A TONE OF TIMIDITY

FINAL APPEAL: DECISION-MAKING IN CANADIAN COURTS OF APPEAL by Ian Greene, Carl Baar, Peter McCormick, George Szablowski, and Martin Thomas (Toronto: James Lorimer & Company, 1998)

I. INTRODUCTION

The five co-author of *Final Appeal*[1] have written the first study of Canadian appellate court decision-making in the ten provinces, the Federal Court of Appeal, and the Supreme Court of Canada. Threaded throughout the book are interrelated themes concerning the exercise of judicial discretion as it affects public policy, the legitimacy of an unelected judiciary in Canadian democracy, and the suitability of the judicial appointment process. This work is destined to join the ranks of those other legal and political science studies which have contributed to a more systematic examination of the third branch of Canadian government. Regrettably, the width of the subject matter considered in *Final Appeal* far exceeds the depth of the analysis. The sequence of the chapters should have been organized more tightly, the analyses of the responses to the judicial questionnaire and the empirical data should have been expressed more sharply, and the prescriptions for change should have been stated more boldly.

The catalyst for this project was a gentle chastisement of academics by Justice Bertha Wilson in 1986 for having done very little research on appellate court decision-making.[2] Therefore, the project was conceived in deference to a judicial suggestion, and the analyses and prescriptions are marked by a pronounced tone of timidity throughout the book. If the authors believed that they had perceived an ideal of the law's future, they should not have "hesitated to point it out and to press toward it with all [their] heart[s]."[3] Otherwise, the reform which they desire will not occur.

In this review, I shall examine the methodology and organization of the book's content, the theme of judicial discretion and democracy, and the prescriptions for change to the judicial appointment system.

II. CONTENT, METHODOLOGY, AND ORGANIZATION

The authors commence with a discussion of judicial discretion and its relationship to democracy.[4] They then proceed to the professional and personal backgrounds of the judges, which influence the exercise of discretion that affects public policy.[5] Case-flow data and decision-making procedures are examined in relation to each of the appellate courts.[6] Because of the unique nature of the Quebec Court of Appeal and the Supreme

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1 I. Greene, *et al.*, *Final Appeal: Decision-Making in Canadian Courts of Appeal* (Toronto: James Lorimer & Company, 1998).

2 *Ibid.* at 212.

3 O.W. Holmes, Jr., "The Path of the Law" (1897) 10 Harvard L. Rev. 457 at 474.

4 *Final Appeal*, *supra* note 1 at c. 1.

5 *Ibid.* at c. 2.

6 *Ibid.* at c. 3, 4.

Court of Canada, both courts justifiably receive separate treatment in chapters discussing their appellate processes.[7] The authors then examine the means by which judges support their decisions through reasons and citations.[8] The study of citations is focussed upon the six basic values of hierarchy, consistency, deference, coordination, leadership, and diversity.[9] The speed with which appellate courts hear and decide their cases is employed as a measurement of performance.[10] Finally, in the last two chapters, the authors return to the specific consideration of their earlier theme related to judicial discretion and democracy in the Canadian polity.

The data for the book was collected through interviews based on a ten-page questionnaire with 101 appellate court judges, an additional four-page background questionnaire completed by 56 of the judges (plus ten résumés), and a representative sample of nearly six thousand appellate court cases (ix-x, Appendix). By employing the interview and questionnaire techniques, the authors are adopting the research methodology of the judicial behaviouralists. The adherents of this school probe the motivations behind judicial decisions with particular emphasis upon the attitude of the decision-maker.[11] Political science Professor Peter Russell, to whom *Final Appeal* is dedicated, has observed that "[s]tatistics about courts and judges can at best give only an indication of broad trends in the work of the courts and the inclinations of judges."[12]

Because of this limitation inherent in judicial behaviouralism, the authors are confronted continually with a dilemma. They have researched an enormous amount of descriptive data, but in stating their analyses they must draw back from conclusive generalizations. Even as aggregate decision-making patterns emerge, the adjudicative process requires "that individual attention be given to individual cases."[13] The limitations of judicial behaviouralism are compounded in the Canadian federation because of its diverse legal cultures. Within a single province, there are several variations of legal culture among the many judicial districts.[14]

In addition to this methodological difficulty, the book lacks rigorous organization. As indicated in the Reference section, the authors draw extensively upon their previous publications. The combination of these earlier sources with the new data in an original work leads in some instances to needless repetition and to a disjointed structure. For example, the reader is informed three separate times that the Judicial Committee of the

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7 *Ibid.* at c. 5, 6.

