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THE CRISIS OF MULTI-NATIONAL FEDERATIONS: POST-CHARLOTTETOWN REFLECTIONS

Philip Resnick*

Recognizing the inevitability that constitutional issues will again emerge for public discussion in Canada, the author discusses three competing visions of nationhood and identity which have emerged as between English Canada, French Canada, and Aboriginal peoples.

The solution offered to these difficulties is to separate the concept of nation from that of the state, and to recognize the sociological reality of the three nations within the territorial structure of a single state. The author submits this can be accomplished by observing three principles: (i) Fundamental reforms must be undertaken to our existing federation along asymmetrical or confederal lines; (ii) Nationalism must be viewed as self limiting since negative consequences of intolerance and one's ability to live in harmony with one's neighbours inevitably emerge and; (iii) Sovereignty is an irrelevant option owing to current economic forces of globalization, and the integration of regions and continents.

The author concludes by noting that the emergence of multiple national identities within Canada is necessary to avoid the break-down experienced by other federations in recent years, notably in Eastern Europe.

Sachant que les questions constitutionnelles ne manqueront pas de resurgir dans les débats publics, l'auteur examine trois façons de concevoir le principe de nation et d'identité qui ont émergé au Canada comme se situant entre le Canada anglais, le Canada français et les peuples autochtones.

Pour résoudre ces difficultés, il propose de séparer le concept de nation et celui d'État, et de reconnaître la réalité sociologique de trois nations au sein de la structure territoriale d'un État unique. L'auteur soutient que cette solution est réalisable à condition de respecter trois principes: i) Il faut apporter à notre fédération actuelle des réformes fondamentales selon un mode asymétrique ou confédéral; ii) le nationalisme doit être perçu dans sa portée restrictive, vu que les conséquences négatives de l'intolérance et la capacité de vivre en harmonie avec ses voisins émergent inévitablement; (iii) la souveraineté est une option hors de propos compte tenu des forces économiques de la globalisation et de l'intégration des régions et continents.

L'auteur conclut en notant que l'émergence d'identités nationales multiples au sein du Canada est nécessaire pour éviter le morcellement vécu récemment par d'autres fédérations, notamment en Europe de l'Est.

Let me assure you that I do not intend to re-visit the field of our recent referendum battle, or to dwell in loving detail on the provisions of the late

* Department of Political Science, University of British Columbia. This is the text of the Fifth Annual McDonald Lecture in Constitutional Studies, delivered at the Faculty of Law, University of Alberta on March 25, 1993.

and unlamented Charlottetown Accord. We all deserve a respite. But I am also convinced that we are by no means out of the woods where deeper issues of national identity and political restructuring are concerned. Six months from now, or twelve, or twenty-four, they will return to haunt us. So why not address them when, for once, we do not have a figurative gun to our heads?

Beneath the particulars of the Canadian debate lie issues that have surfaced in recent months and years in a number of other multi-national federations. The break-up of the Soviet Union and Yugoslavia in 1991 — the latter accompanied by devastating bloodshed and population displacement — and the more recent break-up of the Federated Republic of Czechs and Slovaks on January 1, 1993 serve as an immediate backdrop to these reflections. The ongoing difficulties faced by states like Belgium[1] or Spain in making a federal system function or by third world states like India or Nigeria suggest that federalism in ethnically or nationally-divided societies is fraught with problems.

Such problems are inherently different in character from those faced by federal states with ethnically or linguistically unified populations in countries like Australia, the United States or the Federal Republic of Germany, since there are no significant sub-units or regions aspiring to independence — whatever may have been the case in the past. Notions of citizenship and nationality overlap, even as nation and state tend to fuse into the single concept of nation-state.

For a long time, we in Canada, especially on the English-speaking side, but to a certain degree on the French-speaking side as well, might have assumed that ours was a federation in which a single concept of nationality and national sentiment prevailed. This was certainly the aspiration of the original Fathers of Confederation like John A. Macdonald and Georges-Etienne Cartier and of as recent a federal Prime Minister as Pierre Elliott

[1] See A. Alen, *La Belgique: Un Fédéralisme Bipolaire et Centrifuge* (Bruxelles: Ministère de Affaires Étrangères, November 1990); A. Tondeur, "L'intégration européenne fragilise l'Etat belge" [July 1992] Le Monde Diplomatique, 1 at 3.

