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In Defense of Fundamental Rights

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Reviews

In Defense of Fundamental Rights. By William E. Conklin. Alphen aan den Rijn, The Netherlands: Sitjhoff & Nordhoff, 1979. Pp. 307. Price: \$38.00.

The central question dealt with by William E. Conklin in *In Defense of Fundamental Rights* is “Why are fundamental rights considered fundamental?” (p.2). In Part I he looks at traditional juridical answers to this question (all of which he finds unacceptable). In Part II he turns to the answers of philosophers, in particular John Stuart Mill and John Rawls, and then goes on to formulate his own view as to what is, in his words, “the ultimate norm in a democratic society” (p.6). Lastly he makes use of this norm to determine which rights are fundamental and when they may be infringed.

In the Introduction Conklin discusses what he means by “fundamental”. This is the key term in his book and an ambiguous one so that such a discussion is necessary. As Edel has pointed out, when we say rights are fundamental we may mean either that they are axiomatic in the moral system; i.e., that they are the rights from which other rights derive, or that they have greater weight than other rights within the moral system.¹ There are also other things we may mean; e.g., that they are those rights which, for whatever reason (perhaps their moral weight, but not necessarily) warrant special legal protection such as constitutional entrenchment. Conklin in explaining what he means by “fundamental” refers to various dictionary definitions, and then says:

The thrust of these definitions makes it clear that something is fundamental if it is “at the root of the matter”, “essential”, “basic”, “underlying”, “primary”, “formative” or “irreducible”. These are very strong words. They require that we place a heavy burden upon those who would claim that the rights in any country are fundamental rights. The definitions also tell us that when reading judgments, statutes and legal writings, I should look for something which tells us why rights are “at the root” of the legal system, “essential”, “basic”, “underlying”, “primary”, “formative” or “irreducible” elements of the law in the three countries under consideration (p.3).

1. Abraham Edel, “Some Reflections on the Concept of Human Rights” in Ervin H. Pollack, ed., *Human Rights* (Buffalo, N.Y.: Jay Stewart Publications, Inc., 1971) at 5.

This is vague and metaphorical language, but Conklin seems to be saying that “fundamental” means axiomatic. However, in fact it is his ultimate norm which is axiomatic. The remainder of his book indicates that what he means by “fundamental” is of greater moral weight. The issue of whether he thinks fundamental rights are deserving of special legal protection will be discussed below.

In Part I Conklin evaluates three responses of judges and lawyers to the question of what makes fundamental rights fundamental. First he considers Chief Justice Coke’s “backward looking” argument that something is a fundamental right if there is longstanding precedent for its being so. Conklin points out that there would be very few fundamental rights in Canada on this approach; e.g., the right to participate in elections has only been recently acquired, and we have no consistent tradition of respecting religious freedom.

Next Conklin considers the view that something is a fundamental right if contemporary values indicate it is. He expresses the three forms of this view as follows:

It seems that the “contemporary values” method for establishing the existence of fundamental rights has taken three quite different forms in Anglo-Canadian-American legal literature. First, judges have oftentimes suggested that in a civil liberties case they should project into the record what they as judges consider to be the dominant contemporary values of society. This was Lord Devlin’s idea of the “reasonable”, “rightminded man”. It also underlay some of the judgements of Mr. Justice Marshall, Cardozo, and Frankfurter. A second, Benthamite form of the “will of the majority” underlay the writings of some jurists. Gallup polls, plebescites, communications between politician and citizen, and the like have been used as indicia for the existence (or non-existence) of fundamental rights. A third, more traditional form has been the notion of the supremacy of the legislature. We shall examine each in turn (p.55).

None of them he finds acceptable. The first form, which he refers to as the shock the conscience argument, is too subjective. As to the majority will argument, it is difficult to determine what the majority will is, and anyway it may be wrong. And of the supremacy of the legislature argument Conklin says, “How can a right be considered fundamental if the legislature creates all rights, determines their meaning and scope, and possesses the authority to destroy them?” (p.77). He goes on in a very interesting discussion of the doctrine of the supremacy of Parliament to argue it is in fact a normative rather than a legal doctrine; i.e., it is not a duly enacted law but rather the

grundnorm which determines what constitutes duly enacted laws. He concludes that since it is a normative doctrine it should be replaced if it is found wanting — and he finds it wanting.

Conklin then rejects the view that fundamental rights are those rights which are entrenched in a constitution. He points out that even if the constitution provides us with a list of fundamental rights it does not tell us their scope or the appropriate level of judicial scrutiny to determine whether they have been violated. These, he concludes at the end of Part I, are normative questions.

Part II attempts to answer these and other normative questions. Conklin's starting point is liberal political theory, and in particular John Stuart Mill's concept of the inner sphere of life, that is, the sphere of life which should be immune from state regulation. He says:

If we could successfully construct an argument to justify why society and the state ought not to penetrate the "inner sphere of life" and if we described rights as the foundation-stones which entrenched the boundaries of that sphere, we could quite legitimately describe the rights as fundamental rights. The number and scope of the fundamental rights, of course, would depend upon what we meant by the term "the inner sphere of life". Although we shall examine below what Mill himself meant by the term, the "inner sphere of life" would *prima facie* seem to be bound up with a fundamental right of political and religious conscience (p. 127).

This is a large assumption to make early in his quest to determine what makes fundamental rights fundamental. Liberal political theory is in effect the view that there is a sphere of life in which people are free to behave badly — to publish pornography or hate propaganda, to hold Nazi rallies, to be addicted to alcohol or drugs. The alternative view — that in fact the state has jurisdiction to pass laws in regard to all spheres of life although of course if it passes bad laws it is subject to reprobation — is at least a tenable one. Even if there is sphere of immunity, perhaps it is not where our fundamental rights lie, or at least not their sole repository. Perhaps we have fundamental rights not only to be free of certain laws but also to be protected by others — for there to be laws against crime and providing for medicare and so on. Conklin does acknowledge at the beginning of Part II that his views presuppose a particular political framework, and in his conclusion to a limited extent goes beyond the view that fundamental rights have to do with protecting the inner sphere of life from State regulation; i.e., to do with liberty.

