THE *CHARTER* AND ANGLOPHONE LEGAL THEORY

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The Canadian Charter of Rights and Freedoms has generated not only new terrain over which discursive positions are mobilized, but it has catalysed theoretical reflection about law, society, state, and the self. Examining the implications of the Charter for Anglophone legal theory, the author conducts both a qualitative and quantitative survey of jurisprudential work on the Charter and concludes that the Charter's impact on legal theory has been significant. The Charter has prompted expansion of the range of interdisciplinary influences, contextualized theoretical reflection, and made jurisprudence more engaged with and relevant to Canadian social life. The Charter also has facilitated a fragmentation or "jurisprudential pluralism," reflective of underlying shifts in Canadian political discourse. The Charter's most significant impact, however, will have been its impetus to transform theoretical engagement with the law in directions far removed from the stale confines of analytical positivism.

Non seulement la Charte canadienne des droits et libertés a-t-elle créé un terrain nouveau où les positions discursives se mobilisent, mais elle catalyse également la réflexion théorique sur le droit, la société, l'État et le soi. L'auteur examine les implications de la Charte pour la théorie juridique anglophone. Au terme d'une enquête qualitative et quantitative des travaux jurisprudentiels en la matière, il conclut que la Charte exerce une influence déterminante sur la doctrine. La Charte a contribué à élargir considérablement la portée des influences interdisciplinaires, à contextualiser la réflexion théorique et à rehausser la pertinence de la jurisprudence en regard de la vie sociale canadienne. La Charte a également facilité une certaine fragmentation du « pluralisme jurisprudentiel », à l'image des changements sous-jacents du discours politique canadien. L'impact majeur de la Charte, cependant, réside dans l'incitation au changement qu'elle exerce sur l'engagement théorique avec la loi, bien au-delà des perspectives étriquées du positivisme analytique.

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> Constitutional litigation ought not to be seen as a barren exercise of statutory interpretation .... The legal community must assist the courts by working to develop a theoretical framework of constitutional principles.
>
> Brian Dickson C.J.[1]

> The process of the production of modern legal systems is part of an ongoing production of social life. A country's jurisprudence is a specific representation of a socially constructed order of things — a construction that is not the prerogative of ruling classes or of men, but which is struggled for, negotiated, compromised and redirected every step of the way.
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> V. Kerruish[2]

I. ON METHOD — JURISPRUDENTOLOGY

It is a commonplace for academics to convince themselves of the necessity of writing a paper and, then, when they come to work on it sometime later, to discover that they are unclear both as to what they might want to say and, even more frustratingly, how they might begin to embark on the process of discovering what they want to say. This sense of paralysis when it comes to method, while common among scholars from many disciplines, is I think particularly acute for legal academics for two interconnected reasons. First, as the *Arthurs Report* in its (in)famous diagrammatic way revealed, the vast majority of legal scholarship in Canada has tended to be in the genre of black letter, doctrinal exposition.[3] As a result, while such an approach clearly involves a method, more often than not such a method is simply assumed to be the right way of going about things and, therefore, requiring of no further reflection. Secondly, relative to most other academic disciplines, common law legal scholars historically have had short periods of graduate legal training and, therefore, have had little opportunity to consider questions of method. We have tended to be a "just do it" sort of discipline. While having certain advantages (at least in terms of efficiency) such an approach tends to leave us high and dry when we attempt to do something different.

Such was my own sense when I decided to write an essay on the relationship between the *Charter* and Canadian jurisprudence. In theory, it seemed like a great idea, but executing such a practice proved to be quite daunting. Thus, the first step of the process was to consider how one could go about identifying and evaluating the dynamic between legal theory and the *Charter*. The solution that

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1 "An Address to the Mid-Winter Meeting of the Canadian Bar Association" Edmonton (2 February 1985) 13-19.

2 V. Kerruish, *Jurisprudence as Ideology* (New York: Routledge, 1991) at 196.

3 *Law and Learning: Report to the Social Sciences and Research Council of Canada* (Ottawa: Research Council of Canada, 1983) c. 5.

I have come up with can be captured in a fancy new term that describes a fairly simple idea: "jurisprudentology." An "-ology" is a short hand way of saying "the study of something," in the sense of sociology, archaeology or theology. Jurisprudentology is the study of jurisprudence and, therefore, assumes that there is in fact a practice called jurisprudence. Consequently, there is a distinction to be drawn between doing jurisprudence and thinking about jurisprudence. Phrased somewhat more philosophically, this can be considered analogous to the distinction between "theory" and "metatheory." Thus, this essay is an attempt to think about legal theory.[4]

But before we can get to jurisprudentology, it will probably be helpful to say a little more about the term "jurisprudence," as well as the nomination "legal theory" which, as the reader will have noticed, I use interchangeably.

II. ON THE PARAMETERS OF LEGAL THEORY

In this section, I want to make a few preliminary comments about the nature, scope, and methods of legal theory. However, it is to be noted that what follows should not be conceived of as an attempt to provide a single comprehensive

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[4] It is to be noted, however, that although I think I might have created a neologism, I am certainly not claiming to be the first to think about jurisprudence. Jurisprudentology is frequently practised, both explicitly and implicitly. For example, on the explicit level, there are reviews by S. Boyd & E. Sheehy on feminist legal theory ["Feminist Perspectives on Law: Canadian Theory and Practice" (1986) 2 C.J.W.L. 1], F. DeCoste's tentative ruminations on the politics of legal theory ["Taking a Stand: Theory in the Canadian Legal Academy" (1991) 29 Alta. L. Rev. 941], R.A. MacDonald's early assessment of *Charter* jurisprudence ["Postscript and Prelude — the Jurisprudence of the *Charter:* Eight theses" (1982) 4 S.C.L.R. 321] and M. Gold's reflections on constitutional scholarship ["Constitutional Scholarship in Canada" (1985) 23 Osgoode Hall L. J. 495; M. Gold, "Moral and Political Theories in Equality Rights Adjudication" in J. Weiler & R. Elliot, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1986) at 85]. See also R. Shiner, "Jurisprudence: Ideology or Analysis?" (1993) 8 Can. J. Law & Soc. 205 and R. Case, "Theorizing about Law" (1993) 6 Can. J. Law & Jur. 113.

On the implicit level, to the extent that much legal theory critically engages in debate with other legal theories, frequently by demanding that they be more self-reflective about their own assumptions and aspirations, it is also an exercise in jurisprudentology. See, for example, J. Bakan, "Constitutional Interpretation and Social Change: You Can't Always Get What You Want (Or What You Need)" in R. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery, 1991) at 445; B. Etherington, "An Assessment of Judicial Review of Labour Laws Under the *Charter*: Of Realists, Romantics, and Pragmatists" (1992) 24 Ottawa L. Rev. 685; or D. Herman, "The Good, the Bad, and the Smugly: Perspectives on the Canadian Charter of Rights and Freedoms" (1994) 14 Oxford J. Leg. Stud. 589.

definition of legal theory for such closure, even if it were possible, would be undesirable in that it would attempt to impose parameters on a practice that is always in the process of becoming.

Jurisprudence, drawing on its latin origins, can be understood as wisdom about law.[5] More specifically, and supplementing in a crucially important way Catharine MacKinnon's insight,[6] jurisprudence is theory about the relationship between law, life, and death. Theory is one technique, one approach, by which we can seek to achieve wisdom. More precisely, by theory I mean the active process (theorizing) of self-consciously making explicit and reflectively interrogating: a) the underlying presumptions; b) the methodological assumptions; c) the definitional boundaries; d) the procedural norms; e) the criteria for validity; and f) the preferred justifications for any or all of these in relation to a social or intellectual phenomenon.

If one raises an explicitly jurisprudential point, a common reaction is what might be described as theory phobia, a response that may reflect either a concern by another as to their own inability to think on the theoretical level or, alternatively, a rolling of the eyes in the expectation of unintelligible abstractionism that has little practical relevance. The first response sometimes engenders disengagement and silence, the second disparagement and even hostility. While theory can suffer from the vices of intellectual elitism and naval gazing (a.k.a. theoreticism), it need not necessarily do so. A great deal of the problem, I think, depends upon what we mean by abstraction. If it is taken to mean obscurity, then it seems to me that scepticism is warranted. If, however, abstraction is understood as simply the ability to stand back from the minutiae of an intellectual or social phenomenon — law, for example — in order to be able to develop some reflective perspective on that phenomenon, then I think that the scepticism is unwarranted.

Moreover, it is important not to confuse abstraction with decontextualism, that is, the process whereby one attempts to isolate phenomena from their (in)formative environment in order to attain a clearer, or at least less contaminated, understanding of the nature of the phenomenon. While decontextualization can be one theoretical strategy, so too can contextualism, the

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5 It can of course be understood in other ways. Frequently, the collective case law of a jurisdiction is described as jurisprudence. As will become clear, this is not the sense in which I propose to use the word, though clearly every case is premised upon jurisprudential assumptions.

6 C. MacKinnon, *Toward a Feminist Theory of The State* (Cambridge Mass.: Harvard University Press, 1989) at 237.

process of locating phenomena in their relational affinity to other influential forces. For example, if we understand law as a social phenomenon, a decontextualist theory may seek to consider it as distinct from other factors such as history, politics or sociology as, for example, in Kelsen's pure theory of law.[7] On the other hand, it is possible to adopt a contextual approach to law to argue that law can only be understood in its relationship to the class relations of a society or, in Marxist terms, through the grid of historical materialism.[8] Similarly, feminist method suggests that jurisprudence must be attentive to the specificities of women's conditions.[9] In other words, certain forms of theory do factor in the relationship between the general and the particular, the abstract and the concrete.

Furthermore, even if one wants to retain a healthy scepticism about the utility of theory, it is to my mind at the very minimum a necessary evil. Because there is no such thing as presuppositionless thought or practice, there is always a need for reflection on the significance of stances adopted, be they intellectual or practical. To borrow a metaphor from Alison Young, forms of legal analysis that are dismissive of theory find themselves "in the middle of an uncharted theoretical ocean."[10] A self-conscious legal analysis is a reflective mode of analysis, one that is willing to interrogate its own assumptions, orientation and practices.

In sum, in this essay I want to invoke an enlarged or expansive conception of legal theory, one that recognizes jurisprudence as a multi-dimensional and multi-tiered interrogative process in the pursuit of a greater understanding of the nature and functions of law, which itself must be understood as a complex, controversial, and problematic phenomenon. This emphasis on the interrogative dimension is important because it emphasizes that in theory the process of questioning is just as important as the results attained. And the sort of questions that are asked might include: What is the nature of law? What sort of roles or functions do law, legal institutions, legal rules and legal procedures fulfill in society? How does law fulfill those functions? How important is law in a

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7 H. Kelsen, *Pure Theory of Law* (Berkeley: University of California Press, 1967).

8 J. Fudge, "Marx's Theory of History and a Marxist Analysis of Law" in Devlin, *supra* note 4 at 151; M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2d ed. (Toronto: Thompson, 1994) at 353, 395-97, 425.

9 M. Eberts *et al.*, *The Case for Women's Equality: The Federation of Women Teachers' Associations of Ontario and the Canadian Charter of Rights and Freedoms* (Toronto: FWTAO, 1991).

10 A. Young, *Femininity in Dissent* (New York: Routledge, 1990) at 156.

society? Which perspectives, overtly or covertly, inform legal institutions, rules or procedures?

However, an expansive conception of legal theory should not be mistaken for the claim that we are all jurisprudes now. While I do not want to repeat the dangers of turf patrolling inherent in a thesis such as *The Province of Jurisprudence Determined*,[11] to conceive of all legal scholarship as of jurisprudential significance would result in an analytically unhelpful over-inflation. In this sense, it may be easier to suggest what is not within the realm of legal theory: classical, formalistic, and expository doctrinal analysis that sees its task as being exclusively the systematic reorganization of case law into some sort of cohesive structure, designed in the main for the benefit of a busy practising bar.[12] Thus, a desire for explanation rather than mere description is a necessary, if insufficient, benchmark for inclusion in the realm of jurisprudence. By way of example, my expansive definition of legal theory might encompass Cooper Stephenson's *Charter Damages Claims*[13] and Fitzgerald's *Understanding Charter Remedies: A Practitioner's Guide*[14] but not Hogg's *Constitutional Law of Canada*[15] or Finkelstein and Rogers' *Charter Issues in Civil Cases*.[16] And this is no paltry exclusion for doctrinal exegesis is still the preferred domain of many legal scholars as is evidenced, for example, by the seventy-eight page bibliography in Beaudoin and Ratushny's *The Canadian Charter of Rights and Freedoms*.[17]

Finally, it should be acknowledged at the outset that in order to render the project manageable, there are at least three limitations that significantly

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11 J. Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1965).

12 This is not intended as a critique of this form of scholarship, for undoubtedly such work serves valuable purposes. My point is simply that this type of scholarship is not a form of jurisprudence, although to my mind all scholarship is premised upon certain jurisprudential assumptions. As Northrop has argued:

> To be sure, there are lawyers judges and even law professors who tell us that they have no legal philosophy. In law, as in other things, we shall find that the only difference between a person without a philosophy and someone with a philosophy is that the latter knows what his [sic] philosophy is.

See F. Northrop, *The Complexity of Legal and Ethical Experience* (Toronto: Little, Brown and Company, 1959) at 6.

13 (Toronto: Carswell, 1990).

14 (Toronto: Carswell, 1994).

15 P. Hogg, *Constitutional Law of Canada*, 3rd ed. (Toronto: Carswell, 1992).

16 (Toronto: Carswell, 1988).

17 3rd ed. (Toronto: Carswell, 1989).

circumscribe the scope and ambitions of this essay. First, there is no attempt to provide a comparative or longitudinal analysis of the development of Canadian constitutional theory.[18] Second, the focus is primarily on legal academics who write in relation to the *Charter* and, therefore, I have tended to marginalize the important contributions of scholars from other disciplines. Third, and most problematically, due to my own inability to read French, I have concentrated on anglophone scholars.

Having outlined some caveats and methodological points, I am now in a position to begin to analyze the relationship between the *Charter* and the recent developments of Anglophone legal theory in Canada. Two modes of analysis are adopted. First, I develop a somewhat cursory quantitative review of Canadian legal scholarship to assess the amount of *Charter*-oriented legal theory being produced in Canada. Second, and more significantly, I pursue a qualitative evaluation of the types of *Charter* analysis and their jurisprudential orientation. To achieve this latter task I propose to borrow — or perhaps more accurately to hijack — and modify a structure of analysis, a taxonomy even, first articulated over twenty years ago by Bill Twining in an article entitled "Some Jobs for Jurisprudence" and, subsequently, reworked on several occasions since then.[19] Twining argues that there are at least five functions[20] or tasks for jurisprudence to fulfil: the pursuit of intellectual history; a conduit function; the construction of high theory; the development of theories of the middle order and working

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18 But see, for example, Gold, *supra* note 4 at 495, and R. Yalden, "Liberalism and Canadian Constitutional Law: Tensions in an Evolving Vision of Liberty" (1988) 47 U.T. Fac. L. Rev. 132.

19 W. Twining, "Some Jobs for Jurisprudence" (1974) 1 Brit. J. Law & Soc. 149; "Evidence and Legal Theory" in W. Twining, ed., *Legal Theory and Common Law* (New York: Basil Blackwell, 1986) at 62; W. Twining & N. MacCormick, "Theory in the Law Curriculum" *ibid.* at 238. There are, of course, other structures available for analyzing legal theory. However, most of these adopt a "schools of thought" methodology. For the purposes of this paper, I find Twining's approach more helpful in that it allows for a discussion of the *forms* of jurisprudence as well as the substance somewhat more readily than the schools of thought approach. Having said this, I acknowledge that every analytical structure is contingent and that some readers may not agree with every categorization that ensues. What is offered is a modest attempt to make sense of an enormous and rapidly expanding literature.

20 I realize that the very mention of the term "function" may ring alarm bells for some readers. There is no suggestion in this paper that these are the only functions of legal theory or that such approaches are structurally predetermined by some systemic imperative. The word is used in the spirit of much of this paper, in a fairly straightforward way, as simply a cognate for "job," rather than as a term of theoretical art.

theories; and a synthesizing function.[21] To these I will add a sixth task for jurisprudence: an ideological function.

III. A QUANTITATIVE ANALYSIS

On a quantitative level, legal theoretical scholarship seems to have experienced a significant growth over the last decade or so. First, there have been a relatively large number of monographs focusing either exclusively or primarily on the *Charter* published in the last ten years.[22] There have been at least an equally large number of edited collections[23] and symposia[24] with the

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[21] See "Some Jobs for Jurisprudence," *supra* note 19 at 160; also see "Evidence and Legal Theory," *supra* note 19 at 64.

[22] D. Beatty, *Putting the Charter to Work: Designing a Constitutional Labour Code* (Kingston: McGill Queen's University Press, 1987); D. Beatty, *The Canadian Production of Constitutional Review: Talking Heads and the Supremes* (Toronto: Carswell, 1990); D. Beatty, *Constitutional Law in Theory and Practice* (Toronto: University of Toronto Press, 1995); W. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Toronto: Oxford University Press, 1994); K. Cooper Stevenson, *supra* note 13; M. Eberts et al., *supra* note 9; Fitzgerald, *supra* note 14; D. Gibson, *The Law of the Charter: General Principles,* (Calgary: Carswell, 1986); D. Gibson, *The Law of the Charter: Equality Rights* (Calgary: Carswell, 1990); D. Herman, *Rights of Passage: Struggles for Lesbian and Gay Legal Equality* (Toronto: University of Toronto Press, 1994); A. Hutchinson, *Waiting For Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Mandel, *supra* note 8; M. Manning, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982* (Toronto: Emond-Montgomery, 1983); P. Monahan, *Politics and the Constitution: The Charter, Federalism and the Supreme Court of Canada* (Toronto: Butterworths, 1991); L. Trakman, *Reasoning With the Charter* (Toronto: Carswell, 1992); J. Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill University Press, 1994). B. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review,* 3rd ed. (Toronto: Butterworths, 1988) might also be added given the incorporation of *Charter* issues.

[23] J. Bakan & D. Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992); A. Bayefsky & M. Eberts, eds., *Equality Rights and the Canadian Charter of Rights and Freedoms* (Agincourt: Carswell, 1985); C. Beckton & W. MacKay, eds., *The Courts and the Charter* (Toronto: University of Toronto Press, 1985); G. Beaudoin, ed., *Charter Cases 1986-1987* (Cowansville: Yvon Blais, 1987); G. Beaudoin, ed., *Your Clients and the Charter: Liberty and Equality* (Cowansville: Yvon Blais, 1987); G. Beaudoin, ed., *As the Charter Evolves* (Cowansville: Yvon Blais, 1989); G. Beaudoin, ed., *The Charter: Ten Years Later* (Cowansville: Yvon Blais, 1992); Beaudoin & Ratushney, *supra* note 17; C. Boyle *et al., Charterwatch: Reflections on Equality* (Toronto: Carswell, 1986); P. Bryden *et al.*, eds., *Protecting Rights and Freedoms* (Toronto: University of Toronto Press, 1994); C.I.A.J., *The Canadian Charter of Rights and Freedoms* (Cowansville: Yvon Blais, 1983); Canadian Human Rights Foundation, ed., *Multiculturalism and the*

same emphasis. Moreover, several new journals have surfaced some which are explicitly jurisprudential,[25] others of which are heavily influenced by legal theoretical concerns.[26] Finally, other new journals have sprung up with a heavy focus on *Charter* analysis.[27]

To this extent, it can be said there is at least some parallel between growth of jurisprudential analysis and *Charter* scholarship. However, on a qualitative level it would seem impossible to draw any causal connection between the growth of legal theory and *Charter* talk.