Trudeau — one whose views in matters constitutional still carry great weight. It is a feeling that was certainly fostered by Canada's progressive emancipation from British tutelage, through two world wars, the Statute of Westminster, membership in the League of Nations and the United Nations, and beyond.

Yet when one examines the course of Canadian history since 1867, one is struck by the latent difference in national sentiment and identity between English-speaking and French-speaking Canadians. On a whole series of issues, from the hanging of the Métis leader, Louis Riel, in 1885, to the suspension of French language instruction in Manitoba in the 1890s or Ontario in the 1910s, to the conscription crises of this century's two world wars, to the patriation of the Canadian constitution in 1982, differences between public opinion in the English-speaking provinces and in Quebec have often been acute. Even the "Nos" in English Canada and in Quebec on the night of October 26, 1992 were not the same.

In a more general sense, as I have argued elsewhere, the English Canadian sense of nation has itself been very much a by-product of the creation of central government in 1867, the year of Canada's Confederation.[2] The sense of identity and citizenship for most English-speaking Canadians has been caught up with that level of government. Though regionalist sentiment has not been lacking, especially in the Atlantic provinces or in western Canada, the vast majority of English-speaking Canadians define themselves as Canadians first. Nor have there been serious secessionist movements in English-speaking Canada in recent times comparable to the sovereigntist movement in Quebec.

The French-speaking residents of Quebec had an identity as *canadiens* (in contrast to *les anglais*) long before Confederation in 1867. Nor did Confederation come without strong opposition from the Rouges within Quebec. From the French-Canadian point of view, the chief attraction of

[2] See the discussion in P. Resnick, *The Masks of Proteus: Canadian Reflections on the State* (Montreal: McGill-Queen's University Press, 1990) chapter 10, "English Canada and Quebec: *State* v. *Nation*."

Confederation was that it re-established a separate province of Quebec (after the forced union of Upper and Lower Canada in 1840), one within which French Canadians would constitute a permanent majority. Successive Quebec governments over the first century of Canada's existence would fight zealously to preserve areas of provincial jurisdiction from federal encroachment.

The more traditional, clerically-based variant of French-Canadian nationalism gave way in the 1960s, the period of the so-called Quiet Revolution, to a new, more modernizing and secular version of nationalism. Quebec nationalists looked to an ever larger role for the Quebec government in both the economy and society; to an increasing degree this led to conflict with the federal government over issues of jurisdiction and tax revenues. It was during this period that the sense of a Quebec identity, in contradistinction to a larger Canadian one, came to be forged. By 1976, a clearly sovereigntist party, the Parti Québécois, had come to power, setting the stage for a referendum four years later on the proposal to negotiate a form of sovereignty-association between Quebec and the rest of Canada. This proposal secured 40% of the votes cast, with 60% of voters, including the vast majority of anglophones and allophones making up some 20% of Quebec's population, voting against.

By 1980, therefore, it was clear that a significant proportion of the francophone population — approximately 50% — saw itself as Québécois first where national sentiment and identity were concerned. Even many of those who had voted "No" in the referendum were interested in seeing a new type of federal structure for Canada in which Quebec would acquire significantly greater power.[3]

This was not to happen in 1980-1. Instead, the federal government of Pierre Trudeau was able to secure the patriation of the Canadian constitution from Great Britain with the existing federal-provincial division

[3] See, for example, the proposals of the Constitutional Committee of the Liberal Party of Quebec, *Une nouvelle fédération canadienne*, published in 1980.

of power largely unaltered. Moreover, a major addition to the Canadian constitution, the *Charter of Rights*, entrenched a variety of individual and group rights against both federal and provincial intervention. It constitutionalized Canada's two official languages and with them the right of linguistic minorities, English in Quebec, French outside Quebec, to services like education. The constitutional package of 1981 had nationalizing influences where Canada outside Quebec was concerned, with enthusiastic support from a whole array of citizens and groups for the *Charter of Rights*. In Quebec, however, the introduction of the package over the opposition of the Quebec government significantly undermined its legitimacy.[4] Subsequent efforts by the Conservative government of Brian Mulroney, first through the Meech Lake Accord, then through Charlottetown, to allay Quebec discontent backfired, triggering a major political crisis with whose fallout we are still living.

