Consumers and the Regulators: Intervention in the Federal Regulatory Process. By T. Gregory Kane. Montreal: The Institute for Research on Public Policy, 1980. Pp. xvii, 123.

The regulatory process promises to be fertile ground for re-evaluation and reform during the next decade. The federal government,[1] the Economic Council of Canada,[2] the Ontario Economic Council,[3] the Law Reform Commission of Canada,[4] the Institute for Research on Public Policy,[5] and the Institute of Public Administration of Canada[6] have already published major studies on the subject. The pages of learned journals are sprinkled with articles by political scientists and lawyers and this activity seems ready to bear fruit.[7]

The role of the consumer in the regulatory process has been a recurring analytical theme. A consensus has developed since the early 1970s that the public has always suffered in regulatory decision-making.[8] Lack of notice, information and resources have hampered consumer intervention. Bureaucratic impediments and anti-consumer attitudes by decision-makers have effectively excluded meaningful public participation. *Ex parte* contacts, agency capture and monopolies on expertise lead tribunals to favour the regulated industry itself. Most regulation is highly political in nature and often involves cabinet appeals, so that even where effective consumer representation before agencies is possible, it may be rendered nugatory at a later stage in the decision-making process. *Consumers and the Regulators* examines each of these issues in some detail, outlining the failings

[1] See *Parliamentary Task Force on Regulatory Reform: Discussion Paper* (1980).

[2] Economic Council of Canada, *Responsible Regulation* (1979).

[3] Ontario Economic Council, *Government Regulation* (1978).

[4] Law Reform Commission of Canada, *Independent Administrative Agencies* (1980).

[5] W. Stanbury, *Studies on Regulation in Canada* (1978); R. Schultz, *Federalism and the Regulatory Process* (1979); D. Hartle, *Public Policy Decision-Making and Regulation* (1979); W. Stanbury, *Government Regulation: Scope, Growth, Process* (1980).

[6] See, *e.g.*, R. Schultz, *Federalism, Bureaucracy and Public Policy* (1980).

[7] It would be impossible to refer to all the literature which has appeared even in the past five years. Nevertheless, the collection of essays edited by G. Doern, *The Regulatory Process in Canada* (1978), the work of H. Janisch, and the fine article by Breyer, *Analysing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform* (1979) 92 Harv. L. Rev. 547, deserve special mention.

[8] Perhaps the leading article in forming this new consensus was Trebilcock, *Winners and Losers in the Modern Regulatory System: Must the Consumer Always Lose?* (1975) 13 Osgoode Hall L.J. 619.

of the current regulatory framework and elaborating proposals to overcome these failings.

The thrust of the book is best explained by the author himself in his conclusion. After noting the enormous range of regulation and its diverse formats, he reminds the reader that only "public utility regulation" at the federal level, *i.e.,* CRTC, CTC, NEB, *etc.,* has been covered by his book. He continues:

> The critical, underlying theme to this study has been as follows: before a regulatory agency can engage in a process of balancing the variety of interests that relate to a particular issue, those interests must be articulated before the tribunal. Furthermore, it is absolutely fundamental that the regulatory tribunal facilitate this process by making its proceedings as accessible as possible to the widest number of interests so that the ultimate decision will have been based upon a variety of "inputs".[9]

Each of the first four chapters explores a different aspect of this underlying theme. Mr Kane begins by elaborating a theory of public participation in regulation based on the touchstone that "regulation is there to serve the public, not to be the instrument of a selected few". Problems of interest articulation — standing, representatives, diffuseness, regulatory capture — are given a cursory treatment in Chapter Two. The book's third chapter addresses the thorny problem of tribunal independence and public policy: to what extent should agencies be free of political control? To what degree should courts make agency policy? How should policy be communicated to agencies by government? Chapter Four questions the current structure of cabinet appeals and raises the issue of accountability of regulatory tribunals; the current framework of policy guidance and non-judicial recourse is roundly criticized for being contrary to the Rule of Law.

The final two chapters contain Mr Kane's prescriptions for a better regulatory process. In Chapter Five, several "bloodless" (the word is the author's) procedural changes are proposed. These range from improving notice requirements, permitting preparation time, better scheduling of public hearings, making *ex parte* contacts a matter of record, improving access to documents and rethinking the manner of appointment to agencies. The book's final substantive chapter deals with the financing of consumer representation. Two proposals are mooted: the direct government subsidy of groups and the awarding of costs for appearances before regulatory tribunals.

Consumers and the Regulators is a very appealing book: well written, carefully argued, thoroughly documented, neither shrill nor polemical in its analysis, and moderate in its recommendations.[10] I agree almost completely

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[9] T. Kane, *Consumers and the Regulators* (1980), 121.