First, a review of a journal such as Canadian Journal of Law and Jurisprudence suggests that, in fact, the *Charter* has had relatively little impact. Despite special issues on collective rights, equality rights and law and sexuality, the preference seems to be for quite positivistic and highly abstracted analyses very much in the oxonian tradition. Particular favourites seem to include Dworkin, Finnis, Hart, Rawls and Raz.[28] Similarly, the interdisciplinary Canadian Journal of Law and Society and Journal of Human Justice, while hospitable to *Charter* issues, have been quite wide ranging in their

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Charter: A Legal Perspective (Toronto: Carswell, 1987); K. Mahoney & S. Martin, eds., *Equality and Judicial Neutrality* (Toronto; Carswell, 1987); D. Schneiderman, ed., *Freedom of Expression and the Charter* (Calgary: Thompson, 1991); R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths 1987); L. Smith, *et al., Righting the Balance: Canada's New Equality Rights* (Saskatoon: C.H.R.R., 1986); K. Swinton, ed., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988); W. Tarnopolsky & G. Beaudoin, *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Carswell, 1982); Weiler & Elliot, *supra* note 4.

24 (1983) 61 Can. Bar Rev.; Charter Edition (1982) 16 U.B.C. L. Rev.; The New Constitution and the *Charter*: Background, Analysis and Commentary (1982) 8 Queen's L. J. 7; Labour Law and The *Charter* (1988) 13 Queen's L. J.; The Loss of Innocence: Coming to Terms with the *Charter* (1989) 23 U.B.C. L. Rev. 447; E. Belobaba & E. Gertner, eds., The New Constitution and the *Charter* of Rights: Fundamental Issues and Strategies (1982) 4 Sup. Ct. L. Rev.; The *Charter*: Initial Experience, Emerging Issues, Future Challenges (1983) 13 Man. L. J. 427; Critical Perspectives on the Constitution (1982) 4 Socialist Studies; B. Strayer, Life Under the Canadian *Charter*: Adjusting the Balance Between Legislatures and Courts (1988) Public Law 347.

25 See, for example, Canadian Journal of Law and Jurisprudence.

26 See, for example, Canadian Journal of Law & Society and the Journal of Human Justice. See also the Canadian Journal of Women and the Law, which was first published in 1985, the year the equality provisions came into force.

27 See, for example, Canadian Human Rights Yearbook, Constitutional Forum, National Journal of Constitutional Law and the Review of Constitutional Studies.

28 It is to be noted that in 1995, it added a new subtitle: An International Journal of Legal Thought.

jurisprudential coverage. Moreover, the *Charter* seems to have had little impact on the scholarship of some of Canada's most established jurists, for example, Professors Weinrib and Trebilcock.

However, it would be a mistake to underestimate the significance of the *Charter*. The Review of Constitutional Studies and the National Journal of Constitutional Law, for example, have published a significant number of articles that manifest a subtle (and quite readable) blend of theory and doctrine. Moreover, conventional law reviews have devoted a great deal of space to literally hundreds of fairly reflective articles on the *Charter*. Thus, one pattern that seems to be emerging is that although *Charter*-oriented legal theory has not (thankfully) occupied the field of the explicitly theoretical journals, it has had a significant impact on the broad spectrum of legal journals. Further, leading jurists have been unable to resist the allure of the *Charter*, for example, Bill Conklin[29] and J.C. Smith.[30] Moreover, it might also be suggested that while the scholarship of many traditional jurists tends to begin with conceptualism and then, perhaps, to work its way down to the practical concerns of law, others (perhaps of a younger generation) begin their scholarship with pressing and immediate issues and through a process of reflection and argument work their way up to theory.[31] In this light, rather than suggesting that the *Charter* has caused a growth in legal theory, it can be understood as a terrain of discursive practice that serves as both a forum and catalyst for legal theoretical reflection.

IV. A QUALITATIVE ANALYSIS

Quantitative analyses, while helpful, can only provide a very limited snapshot of the potential relationship between the *Charter* and anglophone legal theory. What is required is a more qualitative analysis, one that is able to map the contours of the jurisprudential terrain. As mentioned earlier, a slightly modified application of Twining's topography can provide the tools required.

A. Constructing Intellectual History

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29 W. Conklin, *Images of a Constitution* (Toronto: University of Toronto Press, 1989).

30 J.C. Smith, *The Neurotic Foundations of Social Order: Psychoanalytic Roots of Patriarchy* (New York: New York University Press, 1990).

31 See, for example, M. Jackman, "The Protection of Welfare Rights under the *Charter*" (1988) 20 Ottawa L. Rev. 257; L. Phillips, & M. Young, "Sex, Tax and the *Charter*: A Review of *Thibaudeau* v. *Canada*" (1994) 2 Rev. Const. Studies 221. Other examples which I shall return to later in the text might include feminist reflections on the significance of s. 15 and arguments by some First Nations scholars on the dangers of the rights orientation of the *Charter*.

Twining, while acknowledging that it is not a task that is unique to legal theory, argues that the pursuit of intellectual history entails "the systematic study and criticism of the heritage of legal thought and critical study of the work of individual thinkers."[32] While there has been some work by Canadian legal theorists in developing this sort of work,[33] not surprisingly the *Charter* has had little influence given its recent vintage. The closest we come is perhaps some scholarship in symposia for retiring Supreme Court judges such as Dickson C.J.[34] and Wilson J.[35] or general overviews of the various stances commentators have taken in relation to the *Charter*.[36]

B. Conduit Function

Twining argues that jurisprudence has "centrifugal tendencies" in the sense that jurists have a proclivity to inquire into and draw upon the insights of other intellectual disciplines and environments. In this light, the role of the jurist is to serve as a bridge between law and something else. In my opinion, such a function can be fulfilled in one of two ways: jurisprudence as assimilation and jurisprudence as an interpretive grid. Twining himself seems only to recognize the first.

In terms of the assimilationist approach, Twining argues that the role of the jurist is to "venture forth ... [and] bring back the ideas, techniques, and insights of [another] discipline and to integrate or assimilate them into the intellectual milieu of the law."[37] It is to be noted that such an approach seems to be premised upon strong assumptions as to the nature and parameters of law. In that sense it tends to presume that law itself is unproblematic. Moreover, it constructs

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32 "Evidence and Legal Theory," supra *note* 19 at 64.

33 See, for example, G.B. Baker, "The Reconstitution of Upper Canadian Legal Thought in the Late-Victorian Empire" (1985) 3 Law & Hist. Rev. 219; Conklin, *supra* note 29; J. Crimmins, "'A Hatchet for Paley's Net': Bentham on Capital Punishment and Judicial Discretion" (1988) Can. J. Law & Jur. 63; D. Patterson, ed., Legal Theory and Wittgensteinian Thought (1990) 3 Can. J. Law & Jur. 3; R. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: SUNY Press, 1991).

34 R. Penner, "Introduction: The Dickson Legacy, The Legacy of a Judicial Humanist" (1991) 20 Man. L. J. 263.

35 The Democratic Intellect (1992) 15 Dalhousie L. J.; see also R.E. Hawkins & R. Martin, "Democracy, Judging and Bertha Wilson" (1996) 41 McGill L. J. 1.

36 See, for example, J. Bakan, "Constitutional Arguments: Interpretation and Legitimacy in Canadian Constitutional Thought" (1989) 27 Osgoode Hall L. J. 123; Etherington, *supra* note 4.

37 "Some Jobs for Jurisprudence," *supra* note 19 at 157.

jurisprudence as an active subject and other intellectual genres as passive objects, waiting to be press-ganged into the service of legal theory. Such an assumption has resulted in the familiar paradigm of "law and ..." approaches, with corresponding charges of intellectual imperialism (and naïveté).

The interpretive grid approach is somewhat more self-reflective and modest in its ambitions. It recognizes that legal theory is a form of intellectual practice, but one that may be potentially enriched through an egalitarian engagement with other intellectual disciplines. In this approach, jurisprudence is understood as a framework of analysis that is both latently enlightening and necessarily partial, in the sense of incomplete. Within this approach, law itself is recognized to be a problematic category of analysis that is up for grabs. The agenda in this approach is not one of the assimilation of other disciplines, but constructive, if mutually critical, explorations.

There appears to be ample evidence of this interdisciplinary turn in *Charter* jurisprudence.[38] References to, and adaptations of, anthropology, economics, literary criticism, philosophy, political theory, rhetoric, semiotics, sociology, social theory, and even social psychology and psychoanalysis are rampant. Indeed, it almost seems *de rigueur* to at least footnote some non-legal thinker or tradition whose insights lay the foundation for what the *Charter* jurist has to offer.

Moreover, I would suggest that, as *Charter*-oriented jurisprudence has sought out interlocutors over the last decade or so, there has been a shift from philosophy — particularly in its positivistic and analytical mode — to social theory — particularly in its progressive modes.[39] In other words, the focus is not

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[38] For an early exhortation to engage in interdisciplinary work see N. Lyon, "The Teleological Mandate of the Fundamental Freedoms Guarantee: What to do with Vague but Meaningful Generalities" (1982) 4 Sup. Ct. L. Rev. 57.

[39] For a particularly clear example, see the excellent debate between Fudge and Glasbeek and Herman. [J. Fudge & H. Glasbeek, "The Politics of Rights: A Politics with Little Class" (1992) 1 Soc. & L. Stud. 45; D. Herman, "Beyond the Rights Debate" (1993) 2 Soc. & L. Stud. 25]. See also L. Clark, "Liberalism and the Living-Tree: Women, Equality, and the *Charter*" (1990) 28 Alta. L. Rev. 384; M. Eaton, "Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis" (1994) 17 Dalhousie L. J. 130; D. Fraser, "And Now for Something Completely Different: Judging Interpretation and the Canadian Charter of Rights and Freedoms" (1987) 7 Windsor Y.B. Access Just. 66; D. Greschner, "Abortion and Democracy for Women: A Critique of *Tremblay* v. *Daigle*" (1990) 35 McGill L. J. 633; Mandel, *supra* note 8 at 83, 222; Trakman, *supra* note 22; N. Sargent, "Rethinking the Law and Social Transformation Debate: Beyond the Correspondence Metaphor" (1991) 3 J. Human Just. 1; C. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and

so much on the question "what is law?" but more on the question, "what is to be done with, or about, law?" This transition is particularly apparent in the work of jurists like J.C. Smith who have shifted from a heavy focus on analytical positivism[40] to "postmodern psychoanalytic theory" with a heavy Freudian bent,[41] or Bill Conklin with his Derridean inspired "image of a constitution" theory.[42]

Also of considerable significance is the turn, sometimes implicit but often explicit, to literary criticism. Many scholars, who emanate from diverse and often quite contradictory ideological positions, seem to be inspired by their inquiries into the different approaches to literary criticism. However, despite these differences, there appears to be widespread consensus that the way to proceed in a *Charter*-ized regime is through a colloquy,[43] democratic dialogue,[44] a postmodern democratic dialogue,[45] a distinctively Canadian conversation,[46] communicative discourse,[47] constitutional dialogue of democratic accountability,[48] a conversation of justification,[49] a conversation about rights and roles.[50] Sections 1 and 33 are often invoked as exemplars of this dialogic vision. I will have more to say about this apparent faith in dialogism later in the essay, but at this point I simply want to highlight that almost everyone seems to be doing it.

Equality Rights Jurisprudence in Canada" (1995) 8 Can. J. Law & Jur. 49; B. Weber, "A Disenchanted *Charter*? The Common Law Tradition and the Charter of Rights and Freedoms" (1988) 3 Can. J. Law & Soc. 195.

40 J.C. Smith, *Legal Obligation* (Toronto: University of Toronto Press, 1976); S.C. Coval & J.C. Smith, *Law and its Presuppositions: Actions, Agents and Rules* (London: Routledge and Kegan Paul, 1986).

41 *Supra* note 30.

42 *Supra* note 29.

43 A. Bayefsky, "The Judicial Function Under the Canadian Charter of Rights and Freedoms" in A. Bayefsky, ed., *Legal Theory Meets Legal Practice* (Edmonton: Academic Printers & Publishing, 1988) 121 at 155, 162.

44 Hutchinson, *supra* note 22.

45 C. Stychin, "A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination" (1994) 17 Dalhousie L. J. 61.

46 Webber, *supra* note 22 at 192.

47 Trakman, *supra* note 22 at c. 1.

48 J. Nedelsky, "Reconceiving Rights as Relationship" (1993) 1 Rev. Const. Studies 1; J. Nedelsky & C. Scott, "Constitutional Dialogue" in Bakan & Schneiderman, *supra* note 23 at 59.

49 *Putting the Charter to Work*, *supra* note 22 at 5, 53; *Talking Heads and the Supremes*, *supra* note 22 at 25-26.

50 M. Gold, "Of Rights and Roles: The Supreme Court and the *Charter*" (1989) 23 U.B.C.L. Rev. 507.

Moreover, while I clearly believe that the interdisciplinary turn of recent jurisprudence is an undoubted plus, there is of course the ever-present danger of dilettantism: the superficial and uncritical borrowing of concepts, interpretive strategies and methods from other disciplines without sufficient familiarity of the internal debates or an adequate appreciation as to their pedigree within their own discipline. Bix, for example, has been very critical of Langille's "misapplication" and "flouting" of Wittgenstinian ideas.[51]

C. The Construction of High Theory

i) High Theory Defined

For Twining, "high theory" is essentially "philosophical," it addresses "fundamental issues," which might include:[52]

> [v]ery general questions about the nature and functions of law, the concept of a legal system, the relationship between law and morality, the differences between law and other types of social control, perennial questions about justice, and ultimate questions about the epistemological and other fundamental assumptions of legal discourse ....

Closely connected with the idea of high theory is what, in some circles, is called conceptualism. Conceptualism is an approach to jurisprudence which, rather than considering the law in action, tends to draw on the insights of analytic philosophy to posit that it is most appropriate to think of law as if it were a system of ideas or concepts each of which is in need of elucidation. Key categories of conceptual analysis might include inter alia: right, good, duty, command, sanction, validity, rule, principle, authority, legitimacy, and obligation.

Dovetailing with both high theory and conceptualism is an implicit depoliticization of law. While this is a point I will address in more detail later, I want to suggest that the philosophical abstraction of high theory, coupled with the disengagement from social issues engendered by conceptualism, tends to portray law and legal thinking as somehow autonomous and distinct from the political messiness of law in action.[53] Thus, it is suggested that high theory (or

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51 B. Bix, "The Application (and Mis-Application) of Wittgenstein's Rule-Following Considerations to Legal Theory" (1990) 3 Can. J. Law & Jur. 107.

52 "Some Jobs for Jurisprudence," *supra* note 19 at 158.

53 But see F. DeCoste, "Radical Discourse in Legal Theory: Hart and Dworkin" (1989) 21 Ottawa. L. Rev. 679.

philosophy) is a method of jurisprudence but, unlike legal theory, it is not coterminous with jurisprudence.[54]

Quite a lot of Canadian legal theory operates in the tradition of high theory, particularly in the pages of the Canadian Journal of Law and Jurisprudence.[55] At first blush it would seem that, in the main, the *Charter* has had little impact in this sphere except for a passing question as to the pedigree of the *Constitution Act 1982* in relation to the "rule of recognition."[56] But there are perhaps two exceptions to this suggestion which may have quite a large impact: the post-rationalist turn in jurisprudence and the rights debate.

ii) The Post-Rationalist Turn

The first exception to the proposition that the *Charter* has not had a great deal of influence on the practice of high legal theory might be described as the "post-rationalist" turn in Canadian legal thinking. Historically, most legal thought has tended to conceive of the rule of law as "an unqualified human good,"[57] as an instrumentality for cogently identifying and resolving societal problems. For many, the *Charter* is but another confirmation of law's capacity to do the right thing, this time by delineating the scope of human rights in Canada and the limited circumstances in which they may be thwarted.[58]

Perhaps the grandest assault on this rational instrumentalist conception of law comes from J.C. Smith and his argument that our legal order may, in fact, be driven by a neurotic patriarchal psyche, a juridical unconscious that is motored by an irrational fear of the other.[59] Smith, however, has little to say about the *Charter,* although in passing he does appear to suggest that women judges can interpret it in a "different voice" that is more open to diverse needs of a postmodern society such as Canada.[60]

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54 *Evidence and Legal Theory*, *supra* note 19 at 62.

55 See also L. Green, *The Authority of the State* (New York: Oxford University Press, 1988); Discussion (1982) 2 Windsor Y.B. Access Just. 293 et seq.

56 R. Shiner, "The Acceptance of a Legal System" (1990) 3 Can. J. Law & Jur. 81.

57 E.P. Thompson, *Whigs and Hunters; The Origin of the Black Act* (London: Allen Lane, 1975) at 266.

58 Gibson, *supra* note 22 at 1.

59 *Smith*, *supra* note 30.

60 J.C. Smith, "Psychoanalytic Jurisprudence and the Limits of Traditional Legal Theory" in Devlin, *supra* note 4 at 223.

Bill Conklin is less psychoanalytic in his orientation. He urges us to focus less on the unconscious and more on the conscious images of a constitution that construct and curtail legal praxis. In the tradition of postmodern epistemology, Conklin has identified the limits of the various rationalistic strategies — rule rationalism, policy rationalism, and orthodox rationalism — adopted by lawyers and judges over the years to neutralize and depoliticize their decision-making. Rationalism in the service of legal thought has been conceived of as mere instrumental technique. Through a review of *Charter* case law at both the Supreme Court and (unusually for most jurists) at the lower levels he identifies the perpetuation of such rationalistic legitimation strategies.

In their place, drawing on the scholarship and judgments of Rand J., he calls for a more "teleological" commitment to decision-making. This mode of legal reasoning makes explicit one's conception of the good, one's understanding of social interaction and, most importantly for Conklin, one's theory of the person:[61]

> The challenge for the contemporary lawyer is to picture a constitution which allows him/her to question the "givens," to connect the "givens" universalist human rights claims of theory, and to critique their reified character when divorced from social/cultural practice.[62]

By unpacking such presuppositions Conklin aspires to make legal decision-makers subject to the demands of what he, in contrast to instrumental reason, calls "critical reason."[63] Critical reason insists that one must develop the talent of self-reflexivity, that one must resist juridical closure and that one must make explicit one's prejudgments, be they ontological, political or moral. Furthermore, Conklin argues that the *Charter*, because of the centrality of the manifestly contestable concepts of freedom, democracy, liberty, and equality, necessarily "entertains" and "fosters" such recourse to social, political and moral theory.[64] In other words, legal decision-makers must justify their reasons and, therefore, be held accountable for the enforcement of their preferred image of

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61 Conklin refers to two competing theories of the person: first, as a relational, associative or social being and, second, as an atomistic, lonely, and self-sufficient individual. Conklin, *supra* note 29 at 223, 226.

62 *Ibid.* at 218.

63 *Ibid.* at 248-52.

64 *Ibid.* at 236-65.

the constitution. In this way, Conklin argues, the nexus between (legal) knowledge and power is rendered transparent and, thereby, more contestable.[65]

Turpel is even more poignant in her challenge to the assumed beneficence and rationalism of the *Charter*. Again drawing on the insights of post-analytic philosophy (this time from a First Nations perspective) she argues that the *Charter* has little to do with "the good." Rather, it is a symbol and practice of cultural and juridical imperialism through which the dominant Canadian culture continues its colonization of First Nations people who have very different conceptions of social relations and legal norms.[66]

iii) The Rights Debate

The second exception where there does appear to be a connection between high theory and the *Charter* relates to "rights." Two quite distinct questions are pertinent. First, there is the debate between those who believe in the utility of a rights discourse, those who do not, and those who resist dichotomous analyses.[67] Secondly, there is the question of whether there can be such a thing as collective rights or group rights.