However, to a large extent his theory of fundamental rights is coloured by his initial assumption.

Conklin examines Mill's view that the sphere of life which should be free from State regulation is that in which we are engaged in self-regarding conduct; i.e. as Conklin summarizes Mill's position, "society might rightfully exercise authority over an individual against the latter's will only for one reason; to prevent harm to others" (p. 128), although, as Conklin points out, there are certain positive duties of a minimal nature that Mill is willing to impose on individuals. Conklin then looks at various rationale that have been offered for the protection of self-regarding conduct from State regulation. Utilitarianism does not provide an adequate rationale, he contends, because there may well be cases where it will not be conducive to the greatest happiness for the greatest number for self-regarding conduct to go unregulated. As to Mill's argument that it is for epistemological reasons that it should be left alone; i.e., that "when it [the public] does interfere, the odds are that it interferes wrongly, and in the wrong place" (quoted at p. 148), Conklin says:

This argument, however, assumes that there are such things as "rightness" and "wrongness" This assumption seems to coincide with a utilitarian perspective in that the rightness of an action is gauged by its utilitarian relationship to the general welfare. But could not a stronger argument be made that, with respect to "self-regarding" conduct, an individual's conception of rightness is just as valid as society's because we simply do not know what is right or wrong in such contexts? The objection which we should have toward the Puritans who prohibited music, dance or theatre and the objection which we should have toward the Spain of Mill's day which enforced a state religion is not, in other words, that society may more often be wrong than right. Rather, the objection is that, with respect to such matters, we just do not know what is wrong or right and, therefore, the dissenter's position is just as valid as the Puritan's or the state's.

In Chapter V Conklin temporarily leaves the issue of why self-regarding conduct should be unregulated and turns to the philosophy of John Rawls. Rawls says in effect that there are two basic rights — the right to liberty, or at least to such basic liberties as freedom of religion and freedom of speech, and the right that social and economic inequalities be arranged so that they are both (a) reasonably expected to be to everyone's advantage and (b) attached to positions and offices open to all. However, at least if certain minimum economic conditions are met, the right to the basic

liberties always supercedes the qualified right to socio-economic equality, because according to Rawls it is more intimately connected with self respect than the right to increased wealth or position. Self respect, Rawls concludes, is a primary social good because

. . .without it nothing may seem worth doing, or if some things have value for us, we lack the will to strive for them. All desire and activity become empty and vain, and we sink into apathy and cynicism (quoted at p. 180).

Moreover, Rawls goes on to conclude that since it is difficult to maintain self respect without the respect of others, respect for persons is a basic duty.

It is worth pointing out, although Conklin does not dwell on this, that the "inner sphere of life" has quite different boundaries on Rawls' theory than on Mill's. According to Mill, the state can only pass laws to prevent us from harming each other, whereas according to Rawls it is not self-regarding conduct which is protected from State regulation, but rather conduct which involves an exercise of such basic liberties as freedom of speech and religion. Self-regarding conduct is not coextensive with conduct involving an exercise of the basic liberties. For example, suicide would be included in the former but not the latter, whereas burning widows on religious grounds would be included in the latter but not the former. Also, Rawls supplements the right to liberty with the qualified right to socio-economic equality, because the latter as well as the former is necessary if we are to be free to carry out what he calls our plan of life. Thus the right to liberty is defined differently by Rawls than by Mill, and moreover is supplemented by other rights so as to give us the right to freedom in a fuller sense; i.e., to include, in the language of T.H. Green adopted by Conklin, positive freedom as well as negative freedom (p. 192).

In Chapter VI Conklin draws on the philosophy of Mill and Rawls to present his own view as to what makes fundamental rights fundamental. He argues that the ultimate norm in a democratic society is that each person is owed recognition respect as a person who is an open-ended potentiality in the process of becoming. Recognition respect is respect owed to a person independently of his status of merit, and is contracted with appraisal respect. The concept of a person as an open-ended potentiality in the process of becoming is preferred by Conklin to that of a person as an actual bundle of desires or as a hypothetical ideal person. Thus according

to Conklin each person is always in the process of change and development, and moreover no value judgments may be made of people.

I find the latter point hard to accept. I have no trouble in saying, for example, that Martin Luther King Jr. was a better person than Jim Jones. Conklin quotes with approval Mill's analogy of the individual to "a tree, which requires to grow and develop itself on all sides, according to the tendency of the inward forces which make it a living thing" (quoted at p. 190). This may well be true, but some trees are stunted or diseased or damaged whereas others flourish. And this is a key point in Conklin's theory, as he uses it as his justification for the principle of liberty implicit in his ultimate norm; i.e.; as the reason the state should not regulate the inner sphere of life.

The principle of liberty, however, is only one of two principles contained in his ultimate norm. The other is the principle of personal respect; i.e.; of adopting the other person's point of view: "The individual's obligations are of two kinds: an attitude of non-interference in the activities and thoughts of others, and a duty of personal respect towards others" (page 211). He applies these two principles in various fact situations to conclude that employers do not have the right to discriminate on the basis of race nor employees to enter contracts of slavery, but that people do have the right to commit suicide, take whatever drugs they like, and not fasten their seat belts. This is the part of his book I find the weakest. I can't tell whose point of view I'm supposed to adopt when I apply the principle of personal respect. For example, in the discrimination case Conklin says the employer should adopt the employee's point of view and hire him — why shouldn't the employee adopt the employer's point of view and look for another job? And when the two principles conflict, how does one know which controls? For example, the principle of liberty in the discrimination case would surely go against the duty to hire (although Conklin seems to say otherwise), whereas the duty to show personal respect apparently goes in favour of such a duty. Why does the latter consideration outweigh the former?

In his last chapter Conklin makes use of his ultimate norm to answer two questions: what rights are fundamental, and what moral weight do such rights have? In regard to the first question, he gives the following answer:

"Recognition respect for persons" would appear to require at

least three avenues of constitutional inquiry. First, recognition respect for persons proscribes discrimination on grounds of race, sex, national origin and colour. Secondly, it precludes interference with a person's life, his inner sphere of life, his thoughts and feelings, the modes of his own expression and due process. Thirdly, it requires that we ensure the equal worth of these fundamental rights. This demands, in turn, that one examine the socio-economic considerations surrounding the effective exercise or non-exercise of the rights (p. 219-20).