[10] Without being unfair to Mr Kane it is important to note that almost all his suggestions have previously been mooted in American periodical literature. See, *e.g.,* Breyer, *supra,* note 7. Nevertheless, the author does a fine job of adapting this literature to Canadian problems.

with Mr Kane's views on the symptoms of the disease, but I am convinced neither by his analysis of its causes nor by all his prescriptions for its cure. In the following paragraphs a brief critique of the author's thesis will be attempted. My comments are grounded in what I see as three fundamental defects in his theoretical perspective. First, he starts from an insufficiently nuanced view of the phenomenon of regulation: its form, limits and functions are not exhausted in direct legislative initiatives. Second, he brings a rather naive perspective on the process of decision-making to his analysis: adjudication is not the only model for dispute settlement in a modern democracy. Finally, his views on interest formulation and articulation fail to take into account important recent work in jurisprudence: the identification of and justification for asserting the consumer interest presents difficult challenges for democratic theory.

During the past decade public lawyers in the United States have devoted a great deal of energy to analysing the systematic nature of administrative law. Works by Professors Vining[11] and Freedman[12] are essays on how non-regulation may effectively amount to a form of regulation which totally ignores the consumer interest and deprives citizens of input into important social decisions. These authors point out that by their very existence, legal structures enhance public participation, either through the identification of problems, or through the transformation of economic issues — over which the citizen can exercise little control — into legal issues of procedure, where his concerns may be legitimated. One should also recall that visible regulation operates against a matrix of socio-political forces which are rarely visible and even more rarely understood. To assert the primacy for consumers of traditional adversarial input into visible regulation misses the point that invisible regulation thereby escapes scrutiny. It also implicitly establishes economics as the standard against which regulatory effectiveness is to be measured.

Rather than set out in detail the gaps in Mr Kane's analysis which flow from his focus on the adjudicative and quasi-adjudicative aspects of regulation,[13] I shall make only one observation at this point. A denial of the kind of consumer group representation advocated by the author may be a result more of the unsuitability of this model of decision-making to such input than of secretiveness, conspiracy or lassitude. For example, a

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[11] J. Vining, *Legal Identity: The Coming of Age of Public Law* (1978).

[12] J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* (1978).

[13] A lengthy and belaboured treatment of this point may be found in Macdonald, *Judicial Review and Procedural Fairness in Administrative Law* (1980) 25 McGill L.J. 520 and (1980) 26 McGill L.J. 1.

comparison of the recent work of Professors Gilmore,[14] Macneil,[15] Atiyah[16] and Fried[17] in the law of contracts with recent writings on natural justice in administrative law clearly reveals the poverty of the latter's contribution to generating a general theory of procedural fairness. While writers on the law of contract constantly seek to explain contracting as one of several social institutions with its own symbolism and range of useful application, administrative lawyers tend to see adjudication as the only means of creating and enhancing social ordering. Until those who argue "the consumer interest" develop a more plausible model of the regulatory process, little progress towards effective participation is likely to occur.[18]

Perhaps the reader should not expect Mr Kane to note that many of his claims are grounded in social theory. But there is no reason the author should not at least refer to the work of Professors Rawls,[19] Nosick,[20] Unger,[21] Ackerman[22] and Ely[23] where these support the thesis he is arguing. After all, those who assert the consumer interest are really arrogating a neutral label to sustain their claim for special protection. Whose consumer interest do consumer advocates really reflect ? The evolution of trade union jurisprudence in matters of expulsion, the duty of fair representation and secondary boycotts should serve as a reminder that simply because a group holds itself out as representing a certain interest is no guarantee that it actually does so. Mr Kane's brief treatment of this issue in Chapter Two is simply inadequate as a justification for the position he adopts.

It is, of course, impossible in a 123 page monograph to argue fully all the issues canvassed in the last few paragraphs. As a reader who does not share the assumptions of the *Institute for Research on Public Policy* and its various authors, however, I am frustrated by the failure to address these problems even superficially. If one is already a convert to shibboleths such as

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[14] G. Gilmore, *The Ages of American Law* (1977).

[15] I. Macneil, *The New Social Contract : An Inquiry into Modern Contractual Relations* (1980).

[16] P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

[17] C. Fried, *Contract as Promise : A Theory of Contractual Obligation* (1981).

[18] It has always been a puzzle to me why administrative lawyers are not more receptive to the work of political scientists in this regard. Compare the overt theorizing in Schultz, *supra,* note 6, chap. 1, with the first chapter of Mr Kane's monograph.

[19] J. Rawls, *A Theory of Justice* (1971).

[20] R. Nozick, *Anarchy, State and Utopia* (1974).

[21] R. Unger, *Law in Modern Society : Towards a Criticism of Social Theory* (1976).

[22] B. Ackerman, *Social Justice in the Liberal State* (1980).

[23] J. Ely, *Democracy and Distrust : A Theory of Judicial Review* (1980).

deregulation, agency capture, adversarial adjudication, independent and non-political regulatory agencies, consumer advocacy, and so forth this monograph will be enjoyable reading. If not, the sense of pique it generates may contribute to a livelier debate on underlying themes. In either case the book will have served its primary purpose. Would that most legal writing were as successful!