The heart of the problem as I see it is that there are differing national visions within Canada. The majority English Canadian view (within which grouping I include the close to 40% of Canada's population of neither British nor French origin) looks to a reasonably strong federal government able to provide economic coordination, national standards in social services, and cultural institutions for Canadians in whatever province or region they may live. English-speaking Canadians have no difficulty accepting the importance of provincial governments continuing to exercise powers within their own spheres. They are not, however, supportive of any wholesale transfer of power from the federal government to the provinces nor of special status for Quebec within our current federal arrangements.[5] Many of the "No" votes in English Canada on October 26 were coloured by such views.

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4 See G. Laforest, *Trudeau et la fin d'un rêve canadien* (Sillery: Septentrion, 1992) especially chapter 6, for a pointed critique from a Quebec nationalist perspective of Trudeau's constitutional initiatives.

5 See the CBC/Globe and Mail poll results in *The Globe and Mail*, (22 April 1991) A4.

The majority of the French-speaking population of Quebec, whether sovereigntist or not, supports a major transfer of power from Ottawa to Quebec. This would probably include many of the areas from communications and culture to labour market training and immigration highlighted in the Allaire Report of the Quebec Liberal Party in 1991. Many in Quebec, if polls over the year and half after Meech were to be believed, would prefer a form of Quebec sovereignty; but it would also appear that there is ongoing support for links with the rest of Canada, provided the Quebec element of identity receives heightened recognition. This was certainly the view of that swing group of voters in Quebec during the October 1992 referendum, the so-called Allairistes, who helped secure a 56.5% share of the vote for the "No" side.

A third, numerically small, but strategically crucial group — aboriginal peoples — have become full-fledged advocates of their own particular national recognition. Historically, native people have been excluded from political participation since well before Confederation. Yet, in the late 20th century, with pressing land claims that have not yet been resolved and the resurgence of indigenous identities in many parts of the world, Canada's aboriginal people are determined to not be ignored. They are demanding recognition of their inherent right to self-government as against both provinces and the federal government; thereby, they have upset the simple duality between anglophone and francophone that long prevailed. There can be no satisfactory solution to our predicament that ignores their claims.[6]

It follows that we need to reconcile at least three national visions or identities within the framework of what we call Canada. Can this be done by simply going the road of three or more nation-states? I think the answer to this is "No", all the more when we look at the unhappy aftermath of the Soviet or Yugoslav meltdowns.

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[6] See D. Engelstad & J. Bird, eds., *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Concord: Anansi, 1992).

The break-up of a long-established country cannot come without much hurt and pain. There is a whole series of problems which would need to be resolved — from the division of existing assets and liabilities, to the question of the treatment of linguistic minorities within the successor states, to the not so pleasant question of boundaries. Both on the English Canadian and on the Quebec side there are those who would challenge the existing boundaries.[7] And there are powerful claims by the Cree to much of northern Quebec.[8] Nor is it evident what native sovereignty of the nation-state form might begin to mean, when we are speaking of many distinct aboriginal people (with some 500,000-600,000 members within a population of 27 million Canadians), spread across the length and breadth of Canada's territory.

The only solution to the problems of multi-national federations like Canada lies in the separation of the concept of nation from that of state, in the recognition of the sociological reality of our three nations within the territorial structure of a single state.[9] This may be easier said than done, as the Czechs and Slovaks might tell us. But I do think it is possible.

For this to happen a number of steps will be required. 1) A majority of the population and its political leaders must come to accept the

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7 See D. Bercuson & B. Cooper, *Deconfederation: Canada without Quebec* (Toronto: Key Porter Books, 1991); S. Reid, *Canada Remapped: How the Partition of Quebec will Reshape the Nation* (Vancouver: Pulp Press, 1992); and on the Quebec side, the series *Etudes Québecoises*, edited by VLB, with a map on its cover of Quebec including Labrador within its territory.