The first proscription is unambiguous. The second is less so. The right not to have one's life interfered with is subsequently referred to by Conklin to as the right to life, but it does not appear to include the right to positive assistance in order to ensure one's continued existence *nor* the right to a certain quality of life. Thus the example Conklin gives of a breach of this right is capital punishment. As to the right to noninterference with one's thoughts and feelings, it is not equivalent to the right to free speech. As Brandt has pointed out:

Freedom of speech has nothing to do with freedom of thinking or conscience. Indeed, there cannot be interference with thinking or conscience, since one's inner thoughts are not observable by anyone but oneself. There can be influence on these, by propaganda, by control of the channels of information; but that is a different matter. Freedom of speech means freedom to communicate, either orally or in writing.²

As an indication of what he means by the right to freedom of thought, beliefs and feelings Conklin says people should not be involuntarily detained in mental hospitals.

However, as Conklin points out, the second avenue of constitutional inquiry also "incorporates the fundamental freedoms of political participation, speech, religion, due process and assembly" (p. 221). This is somewhat puzzling. In his general discussion of the ultimate norm it was liberty in general that deserved protection. Now it is only the "fundamental freedoms" or, in Rawls' language, the basic liberties; i.e., freedom of religion, speech, assembly, political participation and due process (one wonders why due process is classified as a liberty or freedom). Conklin says both the principle of personal respect and the principle of liberty require that special protection be given the fundamental freedoms:

2. Richard B. Brandt, *Ethical Theory* (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1959) at 450.

These freedoms would appear to be fundamental largely because they provide critical means of recognising the *daimon* or “ideal possibility” within the individual. With respect to the recognition element, a zone which constitutionally protects one’s political participation, expression and due process demonstrates respect toward the ideal possibility within an individual. By participating, for example, the individual becomes someone “who counts for something in the community’s decision making processes.” That is, his humanness which he shares equality with others is being recognised. With respect to the second element, participation in a common enterprise, expression through speech, assembly or religion, or being assured of due process in matters that might burden one’s person: these elements delineate the boundary lines within which the individual will fulfill his own potentiality, his own person (p. 221).

However, it is at least arguable that if the justification for liberty lies in the development of individuality, it is liberty in general rather than the basic liberties which must be protected. We must be free not only to be journalists or religious fanatics but also to be racing car drivers or diamond thieves if each of us is to achieve his particular *daimon*. As to Conklin’s principle of personal respect, it is an amorphous doctrine, and therefore it is hard to know whether it would give rise to the right to liberty in general or only to the basic liberties.

Lastly Conklin argues that socio-economic arrangements must be such that the fundamental rights of every person are of equal worth. In this he differs from Rawls. However, unlike Rawls he does not supplement his basic liberties with an independent right to socio-economic justice. This is a serious defect. Surely our right to have enough to eat does not obtain simply to ensure that we are strong enough to get to the polling booth. Most writers who stress respect rather than freedom or liberty as the basic value in the human rights area are more concerned with the satisfaction of needs than with the protection of fundamental freedoms. Simone Weil, for example, argues in *The Need for Roots* that there is “only one obligation: respect”, and that “[the] obligation is only performed if the respect is effectively expressed in a real, not a fictitious, way; and this can only be done through the medium of Man’s earthly needs”.³ In regard to the fundamental freedoms, on the other hand, she says that people who misconduct themselves in speech are as

3. Simone Weil, *The Need for Roots* (New York: Harper & Row, Publishers, 1971) at p.6.

subject to reprobation as people who misconduct themselves in action. But Conklin by defining persons as open-ended potentialities in effect collapses the right to respect to the duty to observe the right to liberty.

As to the second issue dealt with in the last chapter; i.e., the moral weight of fundamental rights, Conklin argues that it is very great indeed, and that “[the] only circumstances when . . . rights may be compromised are when they conflict with other more important rights” (p. 235) — it is not sufficient that they conflict with the public interest (or indeed any individual’s interests). This view is all very well if one’s list of fundamental rights is exhaustive, but if not its application results in some serious jars to our moral sense. For example, let us suppose that a child needs a blood transfusion but it is against his parents’ religion for him to have one. If we look to Conklin’s list, the only fundamental right involved in this situation is the right to freedom of religion (unless, of course, one gives a broader interpretation to the right to life than he appears to do). Thus, the “interest” of the child in having his life preserved is not sufficient to outweigh the right of the parents not to consent to the transfusion.

As indicated above there are, I think, some fatal flaws in Conklin’s theory of fundamental rights. But his book is nevertheless an important one. In it Conklin tries to answer a question of real significance, one which is too often not posed, let alone satisfactorily answered. And he recognizes that to answer this question of what makes fundamental rights fundamental it is necessary to venture into the normative realm. This is a point it is hoped the judiciary will recognize if the proposed Canadian Charter of Rights and Freedoms is in fact entrenched in the Constitution. Perhaps the list of rights it contains would be less *ad hoc* and more satisfactory if the persons who framed it had embarked on the task Conklin set himself.

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An International Criminal Court. By Benjamin Ferencz. Dobbs Ferry, N.Y.: Oceana, 1980. 2 vols. Pp. xvii, 538, 674. Price \$37.50 per vol.

International Criminal Law. By M. Cherif Bassiouni. Alphen aan den Rijn, Netherlands: Sijthoff & Noordhoff, 1980. Pp. xxxv and 250. Price \$50.00

The activities of the war crimes tribunals after the Second World War and particularly the Nuremberg Judgment resulted in the decision of the United Nations to request the International Law Commission to draft a Convention relating to Offences against the Peace and Security of Mankind. This Convention was primarily concerned with offences by or at the instigation of the state which could be considered to amount to threats to the peace. Emphasis has changed somewhat during recent years as a result of the activities of terrorists, both within and without the borders of a single state. Nowadays there is much pressure for the adoption of a criminal code which will provide for universal jurisdiction over acts considered to be offences against international law. Political ideology and sympathy, however, may well result in a particular state failing to exercise such jurisdiction over an alleged offender present within its territory. It becomes clear, therefore, as was recognized by the League of Nations when in 1937 it adopted both a Convention against Terrorism and another embodying the Statute of an International Criminal Court, neither of which came into force, that the two are inextricably interwoven, such a court being necessary if international criminal law is to be successfully enforced.

