Civil Liberties in Canada: Entering the 1980's, Gerald L. Gall ed., Toronto: Butterworths, 1982. Pp. *xv*, 259, $42.50 (cloth).

This work, one of a plethora appearing in response to the entrenchment of the Canadian *Charter of Rights and Freedoms* in the Canadian Constitution, is described by its editor as "a forum for individuals with diverse backgrounds and perspectives to express their views on civil liberties issues".[1]

The book comprises nine essays on Canadian civil liberties loosely ordered under four main divisions — a historical analysis, three modern appraisals, four essays on specific issues (women, children, war, the right to counsel) and an essay by the Hon. Mark MacGuigan under "The Future Era".

In the first essay, Dr. Noel Kinsella asserts that a historical perspective obtains for the reader some insight into the methods used by those who have struggled to protect their rights in other ages, an opportunity to take a wider view of human rights and to undertake comparative analysis "to serve as an orientation towards seeking to expand the basis of rights and liberties, and to redefine those concepts in response to present-day and future needs rather than toward the destruction of rights with the idea of proceeding *ex de novo*".[2] The thumbnail history of human rights which follows provides the reader with a clear, concise and complete survey of world human rights developments from prehistoric man to the present day. Dr. Kinsella rejects the notion of an evolution of a set form of theories from a simple to a more complex state, and concludes that no universally-accepted international theory of human rights has been achieved. However, he notes there have been enough philosophical meeting points to reach international agreements under the auspices of the United Nations. These include the 1948 *Universal Declaration of Human Rights*; a framework within which divergent philosophies, religions, as well as economic social and political theories can be entertained, and the International Human Rights Covenants; a translation of the principles of the Universal Declaration into international legal obligations. It is Dr. Kinsella's thesis that human rights legislation in Canada has been a response by national and provincial governments to the international human rights movement. In a sentiment echoed by most of the book's contributors, he concludes that the Canadian judiciary, given the choice between protection of human or property rights, opted for the latter. As a result, the common and civil law systems in the country failed to respond to demands for greater civil liberties and became redundant in this regard.

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[1]Gerald L. Gall, ed., *Civil Liberties in Canada: Entering the 1980's*, (Toronto: Butterworths, 1982) at vii.

[2]*Ibid.*, at 4.

Although it is not expressly stated, it is somewhat axiomatic that the entrenched Canadian *Charter of Rights and Freedoms* is also a direct result of judicial failure to maintain a viable role for the common and civil law systems in regard to human rights protection. Direct and indirect government initiatives have compensated for this failing. Canada's response to international human rights is rated "respectable";[3] however, deficiencies are noted in anti-discrimination, emergency measures, involuntary detention, immigration and minority rights legislation. Dr. Kinsella sees future human rights challenges arising from the increased interdependence of mankind. New technology will play a critical role in establishing the nature of this relationship, either through the amelioration of respect for human rights or by human degradation through the unlimited invasion of privacy made possible by this phenomenon. Canada's response is seen as one which should promote human rights protection internationally and domestically to "help build a world resting on a foundation of social justice (because) Canada can best flourish in such a world".[4]

The contributions by Max Wyman, Francis Muldoon and Douglas Schmeizer are designed to provide a modern appraisal of civil liberties in Canada. Dr. Wyman has endeavored to define the concepts of human freedom, human rights and human discrimination in both a dictionary and practical context. This is a useful exercise, if only because these three terms are among the three most abused and over-exercised in the English language. Dr. Wyman defines freedom as "the sum total of all forms of human behavior, less those forms of human behavior which are explicitly or implicitly forbidden by law".[5] A human right is defined as "a benefit whose expectation of fulfillment is guaranteed by law. If the expected fulfillment is not attained, a person can invoke the enforcement procedures of the law in an attempt to obtain the expected benefit".[6] A discriminatory practice is interpreted as "the rewarding of every member of one classification with a specific benefit, one which is denied to every member of another classification".[7]

Armed with these definitions, Dr. Wyman then proceeds to "expose the fundamental issues involved in current debates about human rights with the hope that a proper understanding of these issues will reduce some of the hostility being directed against human rights legislation and against those who have to administer such legislation".[8] This exposé, which is candidly more topical than academic, provides a platform for the writer to

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[3] *Ibid.*, at 31.