8 *Ibid.* at c. 7.

9 *Ibid.* at 140.

10 *Ibid.* at c. 8.

11 Lord Lloyd of Hampstead & M.D.A. Freeman, *Lloyd's Introduction to Jurisprudence*, 5th ed. (London: Stevens & Sons, 1985) at 705-709.

12 P. Russell, "The Supreme Court and the Charter: Quantitative Trends — Continuities and Discontinuities" (1998) 6: 4, 5 & 6 *Canada Watch* 61. Quoted in F. Vaughan, "Judicial Politics in Canada: Patterns and Trends" (1999) 5:1 *Choices* 4 at 13.

13 *Final Appeal*, *supra* note 1 at 180.

14 *Ibid.* at 52.

Privy Council ceased to be Canada's highest court of appeal in 1949.[15] In addition, the subject matter of the final two chapters regarding the judiciary, democracy, and the human elements affecting judicial discretion are directly connected to the topics addressed in the first two chapters of the book. A more skilful editorial effort should have been made in order to integrate these chapters.

Finally, there are several typographical errors that detract slightly from the effective expression of the book's content. These errors should be corrected in a future edition.[16]

III. JUDICIAL DISCRETION AND DEMOCRACY

The theme which permeates the pages of *Final Appeal* is the exercise of judicial discretion and its relationship to democracy in Canada. The authors' analysis does not adequately account for the extensive scholarship which forms the foundation of this debate.

In describing judicial discretion, Professor Greene *et al.* contend that there is an array of potentially "right" answers to legal disputes, in addition to an infinite number of potentially "wrong" answers.[17] The task of the appellate court judges is to eliminate the "wrong" answers from the courts below, while also explaining why their answer is the best "right" answer along the continuum of acceptable alternatives. The authors are clearly adhering to a theory of legal realism in their description of judicial discretion. A consideration of the extent of judicial discretion lists three instances in which it is unavoidable.[18] This analytical framework is very similar to the three categories of rule-skeptics, fact-skeptics, and opinion-skeptics found in legal realism, particularly in the work of Jerome Frank.[19]

Like all legal realists, Professor Greene *et al.* must struggle in order to insist upon the legitimate margin of error in the human process of judging without reducing law to "nothing more coherent than a mass of nebulous particulars."[20] The authors hasten to add that they do not adopt a relativist perspective.[21] However, their excessive emphasis on the broader role of discretion in judicial decision-making (so as to educate all non-judges about the flexibility of the process) could result in a decline in judicial rigour in the effort to establish the range of "right" answers from which the judge must select the best "right" answer. If a wide discretion is a central element in the decision-

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15 *Ibid.* at 3, 140-41, 151-52.

16 For example, Gérard La Forest is referred to as "Gerald La Forest" (*ibid.* c. 6, 229, n. 2), and Roger P. Kerans is called "Robert Kerans" (*ibid.* c. 5, 229, n. 37).

17 *Ibid.* at 22.

18 *Ibid.* at 18-19.

19 Lord Lloyd of Hampstead & Freeman, *supra* note 11 at 684, and 684, n. 32. "Rule-skeptics" regard legal uncertainty as residing in the "paper" rules of law. "Fact-skeptics" believe that the unpredictability of court decisions originates in the elusiveness of facts. "Opinion-skeptics" contend that there is a "judicial hunch" or intuition, which an *ex post facto* decision seeks to rationalize as the legally "right" answer.

20 B.N. Cardozo, "Jurisprudence" in M.E. Hall, ed., *Selected Writings of Benjamin Nathan Cardozo* (New York: Fallon Publications, 1947) at 30.

21 *Final Appeal, supra* note 1 at 14.

making process, judges may be tempted not to narrow their range of choices. The judiciary must constantly be reminded that there is an important distinction between an undifferentiated plurality of possible decisions and a legitimate pluralism. Otherwise, the judiciary may expand "the totality of the circumstances mode of analysis" to provide *ad hoc* answers that will make a majority of a court content with the law for a transitory period of time, but will not provide the requisite certainty.[22] In describing this delicate and dynamic balancing act which the courts must perform in the judgment process, Mr. Justice Cardozo stated: "There are times when principles and rules and concepts must be accommodated to ends, yet there must always be remembrance of the truth that of the ends to be achieved definiteness and order are themselves among the greatest and most obvious."[23]

The authors find "no inherent contradiction between the lawmaking role of courts and democracy" when judicial discretion is exercised in the promotion of the democratic principle of mutual respect.[24] The "subprinciples" of mutual respect "are the upholding of the rule of law and the protection of the principles of minority rights, social equality, procedural fairness, and freedom of expression."[25] *Final Appeal* contains a brief review of Canadian legal and political science scholarship relating to the legitimacy of judicial lawmaking in a democracy.[26] The authors assert that the debate should be shifted from a focus on policy-making through elected legislatures to include the legitimate role of the courts in the policy-making process.