The amount of official documentation and learned comment in this field has become almost unmanageable (the bibliography in Bassiouni's monograph runs to 70 pages, and this does not include all the references in his footnotes), so that gratitude is due to anyone who collates the material and makes it available in a readily usable form. Insofar as *An International Criminal Court* is concerned, Professor Ferencz, who had already placed us in his debt with a compilation relating to the definition of international aggression, has collected the material in two volumes, the first entitled *Half a Century of Hope* and the second *The Beginning of Wisdom*, the two together being described as *A Step Toward World Peace*. Volume 1 covers the period 1899 to 1948, beginning with the 1899

Convention on the Pacific Settlement of International Disputes, and proceeding by way of the 1907 unaccepted Convention for an International Prize Court, the Report of 1919 on the Responsibility of the Authors of the War and Enforcement of Penalties, the 1920 Proposals of the Committee of Jurists on an International Criminal Court, the 1926 draft Statute proposed by the International Law Association, the two League Conventions, the proposals relating to the trials of war criminals after 1939, and the Nuremberg Charter of 1945, until it reaches the judgments of the two International Military Tribunals at Nuremberg and Tokyo. It is interesting to note that Professor Ferencz provides a mere twelve-page summary of the Nuremberg Judgment, completely ignoring the dissent of the Soviet judge, while his summary of Tokyo, normally considered the less significant of the two judgments, receives 34 pages, of which only three deal with the majority opinion, the remainder being devoted to the dissenting opinions of Judge Roling of the Netherlands (17 pages) and Judge Pal of India (10 pages).

In his introduction to Volume 1 Professor Ferencz comments upon the 'achievements' of 70 years. He states that

...proponents of an International Criminal Court never suggested that such a Court should serve as a mask of justice to hide the face of vengeance. Nor was the Court conceived as an instrumentality to guard the status quo in a changing world. A Tribunal, to be effective, would require a dynamic conception of justice. It would have to function within the frame-work of principles generally agreed upon and its integrity would have to be broadly recognized. Code, Court and Enforcement would be the essential components of an integrated system for the prohibition of international violence (p.89).

He recognizes that

...there were ups and downs in the process of evolutionary development and it would be understandable if some would say that it was nothing more than a ride on a carousel which ended where it began. But that would be an incomplete picture. The outstanding fact is that progress — however cautious — was made in a relatively brief historical span. Despite all the vicissitudes and the doubts, the idea of an International Criminal Court remained vital and irrepensible (p.90).

But the idea of a world state and a world government also remains vital and irrepensible for some, and it can hardly be said that we are any nearer their attainment today than we were in 1899.

The idea of an international criminal code and the court necessary

to enforce it remains attractive and — like so many motherhood proposals of the United Nations — is difficult to oppose. However, if one looks at the world as it is, taking the United Nations as its barometer, it is difficult to maintain that the carousel ride of volume 1 has in fact changed in any way. It remains an interminable circuitous switchback and the collection of documents to be found in Volume 2, despite the hopefulness underlying that volume's title, does nothing to change one's view. Here we find the plethora of reports that have come out of the International Law Commission relating to the Nuremberg Principles as well as the draft Code of Offences against the Peace and Security of Mankind; the Genocide Convention and the documents leading to its adoption; the reports and proposals of the Committee on International Criminal Jurisdiction together with a draft Statute for a Court; the Conventions on the Suppression and Punishment of the Crime of *Apartheid*, on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomats, and that of 1979 on the Taking of Hostages, together with the instruments leading to the postponement of action on a Convention concerning Terrorism. It is perhaps unfortunate that Professor Ferencz does not provide a list of states ratifying the various Conventions referred to, for this would emphasise how little has in fact been achieved, and would draw attention to the significance of politics in this field — a significance which is particularly clear in relation to the crime of *apartheid*, and which is emphasised by the provisions of the Resolution to which the Convention on Internationally Protected Persons is annexed.

Professor Ferencz has tended to confine himself to those international documents which clearly relate to the activities of an international court. As a result, he omits from his collection such important documents in the field of international criminal law as the Convention against Limitation Periods in relation to war crimes and the Tokyo, Montreal and Hague Conventions relative to aerial hijacking and other crimes affecting aircraft. If there were such a Court, one might hope that its jurisdiction would extend to such matters too. It is in this connection that Professor Bassiouni's monograph becomes relevant, for it carries the subtitle 'A Draft International Criminal Code'. His introductory chapter on the history and scope of international criminal law indicates that concern with this matter goes much further back than the opening point of Professor Ferencz' collection, for he shows how significant

were national regulatory codes for the armed forces which introduced criminal sanctions for offences which today would be considered contrary to the law of armed conflict and, as such, international crimes which should be dealt with by an international tribunal. In a mere 6 pages he carries the story from Sun Tzu in the fourth century B.C. to Nuremberg and Tokyo. Moreover, in this introductory chapter he refers to a variety of international conventions relating to slavery, the traffic in women and children, narcotics offences, piracy and hijacking, terrorism, obscene publications, aggression, *apartheid*, genocide and torture, which indicate how busy an international criminal court might be if it ever came into existence. This list also serves to show that a collection of documents based solely on proposals for such a court only partially tells the story.