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Ontario Securities Law. By Victor P. Alboini. Toronto : Richard De Boo Ltd, 1980. Pp. 992.

This book gives cause for celebration among those who study and work in the field of securities regulation. It is a narrow field of law which none the less has a significant impact on the economic well-being of our society. The fact that Canada and the United States have the two best-developed and most efficient capital markets in the world is in no small measure due to the legal framework in which they function. That framework provides a reasonable measure of security for the investor — individual and institutional alike. At the same time, it allows North American capital markets to function with a high degree of efficiency and innovation.

Twenty years ago, there was much cause for criticism of the underdeveloped state of the Canadian law and academic literature in the field of securities regulations.[1] Professor J.P. Williamson's book *Securities Regulation in Canada,* published in 1960 and supplemented in 1966,[2] was a major step forward in filling the void. It was the first book to deal with the subject since the publication in Canada in 1913 of Thomas Mulvey's *Canadian Company Law.*[3]

The appearance of the *Kimber Report*[4] and its product, the *Ontario Securities Act,* 1966,[5] were the major initiatives in modernizing the law. In the twenty years since the appearance of Professor Williamson's book, the law has become modern and sophisticated without becoming unduly cumbersome. During the same period of time, an impressive number of studies, reform proposals, articles and legal treatises have appeared to improve and explain that law.

This evolution is particularly welcome in Canada, which is a relatively small country from the point of view of comparative jurisprudence. Canadian securities law has been influenced substantially by treatises, statutes and jurisprudence from other countries. It is therefore refreshing to see the development of a Canadian body of law and accompanying literature which borrows appropriately from these other jurisdictions but is tailored uniquely to Canadian conditions.

The book serves three important purposes. First, it will improve the understanding of the law by practitioners and the clients they serve. An

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[1] See, *e.g.,* Canada: Department of Finance, *Report of the Royal Commission on Banking and Finance* (1964), 344-55 [commonly referred to as *The Porter Report*].

[2] J. Williamson, *Supplement to Securities Regulation in Canada* (1966).

[3] T. Mulvey, *Canadian Company Law: A Collection of Statutes of the Dominion of Canada and the Various Provinces* (1913).

[4] Ontario : Attorney General, *Report of the Attorney General's Committee on Securities Legislation in Ontario* (1965).

[5] S.O. 1966, c. 142.

improved understanding produces a higher quality of law and of commercial transactions circumscribed by that law. Secondly, a book of this nature augments the education of law students who in turn will be able to make a more significant contribution to the profession when they enter it. Thirdly, the book provides a helpful gloss for administrative practices and presents constructive criticism so that successive generations of amendments, regulations and policy statements can better satisfy the basic goals of securities regulation.

The book is notable because it comes from the pen of a busy practitioner. It reflects the best results of an efficient practitioner's research combined with a network of extensive legal memoranda available only in a large, integrated law firm. It also demonstrates a sound grasp of the problems that a specialist practitioner faces daily in this area. It is a mark of the sophistication of the practising bar in this specialized field that Mr Alboini has been able to produce this book with the support and active collaboration of associates within his firm.

The book itself is almost 1,000 pages long. It analyzes each section and clause of the *Ontario Securities Act,* 1978,[6] with appropriate reference to regulations, case law, administrative decisions and policy statements. It draws sensibly from the six bills which preceded the *Act* as well as from explanatory memoranda, records of hearings, and briefs to trace the evolution of some of the new passages.

Some of the most significant provisions of the *Ontario Securities Act* are new and untested and the book provides the extensive explanation needed to make them work effectively. Several chapters provide thorough discussions of industry practice, which will be particularly helpful to students. In general, the book has been extensively researched and will provide a reasonably complete list of primary sources for anyone attempting to give a carefully considered opinion on a particular question.

About fifteen years ago, the late Manuel Cohen, former Chairman of the United States Securities and Exchange Commission, advised a law reform group from one of the British Commonwealth countries not to look to the United States federal statute and practice for a model but rather to the *Ontario Securities Act,* 1966. He suggested that Ontario had a statute and administrative practice which gave the essential framework of a sound securities regulation system and which at the same time was simpler and less cumbersome in practice. The new statute of 1978, with the help of Mr Alboini's book, gives a ringing endorsement to that prophesy.

David Lloyd Johnston*

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[6] *An Act to Revise The Securities Act,* S.O. 1978 c. 47, as am.

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A Modern Legal History of England and Wales 1750-1950. By A.H. Manchester. London : Butterworths, 1980. Pp. xxv, 419.

Students in need of a general history of English law and its institutions between 1750 and 1950 will find this text to their liking, especially on the eve of their examinations. The book is unlikely to win a place among established texts by Potter,[1] Plucknett,[2] Milsom[3] and Baker,[4] and one assumes that it was never intended to do so. However, anyone who by interest or compulsion seeks quick knowledge about this period of the law will find assistance in Mr Manchester's work. The author should be complimented for his success in producing a text that undergraduates in history, political science, economics and other disciplines, as well as law, can use with profit to gain an introduction to recent legal history.