Professor Greene *et al.* do not capture the full polarization of the academic debate. Thus their analysis does not explain the origin of this increasingly wide academic fissure. In the last decade, two major conflicting approaches to the proper role of the judiciary in Canadian democracy have been developing. As representative scholars of one approach, Professor Knopff and Professor Morton have argued that courts should have a limited role in constitutional interpretation, since there is an inherent danger that unelected judges may impose upon others their views on social policy. Elected legislatures are the proper bodies in which the required compromises concerning fundamentally important social issues should be negotiated.[27]

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22 A vigorous critique of the "totality of the circumstances mode of analysis" in American constitutional law was delivered by Mr. Justice Antonin Scalia, dissenting, in *Morrison* v. *Olson*, 108 S. Ct. 2597 at 2641 (1988). Scalia J.'s position in this case regarding the constitutionality of the office of independent counsel has been subsequently praised. See Andrew Cohen, "Congress lets special-prosecutor law die, but Starr as busy as ever" *The Globe and Mail* (3 July 1999) A9.

23 Cardozo, *supra* note 20 at 30.

24 *Final Appeal*, *supra* note 1 at 13.

25 *Ibid.* at 12-13, 193.

26 *Ibid.* at 4-10.

27 This division in Canadian legal and political science scholarship regarding the legitimacy of judicial review in a democracy was developing when *Final Appeal* was being researched and written. See F.L. Morton, "The Charter Revolution and the Court Party" (1992) 30 Osgoode Hall L.J. 627. Since *Final Appeal* appeared, this division has polarized further. See F. L. Morton, "Dialogue or Monologue?" (1999) 20:3 *Policy Options* 23, and R. Knopff, "Courts Don't Make Good Compromises" (1999) 20:3 *Policy Options* 31. See also F.L. Morton & R. Knopff, *The Charter Revolution and the Court Party* (Scarborough, Ontario: Broadview Press, 2000).

Among the academics and judges who represent the contrary position, Dean Peter Hogg,[28] the Honourable Bertha Wilson,[29] and Chief Justice Beverley McLachlin[30] have endorsed the view that the courts are not usurping power, but are commissioned in the governmental system with the responsibility to review executive and legislative action for compliance with the Constitution. The judiciary is engaged in a "dialogue" with the other two branches of government, since most judicial decisions are subject to reversal, modification, or avoidance by the competent legislative body.[31]

The authors of *Final Appeal* are aligned closely with the group that asserts the strong legitimacy of judicial review in a democracy. In discussing the wider view of democracy as being more than "the selection of leaders through elections and the approval of laws by elected legislatures,"[32] they cite with approval the Supreme Court of Canada's decision in the *Quebec Secession Reference*.[33] In January, 1998, several months before the release of the *Quebec Secession Reference* opinion, Justice Michel Bastarache indicated a similar inclination in an extrajudicial speech:

> True democracy is majoritarian government subject to conditions, democratic conditions. The majority cannot discriminate or silence the minority. Democracy is not necessarily improved when it serves the majoritarian purpose. The essence of democracy is more complex. *Determining the essential requirements of democracy must be left to the courts.*[34]

The origin of this fundamental philosophical and practical disagreement regarding the exercise of judicial discretion in a democracy is not probed in *Final Appeal*. In my view, the disagreement can be traced to two different conceptions of the separation of powers doctrine. Professors Knopff and Morton believe that there is an outright struggle

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28 P.W. Hogg & A.A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75, and P.W. Hogg & A.A. Thornton, "The *Charter* Dialogue Between Courts and Legislatures" (1999) 20:3 *Policy Options* 19. The concept of a "dialogue" among the branches of government has been approved by Iacobucci J. in *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 at 565. See also L.M. Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada* (Scarborough: Carswell, 1999) at 15-16. For a brief critique of the "dialogue" concept see F.C. DeCoste, "The Separation of State Powers in Liberal Polity: *Vriend* v. *Alberta*" (1999) 44 McGill L. J. 231 at 235, n. 16.