The largest part of *International Criminal Law* (some 60 pages) comprises the contents of the Code. Professor Bassiouni, in his capacity as Chairman of the relevant Committee of Experts of the International Association of Penal Law, considers that such a Code should apply to aggression (retaining the unfortunate provision in the General Assembly's definition which excludes from condemnation acts done in the name of self-determination) as well as to war crimes, unlawful use of weapons, with a clear ban on explosive and expandable bullets, asphyxiating gases (which would probably leave untouched lachrimose agents like CS which might also have a fatal and disabling effect), and chemical and bacteriological agents. Interestingly enough, there is no prohibition of nuclear or other weapons having a longterm deleterious effect, even though some of the latter have been declared illegal under the 1977 Protocol on Humanitarian Law in International Armed Conflicts. The Code would also make criminal genocide, crimes against humanity, *apartheid* (in a form that is somewhat wider than the normal use of this term restricting it to South Africa), slavery, torture and unlawful medical experimentation (with a careful provision regulating the issue of consent to such acts), piracy, crimes relating to international air communications (but there is no provision for similar criminal activities at sea or on land), threats and the use of force against internationally protected persons (on this occasion there is no special protection for those claiming to be acting in the name of self-determination), and the taking of hostages. There is a special provision concerning the torture of a hostage, and the definition here is wide enough to cover pretty well every act of

ill-treatment reported to have been perpetrated against the Americans in Tehran, for it is enough to inflict severe pain or suffering, whether physical or mental, whereas the crime of torture *per se* has to be committed “by or at the instigation of a public official or for which a public official is responsible”. In addition to these more modern offences, the Code includes a number which are traditionally condemned by international treaty — unlawful use of the mails, drug offences, falsification and counterfeiting, interference with submarine cables, international traffic in obscene publications, and, reflecting more modern concepts, the theft of national and archeological treasures and bribery of foreign public officials. Surprisingly, there is no reference to over-fishing or the preservation of endangered species.

The remaining two sections of this exposition of *International Criminal Law* are concerned with procedures of indirect and direct enforcement. The former relates to the exercise of national jurisdiction and the problem of international cooperation, e.g., *aut dedere aut judicare*, extradition (with exclusion of the political offence exception), judicial assistance, recognition of foreign judgments, and the transfer of offenders and execution of the sentences abroad. Insofar as the individual offender is concerned, the only provision relates to the right to appear, to oppose an extradition request, to be represented by counsel and to be heard before an impartial tribunal “under fair procedures in conformity with the laws of” the country before whose court he is appearing — hardly a guarantee of the rule of law! Direct enforcement depends upon the activities of an international criminal court, and to this end there is a thirteen article draft statute.

Taken together the volumes on *An International Criminal Court* edited by Ferencz and the small work on *International Criminal Law* representing the activities of the Bassiouni Committee constitute enough raw material for those who wish to work in this field. They can hardly be said, however, to have exhausted the subject and there is ample scope for further research and analysis.

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Atiyah Rules, O.K.?

The Rise and Fall of Freedom of Contract. By P.S. Atiyah. Oxford: The Clarendon Press, 1979. Pp. ix, 791. Price \$78.50

In his essay "Form and Substance in Private Law Adjudication"¹ Duncan Kennedy argued

that there are two opposed rhetorical modes for dealing with substantive issues, which I call individualism and altruism. There are also two opposed modes for dealing with questions of the form in which legal solutions to the substantive issues should be cast. One formal mode favors the use of clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing *ad hoc* decisions with relatively little precedential value.²

Kennedy went on to suggest that the link between these opposing views of form and substance was that

altruist views of substance private law issues lead to willingness to resort to standards in administration, while individualism seems to harmonize with an instance on rigid rules rigidly applied.³

In two works of radically different scope Professor Atiyah of Oxford University has articulated a view of English legal history which, in my view, bears out Kennedy's assertions. The first is his inaugural lecture, "From Principles to Pragmatism",⁴ in which Professor Atiyah outlined briefly the transition in the *form* of private law adjudication from what Kennedy described as reliance upon "clearly defined, highly administrable, general rules" (principles), which dominated legal reasoning in the last century to the modern "use of equitable standards producing *ad hoc* decisions with relatively little precedential value" (pragmatism).

The second work is *The Rise and Fall of Freedom of Contract*. In this richly textured book Professor Atiyah traces and reveals changes in the *substance* of private law adjudication by focussing upon the idea of contractual liability as it has evolved over the course of English legal history from roughly the beginning of the seventeenth century. The conclusion is simply, as the title suggests,

1. (1976), 89 Harv. L. Rev. 1685

2. *Id*

3. *Id.*

4. Oxford: Clarendon Press, 1978.

that the nature and basis of contractual liability has changed and that we are witnessing what in Kennedy's language is a shift from individualism to altruism. A note of warning must be immediately sounded. This is not a long dry tome in which an Oxford scholar plods some lost by-way of English legal history in the name of an unfathomable thesis. This book is as much a political, social, economic, and intellectual history of England as it is a legal history. It is, as one would expect, both learned and lucid. But it is also delightful in its rich detail, its bizarre anecdotes, its potted biographies of leading characters, and its never ending chain of interesting ideas. The major virtue of the book is its drawing of English legal history into the mainstream of English history and the author's manifest ability to show the life of the law as part of, and reflecting, life in general.

II

Professor Atiyah begins his book with the claim that "the nature of contractual and promissory liability have been largely misunderstood by lawyers, philosophers, and others" (p.1). This is largely because theorizing about the nature of contractual liability has been dominated by a classical model developed in the nineteenth century. This model did not just happen to develop but was the creation of the intellectual climate of the times, which stressed self-reliance, individualism, and freedom of contract. The irony and the difficulty is that the classical model continues to control thinking about contractual liability while the ideas and values which favored its creation have long since lost their status as self-evident truths.⁵

The purpose of Professor Atiyah's book is to trace the rise of this classical theory, to explain it as the product of the social, economic, political, and philosophical vectors acting upon it and to demonstrate the radical alteration in those forces necessary to both create and destroy the need for such a theory. To achieve this end the outline of the book is elegant and structured. It contains three parts, *The Beginnings of Freedom of Contract: The Story to 1770*, *The Age of Freedom of Contract: 1770-1870*, and *The Decline and Fall of Freedom of Contract: 1870-1970*. Each of these three parts contains sections on "The Condition of England", "The Intellectual Background", and "The Legal Background". Part II of the book is the most richly developed.

5. Professor Atiyah's account purportedly stops at 1970. One wonders how he views the rise of Ronald Reagan, Margaret Thatcher, and Milton Friedman.

III

Any modern course in contract law revolves around three central concepts introduced by Fuller and Purdue in their famous “Reliance Interest in Contract Damages”.⁶ In Professor Atiyah’s language, these three concepts are promise based liability, reliance based liability, and benefit based liability. If A promises to sell B one ton of wheat for \$100, delivers the wheat, and B refuses to pay, it is clear that A may sue B, but why? Because A *relied* on B’s promise and delivered the wheat? Because B was *benefited* by the receipt of the wheat? Or because B *promised* to pay?