The dominant intellectual paradigm in Canadian jurisprudence presumes that rights, like law, are both natural and unequivocally desirable. Drawing on the spectre of an unfettered majoritarianism advocates of an entrenched *Charter* argue that the more rights we have the better.[68] In particular, pride of place is given to the right to individual liberty.[69] Viewed from this perspective, the

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65 See also Hutchinson, *supra* note 22 at 22. The discussion in the text outlines the positive spin which Conklin gives to his postrationalist analysis. However, in other essays Conklin is much more pessimistic, suggesting that the *Charter* is yet another level of "juridical metalanguage" that enhances the power of lawyers at the expense of citizen participation. W. Conklin, "'Access to Justice' As Access to a Lawyer's Language" (1990) 10 Windsor Y. B. Access Just. 454.

66 M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Devlin, *supra* note 4 at 503.

67 See also Kerruish, *supra* note 2 at 141. Kerruish's approach is to identify two broad camps — "mainstream" and "socialist, feminist and critical" — whereas my approach suggests much less cohesion among her triad of progressives.

68 See, for example, T. Axworthy, "Colliding Visions: The Debate Over the Charter of Rights and Freedoms 1980-81" in Weiler & Elliot, *supra* note 4 at 13; T. Axworthy, "Liberalism and Equality" in Mahoney & Martin, *supra* note 23 at 43; Bayefsky & Eberts, *supra* note 23; N. Lyon, *supra* note 38; J. MacPherson, "Litigating Equality Rights" in Smith, *supra* note 23, 231 at 232; J. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the *Charter*" (1983) 13 Man. L. J. 455.

69 *Putting the Charter to Work*, *supra* note 22 at c. 6.

juridical history of Canada is one of inexorable (if slow) improvement as we have moved from a shaky common law regime of inchoate rights, to the statutory recognition of rights, to the constitutional entrenchment of rights.[70] Jurists who subscribe to such a perspective envision the *Charter* as a normative and institutional structure designed to encourage both the courts and the legislators to maximize human rights[71] and social justice.[72] However, if there is conflict between the legislatures and the courts, most rights advocates tend to argue that the courts should have the last word not only because they are likely to be the strongest guardians of minority interests,[73] but also because the *Charter* itself provides objective and determinative right answers.[74] Importantly, many rights theorists emphasize that the judicial enforcement of rights is grounded in principle, not policy, politics or power.[75] The call is for "judicial statesmanship"[76] and constitutional fidelity.[77]

Others, however, are unimpressed and advance several arguments against the ideology and practice of the *Charter*-ization of rights.[78] First, critics argue that

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70 See, for example, D. Baker, "The Changing Norms of Equality in the Supreme Court of Canada" (1987) 9 Sup. Ct. L. Rev. 497; D. Gibson, *Equality*, *supra* note 22 at c. 1; W. Tarnopolsky, "The Evolution of Judicial Attitudes" in Mahoney & Martin, *supra* note 23 at 378; L. Weinrib, "The Supreme Court of Canada and Section One of the *Charter*" (1988) 10 Sup. Ct. L. Rev. 469.

71 W. Lederman, "The Power of the Judges and the New Canadian Charter of Rights and Freedoms" (1982) U.B.C. L. Rev. 1; W. Lederman, "Democratic Parliaments, Independent Courts, and the Canadian Charter of Rights and Freedoms"(1985) 11 Queen's L. J. 1; P. Monahan & M. Finkelstein, "The Charter of Rights and Public Policy in Canada" (1992) 30 Osgoode Hall L. J. 501 at 507; B. Slattery, "A Theory of the Charter" (1987) 25 Osgoode Hall L. J.7 701; L. Weinrib, "Learning to Live With the Override" (1990) 35 McGill L. J. 541.

72 *Putting the Charter to Work*, *supra* note 22 at x, 10, 88, 182; N. Lyon, "An Essay on Constitutional Interpretation" 26 Osgoode Hall L. J. 95.

73 Slattery, *supra* note 71; Whyte, *supra* note 68.

74 *Talking Heads and the Supremes*, *supra* note 22 at vi, 114-16; D. Beatty & S. Kennett, "Striking Back: Fighting Words, Social Protest and Political Participation in Free and Democratic Societies" (1988) 67 Can. Bar Rev. 573.

75 *Putting the Charter to Work*, *supra* note 22 at 11-12; M. Gold, "A Principled Approach to Equality Rights: A Preliminary Enquiry" (1982) 4 Sup. Ct. L. Rev. 131; Lyon, *supra* note 38 at 245, 252; Weinrib, *supra* note 70 at 481-82, 508-13.

76 D. Gibson, "Interpretation of the Canadian *Charter of Rights and Freedoms*: Some General Considerations" in Tarnopolsky & Beaudoin, *supra* note 23, 25 at 28.

77 Lyon, *supra* note 72 at 99.

78 For an early articulation of some criticisms see R. Samek, "Untrenching Fundamental Rights" (1982) 27 McGill L. J. 755; D. Schmeiser, "The Case Against Entrenchment of a Canadian Bill of Rights" (1973) 1 Dalhousie L. J. 15. For an early assessment, see MacDonald, *supra* note 4.

judicial review is undemocratic because judges are unelected and, therefore, unaccountable.[79] Moreover, they are said to be unreflective of the class, race, gender, (dis)abilities, sexual orientations or political preferences of Canadian society-at-large.[80] Particular attention has been focused on the hostility of the courts to rights claims by unions as manifested in *Dolphin Delivery*[81] and the right to secondary picket, the *Labour Trilogy*[82] as to whether the freedom to associate includes a right to strike, and the *BCGEU*[83] case in which the right to picket, though recognized as a form of expression under section 2(b) could be justifiably restricted under section 1.[84] Inversely, the courts are identified as having a pro-business tendency in, for example, their somewhat formalistic and legalistic recognition of corporations as persons and the correlative entitlement to a panoply of *Charter* rights.[85]

Second, and closely related, is the argument that a public preoccupation with a *Charter* and rights arguments tends to subordinate and colonize other forms of political debate and mobilization. Such a dynamic priorizes litigation rather

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Some readers may be concerned that the ensuing criticisms cannot really qualify as a form of high theory. In response, as I suggested in Section II, theory is not co-extensive with either conceptualism or abstraction. I further suggest that while some of the arguments of the skeptics reflect a conceptualist theoretical method others are more contextualist, that is, they attempt to locate an abstract concept, for example "right," within formative ideological, material and institutional dynamics. To the extent that such arguments advance the proposition that concepts like rights are not free floating but irredeemably embedded in social practices, they can be understood as a form of high theory.

79 Bakan, *supra* note 36 at 169-78; Bakan, *supra* note 4; Bogart, *supra* note 22 at c. 1; J. Fudge, "Labour, The New Constitution and Old Style Liberalism" (1988) 13 Queen's L. J. 61 at 64, 68-69; Mandel, *supra* note 8 at c. 2; Monahan, *supra* note 22 at 29. But see Monahan & Finkelstein, *supra* note 71 at 507.

80 Bakan, *supra* note 4.

81 *R.W.D.S.U., Local 580* v. *Dolphin Delivery Ltd.,* [1986] 2 S.C.R 573.

82 *Re Public Service Employee Relations Act*, [1987] 1 S.C.R. 313; *PSAC* v. *Canada*, [1987] 1 S.C.R. 424; *RWDSU* v. *Saskatchewan*, [1987] 1 S.C.R. 460.

83 *B.C.G.E.U.* v. *B.C. (A.-G.)* (1988), 53 D.L.R. (4th) 1.

84 Etherington, *supra* note 4; M. MacNeil, "Courts and Liberal Ideology: An Analysis of the Application of the Charter to Some Labour Law Issues" (1989) 34 McGill L. J. 86. But see P. Weiler, "The Charter at Work: Reflections on the Constitutionalizing of Labour and Employment Law" (1990) 40 U.T.L.J. 117.

85 Hutchinson, *supra* note 22 at 32-34, 150-51; A. Petter, "The Politics of the *Charter*" (1986) 8 Sup. Ct. L. Rev. 473 at 490-93; E. Sheehy, "Regulatory Crimes and the Charter: *R.* v. *Wholesale Travel Inc.*" (1992) 3 J. Human Just. 111; C. Tollefson. "Corporate Constitutional Rights and the Supreme Court of Canada" (1993) 19 Queen's L. J. 309.

than participation,[86] and reconstructs "citizens" as "petitioners."[87] This is compounded by the danger that litigational politics tends to catapult lawyers into the position of a political vanguard, a vanguard that is disconnected from broader social causes.[88]

Third, *Charter* politics are accused of being elitist in that only the institutionally well positioned or the affluent can afford to utilize the courts[89] — the *Lavigne*[90] case is said to have cost the unions about $400,000[91] and rumour has it that LEAF may have spent up to $1 million on *Andrews*.[92]

Fourth, it is argued that in both form and structure the *Charter* advances individualism, consolidates essential capitalist legal relations and undercuts solidarity and collectivism in that it favours freedom of the individual from state intervention when a caring society requires such state intervention to equalize and redistribute social goods.[93] Former Chief Justice Dickson's liberal individualistic prognostications on the purpose of the *Charter* in *Hunter* v.

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86 Bogart, *supra* note 22 at c. 1; J. Fudge, "The Effect of Entrenching a Bill of Rights upon Political Discourse: Feminist Demands and Sexual Violence in Canada" (1989) 17 Int. J. Soc. L. 445; Monahan, *supra* note 22 at 138; J. Webber, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian *Charter* of Rights and Freedoms" (1993) 5 Canterbury L. Rev. 207 at 221-25.

87 Hutchinson, *supra* note 22 at 122; Mandel, *supra* note 8 at xi-xii. But see *Talking Heads and the Supremes*, *supra* note 22 at 147-48.

88 Conklin, *supra* note 65; S. Razack, *Canadian Feminism and the Law: The Women's Legal Education and Action Fund and the Pursuit of Equality* (Toronto: Second Story Press, 1991) at 52-58.

89 G. Brodsky & S. Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: CACSW, 1989).

90 *Lavigne* v. *OPSEU*, [1991] 2 S.C.R. 211.

91 I. Greene, *The Charter of Rights* (Toronto: J. Lorimer, 1989) at 62-63.

92 *Andrews* v. *Law Society (British Columbia)* (1989), 56 D.L.R. (4th) 1 (S.C.C.).

93 L. Apland & C. Axworthy, "Collective and Individual Rights in Canada: A Perspective on Democratically Controlled Organizations" (1988) 8 Windsor Y.B. Access Just. 44; Bogart, *supra* note 22 at 125; Brodsky & Day, *supra* note 89; R. Cairns Way, "The *Charter*, The Supreme Court and the Invisible Politics of Fault" (1992) 12 Windsor Y.B. Access Just 128; J. Fudge, "What Do We Mean by Law and Social Transformation?" (1990) 5 Can. J. Law. & Soc. 47 at 57; Hutchinson, *supra* note 22 at c. 4; Monahan, *supra* note 22, c. 5-6; A. Petter, "Immaculate Deception: The Charter's Hidden Agenda" (1987) 45(6) Advocate 857; Webber, *supra* note 86 at 218-21.

Southam,[94] *Big M Drug Mart*[95] and *Oakes*[96] often are targeted here.[97] Similarly, there has been much criticism of the Supreme Court's confirmation of the National Citizens Coalition argument that limitations on third party spending violated section 2(b) of the *Charter* because the effect was to enhance the amount of money that the corporate elite was able to donate to the federal Progressive Conservative party during the Free Trade election of 1984.[98]

Fifth, it is argued that the courts are an inappropriate forum for social policy making because: a) judges are unequipped to deal with large scale social issues; b) the exceptionalism and specificity of individual cases unduly decontextualizes the complexity of the issues;[99] and c) when legalized, all public social problems tend to be re-encoded and repackaged as issues of private individual rights which can only generate zero-sum solutions.[100] Again, labour relations are frequently cited.

Sixth, due to their abstraction, rights discourse and legal reasoning are identified as deeply indeterminate and, therefore, capable of diverse interpretations, depending on the ideological preferences of the interpreters (judges) and the contexts in which such interpretations are invoked.[101] Moreover, there is the problem of causal indeterminacy; that is, the long term and broader social impact of a particular decision or set of decisions can be extremely difficult to predict.[102] In short, the symbolism of a "rights victory" may not have

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94 *Hunter et al* v. *Southam Inc.* (1984), 11 D.L.R. (4th) 641 (S.C.C.)

95 *Regina* v. *Big M. Drug Mart* (1985), 18 D.L.R. (4th) 321 (S.C.C.).

96 *R.* v. *Oakes*, [1986] 1 S.C.R. 103.

97 Hutchinson, *supra* note 22 at 132; Mandel, *supra* note 8; Petter, *supra* note 85, 100, 101 at 493-98.

98 Mandel, *supra* note 8 at 335; Monahan, *supra* note 22 at 132-35.

99 J. Fudge, "The Public/Private Distinction: The Possibilities of and the Limits to the Use of *Charter* Litigation to Further Feminist Struggles" (1987) 25 Osgoode Hall L. J. 485 at 548; Greene, *supra* note 91 at 62-69, 222.

100 Mandel, *supra* note 8 at 175; Monahan, *supra* note 22 at 248-51; Petter, *supra* note 85 at 478; Webber, *supra* note 86 at 225-27.

101 J. Bakan, "What's Wrong with Social Rights?" in Bakan & Schneiderman, *supra* note 23 at 85, 86-87; Fudge, *supra* note 99 at 532-33; Hutchinson, *supra* note 22 at c. 2; Monahan, *supra* note 22 at 8; Petter, *supra* note 85 at 486; Webber, *supra* note 86 at 227-29. But see Beatty & Kennett, *supra* note 74.

102 Bogart, *supra* note 22 at c. 2, 5; Fudge, *supra* note 99 at 536; H. Glasbeek, "A No-Frills Look at the *Charter of Rights and Freedoms* or How Politicians and Lawyers Hide Reality" (1989) 9 Windsor Y.B. Access Just. 293 at 349-51.

any concrete social impact and, indeed, may even operate as a form of deradicalization through partial incorporation.[103]

Finally, at least one critic worries that *Charter*-ized rights can encourage a unidimensional and stultifying nationalism.[104]

Dichotomies rarely capture the full panorama of perspectives,[105] and this is as true of jurisprudentology as it is of any other form of analysis. Thus, it can be suggested that as distinct from the faithful and the skeptics there may be a third category of jurists who, very roughly, might be described as the "progressive deviationists."[106] They are united in a couple of beliefs. First, deviationists accept that, for better or worse, judicial review is a constitutional fact and that it is, therefore, essential to focus on what can best be done with this reconfiguration of social institutions. Second, they argue that rights have no inherent or essential meaning; rather, they are social constructs that have been imagined and given concrete form at certain historical conjunctures and, therefore, they are capable of being remade in the contemporary historical moment. Third, given this plasticity, rights can be reconceptualized, reinterpreted and rearticulated not solely as exclusive fences to protect the individual but also as relational and communitarian interests that entitle citizens to pursue social goods. Fourth, deviationists argue that such an open-ended vision of rights can allow for significant differential treatment and an expansive pluralist tolerance in constructing social, legal, and constitutional policies. Fifth, this pursuit of difference can be most effectively achieved if citizens and judges conceive of rights claims as part of an ongoing mutually empathetic social conversation. Unity can be grounded in the accommodation of difference. Sixth, at the level of strategy, deviationists argue: a) that negative rights are extremely valuable for those who are still the victims of discrimination; b) that rights generally can serve as a medium of personal valorization; c) that rights discourse can serve as a potent form of (counterhegemonic) consciousness-raising, resistance and mobilization and, therefore, it cannot be abandoned as a potential political platform; and d) that the achievement of a rights claim can send an important symbolic message to the broader society. Herman, Nedelsky and

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103 J. Bakan & D. Pinard, "Getting to the Bottom of Meech Lake: A Discussion of Some Recent Writings on the 1987 Constitutional Accord" (1989) 21 Ottawa L. Rev. 247; Fudge & Glasbeek, *supra* note 39 at 56-59; A. Petter, "Legitimizing Sexual Inequality: Three Early *Charter* Cases" (1989) 34 McGill L. J. 358.

104 Webber, *supra* note 86 at 230-31.

105 B. Cossman, "Dancing in the Dark" (1990) 10 Windsor Y.B. Access Just. 223.

106 R. Unger, *The Critical Legal Studies Movement* (Cambridge Mass.: Harvard University Press, 1986) at 15-22, 88-90.

Trakman are probably the most explicit spokespersons for this perspective,[107] but I would suggest that it also informs the legal philosophy of many feminists,[108] self-described egalitarian liberals,[109] and some post-liberals.[110]

The debate between rights advocates, critics, and progressive deviationists continues unabated and, as we shall see, underpins several other forms of jurisprudential analysis. However, before addressing these issues there is a second aspect of the rights debate that is pertinent to the realm of high theory: the controversy over the validity and vitality of group rights.

Specifically, section 15 (the equality provisions), sections 16-23 (language rights), section 25 (aboriginal rights), section 27 (multiculturalism) and section

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107 Herman, *supra* note 22; J. Nedelsky, "Reconceiving Autonomy: Sources, Thoughts Possibilities" in A. Hutchinson & L. Green, eds., *Law and Community: The End of Individualism?* (Toronto: Carswell, 1989) at 219 and "Law, Boundaries and the Bounded Self" (1990) 30 Representations 162; Nedelsky, *supra* note 48; Trakman, *supra* note 22. There are, of course, differences, most notably Herman's socialist feminism renders her less optimistic than Nedelsky and Trakman. Skeptics are critical of these arguments on the basis that what is theoretically possible is not politically probable, that what is intellectually plausible is not realistically persuadable. See Bakan, *supra* note 4 at 446, Fudge, *supra* note 99 at 550 and Hutchinson, *supra* note 22 at 53. It is to be noted, however, that Trakman's optimism seems to have faded as 1995 wore on. See, for example, "The Demise of Positive Liberty? *Native Women's Association of Canada* v. *Canada*" (1995) 6 Const. Forum 71; "Section 15: Equality? Where?" (1995) 6 Const. Forum 112.

108 See, for example, Brodsky & Day, *supra* note 89; Clark, *supra* note 39; Eberts et al., *supra* note 9 at c. 7; D. Greschner, "Judicial Approaches to Equality and Critical Legal Studies" in Mahoney & Martin, *supra* note 23 at 59; M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L. J. 65; H. Lessard, "Relationship, Particularity and Change: Reflections on *R.* v. *Morgentaler* and Feminist Approaches to Liberty" (1991) 36 McGill L. J. 263; Razack, *supra* note 88; C. Sheppard, "Caring in Human Relations and Legal Approaches to Equality" (1992) 2 N.J.C.L. 305.

109 See, for example, D. Dyzenhaus, "The New Positivists" (1989) 39 U.T.L.J. 361; "Regulating Free Speech" (1991) 23 Ottawa L. Rev. 289. See also B. Slattery, "Rights, Communities, and Tradition" (1991) 41 U.T.L.J. 447.