[4] *Ibid.*, at 44.

[5] *Ibid.*, at 56.

[6] *Ibid.*, at 56.

[7] *Ibid.*, at 65.

[8] *Ibid.*, at 53.

discuss aspects of his philosophy of human rights. Among other things, he holds that the *Universal Declaration of Human Rights* is so rhetorical as to defy clear interpretation, that issues of public morality or religion and human rights should be strictly separated, that he is opposed to the concept of inalienable rights, that the role of history should be deprecated as it will "not lead us to salvation"[9], that the Canadian courts have frequently misunderstood and misapplied anti-discrimination legislation, that affirmative action is objectionable since it is a concept based on "indefensible assumptions",[10] and that discrimination such as that based on sexual preference may best be eliminated by "forbidding discrimination which is based on a characteristic by means of which that group can be isolated".[11] In response to the questions 'how much freedom should people have?', and 'how many rights should people be given?', the answers are dependent "on our time in history and our place in geography."[12] For this reason, he believes "we should not attempt to enshrine human rights in a never-changing constitution".[13]

In the chapter entitled "Judicial Discretion: Police Power in a Parliamentary Democracy", the President of the Law Reform Commission of Canada has addressed two issues, namely, the desirability of constitutionally-entrenched civil liberties and the inclusion therein of rules respecting the admissibility of evidence in criminal trials. Civil liberties can only exist in a democratic society and, even in a secular federal parliamentary democracy such as Canada, the bad habits of authoritarianism develop to the extent that most of us evince indifference or intolerance to the rights of others. In Canada, human rights protection has traditionally been entrusted to the legislative and executive branches of government, while the courts have generally limited themselves to delineating the respective authority of the federal and provincial jurisdictions over these rights. Through the establishment of ombudsmen and human rights commissions, the legislative branch of government has recognized that it guards civil liberties most effectively through legislation. The establishment of constitutionally-entrenched civil liberties is an extension of this legislative role. In addition, a constitutionally-entrenched civil liberty "requires the majority of us to be reflectively deliberate, observing the manner and form of constitutional amendment, when we are determined to rule unjustly or intolerantly."[14] Put another way, the establishment of constitutionally-entrenched human rights provides a means of extending the creative abilities of the legislative and executive branches, while reducing their ability to disregard such rights.

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[9]*Ibid.*, at 61.

[10]*Ibid.*, at 76.

[11]*Ibid.*, at 77.

[12]*Ibid.*, at 79.

[13]*Ibid.*, at 79.

[14]*Ibid.*, at 86.

In the second part of this discussion, Mr. Muldoon makes a clear, reasoned and thoughtful argument for entrenching an exclusionary rule with regard to the admissibility of evidence in criminal proceedings. His proposal buttressed by judicial opinion in the *Rothman*[15] and *Amato*[16] cases is now entrenched as subsection 24(2) of the Canadian *Charter of Rights and Freedoms*. This subsection provides that where a court concludes evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute. The author believes that constitutionally-guaranteed provisions such as this one assure the proper operation of the criminal justice system, *i.e.*, that "particular accused are convicted who are — on cogent, admissible evidence — proved guilty beyond a reasonable doubt; but, for the sake of those guaranteed rights and freedoms, not proved guilty at *any* price!"[17] This provision is but one example of the often subtle, yet significant, influence the Law Reform Commission of Canada has had in shaping our present Canadian law.