8 See M.E. Turpel, "Does the Road to Quebec Sovereignty Run through Aboriginal Territory?" in D. Drache & R. Perin, eds., *Negotiating with a Sovereign Quebec*," (Toronto: Lorimer, 1992) 93-106.

9 A clear argument for three nations was first presented in the article, co-authored by 11 Ontario academics, "Three Nations in a Delicate State" *Toronto Star* (4 February 1992) A17. Similar views were also voiced at several of the constitutional conferences held in early 1992, especially the one in Toronto, and by the National Action Committee on the Status of Women during the referendum campaign. See also various articles in *The Canadian Forum*, October and December 1992.

intractability of nationalism and the need for a fundamental re-making of our existing federation along either asymmetrical or confederal lines. 2) The adherents of sociological nationalism, be they English-speaking, French-speaking, or aboriginal, must accept limits to national aspirations, especially where the rights and interests of the others are concerned. There is a price to be paid for pushing one's nationalism too far, in terms of tolerance, pluralism, and the ability to live in harmony with one's neighbours. Self-limiting nationalism must be the name of the game. 3) In a larger world in which economic forces are leading to ever greater globalization and integration of regions and continents, sovereignty of the 18th or 19th century kind has lost many of its attractions. There is the need to balance off aspirations to linguistic and cultural autonomy and political forms of self-rule with commonality of purpose and interaction in the external arena.

Let me briefly explore each of these three principles in turn.

1) The recognition of multiple forms of national identity within a long-existing state like Canada will not come easily, especially to those who insist on a single, unhyphenated form of nationality, grounded in a notion of equal citizen rights. It will involve a major re-thinking of citizenship, in which the relationship of a Québécois or of an aboriginal person to Canada may well be somewhat different from that of the inhabitants of what — for lack of a better term — is often called the rest of Canada. It may also mean, as Charles Taylor has eloquently argued, the acceptance of community or group rights side by side with individual rights;[10] this, in a society where the *Charter* has helped instill a strong notion of individual rights, as was repeatedly brought home in the referendum campaign by some of the Charlottetown Accord's strongest opponents. Further, on the English-speaking side it will demand a quite creative exercise of the imagination in forging an English-Canadian identity distinct and different from the larger all-inclusive Canadian one.

[10] C. Taylor, "Shared and Different Values" in Taylor, *Reconciling the Solitudes: Essays on Canadian Federalism and Nationalism* (Montreal: McGill-Queen's University Press, 1993).

Historically, the English-Canadian sense of identity has been caught up with the structure of a single federal state called Canada, including Quebec and aboriginal people. There has never been an English Canada, so to speak, certainly not politically, in the way in which we can speak of a province, even nation, with reference to Quebec. It is all very well to ask the far-flung inhabitants of the rest of Canada from Newfoundland to Vancouver Island to our northern territories to draw together different strains from our historical past. The notion of an English (or English-speaking) Canada will not come easily or without much internal division, along right-left, regional, and other lines.

Still, the prognosis is not altogether negative. One of the more striking features of our seemingly ceaseless national debate and the ebb and flow of the sentiment for sovereignty within Quebec has been the emergence of a clearer sense of an English-speaking Canada than before. Sometimes, this can take a truculent form, as in calls for Quebec to leave Canada, with a substantially truncated territory to boot.[11] At others, it can take a more realistic form, an honest exploring of options that would face a Canada without Quebec.[12]

I am one who believes we are still at an early stage in conceptualizing any so-called English-Canadian nation and the attributes and ethos it may have. I also recognize the difficulties that lie ahead in giving political expression to any such sociological entity. Yet I am not a total pessimist either. There are few in English Canada, including the west, who would really deny the distinctiveness of Quebec where language and culture are concerned. The real opposition to special status for Quebec, as I read the referendum outcome, hinges on the fear that Quebec would acquire

[11] See Bercuson & Cooper, *supra* note 7 for one example.