110 See, for example, A. Bartholomew & A. Hunt, "What's Wrong with Rights?" (1990) 9 Law & Inequality 1; MacDonald, *supra* note 4; W. MacKay, "Judging and Equality: For Whom Does the Charter Toll?" in Boyle et al., *supra* note 23 at 35; P. Macklem, "First Nations Self Government and the Borders of the Canadian Legal Imagination" (1991) 36 McGill L. J. 382. Also see R. Moon, "The Scope of Freedom of Expression" (1985) 23 Osgoode Hall L. J. 331; "Discrimination and its Justification: Coping with Equality Rights Under the Charter" (1988) 26 Osgoode Hall L. J. 673; "Access to Public and Private Property under Freedom of Expression" (1988) 20 Ottawa L. Rev. 339; "Lifestyle Advertising and Classical Freedom of Expression Doctrine" (1990) 36 McGill L. J. 76.

28 (women's rights) have been hotly contested *Charter* provisions. So too have been proposals for a Social Charter. While some argue that group rights are nonsensical because a group is indeterminate,[111] others point to the needs of native,[112] multicultural,[113] and minority language[114] communities to argue that collective rights are both defensible and that they fulfill an important constitutional function. Problematized by cases such as *Société des Acadiens*,[115] *Ford* v. *Quebec (A.-G.)*[116] and *Sparrow*,[117] as well as the draft legal text of the Charlottetown Accord, many legal philosophers provide us with a steady, and sometimes sustaining, diet of conceptual distinctions that operate at various levels of description and abstraction: individualism and communitarianism;[118] liberalism and communitarianism;[119] history-based groupism and liberal individualism;[120] hostile liberalism, moderately sceptical liberalism and sympathetic liberalism;[121] duality and multiculturalism;[122] multiculturalism, multinationalism and poly-ethnicism;[123] legal rights and moral rights;[124] first-

111 B. Schwartz, "Individuals, Groups and Canadian Statecraft" in Devlin, *supra* note 4 at 39.

112 D. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. Law & Jur. 19; M. McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Can. J. Law & Jur. 217; W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act 1982: Part 1 — The Interpretive Prism of Section 25" (1988) 22 U.B.C. L. Rev. 21, "Part 2 — Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207.

113 J. Magnet, "Multiculturalism and Collective Rights: Approaches to Section 27" in Beaudoin & Ratushney, *supra* note 17 at 739.

114 M. Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987); D. Réaume, "Language Rights, Remedies, and the Rule of Law" (1988) 1 Can. J. Law & Jur. 35, and "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1; L. Green & D. Réaume, "Education and Linguistic Security in the Charter" (1989) 34 McGill L. J. 777.

115 (1986), 27 D.L.R. (4th) 406 (S.C.C.).

116 [1988] 2 S.C.R. 712.

117 (1990), 56 C.C.C. (3d) 263 (S.C.C.).

118 MacDonald, *supra* note 112; Monahan, *supra* note 22 at 111-113.

119 E. Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the *Ford* Decision" (1991) 1 N.J.C.L. 283.

120 Schwartz, *supra* note 111.

121 MacDonald, *supra* note 112.

122 J. Magnet, "The *Charter's* Official Languages Provisions: The Implications of Entrenched Bilingualism" (1982) 4 Sup. Ct. L. Rev. 163.

123 W. Kymlicka, "Liberalism and the Politicization of Ethnicity" (1991) 4 Can. J. Law & Jur. 239.

124 M. Hartney, "Some Confusions Concerning Collective Rights" (1991) 4 Can. J. Law & Jur. 293.

and second-class rights;[125] inherent and contingent rights;[126] rights to collective interests and the rights of collective agents;[127] political collective rights and substantial collective rights;[128] an integrity concept of rights and an agency concept of rights;[129] fully voluntary groups, entry-voluntary groups, entrance-involuntary but exit-voluntary groups and fully involuntary groups;[130] negative liberty and positive liberty;[131] classical rights and social rights;[132] rights as individualistic, exclusionary "quasi-absolute debate stopping conclusions" and rights as relational, open-ended sites of dialogue and struggle.[133]

Thus, it seems to me that the post-rationalist turn and the various debates around rights have served both to ground and expand the imagination of high theory, particularly to the extent that such theory has, historically, been identified with the decontextualism of analytical positivism.[134]

D. The Development of Working and Middle-Order Theories

While Twining sees both of these spheres of theory as closely related, for exposition purposes he tends to separate them. I will also deal first with middle-order and then with working theory.

i) Middle-Order Theory

Twining is not as clear on this task as he is on some of the others but the suggestion is that middle theory operates in the realm between those academics who operate in the domain of high theory and those who toil in the field of legal

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125 L. Green & D. Réaume, "Second Class Rights? Principles and Compromise in the *Charter*" (1990) 13 Dalhousie L. J. 564.

126 Macklem, *supra* note 110; P. Macklem & M. Asch, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498.

127 L. Green, "Two Views of Collective Rights" (1991) 4 Can. J. Law & Jur. 315.

128 L. Jacobs, "Bridging the Gap Between Individual and Collective Rights With the Idea of Integrity" (1991) 4 Can. J. Law & Jur. 375.

129 *Ibid.*

130 J. Narveson, "Collective Rights?" (1991) 4 Can. J. Law & Jur. 329.

131 Trakman, *supra* note 22.

132 M. Jackman, "Constitutional Rhetoric and Social Justice: Reflections on the Justiciability Debate" in Bakan & Schneiderman, *supra* note 23 at 17.

133 Nedelsky, *supra* note 48; Nedelsky & Scott, *supra* note 48.

134 Much the same can be said of the debate in relation to equality rights. See, for example, "Symposium on Equality" (1994) 7 Can. J. Law & Jur. 1.

doctrinal analysis. Here the target market seems primarily to be other legal academics and the chore is to develop "fertile hypotheses to guide research and inquiry in various areas...."[135] Twining proposes that middle-order theorizing can help stimulate further scholarship, not only in "new and neglected fields of study," but also generate a "rethinking [of] old ones."[136] Whereas the conduit and high theory approaches to jurisprudence have a centrifugal dynamic, middle- order theory is more centripetal, or inward looking. It is an exercise in filling the gap between high theory and the pragmatics of practical legal discourse[137] and, as such, attempts to be a functional discourse.[138] This form of theory does not attempt to generate substantive right answers, but rather to create coherent and intelligible frames of reference within which others — lawyers, judges or other academics — can make sense of the tasks they encounter. I will suggest three examples in the *Charter* context of middle-order theorizing: the debate on the legitimacy of judicial review; the question of the application of the *Charter* and reliance upon the public/private dichotomy; and the issue of appropriate *Charter* remedies.

A review of the literature indicates that the dominant jurisprudential concern of the last fifteen years has been the issue of the legitimacy of judicial review.[139] An avalanche of interpretive theories have been advanced by Canadian theorists in order to provide guidance for the judiciary as to the proper approach to adopt in applying the *Charter*: consensualism;[140] purposivism;[141] interpretivism;[142] pragmatism;[143] social criticism;[144] egalitarian liberalism;[145] liberal legalism;[146]

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135 "Some Jobs for Jurisprudence," *supra* note 19 at 159.

136 *Ibid.* at 159-60.

137 "Evidence and Legal Theory," *supra* note 19 at 65.

138 See, for example, Sharpe, *supra* note 23.

139 Despite the intense academic enthusiasm the Supreme Court remains quite disinterested. See *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 497 per Lamer J.

140 B. Strayer, "Constitutional Interpretation Based on Consent: Whose Consent and Measured When?" in Bayefsky, *supra* note 43 at 187.

141 B. Etherington, "Freedom of Association and Compulsory Union Dues: Towards a Purposive Conception of a Freedom Not to Associate" (1987) 19 Ottawa L. Rev. 1; P. Hogg, "The Charter of Rights and American Theories of Interpretation" (1987) 25 Osgoode Hall L. J. 87.

142 Strayer, *supra* note 22 at v; R. Hawkins, "Interpretivism and Sections 7 and 15 of the Canadian *Charter of Rights and Freedoms*" (1990) 22 Ottawa L. Rev. 275.

143 P. Halewood, "Performance and Pragmatism in Constitutional Interpretation" (1990) 3 Can. J. Law & Jur. 91.

144 *Talking Heads and the Supremes*, *supra* note 22 at 250.

145 *Putting the Charter to Work*, *supra* note 22 at 10; Dyzenhaus, *supra* note 109.

146 J. Whyte, "Legality and Legitimacy: The Problem of Judicial Review of Legislation" (1987) 12 Queen's L. J. 1.

postliberal pluralism;[147] democratic communitarian proceduralism;[148] a process theory;[149] a co-ordinate model;[150] substantive rationality review;[151] institutional dialogue;[152] democratic colloquy premised upon a weak form of parliamentary sovereignty;[153] a grammatical approach in pursuit of self-understanding;[154] a philosophical, contextual and justice inspired approach;[155] a teleological interpretive discourse/practice;[156] postmodern communitarian realism grounded in a communicative ethos;[157] responsive asymmetricalism;[158] philosophical realism;[159] and "a complex partnership through institutional dialogue between supercourts and superlegislatures."[160] These analyses often are structured around a review of the relationship between the limitations clause (section 1) and substantive *Charter* provisions.[161]

The debate as to the scope of the application of the *Charter* may provide a second example of middle-order theorizing. Of particular importance here is the question of the public/private dichotomy. While some have argued that the *Charter* should only apply to state action,[162] others have argued that it should encompass a much larger range of relationships between members of society.[163]

147 Gold, *supra* note 75.

148 P. Monahan, *supra* note 22 at c. 6.

149 H. Fairley, "Enforcing the *Charter*: Some Thoughts on an Appropriate and Just Standard for Judicial Review" (1982) 4 Sup. Ct. L. Rev. 217.

150 Slattery, *supra* note 71.

151 A. Brudner, "What Are Reasonable Limits to Equality Rights?" (1986) 64 Can. Bar Rev. 469.

152 Fitzgerald, *supra* note 14.

153 Bayefsky, *supra* note 43 at 148-62.

154 B. Langille, "The Jurisprudence of Despair, Again" (1989) 23 U.B.C. L. Rev. 549.

155 Lyon, *supra* note 72.

156 Conklin, *supra* note 29.

157 Trakman, *supra* note 22 at c. 5-6.

158 Webber, *supra* note 22 at 244-59.

159 *The Law of the Charter: General Principles*, *supra* note 22 at 47, 83.

160 Weinrib, *supra* note 71 at 564-65.

161 See, for example, *Talking Heads and the Supremes*, *supra* note 22; Brudner, *supra* note 151; Monahan, *supra* note 22 at 115-17.

162 M. Pilkington, "Damages as a Remedy for Infringement of the *Canadian Charter of Rights and Freedoms*" (1984) 62 Can. Bar Rev. 517; K. Swinton, "Application of the Canadian *Charter of Rights and Freedoms*" in Tarnopolsky & Beaudoin, *supra* note 23 at 41; J. Whyte, "Is the Private Sector Affected by the Charter?" in Smith et al., *supra* note 23 at 145.

163 Brodsky & Day, *supra* note 89; R. Elliott & R. Grant, "The Charter's Application in Private Litigation" (1989) 23 U.B.C. L. Rev. 459; D. Gibson, "The Charter of Rights and the Private Sector" (1982) 12 Man. L. J. 213; M. Schumiatcher, "Property and the

Still others have pointed to the incoherence and arbitrariness of these positions because of the way they rely on dichotomous thinking engendered by liberal ideology and they invoke decisions such as *Dolphin Delivery*[164] as confirmation of the poverty of such analyses.[165] Often one's position on this debate is informed by whether one is more liberal, feminist, democratic or communitarian in one's underlying legal philosophy.[166]

The issue of legitimate *Charter* remedies provides another example of middle-order theory: assuming there is a breach of a *Charter* provision, what is the right response?[167] Canadian jurists have been particularly interested in the remedy of "reading in."[168] Some have argued that such a strategy is legitimate not just because it is implied by section 24 but also on the basis of the argument that to allow the courts only the limited remedy of striking down a provision could result in "equality with a vengeance,"[169] making more people worse off rather than making some people better off. However, others have argued that such judicial activism is of equivocal value because there can be quite negative spin-off effects.[170] Still others struggle to articulate some middle position that avoids excessive judicial interventionism while at the same time ensuring "progressive" outcomes.[171]

Canadian Charter of Rights and Freedoms" (1988) 1 Can. J. Law & Jur. 189 at 200; B. Slattery, "*Charter of Rights and Freedoms*: Does it Bind Private Persons?" (1985) 63 Can. Bar Rev. 148.

164 *Supra* note 81.

165 Fudge, *supra* note 99; Hutchinson, *supra* note 22 at c. 5; Trakman, *supra* note 22 at c. 4.

166 Y. de Montigny, "Section 32 and Equality Rights" in Bayefsky & Eberts, *supra* note 23 at 565; Elliott & Grant, *supra* note 163; *The Law of the Charter: General Principles*, *supra* note 22 at 117; H. Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology" in Boyle et al., *supra* note 23 at 107; Slattery, *supra* note 163 at 160-61; Whyte, *supra* note 162.

167 J. Cassels, "An Inconvenient Balance: The Injunction as a Charter Remedy" in J. Berryman, ed., *Remedies: Issues and Perspectives* (Scarborough: Thompson, 1991) at 271; Fitzgerald, *supra* note 14; R. Gold, "From Right To Remedy: Putting Equality to Work" (1989) 14 Queen's L. J. 213.

168 Brodsky & Day, *supra* note 89 at 86-88.

169 The phrase is attributed to M. McPhedran by Eberts [M. Eberts, "Sex-Based Discrimination and the Charter" in Bayefsky & Eberts, *supra* note 23, 183 at 224] and was reiterated in *R.* v. *Schachter*, [1992] 2 S.C.R. 679, 702.

170 Mandel, *supra* note 8 at 395-99.

171 N. Duclos & K. Roach, "Constitutional Remedies as 'Constitutional Hints:' A Comment on *R.* v. *Schachter*" (1991) 36 McGill L. Rev. 1; D. Pothier, "Charter Challenges to Underinclusive Legislation: The Complexities of Sins of Omission" (1993) 19 Queen's L. J. 261; C. Rogerson, "The Judicial Search for Appropriate Remedies Under the Charter: The Examples of Overbreadth and Vagueness" in Sharpe,

Thus, these examples indicate that middle-order theory appears to be a very popular form of jurisprudential endeavour.

ii) The Formulation of Working Theory
a) Generally

Twining posits that the jurist who operates at the level of working theory seeks "to identify, to articulate and to examine critically ..."[172] the conceptions and assumptions of law and legal practice that underlie and inform the juridical activities of various legal actors, be they lawyers, judges, law reformers or writers of textbooks. The task of the jurist in this role is:[173]

> ... systematically to examine and bring into the open the working assumptions and operative ideas of various kinds of participant in legal processes and to examine these critically in the light of some more general conceptions about the nature of our legal culture and the actual and potential role of law and lawyers in society.

A great deal of the work by *Charter* advocates tends to operate at the level of working theory. The projects of such scholars manifest at least four foci. First, they seek to broaden the categories of those who can qualify as potential rights holders under the *Charter*, for example: gays and lesbians;[174] students;[175] foreigners;[176] refugees;[177] mentally disabled persons;[178] convicted criminals;[179] and the "unskilled, unlucky, and unorganized."[180] Secondly, they seek to expand the scope of rights located in the *Charter*, for example, a right to food,[181]

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supra note 23 at 233.

172 "Some Jobs for Jurisprudence," *supra* note 19 at 159.

173 *Ibid.* at 159.

174 A. Bruner, "Sexual Orientation and Equality Rights" in Bayefsky & Eberts, *supra* note 23 at 457.

175 A. MacKay, "The Canadian Charter of Rights and Freedoms: A Springboard to Students' Rights" (1984) 4 Windsor Y.B. Access Just. 174.

176 D. Galloway, "The Extraterritorial Application of the Charter to Visa Applicants" (1991) 23 Ottawa L. Rev. 335.

177 *Talking Heads and the Supremes*, *supra* note 22 at c. 8.

178 D. Vickers & O. Endicott, "Mental Disability and Equality Rights" in Bayefsky & Eberts, *supra* note 23 at 381.

179 *Talking Heads and the Supremes*, *supra* note 22 at 175-86; H. Ryan, "The Impact of the Canadian *Charter of Rights and Freedoms* on the Canadian Correctional System" (1983) 1 Can. Hum. Rts. Y.B. 99.

180 *Putting the Charter to Work*, *supra* note 22 at 10, 88.

181 R. Robertson, "The Right to Food — Canada's Broken Covenant" (1989) Can. Hum. Rts. Y.B. 185.

welfare,[182] nude dancing,[183] and legal aid.[184] Thirdly, rights advocates suggest reforms that would engender greater public access to the court system.[185] Fourthly, they propose enhanced remedial powers for the judiciary.[186]

A significant amount of feminist legal theory may operate at the level of working theory. Much feminist analysis seeks to take seriously the *Charter's* canonization of liberty, freedom and (especially) equality but then asks why women as a class seem to be excluded from these constitutional norms. Through what might be described as a "superliberal strategy,"[187] feminists demand that the specificity of women's egalitarian rights be constitutionally recognized, thereby facilitating a transformation of the structural and material conditions of women's existence.[188]

Some gay and lesbian jurists develop similar inclusionary arguments[189] and appear to have had juridical success in having sexual orientation included as an

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182 M. Jackman, "Poor Rights: Using the *Charter* to Support Social Welfare Claims" (1993) 19 Queen's L. J. 65. But see Monahan, *supra* note 22 at 126.

183 J. Ross, "Nude Dancing and the *Charter*" (1994) 1 Rev. Const. Studies 298.

184 M.J. Mossman, "The Charter and the Right to Legal Aid" (1985) 1 J. L. & Social Pol'y 21; R. Moon, "The Constitutional Right to State Funded Counsel on Appeal" (1989) 14 Queen's L. J. 171.

185 See, for example, P. Bryden, "Public Interest Intervention in the Courts" (1987) 66 Can. Bar Rev. 490.

186 See, for example, Cooper-Stephenson, *supra* note 13.

187 R. Unger, *The Critical Legal Studies Movement* (Cambridge, Mass.: Harvard University Press, 1986) at 15-22, 41-42.

188 See, for example, K. Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9 Can. J. Law & Soc. 165 at 175; M. Eberts, "New Facts for Old: Observations on the Judicial Process" in Devlin, *supra* note 4 at 467; P. Hughes, "Domestic Legal Aid: A Claim to Equality" (1994) 2 Rev. Const. Studies 203; K. Mahoney, "Canaries in a Coal Mine: Canadian Judges and the Reconstruction of Obscenity Law" in Schneiderman, *supra* note 23 at 145; K. Mahoney, "The Limits of Liberalism" in Devlin, *supra* note 4 at 57; K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1985) 17 Ottawa L. Rev. 33; E. Zweibel, "*Thibaudeau* v. *R.*: Constitutional Challenge to the Taxation of Child Support Payments" (1994) 4 N.J.C.L. 305; S. Worth Rowley, "Women, Pensions and Equality" in Boyle et al., *supra* note 23 at 283.

189 J. Jefferson, "Gay Rights and the Charter" (1985) 43 U.T. Fac. L. Rev. 70; M. Leopold & W. King, "Compulsory Heterosexuality, Lesbians and the Law: The Case for Constitutional Protection" (1985) 1 C.J.W.L. 163; D. Sanders, "Constructing Lesbian and Gay Rights" (1994) 9 Can. J. Law & Soc. 94; B. Ryder, "Equality Rights and Sexual Orientation: Confronting Heterosexual Family Privilege" (1990) 9 Can. J. Fam. L. 39; Stychin, *supra* note 45; R. Wintemute, "Sexual Orientation Discrimination as Sex Discrimination: Same-Sex Couples and the Charter in *Mossop, Egan* and *Layland*" (1994) 39 McGill L. J. 429.

analogous ground under section 15.[190] However, other gay and lesbian scholars go beyond (heterosexual) feminist scholars, for example, by problematizing the meaning and structure of "family" and "marriage," and again appear to be having some possible success.[191]

The exercise of developing working theories is programmatic and prescriptive. It tends to be self-conscious about its aspirations and explicit about its agenda.[192] To illustrate this claim I will first review debates in relation to the equality provisions and then the Aboriginal provisions of the *Charter*.

b) Equality Provisions, ss. 15, 28.