Professor Schmeizer's appraisal is an attempt to explain why Canadians, having passed through the stage of popular acceptance of human rights concepts, are now going through a period of soul searching about human rights. He also considers three representative problem areas requiring resolution in the 1980's, namely, mandatory retirement, the rights of homosexuals, and discrimination based on citizenship. Based on Canada's experience to date, he concludes that human rights are matters of varying content, can never be construed absolutely, must be applied in a spirit of moderation or become dangerous weapons, and be applied with common sense. On current issues, he offers guidelines for what he perceives as a necessary cost-benefit analysis on mandatory retirement; and argues that legal protection of homosexuals cannot be dealt with in absolute terms, but by limited decisions based on value judgments. With respect to widespread discrimination on the basis of citizenship, he maintains that a careful assessment is required to determine and legislate in areas where such discrimination is unreasonable.

In the first of four essays on current issues, Judith Swanick examines the evolution of the concept of "equal remuneration for work of equal value" on the international, national and provincial levels. She points out that the issue has become a clouded one — internationally, through the inability to establish a clear and generally accepted definition of the terms "remuneration" and "work of equal value"; nationally, by the enormously complex task of developing and assessing job evaluation schemes; and

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[15]*Rothman* v. *The Queen* (1981), 121 D.L.R. (3d) 578 (S.C.C.).

[16]*Amato* v. *The Queen* (1982), 69 C.C.C. (2d) 3 (S.C.C.).

[17]*Supra*, footnote 1, at 94.

provincially, by a failure to give practical effect to the accepted principle. Ms. Swanick is certain that, as greater practical effect is given to the concept "the droaning protest of the denizens . . . will reach fever pitch intensity".[18]

Olive Stone's contribution is a discussion of the extent of state interference in the traditional common law parental hegemony over the child. Although her statutory references are confined mainly to Alberta, the reader may safely generalize them to other Canadian jurisdictions. The author has highlighted most points of contact between the child and the state in regard to civil liberties, concluding that enlightened parental authority and minimal state control over the child will probably best serve the latter's interest. It is unfortunate that the author has largely bypassed the burning issue of parental rights versus the rights of the unborn child.

Military devotees and human rights students will benefit equally from Professor L.C. Green's fascinating review of the development of the concept of human rights protection during armed conflict. He readily admits that the concept has an incongruous ring and that in time of conflict, human rights are among the earliest casualties. However, he then asserts that "since time immemorial, attempts have been made to control the horrors of war and to maintain that even in such situations, man must comply with certain overriding principles, whether they be described as the law of God, of chivalry or humanity".[19] What follows is an excellent historical account of the development of principles for the protection and care of prisoners of war, the wounded and civilians, and for the preservation of private and public property. These notions gradually developed into international codes of conduct — the 1865 Red Cross Convention, the Lieber Code, the Brussels Project, the Oxford Manual, the Hague Convention, the Geneva Protocols — culiminating in the 1949 Geneva Convention and the 1977 Geneva Protocols. These documents are both a codification of existing principles and a departure in terms of protection of captive civilian populations and those involved in certain types of civil strife. The author views national rights to derogate from such liberties and the establishment and enforcement of penal sanctions for human rights violations during times of armed conflict as important current and future issues.

Those who participated in the establishment of clinical legal education programs in Canadian universities in the early 1970's will feel a twinge of nostalgia reading Professor Clayton Rice's article on the right to counsel. Although the fire may well have gone out of the concepts of neighborhood legal services and clinical legal education, it has not gone out of his rhetoric. Professor Rice proceeds from a belief that an effective right to counsel can only exist where there is an efficacious delivery of legal services to the poor. The eclipse of neighborhood legal services and clinical legal education by the more introspective judicare system has served to limit the development

[18] *Ibid.*, at 141.

[19] *Ibid.*, at 166.

of the right to counsel. Judicial interpretation of the *Bill of Rights* provision, now entrenched in the Canadian *Charter of Rights and Freedoms*, does provide that no arrested or detained person shall be deprived of the right to counsel; however, it does not provide that a law shall be construed to bestow such a right. Canadian jurisprudence has only established that there is a discretion in a trial judge to appoint counsel where circumstances dictate. The conclusions the writer draws from this position is that "the right to counsel is a lie";[20] that to think that well-established trends of judicial discretion respecting state-appointed counsel for the poor will be altered by the Charter is "mere tilting at windmills";[21] but that, notwithstanding the foregoing, the writer does "not propose that we embrace chaos and all become anarchists as the escape — at least not yet".[22]

According to Dr. MacGuigan, his essay entitled "The Protection of Freedom and the Achievement of Equality in Canada" explores the theoretical relationship between liberty and equality "in a philosophical context, related in particular to Canadian reality".[23] It is, in fact, a philosophical apology for the existence and contents of the Canadian *Charter of Rights and Freedoms* by one of its principle architects. Coincidentally, it is probably also a statement of the political philosophy of the Liberal Party of Canada.