The first chapter is designed to prime the reader by setting out the most conspicuous trends in England's social and eeonomic development between 1750 and 1950. To meet such a challenge in less than twenty pages is indeed an ambitious task, and the author concedes the futility of the enterprise.[5] It was a regrettable editorial decision to publish this first chapter in its present form. Its shallowness is such that, barring a complete redrafting with substantial amplification, it would better have been scotched entirely or cut into pieces which could have been tucked into appropriate passages elsewhere in the book. Omitted from the chapter is any sustained commentary on the profound influence of philosophy, morality and religion on law, especially in the nineteenth century. This omission is notice that the entire book discusses only positive law and its manifestations in the courts, the legal profession and law reform.

Marked improvement is evident in Chapter Two, where the author gives a brief exposition of the sources of law and miscellaneous efforts at statutory reform, consolidation and codification. This improvement continues in Chapter Three with a good overview of the structure and organization of the Bench and Bar.

Among the best chapters in the book are the five (Chapters Four to Eight) dealing with the courts, which provide a sound introduction to the structure of English courts. They include a clear synopsis of the function of the jury in English law during the last three hundred years and a brief account of court administration,[6] including ample citation of reports by various commissioners or committees. Though the survey is cursory, Mr

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[1] H. Potter, *Historical Introduction to English Law and its Institutions,* 4th ed. (1958).
[2] T. Plucknett, *A Concise History of the Common Law,* 5th ed. (1956).
[3] S. Milsom, *Historical Foundations of the Common Law,* 2nd ed. (1980).
[4] J. Baker, *An Introduction to English Legal History,* 2d ed. (1979).
[5] A.H. Manchester, *A Modern Legal History of England and Wales 1750-1950* (1980), 10.
[6] *Ibid.,* 102-10.

Manchester annotates these pages with enough information to guide readers unfamiliar with this area of legal history to other sources, many of them primary sources, for more detailed discussion of the matter. His review of the jurisdiction of superior courts is adequate but the preceding chapter on inferior courts is threadbare, which is unfortunate because this is a matter that legal historians have frequently neglected in general works of this kind. In particular, the author could have overstepped his date of departure and attempted to describe the characteristics of inferior courts as they had evolved through the sixteenth and seventeenth centuries, and even earlier.

At the end of his chapter on superior courts, Mr Manchester discusses what he calls "alternatives to the courts", touching briefly on arbitration and fleetingly on administrative tribunals.[7] In view of the explosion in administrative law in Britain and elsewhere in the common-law world, this momentary consideration of administrative matters is strikingly deficient. The ebb and flow of administrative law in the past century is one of the great tidal movements in the history of law over the past two hundred years. Not only does it pose vast theoretical challenges, but it raises questions that go to the very nature of the English legal system. It surely deserves an entire chapter of detailed study.

Chapter Eight, entitled "Review and Appeal", also draws much of its strength from the author's extensive reference to contemporary reports concerning reform of appellate courts of both civil and criminal jurisdiction.

Mr Manchester's three chapters on criminal law and its administration (Chapters Nine to Eleven) have a strong sociological aspect, with respect to both substantive law and its enforcement, and this point of view is undoubtedly helpful to the general reader. However, the weakness of these chapters is their concentration, virtually to the exclusion of all else, on the major formative changes in the criminal law during the late eighteenth and nineteenth centuries. More discussion of defences to criminal charges would be desirable, and in an introductory text of this kind one would especially appreciate a thorough account of the origins of the intellectual bog of drunkenness, automatism and insanity.

Two hundred eventful years of contract, tort and property law flash past the reader in slightly more than sixty pages. The discussion of them is little more than one text-writer's headnote to a proper historical text on each of these areas of law, but once again it should be said that a reader with little history and less law will find these chapters informative. One should perhaps admire the author for facing the task at all. However, there are also notable omissions from these chapters, and the consideration of contract law might be singled out for brief criticism. Mr Manchester properly informs us that in the twentieth century "the sanctity of the contract" is an embattled notion,

[7] *Ibid.*, 150.

indeed an idea that is keenly attacked by some as an idol of false piety, and one regrets that the author was unable to consider Professor Atiyah's new book on the subject, which, despite its provocative partisan argument, illustrates nicely the terms of a great debate.[8] Nonetheless, a thorough bibliography of secondary literature is imperative in this field of legal controversy, and the references provided are quite inadequate. In discussing "the erosion of the classic theory of contract",[9] Mr Manchester mentions illegality, misrepresentation and mistake, but he neglects to explore the rich folds of the much broader doctrine of unconscionability or even to cite literature on the topic, such as the excellent essay by Professor Waddams, "Unconscionability in Contracts", which appeared in the *Modern Law Review* several years ago.[10] Surely this growing doctrine, which has a long history in the period of English law studied by Mr Manchester and which has led to the enactment of important modern legislation, is at the heart of the erosion of the classical theory of contract. Not only is it an important issue in modern contract law, but it provides revealing evidence of changes in public opinion, the distribution of wealth and the exercise of economic power.