29 Honourable B. Wilson, "We Didn't Volunteer" (1999) 20:3 *Policy Options* 8.

30 In her first press conference following her designation as Chief Justice of Canada, Madam Justice McLachlin indicated that she viewed the Supreme Court decisions as part of a "dialogue" with elected officials: S. Alberts, "'Real world' crucial McLachlin says" *The National Post* (6 November 1999) A1. See also B. Laghi, "Judges must be mindful of their impact: McLachlin" *The Globe and Mail* (6 November 1999) A5, regarding the Supreme Court of Canada not usurping power but performing its constitutional role. McLachlin and Iacobucci JJ. reiterated the Court's approval of the "dialogue" concept in their majority opinion in *R.* v. *Mills*, [1999] 3 S.C.R. 668 at para. 57.

31 Hogg & Bushell, *supra* note 28 at 79-80 and 105; see also Hogg & Thornton, *supra* note 28 at 20.

32 *Final Appeal*, *supra* note 1 at 10.

33 *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217.

34 Mr. Justice M. Bastarache, "Experience, Morality, and the Liberty Interest in the Charter" (The Lawyers Club, Toronto, 5 January 1998) [unpublished] at 12 [emphasis added]; excerpted in *New Brunswick Telegraph Journal* (10 January 1998) E1 at E2. Bastarache J. draws extensively upon the approach of Ronald Dworkin in *Freedom's Law* (Cambridge, Mass.: Harvard University Press, 1996).

for power among the competing branches of government, as is also perceived by some analysts of the American constitutional system. Mr. Justice Brandeis described this struggle well:

> The doctrine of the separation of powers was adopted by the convention of 1787 not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.[35]

In contrast, Dean Hogg and those others who believe in a "dialogue" among the three branches of government favour that a generally cooperative rather than competitive attitude pervade the governmental system in the performance of each branch's separate function. Civil disagreement is part of this ongoing "dialogue." This approach is derived from the British separation of powers, which was never complete.[36] La Forest, J.A., as he then was, echoed this British constitutional heritage when he wrote:

> In performing this duty [of statutory construction], the courts should not be looked upon as being at odds with the Legislature. Rather they are working along with the Legislature to ensure the preservation of our fundamental political values. All branches of government have an interest and a duty in doing so.[37]

IV. JUDICIAL APPOINTMENT

Judicial discretion and its relationship to democracy are linked inextricably to the person selected to exercise this discretion in the appellate court decision-making process. The authors discuss this linchpin of judicial appointment in relation to process, personality, and representativeness.

In *Final Appeal*, it is noted that courtroom decorum resembles the rituals of the medieval Church.[38] This "liturgical choreography"[39] is a modern reminder of the origins of the English superior court system, to which the Canadian provincial superior courts are the successors.[40] Initially, the common law grew out of the work of the

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35 Brandeis J., dissenting, in *Myers* v. *United States*, 272 U.S. 52 at 293 (1926).

36 Sir W. S. Holdsworth, "His Majesty's Judges" (1932) 173 Law Times 336 at 336-37.

37 *Re Estabrooks Pontiac Buick and Re Fisherman's Wharf* (1983), 44 N.B.R. (2d) 201 at 214 (N.B.C.A.). See also Lord Wilberforce's statement regarding judicial review of administrative action as "carrying out the intention of the legislature, and it would be misdescription to state it in terms of a struggle between the courts and the executive": *Anisminic Ltd.* v. *Foreign Compensation Commission and Another*, [1969] 2 A.C. 147 at 208. For a more competitive view of the separation of powers in the United Kingdom, see H. Woolf, Master of the Rolls, "Judicial Review — The Tensions Between the Executive and the Judiciary" (1998) 114 L.Q. Rev. 579.

38 *Final Appeal*, *supra* note 1 at 71.

39 G. Wills, *Certain Trumpets: The Call of Leaders* (New York: Simon & Schuster, 1994) at 132.

40 W.R. Lederman, "The Independence of the Judiciary" in W.R. Lederman, ed., *Continuing Canadian Constitutional Dilemmas* (Toronto: Butterworths, 1981) at 167. This is a republication of Professor Lederman's seminal article in (1956) 34 Can. Bar Rev. 769-809, 1139-79. Professor Lederman wrote that the judicature sections of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict.,

justiciarii, some of whom were members of the clergy.[41] However, before 1300, a separate legal profession began to emerge independent of the Church and universities, and judges were appointed who were not in Holy Orders.[42] Despite this eventual separation of the secular from the sacred, the common law continues to display some "birthmarks of ... [its] origin."[43] Just as the medieval Church was afflicted by simony, nepotism, venality, and abuses of hierarchical authority in its institutional structure, the modern legal system is also susceptible to patronage, occupation inheritance, pursuit of wealth, and hierarchical abuses.[44] Like the medieval Church, the legal system can become encrusted with undesirable developments. These developments detract from the service of the animating principles for which the organization was originally founded. The system "must be repristinated if it is to be *worth* following."[45] An endless reform effort is required.