The equality provisions of the *Charter* have, perhaps, engendered some of the most polarised theoretical analyses at the level of working theory. Two sets of jurisprudential questions arise in this sphere. First, there is the debate over the meaning of equality. Second, there is the question of how do equality rights relate to other rights and liberties enshrined in the *Charter*. Both these questions

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190 See, for example, *Veysey* v. *Correctional Services of Canada* (1989), 29 F.T.R. 74, (1990) 109 N.R. 300 (F.C.A.); *Brown* v. *British Columbia (Minister of Health)* (1990), 42 B.C.L.R. (2d) 294; *Knodel* v. *B.C.* (1991), 58 B.C.L.R. (2d) 356 (Sup. Ct.); *Haig* v. *Canada* (1992), 94 D.L.R. (4th) 1 (Ont. C.A.); *Egan and Nesbit* v. *Queen*, [1995] 2 S.C.R. 513. It is to be noted that other lesbians are critical of this "minority rights paradigm" arguing that it is premised upon a liberal and formal conception of equality that may be accommodative rather than subversive [G. Brodsky, "Out of the Closet and Into a Wedding Dress? Struggles for Lesbian and Gay Legal Equality" (1994) 7 C.J.W.L. 523; Eaton, *supra* note 39; Herman, *supra* note 22 at c. 3.] Still others have argued that the concept of sexual orientation is problematic in that it obscures the different experiences of gays and lesbians and in the pursuit of greater specificity, a lesbian legal theory should consider conceptualizing discrimination against lesbians as sex discrimination [D. Majury, "Refashioning the Unfashionable: Claiming Lesbian Identities in the Legal Context" (1994) 7 C.J.W.L. 286.] This, in turn, has raised concerns by other lesbians that such a model may not be inclusive enough, for example, in relation to lesbians of colour [C. Petersen, "Envisioning a Lesbian Equality Jurisprudence" in D. Herman & C. Stychin, eds., *Legal Inversions* (Philadelphia: Temple University Press, 1995) 118].

191 Herman, *supra* note 22 at 145-49; C. Stychin, "Novel Concepts: A Comment on *Egan and Nesbit* v. *The Queen*" (1995) 6 Const. Forum 101. But see M. Eaton,"Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1993) 1 Rev. Const. Studies 203. See also, N. Duclos, "Some Complicating Thoughts on Same Sex Marriage" (1991) 1 Law & Sexuality 31.

192 Eberts et al., *supra* note 9 at c. 7; M. Jackman, "The Protection of Welfare Rights Under the *Charter*" (1988) 20 Ottawa L. Rev. 257; MacKay, *supra* note 110.

can be most fruitfully addressed through a discussion of feminist engagements with equality.[193]

"Equality" is one of those infamous "essentially contested concepts."[194] In relation to the *Charter*, three formulations appear to be pervasive in the literature: formal equality, equality of opportunity, and substantive equality.[195] Formal equality is inspired by an aspiration for universal application. Drawing on the tradition of Aristotle, formalists posit that those who are the same should be treated alike, while those who are not the same can be treated differently. Formal equality is highly individualistic and decontextual in its analysis.[196] Consequently, it focuses its attention on discriminatory practices that are direct and intentional. Equality of opportunity (or procedural equality) attempts to deal with indirect and systemic discrimination. It recognizes that not everyone is in precisely the same position, and, therefore, it considers whether people are similarly situated either socially, economically or culturally.[197] If so, it advocates fair play and suggests that some advantages may be given to those who are disadvantaged so that they may be able to compete in a fair race.[198] However, if they are not similarly situated they can be treated differently. Substantive equality (a.k.a. equality of condition or equality of well being) tends to dislike the race analogy mostly because it is too procedural.[199] Instead, it espouses

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193 Obviously, many other jurists also contribute to the debate on equality. See, for example, Brudner, *supra* note 151; *The Law of the Charter: Equality Rights*, *supra* note 22; Gold, *supra* notes 75 and 4; D. Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?" (1991) 1 N.J.C.L. 315; D. Lepofsky & H. Schwartz, "An Erroneous approach to the Charter's Equality Guarantee: *R.* v. *Ertel*" (1988) 67 Can. Bar Rev. 115; P. Rogers, "Equality, Efficiency and Judicial Restraint: Towards a Dynamic Constitution" in Boyle et al., *supra* note 23 at 139.

194 W.B. Gallie, "Essentially Contested Concepts" (1965) 56 Proceedings of the Aristotelian Soc. 167.

195 Other frameworks of analysis have also been proposed. For example, Galloway suggests that recent Supreme Court of Canada decisions manifest three quite distinct conceptions of equality: one tied to membership, one tied to the project of equalization of socially disadvantaged groups, and one tied to human dignity. D. Galloway, "Three Models of (In)Equality" (1993) 38 McGill L. J. 64 and, "Strangers and Members: Equality in an Immigration Setting" (1994) 7 Can. J. Law & Jur. 149.

196 A. Bayefsky, "Defining Equality Rights Under the Charter" in Mahoney & Martin, *supra* note 23 at 106; Brodsky & Day, *supra* note 89 at 81.

197 *Constitutional Law in Theory and Practice*, *supra* note 22 at 92-94; *The Law of the Charter: Equality Rights*, *supra* note 22 at c. 3.

198 T. Axworthy, "Liberalism and Equality" in Mahoney & Martin, *supra* note 23 at 43; *The Law of the Charter: Equality Rights*, *supra* note 22 at c. 7; Monahan, *supra* note 22 at 127-32.

199 C. Sheppard, "Equality, Ideology and Oppression: Women and the *Canadian Charter of Rights and Freedoms*" in Boyle et al., *supra* note 23 at 195.

equality in the distribution of "social goods."[200] Advocates of substantive equality reject the sameness/difference comparative framework as indeterminate and ideologically loaded and they eschew a robust public/private dichotomy. Rather, they take as their starting point inequality, domination and disadvantage,[201] and on this foundation emphasize context specific rather than superficially neutral modes of analysis.[202] Consequently, it is argued that we should focus less on intentions and procedures and more on outcomes and effects.[203] Viewed through this prism, equality must be understood in a more caring, contextual and group-sensitive way.[204] In short, substantive equality favours fair shares and not just fair play.[205]

These arguments have had critical purchase in a series of recent cases. Feminists, for example, in order to avoid the *Bill of Rights* mentality of formal equality,[206] have emphasized not only the affirmative action provisions of section 15(2) and the interpretive mandate of section 28,[207] but also the expansive wording of section 15(1) and, in particular, the "before *and under* the

200 Brodsky & Day, *supra* note 89 at 147; L. Trakman, "Substantive Equality in Constitutional Jurisprudence: Meaning Within Meaning" (1994) 7 Can. J. Law & Jur. 27.

201 Brodsky & Day, *supra* note 89 at c. 8; K. Lahey, "Feminist Theories of (In)Equality" in Mahoney & Martin, *supra* note 23 at 71; D. Majury, "Equality and Discrimination According to the Supreme Court of Canada" (1990) 4 C.J.W.L. 407. This view is developed most fully by Catharine MacKinnon. See, for example, "Making Sex Equality Real" in Smith, *supra* note 23 at 37.

202 Eberts et al., *supra* note 9 at 21.

203 Sheppard, *supra* note 199. See also W. Black, "Intent or Effects: Section 15 of the Charter of Rights and Freedoms" in Weiler & Elliott, *supra* note 4 at 120; "Discrimination and Its Justification: Coping with Equality Rights Under the Charter," *supra* note 110.

204 C. Boyle & S. Noonan, "Prostitution and Pornography: Beyond Formal Equality" in Boyle et al., *supra* note 23 at 225; Brodsky & Day, *supra* note 89 at c. 2 & c. 7; Fudge, *supra* note 99 at 496-97; Razack, *supra* note 88 at 103; Sheppard, *supra* note 108.

205 The fair shares/fair play characterization was introduced by the political scientist Jill Vickers in "Majority Equality Issues of the Eighties" (1983) 1 Can. Hum. Rts. Y.B. 47. See also Jackman, *supra* note 182. For an argument that even the fair shares vision is too accommodationist and insufficiently transformative, see A. Bartholomew, "Achieving a Place in a Man's World: Or, Feminism with No Class" (1993) 6 C.J.W.L. 465.

206 B. Baines, "Law, Gender, Equality" in S. Burt et al., *Changing Patterns: Women in Canada*, 2nd ed. (Toronto: McClelland & Stewart, 1993) 243; Brodsky & Day, *supra* note 89 at 16, 28.

207 K. de Jong, "Sexual Equality: Interpreting Section 28" in Bayefsky & Eberts, *supra* note 23 at 493.

law" and the "equal protection and *equal benefit* of the law" provisions.[208] Such arguments were endorsed by the Supreme Court in *Brooks*[209] when it explicitly overruled its decision in *Bliss*[210] decided a mere ten years earlier. Moreover, in *Andrews,*[211] *Turpin*[212] and *Butler*,[213] the Supreme Court also seems to have accepted arguments by the feminist litigational think tank, LEAF, that the most appropriate conception of equality is one that rejects formalist and similarly-situated approaches and instead adopts a conception that focuses on "disadvantage." Such an interpretation is quite closely connected to substantive conceptions of equality, and shifts the prism of analysis from the sameness/difference paradigm to a domination/subordination paradigm.[214] Similar feminist analyses appear to have a ripple effect on non-*Charter* Supreme Court decisions such as *Janzen*,[215] *Lavallée*,[216] and *Moge*.[217] Such "victories" have encouraged other feminists to build upon these breakthroughs to argue for an enlarged sphere of influence for equality rights.[218]

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208 A. Bayefsky, "Defining Equality Rights" in Bayefsky & Eberts, *supra* note 23 at 1; W. Black & L. Smith, "The Equality Rights" in Beaudoin & Ratushney, *supra* note 17 at 557; Fudge, *supra* note 99 at 506; M.J. Mossman, "Gender, Equality and the Charter" in R. Abella, *Research Studies of the Commission on Equality in Employment* (Ottawa: Supply and Services, 1985) 299; Sheppard, *supra* note 199.

209 *Brooks* v. *Canada Safeway Ltd.,* [1989] 1 S.C.R. 1219.

210 *Bliss* v. *A.G. Canada,* [1979] 1 S.C.R. 183.

211 *Supra* note 92.

212 *R.* v. *Turpin*, [1989] 1 S.C.R. 1296; (1989), 48 C.C.C. (3d) 8 (S.C.C.)

213 *R.* v. *Butler*, [1992] 1 S.C.R. 452; (1992), 70 C.C.C. (3d) 129.

214 Eaton, *supra* note 39 at 133-34; C. Sheppard, "Recognition of the Disadvantaging of Women: The Promise of *Andrews* v. *Law Society of British Columbia*" (1989) 35 McGill L. J. 206. But see A. Bayefsky, "A Case Comment on the First Three Equality Rights Cases Under the Canadian: Andrews, Workers' Compensation Reference, Tupin" (1990) 1 Sup. Ct. L. Rev. (2d) 503 and D. Gibson, "Equality For Some" (1991) 40 U.N.B.L.J. 2.

Herman argues that even this version of equality may not go far enough because there is a real danger that the recognition of gay and lesbian equality rights is premised upon an immutability (or status) argument (as opposed to a choice or conduct argument) which, in turn, is premised upon an unproblematized assumption of heterosexual normality. Herman, *supra* note 22 at c. 3. See also C. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Can. J. Law & Jur. 49.

215 *Janzen* v. *Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252.

216 *R.* v. *Lavallée*, [1990] 1 S.C.R. 852.

217 *Moge* v. *Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.).

218 See, for example, C. Boyle, " The Role of Equality in Criminal Law" (1994) 58 Sask. L. Rev. 203; Jackman, *supra* note 182 and "Constitutional Contact with the Disparities in the World: Poverty as a Prohibited Ground of Discrimination Under the Canadian Charter and Human Rights Law" (1994) 2 Rev. Const. Studies 76; H. Lessard, "Equality and Access to Justice in the Work of Bertha Wilson" (1992) 15 Dal. L. J. 35;

This contextual and substantive conception of equality has also had repercussions for the second category of equality issues: the relationship between the equality provisions and other rights, liberties and freedoms outlined in the *Charter*.[219] Feminists have pointed to section 28 (which, they note, cannot be overridden by section 33) to argue that when read in conjunction with section 15, equality should be understood as an anchor right which should prevail if it conflicts with another right.[220] This prioritization of equality rights appears to have been accepted, to some degree, by McIntyre J. in *Andrews*.[221]

Perhaps the classic and most controversial example of such theorizing is to be found in relation to the pornography debate in which feminist anti-pornography jurists have invoked the equality rights of sections 15 and 28 against the freedom of expression provisions of section 2(b) invoked by pornographers and liberals.[222] Similar patterns of analysis have emerged in the

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C. Sheppard, *Study Paper on Litigating the Relationship between Equity and Equality* (Toronto: Ont. L.R.C., 1993).

There are, however, strong indications that this feminist interpretive influence may have been short-lived. In the recent trilogy of *Miron*, *Egan* and *Thibaudeau*, [1995] 2 S.C.R. 418, 513, 627, a majority of the Supreme Court seem to have reconsidered the appropriateness of the "disadvantaged" approach, and through the idea of "relevancy" retreated to a similarly situated, sameness of treatment or reasonableness approach to equality. For a discussion of these cases, see B. Berg, "Fumbling Towards Equality: Promise and Peril in *Egan*" (1995) 5 N.J.C.L. 263; D. Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress" (1996) 6 N.J.C.L. 295; R. Wintemute, "Discrimination Against Same-sex Couples: Sections 15(1) and 1 of the Charter, Egan & Nesbit v. *Canada*" (1995) 74 Can. Bar Rev. 682.

219 L. Clark, "Liberty, Equality, Fraternity — and Sorority" in Bayefsky, *supra* note 43 at 261.

220 Eberts, *supra* note 169 at 217-18 arguing that ss. 15 & 28 have priority over ss. 25 & 35. See also de Jong, *supra* note 207 at 522-23 and P. Hughes, "Feminist Equality and the Charter: Conflict with Reality?" (1985) 5 Windsor Y.B. Access Just. 39.

221 *Supra* note 92.

222 M. Alexander, "Censorship and the Limits of Liberalism" (1988) 47 U.T. Fac. L. Rev. 58; L. Arbour, "The Politics of Pornography: Towards an Expansive Theory of Constitutionally Protected Expression" in Weiler & Elliott, *supra* note 4 at 294; Busby, *supra* note 188 at 183; P. Hughes, "Pornography: Alternatives to Censorship" (1985) 9 Can. J. Pol. & Soc. Theory 96; K. Lahey, "The Charter and Pornography: Toward a Restricted Theory of Constitutionally Protected Expression" in Weiler & Elliott, *supra* note 4 at 265; "The Canadian Charter of Rights and Pornography: Toward a Theory of Actual Gender Equality" (1984-1985) 20 New England L.R. 649; K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1985) 17 Ottawa L. Rev. 33. See also D. Dyzenhaus, "Pornography and Public Reason" (1994) 7 Can. J. Law & Jur. 261.

Parallel arguments were also developed in the context of anti-hate propaganda legislation, and again the argument that s. 15 (this time in conjunction with s. 27)

sexual assault context where accused men have claimed that the rape shield provisions of the *Criminal Code* violate their right to a fair trial under section 11 and feminists have replied that these are trumped by sections 15 and 28.[223] Clearly, feminists have been crucial and influential formulators of working theory.[224]

However, not all feminists have been as optimistic as either liberal feminists in their accommodation to the "paradigm shift" engendered by the *Charter*,[225] or radical feminist deviations with, and revolutionary reconstructions of, the *Charter*.[226] For example, some feminists have queried just how flexible *Charter* language might be[227] and identified just how channelling and constraining

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trumps, seems to have been persuasive in *R.* v. *Keegstra*, [1990] 3 S.C.R. 697. See, for example, K. Mahoney, "*R.* v. *Keegstra*: A Rationale for Regulating Pornography?" (1992) 37 McGill L. J. 242. However, the argument seems to have failed in *R.* v. *Zundel* (1992), 95 D.L.R. (4th) 202 (S.C.C.). See also the important intervention by R. Moon, "Drawing Lines in a Culture of Prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) 26 U.B.C.L. Rev. 99.

223 For a discussion see E. Sheehy, "Canadian Judges and the Law of Rape: Should the *Charter* Insulate Bias?" (1989) 21 Ottawa L. Rev. 741.

224 The feminist embracement of equality discourse has also had an impact on other areas. For example, LEAF intervened in *Canadian Newspapers Co. Ltd.* v. *Canada (A.G.)* (1988), 43 C.C.C. (3d) 24 (S.C.C.) to argue against the corporate plaintiff's claim that its entitlement to freedom of expression was infringed by the prohibition in the Criminal Code against the publication of the names of victims of sexual assault if the victim requested. The Court, at least indirectly, accepted the equalitarian argument of LEAF that this provision was justifiable because violence against women inhibits their social equality and that anonymity is essential to encourage reporting of sexual assaults. LEAF's factum in *Borowski* v. *Canada (A.G.)* (1989), 47 C.C.C. (3d) 1 (S.C.C.), also attempted to conceptualize abortion as an equality issue, while a similar analysis was unsuccessfully argued in relation to standing in *Canadian Council of Churches* v. *Canada* (1992), 88 D.L.R. (4th) 193. See S. McIntyre, "Above and Beyond Equality Rights: *Canadian Council of Churches* v. *The Queen"* (1992) 12 Windsor Y.B. Access Just. 293.

Substantive equality analysis has also loomed large in feminist jurists discussions of constitutional reform. For example, Baines has argued against the Meech Lake Accord because of the dangers it posed for women's equality rights. B. Baines, "An Alternative Vision of the Meech Lake Accord" (1988) 13 Queen's L. J. 1.

225 R. Abella, "The Dynamic Nature of Equality" in Mahoney & Martin, *supra* note 23 at 3; Clark, *supra* note 39; K. Mahoney, "The Constitutional Law of Equality in Canada" (1992) 44 Maine L. Rev. 229; L. Smith, "A New Paradigm for Equality Rights" in Smith et al., *supra* note 23 at 353, "Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992) 55 Law & Contemp. Prob. 211.

226 Busby, *supra* note 188; Razack, *supra* note 88 at 104, 107, 126.

227 S. Noonan, "Harm Revisited: *R.* v. *Butler*" (1992) 4 Const. Forum 12.

constitutional discourse can be.[228] Others have highlighted the way in which the equality and other provisions of the *Charter* have been used against women thereby forcing feminist organizations into problematic and expensive defensive strategies.[229] *Hess*[230] and *Seaboyer*[231] are invoked as examples of the trumping argument failing miserably.[232] So too might *Daviault*.[233] Other observers have identified the dangers inherent in the "categorization game" and have argued that the courts (and indeed feminists themselves) appear to be unable to deal with complex and overlapping identities, for example, on the basis of race, class or sexual orientation.[234]

Similar debates have been generated by feminist adaptations of section 7, the liberty principle, explicitly in the example of Wilson J.'s decision in *Morgentaler*,[235] and how in reality such an approach may not necessarily

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228 P. Hughes, "The Morgentaler Case: Law as Political Tool" in E. Bennett, ed., *Social Intervention: Theory and Practice* (Toronto: Edwin Mellen Press, 1987) at 255; E. Sheehy, "Feminist Argumentation before the Supreme Court of Canada in *R.* v. *Seaboyer*; *R.* v. *Gayme*: The Sound of One Hand Clapping" (1991) 18 Melbourne U.L. Rev. 450.