But the author says, and rightly so, that "[w]e have no more vivid illustration of the relationship between law and opinion than is provided by a study of the law regarding labour... and... the law regarding capital".[11] The chapter given to these matters, Chapter Fourteen, is quite the best single effort in the book, and for law students and general readers alike it is an excellent précis of the chief milestones in the history of labour law and company law. As regards the latter, however, the author completes his account with the principle of limited liability and the doctrine of *ultra vires,* and thus fails to bring company law into the twentieth century, missing fully fifty years of his chosen period of discussion.

The penultimate chapter concerns family law, and while one might expect this chapter to concentrate on developments in the twentieth century, the author is here again bogged down in the nineteenth and thereby unable to consider much of the fascinating history of family law in this century. Nevertheless, what he has provided is a flat, but adequate, recitation of the salient points, leavened only by an allusion to the astonishing practice of wife-selling as an "extra-legal remedy" for matrimonial distress in the nineteenth century.

Mr Manchester then concludes with a general and familiar *excursus* on the nature of law reform and the many means of its accomplishment.

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[8] P. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).
[9] *Supra,* note 5, 274-6.
[10] (1976) 39 M.L.R. 369.
[11] *Supra,* note 5, 327.

While the generality of the entire book may be its selling virtue for many readers, generality is also its chief vice when it deteriorates to a superficial veneer, as it does in several spots. One feels throughout that the author's general approach implies a correlative obligation to annotate extensively for the benefit of readers who wish to pursue a subject in greater detail. Although one must be quick to praise Mr Manchester for his thorough reference to reports prepared by parliamentary committees, law-reform committees, and commissions of inquiry, he would have done well to have at least cited more of the abundant periodical literature of an historical and legal nature that bears on his topic. The vertebrae of his book remain the standard texts and articles in each field of law, and for a truly successful publication of this kind one would like less of a digest and more of an argument, which is one of the signal virtues of Plucknett, Milsom and Baker with respect to their work about an earlier era. One abiding criticism of Mr Manchester's book is that for all its concern with law reform it fails to identify adequately areas of controversy in the law to 1950 that have continuing and pressing ramifications.

Three cosmetic blemishes deserve the attention of Butterworths, the publisher. First, in a book that includes only a brief subject index, it is irritating not to be provided with a complete bibliography of all works cited in the text. Second, the purchaser of this book is entitled to better proofreading. Third, any reader is entitled to orthodox punctuation, standard abbreviations and consistent annotation.

Professor J.H. Baker remarked recently that legal historians have been reluctant to write at length about the period after 1750, partly because so much of what there is to write about is still in daily use and partly because of the enormity of the resources.[12] Mr Manchester seems to have overcome that reluctance and, with this introductory text for the general reader, he shows that he has done so with justified confidence. The author has succeeded in his attempt to link the law between 1750 and 1950 with basic trends in contemporary public opinion. While he has not evaded legal controversy in this general approach, he has done well to help us see recent legal developments as history.

Patrick Healy*

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[12] Baker, Book Review [*The Rise and Fall of Freedom of Contract*] (1980) 43 M.L.R. 467.

* Of the Law Reform Commission of Canada.

Canadian Prison Law. By John Conroy. Vancouver : Butterworths, 1980. Loose-leaf, two volumes.

John Conroy's *Canadian Prison Law* will be a valuable reference guide for lawyers who have clients confined in federal penitentiaries. This two-volume loose-leaf service provides a lengthy discursive introduction and annotations to the *Penitentiary Act* [1] (including subordinate legislation and orders thereunder), the *Parole Act*,[2] and those portions of approximately thirty-five other federal statutes which apply to prisoners. Conroy is well qualified for this task. As legal counsel for the Abbotsford Community Legal Services Project, he has been involved in leading prison-law cases, including *McCann* v. *The Queen & Cernetic*[3] and the two *Martineau*[4] decisions. The service is replete with annotations of unreported cases in which he participated, or of which he is aware.

Canadian Prison Law is unique and thorough. Aside from the rare appearance of an article in a journal,[5] correctional law in Canada receives scant attention, although the *Queen 's Law Journal* has published two special issues on the subject[6] and the Queen's University Correctional Law Project has also recently established the *Correctional Law Newsletter*. Among government publications, the *Report to Parliament of the Sub-Committee on the Penitentiary System in Canada* (1977) stands out for its objectivity and searching analysis. At the moment, however, interest in prison law is manifested almost exclusively by academic groups such as the Queen's Project, the newly formed Corrections Practicum at McGill, community-action groups such as the one in Abbotsford, and the *Office des droits des détenus* in Quebec. Legal-aid finances almost every prison-law case in the country, and in British Columbia the educational costs and salaries of para-legals working in the area are also paid by the government.