The five authors of *Final Appeal* are all political scientists. Only one is also a lawyer.[46] Because the book is written in the field of "law and politics" within the discipline of political science, the authors are uniquely positioned to avoid the professional myopia of lawyers. The greatest obstacle to the self-improvement of a self-governing profession is a false sense of self-satisfaction. However, the countervailing weakness to this political science strength is that observations may lack practicality because they are insufficiently nourished by the experiences of a professional culture. Proximity may enlighten as well as distort. Unfortunately, the authors' recommendations for reform of the judicial appointment system are delivered tentatively, and lack the requisite clarity.

A. PROCESS

Currently, provincial appellate court judges are appointed with the recommendation of the federal Minister of Justice. If the candidate is being elevated from a trial court,

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c. 3 "collectively make it clear that the ... [*Constitution Act, 1867*] contemplates the continued existence and functioning of superior courts on the English model as basic institutions of our form of government."

41 J.H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990) at 177. In an excellent recent biography of Sir Thomas More, several other descriptions of the overlap of spiritual with temporal affairs in the legal and governmental systems are found. (P. Ackroyd, *The Life of Thomas More* (London: Vintage, 1999) at 30-31, 59).

42 Baker, *ibid.* at 178.

43 This metaphor is employed in relation to the development of a legal principle or a precedent by B.N. Cardozo in *The Growth of the Law*, twelfth reprint (New Haven: Yale University Press, 1963) at 69-70.

44 See H.J. Grimm, *The Reformation Era: 1500-1650* (New York: Macmillan, 1973) at 41, and R.H. Bainton, *Here I Stand: A Life of Martin Luther* (New York: New American Library, 1977). For a formal description of the hierarchical organization of the Roman Catholic Church, see J.A. Coriden, T.J. Green, & D.E. Heintschel, eds., *The Code of Canon Law: A Text and Commentary* (New York: Paulist Press, 1985). Justinian had referred to judges as "priests of the law": Ackroyd, *supra* note 41 at 59. For a modern reference to the historical linkage between the Church structure and the legal system by Lamer C.J.C. see R. Corelli, "'A Cardinal of the Law': J.J. Robinette was One of the Great Courtroom Lawyers" *Maclean's* (2 December 1996) 85.

45 Wills, *supra* note 39 at 143 [emphasis in original].

46 *Final Appeal*, *supra* note 1 at 212-13.

the federal judicial advisory committee in the province is not consulted during the process. The Prime Minister selects the chief justices of the provincial superior courts and the Federal Court, and all of the members of the Supreme Court of Canada.[47]

Ambiguously, the authors of *Final Appeal* focus their reform efforts on the judicial advisory committees, which they refer to as judicial "selection" committees.[48] Presently, the advisory committees for federal appointments to the superior courts do not select or even nominate the candidates for judicial office. They merely screen the applicants.[49] It is not clear if the authors are suggesting a fundamental change in the function of the federal committees in order that they might resemble the Ontario advisory committee model for Provincial Court appointments.[50] Professor Greene *et al.* do believe that the non-judicial members of the committees ought to be recruited by a process "at arm's length from partisan politics."[51] They should also have discussed the circumstances under which an elected government has a right to appoint to the bench its political supporters who possess the requisite legal skills.[52]

Although confirmation hearings are rejected for judicial candidates,[53] "it would not be inappropriate for a parliamentary committee to review the nominations" of possible judicial selection committee members.[54] Judicial appointments and promotions would be considered by the judicial selection committees. *Final Appeal* fails to explain how this committee system would operate in practice. The authors are not sufficiently clear in differentiating between a promotion and a direct appointment, and between the provincial courts of appeal and the national section 101 courts, the nominees of which are not readily amenable to scrutiny by an advisory committee situated in one province.

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47 The present Prime Minister intends to maintain the traditional system regarding appointments to the Supreme Court of Canada: Right Honourable Jean Chrétien, "A Question of Merit" (1998) 7:8 *National* 14. See also Peter H. Russell, *The Judiciary in Canada: The Third Branch of Government* (Toronto: McGraw-Hill Ryerson, 1987) at 112. Recently, the provincial governments of Ontario and Alberta have requested greater provincial involvement in the appointment of Supreme Court of Canada justices because the *Canadian Charter of Rights and Freedoms* decisions are affecting social and economic responsibilities in relation to the division of powers. See J. Ibbitson & S. Chase, "Ontario Joins Alberta: Rein In Top Court" *The Globe and Mail* (25 October 1999) A1, and B. Laghi & K. Lunman, "Justice Minister defends process of nominating Supreme Court judges" *The Globe and Mail* (26 October 1999) A4.