Atiyah’s central theoretical points are that the classical theory of freedom of contract is centered on the notion of promise based liability, that it treats as its “paradigm” case that of the totally executory contract where no acts of reliance or benefit have been undertaken or received, and that it offers as its standard remedy the expectation (lost profit) interest. Under such a theory, contractual liability is, and can only be, promisory liability and thus purely consensual, the product of the will of the parties. Such thinking serves nicely to cut contract off from the law of tort or restitution where liabilities are not voluntarily assumed by the parties but imposed by law. This model of self-imposed, freely chosen, consensual obligations was entirely in harmony with the principles of individualism and self-reliance. Reliance based and benefit based liabilities, which involve the imposition of liability without consent were discordant notions. It was in this period that the whole of the law of restitution was explained away as turning on implied promises, not benefit received. Also developing from the same philosophical traditions were the notions of *caveat emptor* which was based on the virtues of self-reliance, the notion that the courts had no role in relieving parties from their freely entered into bargains, an extreme emphasis on “principle” and “the long run” at the expense of immediately visible unjust results, and the decline of equity. Professor Atiyah’s case for locating the classical theory of promise based liability within the England of its time is most convincing. The link to the dominant philosophical ideas of the times, especially those of the new political economists and the utilitarians is clearly made.

The notion that there has been both a rise as well as a fall of the doctrine of freedom of contract involves the proposition that there

6. (1936), 46 Yale L.J. 52 and 353.

was a time before the classical theory became dominant in which liability was neither regarded as promise based or strictly consensual in nature. In making this part of the argument both Professor Atiyah⁷ and his American counterpart Morton Horwitz⁸ have been criticized on the basis that elements of the classical theory were present in the law long before the proclaimed classical period. I am in no position to act as judge in this war of legal historians. But these arguments seem to me to be merely arguments about history and neither make nor break the much more critical propositions that the classical theory and its intellectual underpinnings have fallen, that there has been a resurgence of benefit and reliance based liability, that this resurgence reflects values of a new age, and that it is time for a new theory which both draws upon our altered values and makes sense of what judges are actually doing in concrete cases.

On these propositions, Professor Atiyah is on more certain ground. That the old theory still has a grip is demonstrated in our desire to explain, as being examples of promissory liability, cases where the real reason for liability is reliance or benefit based. The examples of collateral contract, misrepresentation, the irrevocability of unilateral offers once performance has begun, and promissory estoppel come to mind. Professor Atiyah here clearly demonstrates that the emperor has no clothes. It is, I think, also clear that the virtues of self-reliance and individualism have declined since the last century and that there is a significant trend in favour of equality, fairness, and paternalism in our society and in our law of obligations. Professor Atiyah makes his case for these propositions by reference to developments in England in this century. How easily these notions can be transported to Canada is obviously a matter for some debate but it seems to me that there are obvious parallels if not total congruency. There is no doubt in my mind, however, that Professor Atiyah has a grip on an important idea with great power to explain much of what we see about us and much of what we read in the case reports. The breakdown of the classical theory and the values which support it is amply demonstrated.

Professor Atiyah does not, however, develop a new theory of contractual liability but states, on the last page of his book, that he

7. Baker, Review, (1980), 43 Mod. Law Rev. 467.

8. The Transformation of American Law: 1780-1860, c.6 (Harvard U. Press, 1977) criticized in Simpson, The Horwitz Thesis and the History of Contracts (1979), 46 U. Chic. L. Rev. 533.

hopes to return to the task. It will be an enormous undertaking. This is because rejection of the classical theory of contractual liability based on promissory liability has implications for the whole of our law of obligations. The recognition of reliance based and benefit based liabilities portends the breakdown of the notion of water tight compartments of contract, tort, and restitution. The task to which Professor Atiyah hopes to return is nothing less than the shaping of a theory for the whole of our law of obligations.

IV

This is truly a remarkable book. It would be a mistake to regard it as simply a book for contract lawyers and legal historians. This is a book for any well educated lawyer. I hope that it finds a wide audience for a particular reason. The one pervasive defect in the legal work performed in the law schools, law offices, and the courts of this country is the use of formalistic legal reasoning. The formalist proceeds in the belief that legal principles can be understood without an inquiry concerning their history or purpose and that "the mere invocation of rules and the deduction of conclusions from them is . . . sufficient for every authoritative legal choice".⁹ The classical doctrines of the law of contract (such as "consideration") are most easily fitted to the formalistic view of the world. Professor Atiyah's book will rock the foundation of the most solid of formalistic outlooks. It will do so without dogma, without romantic reductionism about the source of legal rules, but rather by a long, searching, and insightful look into the nitty-gritty of soci-economic, political and intellectual history.

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Lawyers. By Jack Batten. Toronto: MacMillan of Canada, 1980. Pp. 241. Price: \$16.95.

This review must begin with a confession of bias. I approached this book with low expectations because of two personal encounters with the author, Jack Batten. In the spring of 1978, Mr. Batten

9. Unger, *Law in Modern Society* (New York: The Free Press, 1976).

interviewed students and faculty at Dalhousie Law School, including myself, for an article which was published by Imperial Oil Ltd.¹ Mr. Batten left an impression of unbridled optimism and journalistic superficiality, which was not dispelled when the article appeared in published form.

In the fall of 1980, Mr. Batten spoke to a large group of Dalhousie law students and faculty about the object of this review — *Lawyers*. He candidly admitted that this was part of a promotional tour and that he was an unabashed fan of lawyers. His mission was telling all who would listen that lawyers were wonderful and admirable creatures and that most criticism of the profession was unwarranted. Unable to acquiesce in such idolizing of lawyers, I interrupted Mr. Batten's account with the following caustic remark, which was quoted in the next day's edition of the *Toronto Globe and Mail*:

Mr. Batten, your glowing account of lawyers is as devoid of critical analysis as a "rock groupies" account of a Rolling Stones' concert.