Prison law comprises three general topics: civil matters, such as marriage, divorce and finances; substantive rights as provided in the *Penitentiary Act*, the *Parole Act*, and the *Canadian Bill of Rights*;[7] and procedural rights to be dealt with fairly or in accordance with natural justice by administrators deciding matters that affect a prisoner's interests,

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[1] R.S.C. 1970, c. P-6.

[2] R.S.C. 1970, c. P-2.

[3] [1976] 1 F.C. 570 (T.D.).

[4] *Martineau & Butters* v. *Matsqui Institution Inmate Disciplinary Board* [1978] 1 S.C.R. 118 [hereinafter *Martineau (No. 1)*]; and *Martineau* v. *Matsqui Institution Disciplinary Board* [1980] 1 S.C.R. 602 [hereinafter *Martineau (No. 2)*].

[5] *E.g.*, Jackson, *Justice Behind the Walls; A Study of the Disciplinary Process in a Canadian Penitentiary* (1974) 12 Osgood Hall L.J. 1.

[6] See (1971-72) 1 Queen's L.J. 127-310; (1977) 2-3 Queen's L.J. 211-495.

[7] S.C. 1960, c. 44, (R.S.C. 1970, App. III)

privileges, status, *etc.* In his introduction, which unfortunately lacks a table of contents, Conroy concentrates on the third of these topics — the Rule of Law and remedies available to force adherence thereto. This discussion affirms that prison-law cases are based largely on administrative law principles.

The introduction begins with a consideration of the applicability of the Rule of Law to prisons and prison officials. Conroy argues that prisoners are not stripped of all civil and proprietary rights upon sentencing and thus that they retain certain residual rights, albeit rights circumscribed by incarceration. Conroy heralds *Martineau (No. 2)* as conclusively holding that a "prisoner continues to enjoy all of his rights and freedoms, save to the extent that they are expressly or by necessary implication taken away by the governing legislation".[8] The Rule of Law comes into play in prison matters to the extent that these residual rights are affected by administrative action.

Conroy then describes the legal regime applicable to prisoners as set out in the *Penitentiary Act,* the Regulations made thereunder, the controversial Commissioner's Directives, and other rules and orders including divisional staff instructions, standing and routine orders, and lawful orders — the latter being orders which every penitentiary officer is authorized to give. The discussion of the Commissioner's Directives should assist any lawyer seeking to reargue the merits of *Martineau (No. 1).*

Conroy's discussion of judicial remedies provides a mini-treatise on administrative law in fifty pages. Much of what is said may be found in any administrative law textbook, but the many references to cases provide an opportunity to consider in detail the efficacy of the remedies available for various problems such as transfer, parole, lack of procedural fairness, and breach of the *Canadian Bill of Rights.* The remedies of the Federal Court and the provincial remedy of *habeas corpus* are discussed, and the utility of pressing criminal charges against penitentiary officials and possible defences to charges arising out of penitentiary incidents are examined.

In his treatment of the recourses available for ensuring the lawful exercise of delegated powers, Conroy praises the recently-instituted Inmate Grievance Procedure. This praise seems premature and should be tempered by considering the realities of the prisoner-jailer relationship. Over the years, prisoners have complained that they expose themselves to harrassment by guards and administrators by instituting formal or even informal complaints. When marked as reputed troublemakers, there is a greater likelihood that they will be transferred to higher security prisons, or segregated by order of the institutional head. The courts have treated these measures as administrative decisions within the absolute discretion of the

[8] Conroy, *Canadian Prison Law* (1980), vol. 1, 7.

authorized officials and hence not open to judicial review on procedural grounds.

The major question in prison law today is whether the broad implications of *Martineau (No. 2)* will be pursued, leading the Canadian judiciary to abandon its deferential attitude. The answer may well depend on whether administrative decisions, such as those regarding transfer and parole, are seen as causing "serious injustice", as suggested by Pigeon J.,[9] or as affecting rights, interests, property, privilege or liberty, as suggested by Dickson J.[10] in his concurring opinion. It might be argued that the criterion of "serious injustice" would vary with the degree of empathy felt by a court for the prisoner who is, for example, transferred arbitrarily from British Columbia to Québec. By contrast, the question whether "interests" or "privileges" in the broad sense are affected involves a determination of fact and not the weighing of justice and injustice.

Some recent cases show that the lower courts feel free to adopt either standard. In *Culhane* v. *A.-G. British Columbia & Harrison,*[11] Taggart J.A. of the British Columbia Court of Appeal applied the "serious injustice" test, effectively expanding the ambit of Pigeon J.'s remarks to decisions taken by an institutional head which affect the visiting privileges of the general public. Given that Pigeon J.'s remark on the "serious injustice" test arose in conjunction with a decision on internal prison discipline, its expansion by Taggart J.A. is unwarranted ; this appraisal is supported by Lambert J.A.'s dissenting judgment.[12]

In *Dubeau* v. *National Parole Board,*[13] however, Smith D.J. quoted extensively from Dickson J.'s judgment in *Martineau (No. 2),* and characterized the condition of remaining at liberty on parole, as opposed to having parole revoked, as "an 'interest' as well as a 'privilege' of the applicant".[14] He held that members of a parole board should not have questioned a parolee about forthcoming criminal charges and that legal representation should have been allowed at the hearing. An application for *certiorari* was therefore granted and the decision to revoke parole quashed.