48 *Final Appeal*, *supra* note 1 at 202.

49 P.H. Russell, "Prof. Russell Replies" (1999) 20:3 *Policy Options* 17.

50 *Final Appeal*, *supra* note 1 at 196.

51 *Ibid.* at 202.

52 The legitimate involvement of the elected representatives in the judicial selection process was acknowledged by Professor Peter McCormick, a co-author of *Final Appeal*, in his earlier book entitled *Canada's Courts* (Toronto: James Lorimer & Company, 1994) at 108-12. He observed that the Prime Minister's involvement is an oblique form of "judicial answerability to democratic will" (at 111).

53 Recently, Professor Jacob Ziegel has endorsed a confirmation procedure before Parliament for Supreme Court of Canada nominees. He has also suggested an unelected nominating committee as another alternative appointment method. See J.S. Ziegel, "Merit Selection and Democratization of Appointments to the Supreme Court of Canada" (1999) 5:2 *Choices* 1 at 17.

54 *Final Appeal*, *supra* note 1 at 202.

The proposals for the appointment of appellate court chief justices are expressed in an obscure endnote.[55]

The most startling statement concerning the judicial appointment process is the observation "that patronage still plays a part in the appointment process — *though much less now than it did several decades ago.*"[56] The authors offer no evidence to support this conclusion. In their study of the first term judicial appointments of the Mulroney government, Professor Peter Russell and Professor Jacob Ziegel noted only marginal improvement:

> The federal appointing system, it would seem, is still at what Sir Robert Megarry, an English judge, identified as the first and most objectionable stage of political influence on judicial appointments, the one where 'party politics may play so large a part that some of those appointed fall short of the standards that the office demands'.[57]

B. PERSONALITY

Because the personal views of the judges concerning "just" outcomes are critically important in a large number of cases, the authors assert that careful attention should be paid to examining the personal values of judicial candidates. An excellent grasp of the law, good work habits, and competent writing skills are not sufficient. There must be a commitment to the values of compassion, "social equality, deference to representative bodies, respect for minority rights, integrity, liberty, and procedural fairness"[58] demonstrated by career accomplishments and community service. As did Ronald Dworkin in *Taking Rights Seriously*, the authors have constructed a model of a judge with superhuman skill, learning, patience, and acumen, in Dworkin's telling term, a "Hercules."[59] However, unlike Dworkin whose interests were philosophical, Professor Greene *et al.* expect to find these godlike models for judicial office among imperfect human beings.

The model contained in *Final Appeal* can only be viewed as criteria of the ideal, whose purpose would be to guide those who select candidates for judicial office. Human personality is immensely complex. Chief Justice James McRuer is praised in the book for his "passion for human rights and equality."[60] Obviously, the authors are relying upon the Chief Justice's work for the Inquiry into Civil Rights and the Ontario

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55 *Ibid.* at 235, n. 17. The selection committee recommendation regarding chief justiceships is similar to the proposal of Professor Martin Friedland in *A Place Apart: Judicial Independence and Accountability in Canada* (Ottawa: Canadian Judicial Council, 1995) at 231. In *Final Appeal*, the possible impact of this recommendation upon judicial independence is not considered.

56 *Final Appeal*, *supra* note 1 at 36 [emphasis added].

57 P. Russell & J. Ziegel, "Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees" (1991) 41 U.T.L.J. 4 at 25.

58 *Final Appeal*, *supra* note 1 at 201-202.

59 R. Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978) at 105.

60 *Final Appeal*, *supra* note 1 at 23.

Law Reform Commission.[61] They neglect to note that McRuer C.J. was perceived by some counsel as a stern and unbending judge who was nicknamed "Hanging Jim" because of the number of men whom he sentenced to death following their convictions for murder.[62]

Overall, to have prevented McRuer from becoming a judge because his professional rigour was perceived as personal rigidity by some observers would have deprived the judiciary of the services of a jurist who strove mightily to be fair during his era, and who reflected deeply upon human rights issues. Those who are envious of a candidate's obvious professional skills and success could use the authors' emphasis on personal values as an alternative means of arguing against the superior candidate's elevation to the bench. Judicial selection could degenerate into a professional popularity contest. In devising the criteria to guide the judicial selection process, the authors should have been mindful that their words may be "twisted by knaves to make a trap for fools."[63]

Professor Greene *et al.* emphasize repeatedly the importance of community service in the professional formation of a judicial candidate.[64] What the authors do not consider is that only limited regulated advertising was permitted in the legal profession during the time period in which these appellate court judges were lawyers.[65] Community involvement produced an added benefit of a high public profile, which attracted legal business.