[12] See some of the essays in J.L Granatstein & K. McNaught, eds., *English Canada Speaks Out* (Toronto: Doubleday, 1991); K. McRoberts, *English Canada and Quebec: Avoiding the Issue* (Toronto: Robarts Centre for Canadian Studies, York University, 1991); and many of the essays in Drache & Perin, eds., *supra* note 8.

privileges at the expense of others. Attitudes might be very different if it were clear that Quebec would not be getting a free ride.

One possibility lies through an asymmetrical model of federalism. Under such an arrangement, Quebec would give up powers at the federal level for each new power, *e.g.* over culture, immigration, labour market training, that it received. It would receive tax points to help it finance these activities, but would at the same time forfeit any future claims to equalization payments for them. Quebec M.P.s, Senators, and cabinet ministers would no longer participate in decision-making for the rest of Canada in areas from which Quebec had opted out. The government and parliament of Canada for these purposes would become the government and parliament of English Canada.

Such a scheme could only work if the number of areas of exclusive Quebec jurisdiction were limited. For once we cross a certain threshold, for example, the twenty-two powers the Allaire Report proposed, insurmountable problems would arise. Where would confidence reside — with Quebec members present in the House of Commons or not? Would a majority of English Canadians accept such a role for Quebec M.P.s, if Quebec were not subject to the jurisdiction of the federal government in most areas? Almost certainly not.

Under these circumstances, we might well have to envisage an even looser arrangement. The inhabitants of Canada outside Quebec might seek to establish a distinct English Canadian parliament and government in which Quebec were no longer represented. This would probably require some combination of constituent assembly broadly representative of the population of English Canada and subsequent referendum approval to give it life. In the aftermath of Meech and Charlottetown, English-speaking Canadians would surely not accept less.

Quebec, too, would have to go the route of some sort of constituent assembly and referendum in working out its political destiny as a nation. And so, in some fashion yet to be determined, would our aboriginal people. The difficult part, however, which will require feats of

statesmanship of a high order, will be working out a confederal structure to cap any such arrangement and retain a single Canadian citizenship and personality where the outside world is concerned.

In a book published in 1991, *Toward a Canada-Quebec Union*, I have outlined one possible model.[13] English-Canada, Quebec, and, I would now add, aboriginal peoples in lands which they control would have a large measure of self-government. There would, however, be a parliament and government for the Canada-Quebec-aboriginal union in which everyone would have representation (albeit related to population). It is this union or confederal government which would be charged with foreign affairs, defence, trade, currency, citizenship, and the environment. As in the Austo-Hungarian Empire of yore, there would continue to be only one state unit where the external world is concerned. There would be no international boundaries within what is today Canada, nor would we be pressing the United Nations for several more flag-poles alongside Azerbijan or Croatia.

2) For any alternative arrangement to work, it goes without saying, openness and good-will among our sociological nations will be called for. One can hardly conceive of either asymmetrical federalism or a confederal arrangement operating, for example, if within a restructured Canadian union linguistic minorities were to see existing rights to education, cultural or social services in their own language vanish and wholesale intolerance the order of the day. The same would also apply to relations between aboriginals and non-aboriginals.

The lesson I would draw from the excesses of ethnic nationalism elsewhere is not the somewhat pious wish to do away with nationalism altogether. This was the underlying spirit of Trudeau's vision of Canada, of bilingualism and multiculturalism. It was not without its intellectual and logical political appeal; but at the sociological level, it has simply not

[13] P. Resnick, *Toward a Canada-Quebec Union* (Montreal: McGill-Queen's University Press, 1991).

worked. The reality of divergent national sentiments will not go away simply because many, especially in the dominant cultural grouping would like this to happen. This would be the most foolish conclusion to be drawn from the failure of the Charlottetown Accord.

Conversely, nationalists within a multi-national federation like ours — be they Québécois, aboriginal, or English-speaking Canadian — if they are not simply to implant new hatreds or reinforce old ones, must proceed with extreme caution. Not all virtue lies with one's own national grouping; nor do rights and obligations vanish with respect to the members of others. Paradoxical as it may sound, nationalism itself must become of a self-limiting variety if there is to be any alternative to the melt-down of multi-national states.