It appears that until the next authoritative pronouncement of the Supreme Court on a prison matter, the duty of fairness will be amenable to at least two different approaches. The prison lawyer, when presenting an

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[9] *Supra,* note 4, 637.
[10] *Supra,* note 4, 618-9, 628.
[11] (1980) 108 D.L.R. (3d) 648 (B.C. C.A.).
[12] *Ibid.,* 659.
[13] [1980] 6 W.W.R. 271 (F.C., T.D.).
[14] *Ibid.,* 284.

argument regarding the duty of fairness, must assert that the decision being challenged both affected interests and involved serious injustice. *Canadian Prison Law*, with its useful theoretical introduction and thorough compilation of statute and case law, provides the guidelines with which to approach issues of this nature.

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In Defence of Fundamental Rights. By William E. Conklin. Germantown, Maryland: Sijthoff & Noordhoff, 1979. Pp. xix, 307.

Professor Conklin wants to defend fundamental rights and he begins by stating a fact. In Canada, Great Britain and the United States, unlike most other countries, constitutional framers, legislators and jurists (who include judges, lawyers and legal scholars) claim that fundamental rights do exist. But in practice, the author contends, such rights are not consistently and fully realized.[1] The failure is not due to bad faith ; it lies in the use of defective arguments. The problem therefore is to find a new type of argument that will provide principled interpretation of fundamental rights. The author contends that such an argument must have the character of "normative political judgments" which are drawn from moral-political philosophy.[2] That philosophy, so the author finds, provides principled consistency by making one value supreme over all other values, and that supreme value is "recognition respect" for the person.[3]

The validity of the author's thesis depends on three issues. Are the traditional juristic arguments in fact defective ? Are their defects remedied by the new type of argument of making "normative political judgments" ? Does the supreme value of "recognition respect" really ensure the full and consistent realization of fundamental rights ?

The critical analysis of the traditional juristic arguments in the first part of the book is persuasive. The author divides such arguments into three types. The first type, called "the backward-looking approach", wrongly limits its scope to history or precedents and thus neglects emergent fundamental rights such as political participation and religious conscience.[4] The second type relates to contemporary values of society and takes three forms. Arguments based on "shocking the conscience" depend on whose conscience is shocked and are thus highly subjective, culturally *ad hoc* and insensitive to minority groups.[5] Arguments based on the "majority will" are unworkable in determining who is the majority and logically contradictory of the very idea of fundamental rights as protective of minority rights.[6] And arguments based on the "supremacy of the legislature" suffer all the defects of the "majority will" arguments while lacking their commitment to democratic political participation.[7] Arguments based on an "entrenched Bill of Rights" are a third type ; while they overcome most defects of the other

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[1] W. Conklin, *In Defence of Fundamental Rights* (1979), 1-2.
[2] *Ibid.*, 116, 125.
[3] *Ibid.*, 196 *et seq.*
[4] *Ibid.*, 23 *et seq.*
[5] *Ibid.*, 61-3.
[6] *Ibid.*, 66-70.
[7] *Ibid.*, 75-85.

types, they remain crucially deficient in two respects. They fail to provide criteria for determining in principled fashion the identity, scope and meaning of fundamental rights, and a standard of judicial scrutiny appropriate to their existence or realization.[8]

These defects can seemingly be remedied by "normative political judgments" provided such judgments are given logical unity by a supreme value which overrides all contradictions. In practice, this means that political majorities must give up their interests when they conflict with the supreme value. Political majorities might do that if they had the exclusive right to interpret fundamental values, but Professor Conklin appears to agree with the tradition that no one should judge his own case and that the effective implementation of fundamental rights depends on an independent judiciary. The problem therefore is whether one value can be philosophically seen by everyone, particularly legislators and judges, as so clearly superior to all other values that arguments based on it for denying power to political majorities are sure to convince even those majorities.