C. REPRESENTATIVENESS

In discussing the democratizing response to the reality of judicial power, the authors point to a governmental commitment to a representative and inclusive judiciary.[66] This response involves the appointment of women and members of visible minorities.[67] The authors do recognize that this is virtual rather than effective representation. They also describe briefly the difficulties presented by a judge representing a constituency, instead of striving to attain a model of impartial decision-making.

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61 J. Batten, *Judges* (Markham: Penguin Books Canada, 1986) at 275.

62 *Ibid.* at 261. See also P. Boyer, *A Passion for Justice: The Legacy of James Chalmers McRuer* (Toronto: Osgoode Society, 1994) at xxxi.

63 R. Kipling, "If-" in J. Beecroft, ed., *Kipling: A Selection of His Stories and Poems*, vol. 2 (New York: Doubleday & Company, 1956) at 433.

64 *Final Appeal*, *supra* note 1 at 35, 36, 202.

65 Canadian Bar Association, *Code of Professional Conduct* (Ottawa: Canadian Bar Association, 1974) at 53 and 54, n. 7. See also K. Makin, "Legal Directory Shakes up Profession with Brazen Rankings" *The Globe and Mail* (18 January 1999) A5. The practice of law is both a profession and a business.

66 *Final Appeal*, *supra* note 1 at 195.

67 As with any publication which deals with developing trends, the statistics in *Final Appeal* related to gender representation on Canadian appellate courts are somewhat outdated (Table 2.1, *ibid.* at 25). For example, the New Brunswick Court of Appeal now has its first female member, Madam Justice Margaret Larlee: see G. Goguen, "Historic Changes for the Court" *New Brunswick Telegraph Journal* (4 April 1998) A1. As stated *supra* in n. 30, Madam Justice McLachlin has been selected to be the first female Chief Justice of Canada: see K. Makin, "First Female Chief Justice Draws Praise" *The Globe and Mail* (4 November 1999) A1.

The question posed by Madam Justice Wilson as to whether female judges approach the process of judging differently is not addressed.[68] The justification offered by the authors for this virtual representation is the need to show the relationship between the particular institution and the broader society.[69] A contrary opinion had been expressed by the late Brian Dickson, a former Chief Justice of Canada. As part of the Osgoode Society's Oral History Project, Dickson was asked if in addition to professional excellence, those who appoint judges should consider assured representation of women or of people with varied backgrounds. The former Chief Justice replied:

> I don't share that view. If you are talking about affirmative action, I don't think it is any compliment to the particular group that we will have a minimum of, say, three women on it [the Supreme Court of Canada], and one from this particular group, and one other from that particular group. If they aren't the best persons to be sitting as judges of the court, then I think you cheapen the court, and I don't know where you would end up. If you once start recognizing an entitlement to a position on the court simply because of a particular sex or race or religion or what have you, then it becomes I think, something very unmanageable and messy. I think if a person of a particular racial group is truly outstanding, then fine. If it is a woman who is truly outstanding in competition with any man, I think that is wonderful.[70]

The discussion of gender and ethnic inclusiveness should have been presented more fully in *Final Appeal* so that the authors could contend in a more convincing manner that their viewpoint is the better course for policy-makers to follow.

Social class representation is not accorded the same concern as gender and ethnic representation. The authors do investigate the "impact of family,"[71] and document that the great majority of appellate court judges were raised in privileged environments. In addition, there is a significant percentage of occupation inheritance. These statistics are consistent with the higher social class backgrounds of many recent Canadian law students. For example, the average family income in 1993 was estimated by Statistics Canada to be $53,459.[72] A 1989 survey by the Canadian Financial Aid Project revealed that 37.1 percent of the 1,718 law students surveyed had parents who earned in excess of $75,000 annually.[73] In a survey of first year law students at Osgoode Hall

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68 *Final Appeal, supra* note 1 at 25. The Canadian Bar Association report regarding gender equality in the legal profession is not cited in the References of *Final Appeal*. See Canadian Bar Association, *Touchstones For Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993). Following the publication of *Final Appeal*, two reports concerning racial equality in the Canadian legal profession were published. See "The Challenge of Racial Equality: Putting Principles into Practice," and "Virtual Justice: Systemic Racism and the Legal Profession" in Canadian Bar Association, *Racial Equality in the Canadian Legal Profession* (Ottawa: Canadian Bar Association, 1999).