The sense of limits covers a number of things. It means accepting the fact that violence is not an acceptable means to the resolution of national differences. It means respecting genuine pluralism within one's national community and towards the outside. It also means accepting limits to full sovereignty in the political arena, provided a very significant measure of autonomy and internal self-government have been secured.

Self-limiting nationalism may be less of a contradiction than it appears. We have over the past forty years witnessed a rapprochement among the nation-states of Western Europe, the continent which gave us modern nationalism in its most intransigent form. If the French and Germans can accept the need for limits to their nationalism (and to state sovereignty as well, whatever the ultimate fate of Maastricht), is the principle I am advancing entirely absurd? Even as between long-established opponents, for example, Israelis and Palestinians, white South Africans and blacks, there is no denying a grudging acknowledgement, by some at least, of the case for certain basic rights to the other.

Such developments can go significantly further where the relationship between differing communities is not tarnished with secular hatreds. Despite sins of omission and commission, especially vis-à-vis aboriginal people, but to a certain degree in the relationship between English and

French Canadians as well, the political history of Canada is relatively hopeful in this regard. There is a tradition of give and take among large sections of the population which should make it easier to put limits on nationalism. And there is the force of international opinion in the era in which we live, not to speak of mutual self-interest, which should also play a role.

3) This brings me to my final argument. Sovereignty in the late 20th century is no longer the value it once was, when Bodin or Hobbes wrote their works or the nation-states of Europe set out to divide the then colonial world amongst themselves. On the one hand, we have seen the multiplication of political units in the post-World War II world with membership in the United Nations, for example, spiralling from 51 in 1945 to approximately 180 today. On the other hand, the reality of global movements of capital and people, of communications technology, of consumer tastes, of ecological destruction, of a concern for human rights, has also marked us. Nation-states are not islands unto themselves, nor can they easily seal off their borders to the larger world outside — not without danger or loss to themselves.

The exercise of political sovereignty is a more problematic phenomenon today, both in countries of the north and of the south. It makes the prize of nation-state status less alluring to lucid nationalists, especially those concerned with economic arrangements, social safety nets, or environmental standards that, more and more, are the issues of the day. Sovereignty *pure et dure*, as a good number of Québécois will have to recognize, would not come without a price. A sovereign Quebec would need to manage its own currency and monetary policy; adequately fund social and cultural programs; negotiate its own trading arrangements with powers like the United States, little known for its beneficence; maintain amicable relations with the very country, Canada, from which it would just have had a possibly rancorous break-up.

What makes more sense, in my opinion, is to attempt to combine significant sovereignty over language, culture, and social policy, *i.e.* sociological nationhood, with important elements of shared community —

economic and geopolitical — with one's fellow citizens. We must begin to move away from a one-Canada model, based on the notion of a single Canadian nationality, to something more pluralistic and multi-national in character.

In an era of crisis for multi-national federations, there is no alternative to a looser framework based upon the recognition of sociological nations. Yet sociological nationhood need not spell an endless proliferation of nation-states. For once we abandon the fetish that state and nation are one and the same thing, we free ourselves from another *idée fixe*, namely that recognizing a people as a nation inexorably means recognizing the desirability of their forming a state.

There is far more to be lost than to be gained by Canada splintering, like the multi-national federations of eastern Europe, into mutually antagonistic fragments. But the price of preventing this will be acknowledging that the 1867 version of Canadian federalism cannot be retrieved and that beyond Charlottetown lies a Canada of multiple national identities — not one.

PATENTLY CONFUSED: COMPLEX INEQUALITY AND *CANADA* V. *MOSSOP*

Mary Eaton*

Gays and lesbians traditionally have been defined out of equality rights protection. As Mary Eaton writes, there is a tiresome history of adjudicators reading human rights provisions in a heterosexually exclusive way. Mary Eaton discusses the ruling in Canada *v.* Mossop, *where the Supreme Court of Canada held that the Canadian Human Rights Act prohibition against discrimination on the ground of "family status" does not protect gay and lesbian families. Eaton argues that this result was by no means demanded by the logic of the Canadian Human Rights Act nor by the rules of interpretation normally applicable to human rights laws. Moreover, the interpretive approaches adopted by the majority and minority of the Court fail to comprehend the complexity of "overlapping" oppression, where discrimination is experienced on more than one prohibited ground. Eaton argues that forcing claimants to choose between one prohibited ground or another reduces these complex forms of discrimination to simple, unidimensional terms. Equality rights thereby continue to have the effect of subordinating disempowered groups to the authoritative power of the law.*

