter*'s continued use as a sword by such interests as corporations and the National Citizen's Coalition, progressive causes, or those just trying to defend the *status quo*, cannot be expected to abandon legal argument in favour of arguments that expose the apparent illegitimacy of the *Charter*'s judicial decision-making process. Particularly when a judge is bound, absent the operation of the notwithstanding clause, to apply the "supreme law of Canada".[54] Mandel's prescription appears not only naive in relation to the practical consequences which flow from his advice, but it is also downright self-defeating. His failure to discuss alternative strategies is a serious deficiency in a book designed

48. *Supra*, note 1 at 142.

49. Quoted in G.K. Chesterton, *What's Wrong With the World*, 8th ed. (London: Cassel & Company Limited, 1910) at 71.

50. What A. Alan Borovoy has called "disjointed incrementalism": modest and carefully measured improvements as opposed to all-encompassing, comprehensive solutions, impervious to countervailing considerations. For when "we move disjointedly, we increase the likelihood that our priorities will respond to the real needs of the people". See *supra*, note 37 at 310-11.

51. See Petter, quoted by Mandel, *supra*, note 1 at 80.

52. *Supra*, note 1 at 309.

53. *Ibid.*

54. *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s.52.

to be read by, and thereby empower, "every citizen concerned about the future of Canadian democracy".[55]

Mandel's advocacy of the progressive use of section 33 is equally troublesome. Section 33 provides Canadian legislators with a trump on judicial review, a playing card which the moral vision of a bill of rights makes difficult to play. It ensures that the legislatures, and not the judiciary, are ultimately supreme. Mandel argues that, even if the notwithstanding clause could be used wisely, the *Charter* has gained sacrosanct status that would handcuff any government from invoking it. Assuming Mandel is correct, he may continue to be so for only as long as *Charter* decisions are recognized as being within the bounds of reasonableness. One suspects that governments would be much more respectful of hostile public opinion than they would be respectful of the *Charter* if the former demanded invoking the notwithstanding clause with respect to a popular legislative act. Indeed, this is precisely what happened in Québec with respect to the language of signs issue. The notwithstanding clauses in the Québec and Canadian *Charters* were played as a vindication of the democratic morality which Mandel undertakes to defend by this book.

Mandel would admit, I believe, that the *Charter*'s content has some meaning and value to him. It is the manner in which those words are given meaning, through an unaccountable and unelected judiciary, that causes Mandel grave concern. If, in a carefully constructed piece of litigation, the *Charter*'s ambiguous language may be given a meaning by courts which assists substantively the causes which he supports, why insist that the substance be rejected solely because of its form, particularly when, in any event, that substantive benefit is subject to possible legislative override? To advocate the use of the *Charter* is not to eulogize it, but to recognize that we have it. Mandel's strategy likely would be disregarded by experienced activists.[56] For social scientist Michael Walzer, this likely would be in the realm of a "morally impermissible risk". It would mean giving up "present and future gains for the oppressed in the name of a future and impalpable triumph".[57] The late American community organizer, Saul Alinsky, advised that pressure groups push the establishment to live up to their own moral codes, rules and regulations, to hoist them with their own petard, and so advance the interests of the cause at issue. He described this basic tactic in political warfare as "mass political *jujitsu*".[58] The approach is one of holding the liberal-democratic state fast to its promises.[59]

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55. The quote is from Professor Andrew Petter's endorsement of this book, found, among other endorsements, on its back cover.

56. This type of dispute is reminiscent of one found in the early days of the NAACP. See Tushnet, *supra*, note 37 at 10 ff. See the reluctant resolution of this dispute along the lines advocated here in Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (New York: Basic Books, Inc., 1987) c.2.

57. See Michael Walzer, "The Obligations of Oppressed Minorities" in his *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge & London: Harvard University Press, 1970) at 57.

58. Saul D. Alinsky, *Rules for Radicals: A Practical Primer for Realistic Radicals* (New York: Vintage Books, 1971) at 152.

59. Critical legal scholar Roberto Unger may be evolving toward this type of approach. According to Professor Richard Bauman, Unger's "way to post-liberal redemption lies along the road to an internal change in our existing institutions so that they are held to the standards which were originally promised by liberal apologists". See Bauman, "The Communitarian Vision of Critical Legal Studies" (1981) 33 McGill L.J. 295 at 335.

The Legalization of Politics in Canada nonetheless makes for challenging and informative reading. Its author has made a significant contribution to the ongoing *Charter* debate. It is a thorough exploration of political ideology as a source of constitutional decision-making. The book stops short, however, of being a complete critique of legalized politics. No attempt is made to analyze the effectiveness of representative politics, and the interests served by lawmakers in the legislatures and House of Commons.[60] The focus of Mandel's attack is the judiciary and its history of simultaneously defending private property and undermining social welfare reform in the United States and in Canada, both before and after the *Charter*. In conclusion, we are advised that "logic and experience show that where the [*Charter* and representative government] . . . clash, representative government is more often on the side worth being on".[61]

Mandel ends his book by paraphrasing Engels: "legalized politics cannot be simply abolished. It must be made to whither away".[62] With no such impending decay of the *Charter* on the horizon, Professor Mandel might want to re-think his strategy.

David Schneiderman
Executive Director
Centre for Constitutional Studies
University of Alberta

60. This observation has been made by critics of the critical legal studies movement. See Ken Kress, "Legal Indeterminacy" (1989) 77 California Law Review 283 at 295.

61. *Supra*, note 1 at 79.

62. *Ibid.* at 311. It is "note worthy" that in an editorial piece authored by Professor Mandel, he writes that having no Charter at all "is only wishful thinking at this point". See "The need for the notwithstanding clause", *Globe and Mail* (24 July 1989) A7.