This admittedly ill-tempered remark can only be explained by the fact that I was no longer a humble law student, but rather a self-indulgent member of faculty, who had been angered by what I viewed as a simplified and distorted version of reality.

Lawyers rose above what was expected. It provided a more pleasant encounter with Mr. Batten than the previous two. The author describes lawyers in a readable and engaging fashion and allows lawyers to tell their own stories. The high powered corporate lawyer, the children's crusader, the country lawyer, the criminal lawyer, the prosecutor and many others emerge from the pages of the book.

However, except for one sojourn to Yellowknife (pp. 114-37) the book deals with Ontario lawyers. Even more surprisingly, the book does not describe a single female lawyer. This fact coupled with the author's concluding comments may well give cause for suspicion:

I'd set out deliberately to hunt down lawyers who stirred my respect, to find out what separated me, the indifferent lawyer of years ago, from the *guys* who had such grand talents for the profession [emphasis added] (p.241).

When at the end of the day an assessment is made of what stirred the author's "respect", both women lawyers and those outside

1. J. Batten, "Dalhousie: A little less is more", (1978) *The Review* (No. 6), 19.

Ontario can consider themselves lucky not to be on Mr. Batten's list. In my opinion, the author of *Lawyers* and its cast of practitioners exemplify many of the worst characteristics of the legal profession.

Mr. Batten concludes *Lawyers* with an account of Igor Kaplan, who represents the author's ideal of the all-around general practitioner. This is the same Igor Kaplan who as lawyer to Conrad Black of Argus Corporation assisted the Blacks in their 1978 squeeze out of the two widows, Mrs. Bud McDougald and her sister Mrs. Eric Phillips.² Mr. Kaplan is quoted in the book as speaking proudly of his role in the takeover:

This turned out to be my one big contribution to the whole enterprise. I took it on myself to sign an agreement on behalf of the two ladies to sell their shares in Ravelston to the Blacks. I decided I could sign the agreement for them. I don't know to this day whether I was right or wrong. I don't have to know any more. But I took the position I was their attorney-in-law (p.233).

If this is the kind of heroic lawyering that stirs Mr. Batten's respect, I shudder at the thought of the villainous lawyer! Of course, Mr. Batten also agreed with Paul Moore of the prestigious Toronto law firm of Tory Tory (p.240), who is quoted in the following passage:

How could I be a productive member of society defending guys who are already guilty of something? I joined Tory's and burned the midnight oil learning about corporate securities work. That was a very right decision on my part. It's the business aspect of Canadian life that produces the country's wealth. I mean everybody from the Avon lady to the guy who runs a Becker's store to the Bronfman family. I work for those people. I'm loyal to business. That means I'm socially useful. And it doesn't hurt to get paid well for it either (pp. 149-150).

I do not share the same view of social utility. Far from being "productive" members of society, those who blindly prop up the established order of things perpetuate injustice and social inequality. Protecting the principle that a person is innocent until proven guilty is surely as "socially useful" as doing the legal paperwork for wealthy clients. Of course, as Mr. Moore noted, the

2. Peter Newman's *The Canadian Establishment*, Toronto: McClelland and Stewart, 1975, provides a detailed account of corporate power in Canada. The details of this particular take-over were part of a Canadian Broadcasting Corporation 1981 documentary, based on the book and called "The Canadian Establishment".

former does not pay nearly as well.

It is not only corporate lawyers who stir Mr. Batten's respect. He provides a glowing account of a litigation lawyer, Martin Wunder, whom he describes as "Lawyer for the Oppressed" (pp.20-48). Included in this chapter is a touching account of the human tragedy of the landmark damages case of *Teno v. Arnold*.³ However, it does not seem to have occurred to the author that even in the days of insurance, defendants as well as plaintiffs might be "oppressed". Unfortunately, neither lawyers nor their plaintiff clients can always be on the side of the angels.

In fact every single lawyer in *Lawyers* is one for whom the author has admiration and respect. Criminal defence lawyers, prosecutors, the country lawyer⁴ and the divorced lawyers who are wedded to their work — all engender Mr. Batten's respect. To be fair to the author, he also respects lawyers who challenge the established order such as Jeffrey Wilson, the children's crusader (pp. 201-227), and Jack Johnson, the Ontario lawyer who dabbled in leftist politics (pp. 168-72).

The author's lack of discriminating taste may be *Lawyers* greatest flaw. Mr. Batten may have something in common with Will Rogers, the American humourist, in that he also appears to "have never met a lawyer that he did not respect". There are members of the legal profession who do not deserve respect and a book which claims to remove the mystique from lawyers should confront this. The fact that the author does not confront this subtracts from his credibility as a writer.

There are other things about *Lawyers* which are disconcerting apart from its non-critical approach. The practice of law is not all excitement and glitter. There is as high a component of routine and boring work as there is in any other vocation. Not all lawyers are enamoured with their jobs. Not even those Batten interviewed could be as positive about lawyering on a day to day basis. In this respect Mr. Batten adds to the mystique of the legal profession rather than reduces it. By so doing he does a disservice to his readers.

Another disconcerting feature of the book is the journalistic excess of the author. Everytime Mr. Batten interviews a lawyer at a restaurant (a frequent occurrence), the reader is given a detailed

3. (1978), 3 C.C.L.T. 272 (S.C.C.)

4. Mr. Batten emphasizes the slow paced life style of the country lawyer who drinks scotch, listens to classical music and plays with his children. Is this the typical country lawyer?

account of what the lawyer ate. Is this really relevant to the character of the lawyer? Perhaps Mr. Batten has an elaborate theory about the relationship between diet and high quality lawyering, but if he has the reader remains uninformed of it. Short of such a theory, it appears no more relevant than what Mick Jagger eats for breakfast on the day of a Rolling Stones' concert.

The remark about groupies and the Rolling Stones was made in ignorance of two interesting facts — first that Jack Batten had been a reviewer of rock music performances including those of the Rolling Stones,⁵ and secondly that *Lawyers* was conceived as a result of Mr. Batten's involvement as an expert witness in the trial of Rolling Stones drummer, Keith Richards, (pp. 1-6). He gave testimony as to the talents, fame and wealth of Keith Richards, who was being sentenced for a narcotics conviction.