229 Brodsky & Day, *supra* note 89; M. Eaton & C. Petersen "Case Comment: *Andrews* v. *Ontario (Minister* of Health)" (1987) 2 C.J.W.L. 416; Fudge, *supra* note 99; Fudge, *supra* note 86; Petter, *supra* note 103.

230 *R.* v. *Hess and Nguyen*, [1990] 2 S.C.R. 906.

231 *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577.

232 Fudge & Glasbeek, *supra* note 39 at 54; L. MacDonald, "Promoting Social Equality through the Legislative Override" (1994) 4 N.J.C.L. 1; D. Majury, "*Seaboyer* and *Gayme*: A Study In Equality" in J. Roberts & R. Mohr, *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) 268; Sheehy, *supra* note 228. But see C. Boyle & M. MacCrimmon, "*R.* v. *Seaboyer*: A Lost Cause?" (1992) 7 C.R. (4th) 225; S. McIntyre,"Redefining Reformism: The Consultations that Shaped Bill C-49" in Roberts & Mohr, *ibid.* 293; E. Shilton & A. Derrick, "Sex Equality and Sexual Assault: In the Aftermath of *Seaboyer*" (1991) 11 Windsor Y.B. Access Just. 107.

233 *R.* v. *Daviault*, [1994] 3 S.C.R. 63.

234 Bartholomew, *supra* note 205; N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L. J. 179. See also, J. Bakan et al., "Developments in Constitutional Law: The 1993-1994 Term" (1995) 6 Sup. Ct. L. Rev. (2d) 67; M. Eaton, "Patently Confused: Complex Inequality and *Canada* v. *Mossop*" (1993) 1 Rev. Const. Studies 203; L. Philips & M. Young, "Sex, Tax and the *Charter*: A Review of *Thibaudeau* v. *Canada*" (1994) 2 Rev. Const. Studies 221; Sheehy, *supra* note 228; C. Stychin, "Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada" (1995) 8 Can. J. Law & Jur. 49.

235 *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30. See, for example, L. Smith, "Adding a Third Dimension: The Canadian Approach to Constitutional Equality Guarantees" (1992) 55 Law & Contemp. Problems 211 at 230-31; L. Weinrib, "The *Morgentaler* Judgment: Constitutional Rights, Legislative Intention, and Institutional Design" (1992) 42

improve women's access to abortion because it reconstitutes the public/private dichotomy[236] and relies on quite problematic liberal assumptions.[237]

Moreover, Mary Ellen Turpel challenges both the cultural imperialism of the *Charter* framework and, specifically, the discourse of gender equality. Invoking Audre Lourde's famous aphorism that "the master's tools cannot dismantle the master's house," she argues in obvious rebuttal to some feminist analyses[238] that equality is "simply not the central organizing political principle" of First Nations communities.[239] Instead, she advocates in favour of cultural self-determination and suggests that the problem of "patronage is not universal."[240] Thus, for Turpel, sexism within the First Nations communities is a by-product of colonialism that can only be remedied once "cultural" self-determination has been addressed. Poignantly, she argues that because many white feminists favour state intervention and a "preconceived notion of gender equality,"[241] they may run the danger of paternalism in relation to First Nations women.[242]

This debate provides a useful bridge to the second domain of working theory, the Aboriginal provisions.

c) Aboriginal Provisions

There is little within the *Charter* itself that relates to First Nations people. Although First Nations lobbied in the early 1980s for a constitutional declaration that their original rights under treaties and the *Royal Proclamation* of 1763 should be reinstated, federal and provincial procrastination thwarted such

U.T.L.J. 22.

236 Fudge, *supra* note 99 at 544; H. Lessard, "Creation Stories: Social Rights and Canada's Social Contract" in Bakan & Schneiderman, *supra* note 23 at 101, 110-11; See also Bogart, *supra* note 22 at 152-53.

237 B. Cossman, "The Precarious Unity of Feminist Theory and Practice: The Praxis of Abortion" (1986) 44 U.T. Fac. L. Rev. 85.

238 Eberts, *supra* note 169 and de Jong, *supra* note 207.

239 M.E. Turpel, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" (1993) 6 C.J.W.L. 174 at 180.

240 *Ibid.*

241 *Ibid.* at 188.

242 For an attempt to mediate these two apparently contradictory positions by focusing on s. 35(4) see D. Greschner, "Aboriginal Women, the Constitution and Criminal Justice" (1992) U.B.C. L. Rev. (Special Ed.) 338.

Francophone feminists have expressed a similar argument in the context of the relationship between the distinct society clause of the Meech Lake Accord and the *Charter* when many Anglo feminists feared that their equality rights were in danger.

demands. In lieu, all that the First Nations were able to attain within the *Charter* was section 25, a saving provision which instructs judges not to interpret the *Charter* "so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada." Although they are not part of the *Charter,* I think that sections 35 and 37 are also relevant in that they have a direct impact upon debates around the *Charter*. Section 35 "recognizes and affirms ... existing Aboriginal and treaty rights of the Aboriginal peoples of Canada." Section 37 provides for a series of First Ministers conferences on Aboriginal affairs, a process which, from the First Nations perspective, achieved very little.[243] Finally, section 15, the generic equality provision, also applies to First Nations peoples.[244]

Most of the scholarship on the Aboriginal provisions tends to be doctrinal. These prophylactic efforts attempt to make sense of the deeply ambiguous sections so as to enhance potential rights claims by the First Nations.[245] Surprisingly, section 25 has generated very little jurisprudential analysis.[246] However section 35 has encouraged several scholars to articulate some broader working theory of its effect: that it entrenches a constitutional trust;[247] that it signifies a constitutional commitment of honour;[248] that it operates as a distinct and special Charter for Aboriginal peoples;[249] or more radically still, that it is a constitutional acknowledgement of an already existing, continuing and inherent (as opposed to contingent) right of self determination/government.[250] These

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243 M. Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change" in K. McRoberts & P. Monahan, *The Charlottetown Accord, the Referendum and the Future of Canada* (Toronto: University of Toronto Press, 1993) at 117.

244 Sanders suggests that s. 27 might also have some indirect influence. D. Sanders, "Article 27 and the Aboriginal People's of Canada" in *Multiculturalism and the Charter*, *supra* note 23 at 155.

245 See, for example, K. McNeil, "The Constitution Act, 1982, Sections 25 and 35" (1988) 1 C.N.L.R. 1; W. Pentney, *supra* note 112; D. Sanders, "The Rights of the Aboriginal Peoples of Canada" (1983) 61 Can. Bar Rev. 314; B. Slattery, "The Constitutional Guarantee of Aboriginal and Treaty Rights" (1982) 8 Queen's L. J. 232.

246 But see Pentney, *ibid.*

247 B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Can. Bar Rev. 261.

248 Lyon, *supra* note 72 at 101.

249 Lyon, *supra* note 38 at 243, 246.

250 J. Borrows, "A Genealogy of Law: Inherent Sovereignty and First Nations Self-Government" (1992) 30 Osgoode Hall L. J. 291; "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C.L. Rev. 1; B. Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (Montreal & Kingston: McGill-Queen's University Press,

readings, in turn, have led some authors to argue that there is a constitutional mandate to recognize and promote culturally-specific Aboriginal criminal justice systems.[251]

It was the decision in *Sparrow*,[252] however, which most obviously has cranked the jurisprudential mill. In particular, jurists have concentrated on the Supreme Court's determination that although section 35 recognized the *sui generis* nature of Aboriginal rights, such rights were still subject to a reasonableness standard analogous to that of section 1, even though section 1 does not apply to section 35 because the latter is not part of the *Charter*. This has raised important questions about appropriate judicial interpretive method, paternalism, colonialism, conceptions of the rule of law and sovereignty, judicial supremacism, and equality (of peoples).[253]

At the most profound political and jurisprudential level, some have argued that the *Charter* is deeply problematic from a First Nations perspective not only because it was imposed upon First Nations peoples without consent,[254] but also because it represents modes of thought and social relations that are said to be incompatible with the aspiration for self-determination. There is also the problem of the rights of internal minorities.[255] This is exemplified, as already noted, in the debate about the relationship between self-government/ determination, gender and race and whether equality (and indeed which version of equality[256]) should be seen as the trumping constitutional norm.[257] Such concerns have surfaced most recently in relation to the Charlottetown Accord whereby First Nations were recognized as constituting a "third order of

1990); M. Asch & P. Macklem, "Aboriginal Rights and Canadian Sovereignty: An Essay on *R.* v. *Sparrow*" (1991) 29 Alta. L. Rev. 498.

251 See, for example, P. Macklem, "Aboriginal Peoples, Criminal Justice Initiatives and the Constitution" (1992) U.B.C. L. Rev. (Special Ed.) 280.

252 (1990), 56 C.C.C. (3d) 263 (S.C.C.).

253 Asch & Macklem, *supra* note 250; W Binnie, "The Sparrow Doctrine: Beginning of the End or End of the Beginning?" (1990) 15 Queen's L. J. 217; Clark, *supra* note 250 at 201; Macklem, *supra* note 110; K. McNeil, "Envisaging Constitutional Space for Aboriginal Governments" (1993) 19 Queen's L. J. 95.

254 L. Green, "Aboriginal Peoples, International Law and the Canadian *Charter of Rights and Freedoms*" (1983) 61 Can. Bar Rev. 339 at 350.

255 L. Green, "Internal Minorities and Their Rights" in J. Baker, ed., *Group Rights* (Toronto: University of Toronto Press, 1994) 101.

256 Greschner, *supra* note 242.

257 W. Moss, "Indigenous Self-Government in Canada and Sexual Equality under the *Indian Act*: Resolving Conflicts Between Collective and Individual Rights" (1990) 15 Queen's L. J. 279; D. Sanders, "The Renewal of Indian Special Status" in Bayefsky & Eberts, *supra* note 23 at 529.

government," possessing significant powers for self-government.[258] Most importantly, the Accord acknowledged that First Nations could potentially avoid the application of the *Charter* on the basis of the incommensurability argument.

This exclusion caused concern among some Aboriginal women who argued (contrary to Turpel's position[259]) that they required the protection of the equality provisions of the *Charter* against potential sexual discrimination within the Aboriginal community.[260] Recently, it has been suggested that one way to resolve this apparent jurisprudential impasse would be to develop parallel Aboriginal Charters of Rights reflecting First Nations' worldviews.[261] The lack of specificity of such proposals at this point in time makes it difficult to determine if the incommensurability problem can be resolved.

In sum, what these various examples of working theory suggest is that contemporary Canadian jurists believe that legal doctrine matters, but that doctrine is not simply a matter of rules. Rather, legal doctrine is inevitably dependent upon juridically significant background assumptions and social visions and that the role of the legal theorist is to engage in the articulation of these assumptions and visions, to translate needs and aspirations into juridical form.

E. The Synthesizing Function

In a sense, the synthesizing function can be understood as a method of taking stock, of creating an inventory of where legal thought is at. Twining's preferred metaphor here is that of a map. In this realm, the function of the jurist is:[262]

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258 Webber, *supra* note 22 at 170-72.

259 *Supra* note 66. For Turpel's reply see *supra* note 243 at 132-35.

260 T. Nahanee, "Dancing with a Gorilla: Aboriginal Women, Justice and the Charter" in *Aboriginal Peoples and the Justice System* (Ottawa: Supply and Services, 1993) at 359. For discussions see J. Green, "Constitutionalising the Patriarchy: Aboriginal Women and Aboriginal Government" (1993) 4 Const. Forum 110; T. Isaac & M. Maloughney, "Dually Disadvantaged and Historically Forgotten?: Aboriginal Women and the Inherent Right of Aboriginal Self-Government" (1992) 21 Man. L. J. 453; R. Sigurdson, "The Left-Legal Critique of the *Charter*: A Critical Assessment" (1993) 13 Windsor Y.B. Access Just. 117 at 136-37.

261 See, for example, M. Turpel & P. Hogg, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can. Bar Rev. 187, 213-16; Isaac & Maloughney, *ibid.*

262 "Some Jobs for Jurisprudence," *supra* note 19 at 160.

> to chart, and where appropriate, to redesign the general map of the intellectual milieu of the law ... to explore and articulate general frames of reference for law as an academic discipline.

In the *Charter* context, particularly in relation to interpretive theories and politico-juridical positioning, a host of authors have attempted to map the field: Bakan and Beatty are manichean, splitting the terrain between sceptics and believers;[263] Weiler identifies pure-market libertarians (a non-existent breed in Canada), liberal romantics, radical cynics, and pragmatic pluralists;[264] Etherington talks about realists, liberal romantics, and liberal pragmatists;[265] while Herman spotlights debunkers, promoters, reactionaries, and pragmatists.[266] The present essay would probably fall into this category.

F. The Ideological Function

This is not a job for legal theory as is expressly addressed by Twining, although he does make one cursory comment on suggestions by "radical jurists" as to the legitimation function of jurisprudence.[267] What I am a trying to suggest here is the role that jurists can play in identifying the intersections between law and power, and the way in which law and lawyers (in which category I include legal academics) both constitute and are constituted by such power. More particularly, this category will help us to identify the stances that legal theorists take when they come to terms with such intersections.[268] Thus, while on one level it might have been appropriate to treat this category as a sub-category of the conduit function insofar as it draws clearly on insights from other disciplines, such an approach would deflate the question of the importance the ideological dimensions of jurisprudence.

The concept of "ideology" is, of course, indeterminate. Generally, however, it can be understood as a prism through which one comes to terms with the relationship between ideas and reality. More precisely, and factoring in the crucial variable of power, there is a helpful insight to be called from Thompson's proposition that "[t]o study ideology ... is to study the ways in which meaning (or signification) serves to sustain relations of domination."[269]

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263 Bakan, *supra* note 4; *Talking Heads and the Supremes*, *supra* note 22 at 244.

264 Weiler, *supra* note 84.

265 Etherington, *supra* note 4.

266 Herman, *supra* note 4.

267 "Some Jobs for Jurisprudence," *supra* note 19 at 160.

268 See also DeCoste, *supra* note 4, Lahey, *supra* note 222.

269 J.B. Thompson, *Studies in the Theory of Ideology* (Cambridge: Polity, 1984) at 4.

In other words, the concept of ideology enables us to think about the way in which our modes of thought (re)present and filter material practices and experiences to us. Ideology takes seriously the relationship between knowledge and power not just in the sense that to have knowledge is to have power, but more in the sense that power relations constitute the nature, quality, categories and parameters of the knowledge that is available. This is particularly important for jurisprudence (and in particular *Charter* jurisprudence) because legal theory is not only passive and disinterested reflection on the nature and function of law; rather, it is, as the Australian jurist Valerie Kerruish argues, a proactive meaning disseminating practice, a cultural product.[270] Thus, in this section I want to suggest that those who have proclaimed "the end of ideology"[271] have been premature, at least in the context of Anglophone Canadian legal theory.

Ideologies can operate in a variety of ways. In its crudest form, ideology is associated with ideas of a conspiracy thesis through which the dominant elites maintain their power, not only by direct force but also by the process of inculcating in the oppressed classes a false consciousness. Few *Charter* scholars support such a conspiracy thesis.[272] A more cautious version suggests that such are the formative contexts of judges that they almost inevitably identify with and legitimize the perspectives of the elite of Canadian society.[273] *Charter* decisions, particularly in the realm of labour law, have provided a great deal of data to support such analyses.[274]

The debate over whether property/economic rights can or should be included as *Charter* rights is a good example of where the competing ideologies surface. While some argue in favour of such rights because property is in essence a natural right, liberty's "siamese twin,"[275] others concur because it may provide minimum opportunities and rights for the dispossessed.[276] Others are opposed to locating such rights in the *Charter* either because it smacks of illegitimate

270 Kerruish, *supra* note 2 at 196.

271 F. Fukuyama, "The End of History?" National Interest (Summer 1989).

272 On occasion, Mandel comes close, *supra* note 8 at 125, 202, 257.

273 See, for example, Bakan, *supra* note 4; Fudge, *supra* note 8; Mandel, *supra* note 8 at 123; Petter, *supra* note 85, 100, 101 at 486-89.

274 Etherington, *supra* note 4.

275 Schumiatcher, *supra* note 163 at 235.

276 D. Beatty, "Comment on Schumiatcher" (1988) 1 Can. J. Law & Jur. at 224; R. Sharpe, "Comment on Schumiatcher" (1988) 1 Can. J. Law & Jur. at 223; Whyte, *supra* note 68.

judicial activism,[277] or because of the dangers of further enhancing corporate power in Canada.[278] Similar ideological divisions are manifest in the debates over constitutionally protecting commercial expression under section 2(b).[279]

Similarly, it could be suggested that the debates on the legitimacy and effectiveness of the section 33 override provision (the technical legal questions of its relationship to section 1 and whether a court can review a legislature's invocation of the section procedurally or substantively) necessitates an articulation of competing conceptions of democracy.[280] Moreover, it brings into particularly sharp relief the differences between those whose primary fidelity is to a deontological and individualistic worldview and those who subscribe to a more communitarian and majoritarian worldview.[281]

A more subtle theory still of ideology, argues in favour of false necessity analysis, that is, that ideology functions best by portraying certain beliefs as natural, inevitable, self-evident and therefore unchallengeable.[282] Such necessitarianism is, in Bourdieu's terms, "doxa," a belief structure that so closely dovetails with common sense that it seems absurd to even question it.[283] Alternative ideas, practices or modes of social interaction are simply unimaginable and inconceivable. Examples might be the assumption that

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277 G. Brandt, "Right to Property as an Extension of Personal Security" (1983) 61 Can. Bar Rev. 398 at 401; S. Green, "The Charter and Economic Regulation" (1983) Pitblado Lectures 38.

278 R. Bauman, "Liberalism and Canadian Corporate Law" in Devlin, *supra* note 4 at 75, "Living in a Material World: Property Rights in the *Charter*" (1992) 3 Const. Forum 49.

279 See, for example, S. Braun, "Should Commercial Speech Be Accorded Prima Facie Consti-tutional Recognition Under the Canadian Charter of Rights and Freedoms?" (1986) 18 Ottawa L. Rev. 37; Hutchinson, *supra* note 22 at 198-202; W. MacKay, "Freedom of Expression: Is it all Just Talk?" (1989) 68 Can. Bar Rev. 713, 740-42; R. Sharpe, "Commercial Expression and the Charter" (1987) 37 U.T.L.J. 229; R. Sharpe, "A Comment on Allan Hutchinson's "Money Talk: Against Constitutionalizing Commercial Speech" (1990) 17 Can. Bus. L. J. 35.

280 D. Greschner & K. Norman, "The Courts and Section 33" (1987) 12 Queen's L. J. 155. See also S. Scott, "Entrenchment by Executive Action: A Partial Solution to 'Legislative Override'" (1982) 4 Sup. Ct. L. Rev. 303; B. Slattery, "Override Clauses Under Section 33" (1983) 61 Can. Bar Rev. 391; J. Whyte. "On Not Standing for Notwithstanding" (1990) 28 Alta. L. Rev. 347.

281 Compare, for example, Weinrib, *supra* note 71 and P. Weiler, "The Evolution of the Charter: A View from the Outside" in Weiler & Elliott, *supra* note 4 at 49.