69 *Final Appeal, ibid.* at 195.

70 Honourable Mr. Justice R.J. Sharpe, "Brian Dickson: Portrait of a Judge" (July 1998) *The Advocates' Society Journal* 3 at 31.

71 *Final Appeal, supra* note 1 at 40.

72 Statistics Canada, *Income Distribution by Size in Canada, 1993* (Ottawa: Minister of Industry, Science and Technology, 1994) at 13.

73 Quoted in J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991) 70 Can. Bar Rev. 307 at 320, n. 36.

Law School, of the 260 students who completed the survey in the 330 member class, 65 percent estimated that their parents' combined 1987 income exceeded $60,000 annually, and 37 percent stated that the estimated income exceeded $100,000 a year.[74]

The authors do note that this social class dimension may affect the appellate court decision-making process.[75] However, they do not view the wealth, professional connections, and high social status of the parents as a substitute for the child's ability, but as facilitators for the cultivation of that ability. They should have reflected deeply upon the wasted potential of a society that does not provide equal opportunity. This waste of talent dishonours the dignity of the individual, and weakens the collectivity which would benefit greatly from the development of this talent. The existence of a professional legal and judicial monopoly in the third branch of Canadian government should also include a concomitant obligation for the legal profession to attract, encourage, and promote people of talent. It must be emphasized that what is required is a thorough degree of professional knowledge, and not a thoroughbred pedigree of genetic lineage. For one of the measures of a vibrant liberal democracy is its capacity "'to yield up from the most unremarkable origins, the most remarkable... [people].'"[76]

V. CONCLUSION

The authors of *Final Appeal* have achieved their stated purpose of providing a somewhat systematic examination of appellate court decision-making in Canadian democracy.[77] Their extensive research in a comparative context is an original contribution to the legal and political science literature concerning the third branch of government. Unfortunately, the material could have been presented more sequentially, the analyses considered more thoroughly, and the recommendations for reform stated more clearly. Because the legal system is susceptible to institutional arteriosclerosis, the authors ought to have employed their key findings for the purposes of more penetrating diagnoses and bolder prescriptions for change.

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74 N. Brooks, "A Profile of First Year Osgoode Hall Law School Students" (c. 1988) [unpublished] at 4. The relevant portion of this profile was quoted in Bakan, *ibid.*

75 *Final Appeal*, *supra* note 1 at 42.

76 D. McCullough, *Truman* (New York: Simon & Schuster, 1992) at 992. This quotation is from the tribute delivered by Senator Adlai E. Stevenson III following the death of President Truman. It is ironic that a man whose father was a Governor of Illinois, presidential candidate, and United Nations Ambassador, and whose great grandfather had been a Vice-President of the United States would recognize the benefit of greater social equality. For an account of the Stevenson political dynasty, see P. McKeever, *Adlai Stevenson: His Life and Legacy* (New York: William Morrow and Company, 1989), which is a biography of Senator Stevenson's father. Factors in Canada that affect social mobility include social class membership, regional economic disparity, and demographic group membership. Professor David Foot has observed that those Canadians in Generation X (born between 1961 and 1966) have significantly fewer economic opportunities than those born at the commencement of the baby boom (1947-1966). See D.K. Foot & D. Stoffman, *Boom, Bust & Echo 2000: Profiting From the Demographic Shift in the New Millenium* (Toronto: Macfarlane Walter & Ross, 1998) at 24-28. The authors of *Final Appeal* touch fleetingly upon the influence of demographics in the appellate court system (*supra* note 1 at 26; 222, n. 22).

77 *Final Appeal*, *ibid.* at ix.

The persistent tone of timidity that pervades the chapters of *Final Appeal* does not enhance the effort required to remind those who temporarily wield the power of the state just how great is the hope which they are called to serve. For the appellate court judiciary, this hope lies in the arduous progress through the technical ideas of law toward the elusive ideal of justice. If a concerted effort is devoted to this worthy objective, all citizens will have good "reason to be grateful that we are being equipped with legal controls, with decent procedures, with access to the centers of decision-making, and participation in our secular destiny, for our day and for the days we shall not see."[78]

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[78] P. Freund, *On Law and Justice* (Cambridge, Mass.: The Belknap Press, 1968) at 59.