Having carefully read *Lawyers* as objectively as possible, I conclude that it would be more appropriately entitled *Lawyers: A Fan Club's View*. Included in this fan club would be the many lawyers whom Mr. Batten interviewed such as Austin Cooper who spoke glowingly of the "hired gun" model of the criminal lawyer (pp.4-6), and Shelly Altman who described criminal law as a game "but seriously played" (p. 80). It is interesting to discover what lawyers say about themselves, and Jack Batten is a good listener and story teller. However, the disappointing thing about *Lawyers* is that it does not go beyond the anecdotes and provide any real insight into what makes lawyers tick. There is only one lawyer in the whole book of whom the author is at all critical, and that is Jack Batten himself.⁶ If he had directed some of this critical assessment toward the parade of lawyers whom he assumed had made it, *Lawyers* would have been a much better book. Mr. Batten might have been more successful in capturing what had alluded him about lawyering if he had not been president of the fan club.

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5. For five years in the late 1960's and early 1970's Jack Batten reviewed the rock bands who passed through Toronto for the *Toronto Star* and the *Globe and Mail*.

6. Jack Batten was called to the Ontario Bar in 1959 and practised law in a Toronto firm until 1963 when he embarked upon his present career as a journalist and writer.

Humanity in Warfare. By Geoffrey Best. New York: Columbia University Press, 1980. Pp: 400. Price: \$25.00 (U.S.)

Interest has been rekindled in the law of armed conflict in recent years by the Vietnam conflict and by the protracted international conferences at Geneva which produced the Protocols Additional to the 1949 Geneva Conventions in 1977 and a Convention and Protocols concerned with restrictions on weapons use in 1980. Geoffrey Best, a British historian whose primary field is Victorian England, has ventured onto a nearly unexplored territory, the history of the humanitarian law of armed conflict. Best is well aware that the juxtaposition of "humanitarian" and "law" with "armed conflict" may seem incongruous to many. He adopts the position, however, that the law of armed conflict does produce some tangible humanitarian benefits, unfortunately marginal at times, and that the existence and dissemination of this law helps to foster a climate of opinion in which military personnel are more likely to choose a civilized course of action when options are available in combat. Lawyers and legal scholars who have devoted effort to human rights law nationally or internationally may have considerable sympathy for this position.

Best adopts an intellectual history approach, focusing on the evolution of basic concepts rather than case studies of specific incidents. He begins with a review of what he calls the "later Enlightenment consensus" of the middle and later eighteenth century. In his view, a consensus existed at that time whereby war was a matter which involved states, in particular their regular military and naval forces, and had minimal impact on individual citizens. A statement of this consensus is contained in Rousseau's *Social Contract*, "war . . . is not a relationship between man and man, but between State and State, in which private persons are only enemies accidentally, not as men, nor even as citizens, but simply as soldiers". As a result of this approach, a law of war was developed which concentrated exclusively on relations between opposing armed forces. Any injury caused to the civilian population was disregarded as an unavoidable accident of war. In contrast to Rousseau, Vattel took the view that once war began the entire enemy population must be regarded as enemies. Vattel's concept of the law of war was much broader, embracing the entire spectrum of relations between opposing states and their populations. Utilizing this approach one was obliged to discriminate between dangerous

enemies, usually enemy soldiers, and enemies who did not pose a threat. The infliction of hardships on non-threatening enemies had to be justified by some form of necessity. It could not be ignored as an incidental feature of war. The contrast between the approaches of Rousseau and Vattel runs throughout the book. The author considers that excessive reliance on the approach of Rousseau, together with the self interest of the professional military, have resulted in the development of a law of armed conflict primarily concerned with the protection of combatants rather than innocent civilians. Whether or not this argument is valid for the period prior to the First World War, and the author does present a very convincing case, its validity at the present time is debatable. As one example, the recent UN Conference on Conventional Weapons adopted a protocol restricting the use of incendiary weapons against military objectives in populated areas. It was impossible to obtain agreement on restrictions of use against combatants.

Throughout the book, Best makes a large number of illuminating observations. He comments on the militarization of Red Cross Societies, observes that bombardment of civilians has been viewed by continental European writers as a peculiarly and characteristically British (later Anglo-American) way of warfare, and castigates, legitimately, a number of international lawyers for writing as advocates of national positions rather than as impartial jurists. As one who read C.J. Colombos' hagiography of the Royal Navy while searching, unsuccessfully, for a usable law of the sea text, I consider the castigation occasionally justified.

One does not have to agree with a book to find it interesting. On one matter, the strategic air offensive in World War II, the author ventures into a brief case study. Possibly in order to provide a balanced account, he makes a strong argument that the British bombing offensive which concentrated on area bombardment, "dehousing the population", was immoral, illegal and planned with malice aforethought. The bombing offensives of World War II still raise moral and legal qualms. Condemnation of the bombing offensive as conducted by the Royal Air Force may well be justified. At the same time, however, the author applauds the United States Army Air Force for its emphasis on precision bombing. When one considers deficiencies in training and technology at the time and weather conditions over the targets, it is probable that the civilian population at the receiving end frequently

found it difficult to differentiate between “precision bombing” and “dehousing the population”.

The author has the best of humanitarian intentions. At times, however, his arguments inadvertently support inhumane results. For example, he suggests that the insistence by the professional military that non-professional opponents distinguish themselves from the civilian population is a holdover from the days of “gentlemanly warfare”. The major reason for insisting on this distinction is to protect the innocent civilian population, presumably a humanitarian objective. If everyone wears a cerise bath robe and some people wearing cerise bath robes shoot at soldiers, even the best disciplined soldiers may react as if everyone in a cerise bath robe is an enemy combatant.

In summary, the book is a useful and insightful venture onto unexplored terrain. It links law with history but generally at a rather abstract level. Notwithstanding recent history, those who plan international law curricula tend to assume armed conflict is unreal as well as unpleasant. For this reason the law of armed conflict is ignored entirely or placed at the tail end of basic international law courses. *Humanity in Warfare* serves as a useful corrective. It will also, one hopes, encourage others to venture into the field.

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*Views expressed in this review are those of the author only, and not of the Canadian government.