According to the author, law, presumably including an entrenched constitution, is an ordination of reason for the common good. Two goods comprise the common good: external material goods and transcendental spiritual goods. Because of the greater nobility of spiritual goods, freedom of choice of an individual must be subjected to much less restriction in relation to spiritual, rather than material, goods. Consequently, when a conflict arises between a material and a spiritual freedom, the former must yield totally. However, there is also nothing sacrosanct about freedom of choice and there must be sufficient interference by the state with it to make possible the greatest practicable expansion of freedom of attainment in society. The twin of freedom of attainment in society is equality of opportunity. The author postulates that human beings must be made equal in their opportunities to be themselves. The principle purpose of the state in the attainment of this ideal is to offer more through law to those who start with less. The best means of guaranteeing such liberty and equality is by a bill of rights patterned on the American *Bill of Rights*. This bill of rights should guarantee fundamental freedoms, *i.e.*, freedom of choice as directed to non-material goods, and to promise the achievement of equality. A bill of rights does not go beyond guaranteeing civil liberties which are wholly negative in their scope and which relate directly to the human person. It should not, in the author's view, incorporate positive freedoms characterized as social policy, *e.g.*, standard of living, education, health care and

[20] *Ibid.*, at 212.

[21] *Ibid.*, at 214.

[22] *Ibid.*, at 213.

[23] *Ibid.*, at 226.

cultural activity. On the entrenchment process, the author suggests hopefully that he "may perhaps be pardoned for thinking it is the unanimous report of the parliamentary committee that is the final guarantee, both of the acceptance of the Charter in the future and of its form".[24] Unfortunately, the Canadian provinces were not prepared to pardon this scholarly politician for this belief, and it was left to more practical politicians to effect the consensus enabling the entrenchment of the Charter.

The author is not concerned that the Charter will act as a check on the supremacy of Parliament, although he goes to some lengths to justify this new state of affairs. He points out that the Charter may well act as a cornerstone of democracy based on a belief that the fundamental moral value of democracy is freedom founded on a freedom of choice (without which the consent which is the essence of democracy is impossible). He also recognizes that the Charter is a "semi-manufactured"[25] product which will be finished off by judicial decisions and legal institutions; that it will not completely resolve the great moral issues of a democratic society; and that, in the wake of arbitrary public behavior, it is "at worst a holding operation against majority spleen".[26] At its best, however, it is "a guiding light to the more perfect achievement of freedom".[27]

The book is an extremely useful background document on the Canadian *Charter of Rights and Freedoms*. Many, if not all, of the contributors were active players in the long process which led to the entrenchment of the Charter. This bestows on the work a dual value as both a primary and secondary resource.

Some general concerns are noted. First, there is the notable absence of a francophone contributor; does this reflect the decision taken by many Quebecois to "opt out" of the constitutionalization process? Second, one is led to a philosophical concern that, although contributors repeatedly deny the gradual realization of fundamental concepts of civil liberties, the historical and idealistic approach adopted throughout the book may belie such a conclusion. Finally, one notes that there is some overlap, *e.g.*, historical development, failure by the Canadian judiciary to protect human rights. Also the part arrangement of the book is perhaps unnecessary or at least inexact and there are a few typographical errors.

I recommend the book as a useful historical and working resource on Canadian constitutional law.

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[24] *Ibid.*, at 241.

[25] *Ibid.*, at 247.

[26] *Ibid.*, at 239.

[27] *Ibid.*, at 239.

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