It would not be fair to say that Professor Conklin has done no more than add another "top value" to the list of fifteen compiled by Arnold Brecht in 1959.[9] For the author presents an interesting analysis of the ideas of Jeremy Bentham, J.S. Mill, T.H. Green, Isaiah Berlin and John Rawls, especially Mills' theory of "self-regarding conduct" and Rawls' concept of "self-respect". Conklin distinguishes between two types of respect. The traditional concept he calls "appraisal respect for a person", and he rejects it as *ad hoc* because it is dependent on variable judgments of ability, worth, merit or achievement which are temporary and unequal values. In contrast, "recognition respect" for the person as "an open-ended potentiality always in the process of becoming" yields rights which are truly fundamental and permanent. Such rights are rooted in an individual's membership in the human species and are essential to the fulfillment of human nature as we have conceived of it.[10]

But it is fair to ask whether it is sufficient merely to establish a "philosophic perspective", even though that perspective may "consistently support the existence of fundamental rights in general and the absolute inviolability of the inner sphere of life in particular".[11] A value or perspective cannot be supreme unless it invalidates all other values or perspectives, and without a supreme value "normative political judgments" cannot have the unity needed for fully realizing fundamental rights. But what makes "recognition respect" so fundamental that it is entitled always to override

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[8] *Ibid.*, 96-7, 103-5.
[9] A. Brecht, *Political Theory* (1959), 303-4.
[10] *Supra*, note 1, 196-200, 209-11.
[11] *Ibid.*, 211.

justice, liberty, equality, nationalism, humanism and even the personal security an individual needs before he can enjoy "recognition respect"? What principle or type of argument is relevant to proving that one value or perspective is more fundamental than another value or perspective? Professor Conklin explicitly states at the outset of his book that he is not going to consider the key problem of fundamental rights, *i.e.*, "why fundamental rights ought to be valued over other goods such as, say, virtue or happiness".[12] But, in result, his analysis only leads him back to the problem he has disavowed. He implicity concludes that fundamental rights are preferable to other values or goods because they are consistent with that value which is superior to all other values, namely, "recognition respect" without which one is denied his humanity. But why is only the value of "recognition respect" rooted in an individual's membership in the human species and not also any of the fifteen values listed by Brecht? The author fails to address this critical question.

In discussing homosexual activity, obscenity, racial discrimination, contracts into slavery, suicide, the wearing of motorcycle helmets and seat belts, and the involuntary detention of mental patients, Professor Conklin makes a good case that "recognition respect" usually carries great weight for arriving at judgments concerning fundamental rights. But his claim goes further than this. It is that "recognition respect" is itself the standard for determining its weight against competing values. That he has not made good his claim may be seen in the following three cases.

Surely the right to speak the only language one knows is fundamental to membership in the human species. But Professor Conklin states that "language rights are not owed to each person as a member of the human species".[13] Such rights are only owed depending on social circumstances. In Canada such circumstances create the constitutional obligation to protect the right to speak French in a variety of institutional settings,[14] while in other societies, "recognition respect" may not require any constitutional protection for minority languages. This is a baffling conclusion. It makes sense only if there is some higher value or principle which justifies sacrificing "recognition respect" depending on contingent circumstances. For surely if a person speaks only French, or Cree, or German, to insist that he speak the language of the majority in order to live, work and exercise his legal and political rights is to disrespect him as a person. "Recognition respect" for the person, if it is a supreme value, should not depend on numbers, political power, national origin or any other contingent circumstance. And thus, as a supreme value, it

[12] *Ibid.*, 2.
[13] *Ibid.*, 225.
[14] *Ibid.*, 225-6.

must be invoked, contrary to what Mr Justice O.W. Holmes believed,[15] to deny the state the power to require its citizens to learn to speak a common language for the sake of the unity of the nation. But perhaps this is carrying a supreme value too far.

The second case relates to immigration. If "recognition respect" is rooted in membership in the human species, then it follows that denying anyone the right to enter Canada to live honestly and productively disrespects that person. Professor Conklin does not appear to consider this case at all, even though immigration is frequently a matter for litigation in Canada on the basis of fundamental rights. Could it be that "recognition respect" is really rooted not in the human species but in cultural groups, and that respect for members within each such group ultimately depends on treating outsiders as not having any fundamental rights? This is surely a problem that merits serious attention in any defence of fundamental rights as permanent and universal.

The third case is abortion. It would follow from "recognition respect" for the person that both the mother and the foetus should be equally respected. This is particularly so since Professor Conklin defines the person as "an open-ended potentiality always in the process of becoming" which clearly appears to include the foetus. Again, "recognition respect" fails as a supreme value. Not only does it have to be balanced against competing values which at some point can hold their own, but it has to be balanced against itself. Who is more entitled to "recognition respect" — the mother or the foetus? It may be that the value of "recognition respect" as one of several values which must be balanced in the process of determining fundamental rights depends precisely on how it is used to resolve the abortion problem. Yet the author appears to say nothing on the issue.

While the author has not convincingly shown that jurists can solve hard cases by becoming moral philosophers, his effort is useful and stimulating. He has made a good case that "recognition respect" is an important value and that critical awareness of its weight is relevant for determining issues of the meaning and scope of fundamental rights. But what its weight ought to be in concrete cases depends on a calculation more complex than simply postulating the duty of consistency with a supreme value.

Eugene E. Dais*

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[15] *Bartels* v. *Iowa* 262 U.S. 404 (1922). Holmes J., in dissent, would have upheld the constitutional validity of a state law punishing private school teachers who taught young students in the German language only.

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