282 R.M. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (New York: Cambridge University Press, 1987).

283 P. Bourdieu, *Outline of a Theory of Practice* (New York: Cambridge University Press, 1977).

individual rights are by definition a good thing,[284] the presupposition that the individual is the foundational unit of social analysis[285] or the belief that constitutional decision making is principled rather than political.[286]

"Heterodoxy" occurs when someone challenges the self-evidence of such truisms as to the virtue of individual rights. Heterodox jurists, as we have seen, advance several arguments against *Charter* ideology and discourse. "Orthodoxy" is a response to heterodoxy's challenge to doxa, the articulation of justifications for that which had formerly been taken for granted. Schwartz's rejection of Aboriginal rights claims is a good example of such orthodoxy[287] as are Smith's pragmatism in defense of feminist struggles with the equality provisions,[288] Dyzenhaus' egalitarian liberalism,[289] and Slattery's transcendent but practical defence of judicial decision making.[290]

The collective rights debate provides a useful illustration of this discursive spiral of doxa, heterodoxy and orthodoxy. Historically, within a liberal dominated frame of reference, it has been assumed that in their nature and by definition rights are essentially individualistic, and, therefore, any conception of group rights is simply nonsensical.[291] This would be doxa. However, as already discussed, over the last decade or so there have been increasing demands for the recognition of collective rights.[292] This might be heterodoxy. In reply, liberals have been forced to give reasons why there should be no recognition of collective rights, why rights should be preserved to an individualistic paradigm.[293] This is orthodoxy.[294]

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284 See, for example, Tarnopolsky & Beaudoin, *supra* note 23.

285 B. Schwartz, *supra* note 111.

286 See, for example, Putting the Charter to Work, *supra* note 22.

287 Schwartz, *supra* note 111.

288 L. Smith, "Have the Equality Rights Made Any Difference?" in Bryden, *supra* note 23 at 60.

289 Dyzenhaus, *supra* note 109.

290 B. Slattery, "Are Constitutional Cases Political?" (1989) 11 Sup. Ct. L. Rev. 507.

291 Jacobs, *supra* note 128.

292 Bakan & Schneiderman, *supra* note 23; Johnston, *supra* note 112; W. Kymlicka, *Liberalism, Community, and Culture* (New York: Oxford University Press, 1989); D. Réaume, "The Group Right to Linguistic Security: Whose Right, What Duties?" in Baker, *supra* note 255 at 118; Trakman, *supra* note 22 at c. 3.

293 See, for example, P. Benson, "The Priority of Abstract Right, Constructivism, and the Possibility of Collective Rights in Hegel's Legal Philosophy" (1991) 4 Can. J. Law & Jur. 257; Hartney *supra* note 124; Narveson *supra* note 130.

294 See, for example, L. Weinrib et al., "Legal Analysis of the Draft Legal Text of October 12, 1992" (unpublished manuscript).

Gramsci's thoughts on "traditional" and "organic" intellectuals might also have some purchase in an analysis of the ideological context of *Charter* scholarship.[295] Traditionally, intellectuals have tended to be contemplative thinkers, scholars in the idealist tradition who seek a truth uncontaminated by politics, experience, identity or other partisan variables. The goal is the pursuit of objectivity, neutrality, and impartiality. Organic intellectuals, by contrast, deny the possibility of ever achieving such a "view from nowhere" to advocate the contrary argument that theory and experience are mutually constitutive. As members of oppressed social classes, they emphasize the pervasiveness of perspectivism and, as self-conscious representatives of their social group, they strive to articulate the world view or vision that captures the standpoint or location that they represent. Organic intellectuals criticise the purism of the traditionalists as theoreticist and, therefore, complicitous in the perpetuation of oppressive social relations. Instead, organic intellectuals advocate a transformativist conception of theory: that the only legitimate purpose of theory is to help advance progressive political practice.[296] Examples of such organic jurists might include advocates of lesbian and gay rights,[297] First Nations spokespersons,[298] people of colour,[299] disability rights activists,[300] or feminist practitioners.[301] It is more difficult to identify organic intellectuals on the basis of their class, because by the time one reaches the heady plateau of jurisprudence, one has more than likely become a member of the middle class and therefore is distanced from the working class community.[302]

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295 A. Gramsci, *Selections From Prison Notebooks of Antonio Gramsci* (New York: International Publishers, 1972) at 5-23.

296 In this sense, at least they are the heirs of Marx's XI thesis on Fuerbach: "The philosophers have only interpreted the world in various ways; the point is, to change it." See L.D. Easton & K.H. Sudat, eds., *Writings of the Young Marx on Philosophy and Society* (Garden City, New York: Doubleday, 1967) at 402. See also, E. Gross, "What is Feminist Theory?" in Pateman C. and Gross E., *Feminist Challenges: Social and Political Theory* (Boston: Northeastern U. Press, 1987) at 190 .

297 Herman, *supra* note 22; C. Stychin, "A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination" (1994) 17 Dalhousie L. J. 61.

298 Borrows, *supra* note 250; Johnston, *supra* note 112; Turpel, *supra* note 66.

299 Iyer, *supra* note 234.

300 D. Lepofsky, "The Canadian Judicial Approach to Equality Rights: Freedom Ride or Roller Coaster?" (1991) N.J.C.L. 315; Pothier, *supra* note 218.

301 Eberts et al., *supra* note 9 at 3-4; Eberts, *supra* note 188; Lahey, *supra* note 222; Mahoney, *supra* note 188.

302 But see Fudge and Glasbeek's spirited defence of class analysis in the face of identity jurisprudence, *supra* note 39 and Mandel, *supra* note 8 whose work is heavily influenced by a class analysis.

To my mind, there is little doubt that *Charter* jurisprudence is deeply saturated in ideology, not just in the sense that some scholars make explicit their ideological preferences, but also in the sense that all scholarship is premised upon pervasive normative visions (whether they are articulated or not). In the next section I will indicate that this is a good thing.

V. EVALUATIVE COMMENTS

My aim in this paper has not been to distribute bouquets and brickbats to individual scholars. Consequently, in this section, in my attempt to analyze the relationship between the *Charter* and legal theory, I will: a) identify and discuss what are some of the more positive patterns that have emerged in *Charter* jurisprudence; and b) briefly highlight some problems that may be worth further consideration.

A. Positive Patterns

The *Charter* may have done more for legal theory than legal theory has done for the *Charter*. Historically, legal theory has had a marginal existence in law and the legal academy, a poor relation in a family whose primary ambition has been to provide services to the social elites, balanced with a few philanthropic forays such as legal aid clinics or courses on poverty and welfare law. However, because of the manifestly social and political nature of legal decision-making in a *Charter* regime, the traditional gambits for rendering law autonomous and insular are no longer available. This has meant that legal theory as a practice has gained increasing legitimacy in legal circles as witnessed, for example, in even a few references to jurists by members of the Supreme Court.[303] It is important, however, not to overstate the instrumental significance of legal theory. Despite some calls from the judiciary for greater theoretical assistance[304] and even the explicit invocation of jurisprudential perspectives on occasion, it seems to me that jurisprudence remains relatively unimportant. For example, even though the decision in *Dolphin Delivery*[305] has received universal academic criticism from a number of very diverse jurisprudential perspectives, the Supreme Court seems to be adamant in its refusal to reconsider its position.

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303 See, for example, Wilson J.'s decisions in *Operation Dismantle* v. *The Queen*, [1985] 1 S.C.R. 441 at 460, and *MacDonald* v. *City of Montreal*, [1986] 1 S.C.R. 460 at 515-24.

304 See, for example, Dickson C.J., *supra* note 1.

305 *Supra* note 81.

More generally, it might be suggested that *Charter* theory has to some degree escaped the clutches of analytical positivism. Few scholars now invoke the discourse of natural law and legal positivism.[306] Consequently, legal theory appears to have become significantly more interdisciplinary and to have undergone a radical regeneration of interest. There has been a proliferation of more junior scholars whose work is explicitly and self-consciously jurisprudential. In short, the *Charter* has gone some way in liberating Canadian legal scholarship from what Alan Hunt has described as the "dark-age of 'black letter' law"[307] or what I would call the dull compulsion of the doctrinal.

Closely related to this, there seems to be a sense that theory is not significant for theory's own sake, but that it is important because of its utility in advancing one's normative viewpoint.[308] More specifically, the literature seems to suggest that the vast majority of Canadian jurists tend to fall between the liberal and the left end of the political continuum. Thus, debates have tended to involve those who, very roughly, might be called the liberal egalitarian democrats[309] and the radical progressives.

However, two further points may be worth noting here. First, unlike political science or philosophy,[310] within legal circles, few jurists adopt an explicitly right-wing orientation. Law and economics discourse, while influential in other aspects of Canadian jurisprudential life, has only had a marginal influence on

306 But see Hogg, *supra* note 141 and B. Strayer, "Life Under the Canadian Charter: Adjusting the Balance Between Legislatures and Courts" (1988) Public Law 347.

307 A. Hunt, "Jurisprudence, Philosophy and Legal Education — Against Foundationalism: A Response to Neil MacCormick" (1986) 6 Legal Studies 292 at 296.

308 One manifestation of this is that there appears to be a bona fide effort on the part of many legal theorists to attempt to make their jurisprudential arguments as accessible as possible. In part this may be connected to the contextualizing shift in much jurisprudence. Constitutional Forum, with its preference for short, pithy articles and comments is a particularly good example of the attempt to disseminate legal theory. See also D. Schneiderman, ed., *Conversations Among Friends* (Edmonton: Centre for Constitutional Studies, 1991). For a rejection of this politicization of theory see B. Langille, "Political World" (1989) 3 Can J. L. & Jur. 139.

309 Gibson, for example, describes his work as reflective of the "radical or principled middle." *The Law of the Charter: General Principles*, *supra* note 22 at iv-v.

310 See A. Dobrowolsky, "The *Charter* and Mainstream Political Science: Waves of Practical Contestation and Changing Theoretical Currents" in D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of Charter Rights on Law and Politics in Canada* (Toronto: University of Toronto Press, 1997).

Charter theory.[311] The National Citizens Coalition and REAL Women, for example, appear to be without a jurisprudential spokesperson (so far).[312]

Second, although I have suggested that the debate has tended to revolve around disputes between liberal egalitarians and radical progressives this should not be mistaken for a claim that the latter group espouse a uniform position. Rather there have been fractionalizations over time. While there are some holdouts who insist that the *Charter* is incapable of being hijacked for progressive ends,[313] there are now strong signs of left revisionism which advocates a more nuanced position which may allow for *Charter* mobilization, depending upon the issues.[314]

Two examples might illustrate this fractionalization among progressives. Some on the left have argued in favour of a Social Charter as a defence mechanism against the rightward shift in Canadian politics, whereas others have argued that such a strategy is simply symbolic soft law that pretends to advance real human needs while in fact achieving nothing concrete.[315] Similarly, within

311 *Talking Heads and the Supremes, supra* note 22 at 116. See also R. Sharpe, "Mootness, Abstract Questions and Alternative Grounds: Deciding Whether to Decide" in Sharpe, *supra* note 23 at 327; T. Lee & M. Trebilcock, "Economic Mobility and Constitutional Reform" (1987) 37 U.T.L.J. 268.

312 But see R. Martin, "Bill C-49: A Victory for Interest Group Politics" (1993) 42 U.N.B.L.J. 357 and Martin & Hawkins, *supra* note 35. Although I do not subscribe to the currently popular view that left-right distinctions are passé, there are times when there appears to be a certain commonality between some on the legal left and those on the political right, particularly with regard to criticisms of the antidemocratic nature of judicial review. See, for example, Bogart, *supra* note 22 at 148-49 who is not only ambivalent about distinctions between "socialism and toryism," but who also invokes the American papal apologist Mary Ann Glendon in his partial critique of the *Morgentaler* decision. See also Mandel, *supra* note 8 at 73.

313 Mandel, *supra* note 8 at 3, 47, 457-61.

314 See, for example, Fudge, *supra* note 99 at 497-98; Herman, *supra* note 22 and Hutchinson, *supra* note 22 who seems to have made significant alterations in his stance. Originally, Hutchinson appeared to be totally opposed to *Charter* based arguments. See A. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988) 38 U.T.L.J. 278 at 279. Now, in the light of *Andrews* and *Morgentaler*, he appears to have adopted a position of "mindful moderation" and "strategic skepticism" [*supra* note 22 at 41, 158, 175, 177] and to have hunkered down for a long war of position. The problem with such revisionism is that while it manifests the virtues of contextualism and specificity, it provides little real pragmatic guidance. See, more generally, R. Devlin, "Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson" (1996) 22 Queen's L. J. 81. See also Fudge, *supra* note 93 for a similar critique.

315 See generally, Bakan & Schneiderman, *supra* note 23; Mandel, *supra* note 8 at 109-15, 123.

the feminist movement there have been pointed disagreements over, for example, tax deductions on the basis of gender and race,[316] pornography,[317] prostitution,[318] the most appropriate vision of equality[319] and, indeed, the appropriateness of litigational politics at all. Similarly, there have been lesbian critiques of both (heterosexual) feminist jurisprudence and (gay dominated) sexual orientation jurisprudence.[320]

At least three interpretations can be advanced as to the significance of this pluralization of progressive voices. First, it might be suggested that many progressive jurists have adopted a position of Derridean undecidability thereby relinquishing grand theories in favour of more localized and context sensitive politico-juridical strategizing.[321] Alternatively, one might conjecture that the *Charter* debates illustrate yet another failure to consolidate solidarity among progressives,[322] and that radical jurists have been overwhelmed by a discursive regime that is undesirable, but unavoidable.[323] As a consequence, it could be argued that while the left are all over the map in terms of what to do about the *Charter*, conservative and corporate forces have (apparently without a great deal of jurisprudential reinforcement or direction) seized the opportunity created by the *Charter* and effectively pursued a regressive politico-juridical agenda. Third,

316 Iyer, *supra* note 234; A. Macklin, "*Symes* v. *M.N.R.*: Where Sex Meets Class" (1992) 5 C.J.W.L. 498; C. Young, "Child Care and the *Charter*: Privileging the Privileged" (1994) 2 Rev. Const. Studies 20.

317 K. Busby, "LEAF and Pornography: Litigating on Equality and Sexual Representations" (1994) 9 Can. J. Law & Soc. 165; K. Lahey, *supra* note 222; K. Mahoney, "Obscenity, Morals and the Law: A Feminist Critique" (1985) 17 Ottawa L. Rev. 33; V. Burstyn, ed., *Women Against Censorship* (Vancouver: Douglas & McIntyre, 1985).

318 J. Dickin McGinnis, "Whores and Worthies: Feminism and Prostitution" (1994) 9 Can. J. Law & Soc. 105.

319 Bartholomew, *supra* note 205.

320 For discussions see, for example, Eaton, *supra* note 39; D. Herman, "A Jurisprudence of One's Own? Ruthann Robson's Lesbian Legal Theory" (1994) 7 C.J.W.L. 509; Majury, *supra* note 190.

321 Herman is probably the clearest example of this position *supra* note 22 at 8, *supra* note 4 at 603 but so too is Fudge who, despite her differences with Herman, admits that the *Charter* may mean very different things to unions and feminists, *supra* note 93.

Such a view would challenge DeCoste's argument that in spite of strong differences between many progressives, "there are two, and only two, positions possible with respect to the relationship between law and life — a liberationist/ transformative position, and a non-liberationist/reformative position." DeCoste, *supra* note 4 at 946.

322 See, for example, Hutchinson's excessively harsh critique of Conklin, *supra* note 22 at 75-84 or the debate between Fudge and Glasbeek, *supra* note 39 and Herman, *supra* note 39.

323 Fudge, *supra* note 99 at 458; Fudge & Glasbeek, *supra* note 39; Hutchinson, *supra* note 22 at xiii, 147, 174.

and less pessimistically, one could interpret debates among progressive jurists not on the basis of their impact on social and judicial policymaking, but focus more upon the quality of the debates themselves. Viewed in this light, there is no doubt that progressive legal theory is blossoming in Canada and that there is an openness and spirit of engagement that is heartening.[324]

To me this fractionalization suggests a certain irony. Debates within contemporary literary criticism in the last decade or so have tended to suggest that we must confront the death of the author thesis, that is, that authorial intent is of quite limited significance and that what is crucial is the reader's interpretations.[325] A reflection on the relationship between the *Charter* and its jurisprudential interlocutors dovetails with this thesis. As many scholars have suggested, the *Charter* was designed primarily by the federal government as part of a unifying and nation-building strategy, to enhance the collective psyche of a Canadian identity that would counteract the centrifugal forces disaggregating the country, most particularly provincialism and regionalism.[326] However, as this review of the literature has indicated, at least in the realm of jurisprudence, the effect seems to have been the opposite. While it would be somewhat linear to suggest that the *Charter* has caused[327] jurisprudential polarisation, it is probably accurate to suggest that *Charter* discourse has provided a forum for dissensus, an opportunity for divergences, the ramifications of which are more immediately apparent than, for example, the differences around federalism might suggest. Moreover, the dissensus is not superficial. It has necessitated careful reconsideration of our assumptions about the nature of the state[328] and it has called into question fundamental visions of what a good society should strive to be, with very different conceptions of rights, liberty, freedom, and equality and the balances that need to be drawn between them. Indeed, as the arguments advanced by Turpel indicate, the problems may not just be those of divergence,

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324 See, for example, Bakan & Schneiderman, *supra* note 23 or Petersen's reply to Majury, *supra* note 190.

325 For a brief introduction to this literature see, for example, R. Devlin, "Law, Postmodernism and Resistance: Rethinking the Significance of the Irish Hunger Strike" (1994) 14 Windsor Y.B. Access Just. 3.

326 Mandel, *supra* note 8 at 33; R. Knopff & F. Morton, "Nation-Building and the Canadian Charter of Right and Freedoms" in A. Cairns and C. Williams, *Constitutionalism, Citizenship and Society in Canada* (Toronto: University Press, 1985) at 133; P. Russell, "The Political Purposes of The Canadian *Charter of Rights and Freedoms*" (1983) 61 Can. Bar Rev. 30; Webber, *supra* note 22 at 92-120.

327 The concept of causation has empiricist overtones that are probably inappropriate for an analysis that attempts to evaluate the connection between discursive practices such as the *Charter* and legal theory.

328 Fudge, *supra* note 86 at 459, Herman, *supra* note 22 at 9, 126.

but of an incommensurability of legal cultures in which the *Charter* is reunderstood as cultural, political, constitutional and juridical colonialism.[329] Not quite what Trudeau had in mind, eh?[330]

This fragmentation of the jurisprudential conversation has come about, I would suggest, because the nature of political discourse in Canada has undergone transition in the last two decades. Since Confederation, traditionally the primary focus of political concern has been the federalist dilemma: how to allocate power between provinces and the central government. Other political controversies have been filtered through the federalist paradigm.[331] But in the last twenty years, there has been an increasing awareness of how other political debates are autonomous from and have dynamics independent of those of federalism, though at times they may intersect with the federalist dilemma. These political orientations are not so much about geographical or territorial jockeying, but rather are connected to the emergence in western societies of what are called the "new social movements" with an increasing emphasis on identity politics, that is, a politics that is particularly related to issues of (dis)ability, gender, class, sexual orientation and/or race.[332] The *Charter* has been targeted as a terrain of ideological discourse where identity jurisprudences can be articulated, pursued, contested, challenged, legitimized and devalued[333]

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329 Turpel, *supra* note 66.

330 P. Trudeau, "The Values of a Just Society" in Trudeau, P. & T. Axworthy, eds., *Towards a Just Society: The Trudeau Years* (Toronto: Viking, 1990) 357 at 363 and Axworthy, "Colliding Visions: The Debate Over The Charter of Rights and Freedoms 1980-81" in Weiler & Elliott, *supra* note 4 at 13. The general public appears to be a great deal more cohesive than legal theorists in their assessment of the *Charter*. In a poll taken in 1992, Angus Reid found that the vast majority of Canadians supported the *Charter* and believed that their rights had increased in the course of the previous decade. See Angus Reid, "A Decade with the Canadian Charter of Rights and Freedoms" (11 April, 1992). Some may be tempted to read this as indicative of just how far removed Canada's legal theorists are removed from the larger populace.

331 A. Fraser, *The Spirit of the Laws: Republicanism and the Unfinished Project of Modernity* (Toronto: University of Toronto Press, 1990).

332 Identity jurisprudence, like identity politics, may cause some concern in that it raises the spectre of essentialism and standpoint epistemology, i.e., the argument that only those who embody a particular identity can speak of and to that identity. It is interesting to note that this has not yet become a major cause of concern in Canadian jurisprudence. For example, Petersen, who self identifies as lesbian and white, discusses race ["Institutionalized Racism: The Need for Reform of the Criminal Jury Selection Process" (1993) 38 McGill L. J. 147] and Ryder who is white and heterosexual discusses gay and lesbian issues [*supra* note 189] and Duclos who self- identifies as heterosexual discusses same sex marriages [N. Duclos, "Some Complicating Thoughts on Same Sex Marriage" (1991) 1 Law & Sexuality 31.

333 Fudge & Glasbeek, *supra* note 39; Herman, *supra* note 39; Stychin, *supra* note 45.

resulting in judicial decisions that are sometimes unpredictable. And it is this lack of predictability that will ensure a continued jurisprudential engagement because, like it or not, *Charter* discourse has taken on a life of its own. Social actors can no longer choose to ignore it, because unless you are prepared to argue even as a strategy of resistance, others will use it against you.[334]

However, none of this is to claim that many of these developments could not have taken place absent the *Charter*. There is excellent legal theory being generated by theorists who have not been entranced by the *Charter*.[335] While at an earlier time, I have been too hasty in suggesting that the *Charter* has caused a "sea-change" for Canadian legal theory,[336] I still believe that there is a connection, though not causal. The *Charter*, I believe, has provided a forum in which jurisprudence can demonstrate its importance. Whereas other areas of law — contracts, property or torts — clearly have a significant impact on our social ordering, the broader perception of these is that they are esoteric and that, correlatively, theory about such esotericism can only be esotericism squared. The *Charter*, on the other hand, tends to be more publicly accessible and engenders greater symbolic significance; therefore, when theory is invoked to help shed light, it is seen have some further legitimacy.

A good example may be found in relation to Langille's analysis of judicial interpretation of the *Charter*.[337] To bolster his analysis he invoked Wittgenstein. This, in turn, led other theorists to question his use of Wittgenstein[338] or to invoke countervailing theorists,[339] which in turn triggered further

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334 That's the bad news. The "good news" is that this also seems to ensure continued opportunities for legal theorists to add their tuppence worth. Whether this is good for Canadian society would be the subject of another paper.

335 See, for example, S. Boyd, "(Re)Placing the State: Family, Law, Oppression" (1994) 9 Can. J. Law & Soc. 39; R. Coombe, "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy" (1993) 6 Can J. Law & Jur. 249; K. Cooper-Stephenson & E. Gibson, eds., *Tort Theory* (North York: Captus University Publications, 1993); Fraser, *supra* note 331; M. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993).

336 Devlin, *supra* note 4 at 367. For a critique of this suggestion see DeCoste, *supra* note 4.

337 B. Langille, "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill L. J. 451.

338 Bix, *supra* note 51; R. Coombe, "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 McGill L. J. 603.

339 Coombe, *ibid.;* A. Hutchinson, "That's Just the Way It Is: Langille on Law" (1989) 24 McGill L. J. 145.

Wittgensteinian-inspired rejoinders from Langille and others.[340] So while there is no logical reason why Wittgenstein could not have been the subject of legal theory by Canadian jurists, the opportunity was grounded in *Charter*-inspired concerns.

A second example may be found in the various discussions around individual and collective rights. While groupist rights were part of the Canadian constitutional order prior to 1982, the *Charter* served as a catalyst to intensify the tensions and induce jurisprudential reflection. Issues such as Quebec's sign law have engendered debates that are to a significant degree ontological, that is, based on competing conceptions about the nature of personhood.[341]

A third example also focuses on the question of rights. As I have already pointed out, orthodoxy assumes that the purpose of rights is to protect the individual. However, critics of rights have argued that it is only certain interests of the individual that are protected by rights and that many of our needs are ignored. In reply, deviationists have argued that rights are important to the extent that they engender self-valorization among those who are marginalized. But again others, in turn, ask what sort of self or individual is presumed by such claims to empowerment: is it an essentialist conception of the self or a socially constructed sense of the self, a static self or a transgressive self, etc?[342]

Thus, in my estimation, the most significant impact of the *Charter* has been to provide a forum, or more accurately, a discursive opportunity for the articulation by legal theorists of their conceptions not only of law (its nature, its functions, its strengths and its limitations), but also of society, the state, the family and the self. Conklin's work is particularly illustrative as he shifts his "the constitution as imagery" theory first through debates on Canadian federalism to *Charter* interpretation, arguing that the latter tend to trigger pressing debates about "deep meta-issues of theory and a piercing scrutiny of social/cultural practice."[343] In short, for better or worse, the *Charter* has transformed Canada's legal and political "langscape"[344] and jurisprudence, as a dialect within that langscape, has inevitably been impacted by this transformation.

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340 Langille, *supra* note 308; G. Smith, "Wittgenstein and the Sceptical Fallacy" (1990) 3 Can. J. Law & Jur. 155.

341 Macdonald, *supra* note 112; Green, *supra* note 127.

342 Herman, *supra* note 22 at 66, 69.

343 Conklin, *supra* note 29 at 8, 217.

344 J. [sákéj] Youngblood Henderson, "MíkMaw Tenure in Atlantic Canada" (1995) 18 Dal. L. J. 196 at 205.

Another question which sometimes arises is whether there is anything distinctive about Canadian jurisprudence. On occasion, some scholars have suggested that either in general[345] or with specific regard to the *Charter*[346] there is something particular about Canadian legal theory and constitutional practice. As the preceding overview might suggest, debates on the issues of individualism and communitarianism, judicial absolutism and democratic politics, gender, race, class, and sexual orientation, the interpretive turn, etc. also pervade American legal theory. Indeed, many Canadian scholars, explicitly and implicitly, often rely on the insights of leading American theorists. But there remain some important differences. As might be obvious, in my opinion the voice of progressive scholars is quite strong in Canada whereas in the United States — despite the emergence of feminism, critical legal studies and critical race theory — the primary axis of debate remains right vs. liberal rather than liberal vs. left. Second, whereas privacy and liberty have been the lodestars for much American jurisprudence, it would appear that equality discourse has been given a particular spin by Canadian legal theorists. Third, although every democracy faces the difficult jurisprudential debate about the legitimacy of judicial review, it has a particular focus and accent in Canada, given that it is the only jurisdiction in the world to have a section 33 override provision.

Finally, on the theme of positive patterns, I want briefly to address the issue of the tone of contemporary jurisprudential debate. Traditionally, debates within legal theory have tended to be quite polite and when disagreements arose they were often stated indirectly. However, with the advent of the *Charter* the traditional decorum of debates has, on occasion, given way to heated engagement. While not deteriorating into mutual *ad hominems*, frequently contemporary disputes are articulated with a pointedness that until now has been somewhat unusual.[347] David Beatty, in particular, seems to have attracted

345 See, for example, A. Linden, "Introduction" in Bayefsky, *supra* note 43 at 1; Monahan, *supra* note 22 at 4; Slattery, *supra* note 247.

346 Bayefsky, *supra* note 43 at 148-50; Slattery, *supra* note 71.

347 See, for example, the debate between Langille, [B. Langille "Revolution Without Foundation: The Grammer of Scepticism and Law" (1988) 33 McGill L. J. 451; "Political World," *supra* note 308], Hutchinson [*supra* note 22 at 157-65], and Bakan [*supra* note 4]; Gibson's review of Trakman [D. Gibson, "New-Age Constitutionalism: A Review of *Reasoning with The Charter*" (1994) 2 Rev. Const. Studies 123]; the debate between Fudge and Glasbeek [*supra* note 39] and Herman [*supra* note 39]; and Smith's critique of the *Charter* skeptics, *supra* note 288. See also, Legal Theory Students, University of Victoria, "Understanding Inequality: A Reply to Dale Gibson" (1990) 1 Const. Forum 18, and "Forum: Sexual Assault Legislation" (1993) 42 U.N.B.L.J. 317.

particular attention.[348] In my opinion such a shift in tone is not something that we should be too concerned about. All it indicates is that the issues at stake matter; that jurisprudence is not solely the abstract pursuit of pure knowledge (although some may aspire to that) but also is a practice which can have direct and practical consequences both materially and ideologically.[349]

B. Potential Problems

While I am clearly impressed with recent developments in Anglophone legal theory, there are (as might be expected) some problems.

First, as pointed out earlier, a great deal of *Charter*-based jurisprudence has been preoccupied with the issue of the legitimacy of judicial review. While this is clearly important, it seems to me that after fifteen years many of the arguments (both pro and con) are fairly clearly formulated and that on occasion some scholars are starting to sound like broken records.[350] Perhaps then there is more room for discussion of issues such as republicanism,[351] or greater efforts could be taken to be more programmatic in developing theories. Reconstructionists such as Nedelsky and Trakman are still extremely abstract in their visions, while strategic skeptics need to do more to concretize their thoughts on when *Charter* engagement may be desirable or not, or delineate possible alternative structures.[352]

Moreover, within the *Charter* itself, there appears to be a somewhat uneven jurisprudential division of labour. For example, while freedom of expression, freedom of association and the equality provisions seem to have generated a great deal of attention, the legal rights provisions (with the exception of those

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348 See, for example, Bogart, *supra* note 22 at 126; Etherington, *supra* note 4 at 727; Mandel, *supra* note 8 at 275-78, 282-83; Hutchinson, *supra* note 22 at 66-75; Weiler, *supra* note 84 at 136.

349 See, for example, D. Beatty, "Constitutional Conceits: The Coercive Authority of Courts" (1987) 37 U.T.L.J. 183; "A Conservative's Court: The Politicization of Law" (1991) 41 U.T.L.J. 147.

350 For example, a significant number of scholars have reproduced essentially the same article in several different fora. On occasion, given divergent audiences, this may be legitimate. However, sometimes I get the impression that there is some resumé inflation going on.

351 A. Fraser, "Beyond the Charter Debate: Republicanism, Rights and Civic Virtue in the Civil Constitution of Canadian Society" (1993) 1 Rev. Const. Studies 27.

352 Hutchinson, *supra* note 22 at 172. But see A. MacKay & R. Bauman, "The Supreme Court of Canada: Reform Implications for an Emerging National Institution" in Beckton & MacKay, *supra* note 23 at 37.

that deal with issues of gender[353]) appear to be under theorized[354] even though they have been the subject of the most extensive judicial attention in the *Charter* regime. Similarly, the pressing and extremely vital issue of *Charter* remedies has gained only a relatively small amount of jurisprudential analysis.[355]

Third, there is also the problem that because so many jurists have been attracted to *Charter* analyses other pressing political and social problems have been underanalyzed. For example, NAFTA has generated minimal jurisprudential consideration,[356] and federalism (and in particular its interplay with the *Charter*) has been put on the backburner by theorists even though it has been of crucial political significance.[357]

Finally, as pointed out previously, Canadian jurisprudence has been attracted to the interpretive, the idea that what binds us together legally and politically is an implied commitment to ongoing debate, conversation and dialogue. This is obviously an attractive metaphor in that it assumes a basic substratum of commonality that makes social, political, and legal interaction plausible and intelligible. However, one problem with this metaphor is that its abstraction allows it to be invoked by jurists of very different stripes. While it is true that not all Canadian jurists buy into the metaphor — Mandel for example wants us

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353 See, for example, C. Boyle, et al., *A Feminist Review of Criminal Law* (Ottawa: Supply and Services, 1985).

354 But see Bogart, *supra* note 22 at c. 7; R. Cairns Way, "The Charter, the Supreme Court and the Invisible Politics of Fault" (1992) 12 Windsor Y. B. Access Just. 128; Glasbeek, *supra* note 102 at 329-36; R. Harvie & H. Foster, "Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter" (1990) 28 Osgoode Hall L. J. 729; Mandel, *supra* note 8 at c. 4.

355 Cassels, *supra* note 167; Cooper-Stephenson, *supra* note 13; Duclos & Roach, *supra* note 171; Fitzgerald, *supra* note 14; R. Rempel, "The Possibilities of *Schachter*: A Response to Professor Duclos" (1993) 4 Const. Forum 106; D. Gibson, "Accentuating the Positive and Eliminating the Negative: Remedies for Inequality under the Canadian Charter" in Smith, *supra* note 23 at 311; K. Roach, "Remedies for Violations of Aboriginal Rights" (1992) 21 Man. L. J. 498; R. Sharpe, "Injunctions and the Charter" (1984) 22 Osgoode Hall L. J. 473.

356 For an exception see "The Constitutional Implications of NAFTA: Perspectives From Canada, the United States, and Mexico" (1994) 5 Const. Forum 49 et seq.

357 But see B. Baines, "Women's Equality Rights and the Meech Lake Accord" (1988) 52 Sask. L. Rev. 265; Monahan, *supra* note 22, "At Doctrine's Twilight: The Structure of Canadian Federalism" (1984) 34 U.T.L.J. 47; B. Ryder, "The Demise and Rise of the Classical Paradigm in Canadian Federalism: Promoting Autonomy for the Provinces and First Nations" (1991) 36 McGill L. J. 308; K. Swinton, *The Supreme Court and Canadian Federalism: The Laskin — Dickson Years* (Toronto: Carswell, 1990).

(who?) back on the streets,[358] and others warn us that conversational metaphors can reinforce oppression[359] or obscure situational inequalities[360] — my sense is that too many Canadian jurists fetishize the metaphor of dialogue. In a sense, it is almost as if they conceive of politico-legal practice as a near perfect jurisprudence seminar.[361] While many recognize problems with the metaphor, to my mind most underestimate just how deep our differences might be.

For example, the assumption seems to be that the differences are essentially substantive and that with sufficient communicative goodwill it is possible to eventually get to yes.[362] However, there are several problems here. First, and obviously, politics and power are driven as much by bad faith as by good faith and this inevitable reality cannot be glossed over. Second, even assuming that parties to a politico-juridical dialogue were to operate in good faith, there is the question of what language they are to communicate in. The assumptions here appear to be twofold: language is equally available to all, and that language is basically transparent and neutral.[363] But again, not everyone has equal access to language, either qualitatively or quantitatively, thus there is the danger of the "dictatorship of the articulate."[364] Moreover, a language is not just a medium, it also captures and refracts specific cultural norms and practices that are not always translatable.[365] No where in the Anglophone scholarship reviewed have I encountered a jurist even considering whether the dialogue should be in a language other than English. This is not just a political or moral problem, which would be serious enough; it is also epistemological. Third, advocates of dialogism concur that the conversation should remain continually open, but again there are at least two problems here: a) do most citizens really have that

358 Mandel, *supra* note 8 at 454.

359 Nedelsky & Scott, *supra* note 48 at 69.

360 Hutchinson, *supra* note 22 at 189.

361 For example, Hutchinson in support of his reconstructive expansive civic dialogue, argues that "the regulative ideal of dialogue incorporates both a right to hear, to be heard and to be answered. It establishes and maintains the social conditions for open-ended, continuing and meaningful conversations in which people engage as equals." *Supra* note 22 at 212. See also Webber, *supra* note 22 at 118-19, 188-89, 312-13.

362 For example, Hutchinson, quoting Bernstein, suggests that the key aspects of a dialogic community include "mutual understanding, respect, a willingness to listen and to risk one's opinions and prejudices, a mutual seeking of the correctness of what is said" *(supra* note 22 at 203-04).

363 W. Conklin, "The End of Judicial Review" (1992) 10 Current Legal Theory 1.

364 W. Kymlicka,"Liberal Individualism and Liberal Neutrality" (1989) 99 Ethics 883.

365 For example, on 23 October 1995 in a speech delivered at McGill Law School, Matthew Coon Coom, Grand Chief of the James Bay Cree, spoke of the difficulties of translating the Cree Referendum question into English or French.

much time available?; b) at some point some decisions have to be made, even relatively temporary ones, and so some mechanisms for closure are inevitable, or else some players may continue to discuss simply to avoid ever getting to a resolution.[366] In short, when we unpack it the premise underlying the dialogic model is that of liberal contractualism, a regime of haggling, a world of offering and counter-offering, of giving and taking. But this is a deeply optimistic vision for, as Carol Pateman has pointed out, contract rather than being the apotheosis of freedom and choice might well be a highly refined form of subordination.[367]

VI. CONCLUSION

Rod MacDonald once pessimistically bemoaned that "the summer of 1982" was characterized by the "quiescence of Canadian legal theorists."[368] Fortunately, to my mind, this slumber did not last long. Indeed, as I have attempted to demonstrate in this essay, *Charter*-driven jurisprudence has had a significant impact, both quantitively and qualitatively, on Anglophone Canadian legal scholarship.

Thought and theory clearly have their limits, and Canadian society is unlikely to take its cue from the ruminations of academics. But while theory is not everything, it is more than nothing. Theory is only as important as the context and circumstances in which it is produced, disseminated and given effect. In that sense, it should not be considered to be in opposition to practice, but rather as another form of practice, a terrain of discursive struggle that intersects and overlaps with other social practices.

Moreover, as this essay suggests, there is no longer much consensus on what might constitute the core of jurisprudential analysis. Rather, with the mushrooming of legal theoretical work, there has been increasing dissensus and a corresponding emergence of what might be most usefully described as jurisprudential pluralism. In other words, it is probably not helpful to think of jurisprudence as a static paradigm, but rather as terrain of struggle in which several incommensurable paradigms are in play, a constellation of incongruent and dynamic discourses.[369] If this is accurate then it seems to me to be unhelpful to conceive of legal theory in an instrumentalist sense, as the source of

366 A good example of this "all talk, no action" scenario relates to constitutional conferences on Aboriginal Peoples in the mid 1980s.

367 C. Pateman, *The Sexual Contract* (Stanford: Stanford University Press, 1988).

368 *Supra* note 4 at 321. See also Gold in Weiler & Elliot, *supra* note 4 at 95.

369 P. Goodrich, "The Antinomies of Legal Theory: An Introductory Survey" (1983) 3 Legal Studies 1 at 2.

determinative right answers, as Dickson C.J. seemed to have hoped.[370] Jurisprudence is not oracular. What theory can do, however, is to help us identify and rethink some of the assumptions we take for granted. Moreover, it can reveal to us the contingency of such assumptions and thereby facilitate the recognition of the plurality of perspectives that can be brought to bear on law. While the *Charter* cannot be said to have caused this fractionalization in Canadian legal theory, *Charter* based claims and *Charter* discourse has been an important discursive terrain for the articulation of this dissensus.[371] In short, the *Charter* is both fractured and fracturing. And so I would conclude by suggesting that rather than promoting order and coherence, contemporary *Charter*-inspired legal theory refracts the messiness of the problematic that is called Canada.

370 *Supra* note 1.

371 P. Macklem, "Constitutional Ideologies" (1988) 20 Ottawa L. Rev. 117.