Traditionnellement, femmes et hommes homosexuels n'ont jamais pu invoquer la protection des droits à l'égalité. Mary Eaton souligne que, dans l'histoire fastidieuse des tribunaux les dispositions relatives aux droits de la personne sont exclusivement perçues dans une perspective hétérosexuelle. Dans Canada c. Mossop la Cour suprême du Canada a jugé que, au terme de la Loi canadienne sur les droits de la personne, le motif de distinction illicite fondé sur le statut matrimonial ne s'appliquait pas aux familles homosexuelles. Selon Eaton, cette interprétation n'est en rien exigée par la logique de la Loi ni par les règles d'interprétation normalement applicables aux lois régissant les droits de la personne. Les modes d'interprétation adoptés par la majorité et la minorité de la Cour incluent la complexité du principe d'oppression simultanée où la discrimination se fonde sur plus d'un motif illicite. Le fait de forcer les défendants à choisir entre les motifs de distinction illicite a pour résultat de réduire des formes complexes de discrimination en termes simples et unidimensionnels. Les droits à l'égalité ont toujours pour effet de subordonner les groupes démunis au pouvoir autoritaire de la loi.

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I. Introduction

For the first time in over a decade, the Supreme Court of Canada last year faced the task of having to expound on the scope — indeed on the existence — of lesbian and gay equality rights in this country.[1] So much has happened since 1979 when the Court last spoke on the issue in *Gay Alliance Toward Equality* v. *Vancouver Sun*.[2] Two major health epidemics and a crisis of public safety have threatened to render real the long wished for and sometimes openly expressed aspiration of the far right that we, scourge of the fair earth, should be eliminated entirely and once and for all.[3] AIDS, first brought to the forefront of gay consciousness in about 1981, continues to ravage gay males (and some lesbians) killing them by the thousands; breast cancer, only just recently made the subject of measurable public awareness, has at last been named as a leading cause of death amongst lesbians;[4] and the documentation of street violence against both lesbians and gays illustrates dramatically that we take our lives into our hands when we dare to venture out into public spaces.[5]

When Brian Mossop got his day in Court, he asked simply that lesbian and gay couples be recognized as "family" and as such, be protected

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1 *Canada* v. *Mossop*, [1993] 1 S.C.R. 554 [hereinafter *Mossop*].

2 (1979), 97 D.L.R. (3d) 577 (S.C.C.) [hereinafter *Gay Alliance*].

3 The observations and statistics which follow are problematic in the sense that they are not completely cognizant of the potential differences between and amongst homosexuals along the axes of race, gender, class, ability and other similar markers of systemic inequality. However, for reasons which follow later in this paper, my failure to address these important differences in a sustained way will, I hope, prove justifiable.

4 See S. Roan, "Cancer and the 'Invisible Population'" *Los Angeles Times* (23 March 1993) E1.

5 See, for example, G.D. Comstock, *Violence Against Lesbians and Gay Men* (New York: Columbia University Press, 1991) who, after averaging the results of eight different surveys, reports (at 38) that: "33 percent of all respondents were chased or followed; 23 percent had objects thrown at them; 17 percent were punched, hit, kicked, or beaten; another 17 percent reported vandalism or arson against their property; 11 percent were spit at; and 8 percent were assaulted with a weapon."

against "family status" discrimination in accordance with the provisions of the *Canadian Human Rights Act*.[6] Undoubtedly, it was hoped that the Court would acknowledge that lesbians and gays constitute an embattled constituency desperately in need and deserving of legal protection, and would continue what seems to be a trend toward reading equality guarantees in an expansive way and say "yes" to Mossop's plea. It is now a point of historical fact, of course, that the Court's answer was "no".

Time, of course, will tell how *Mossop* is received by the legal community and by larger Canadian society. For lesbians and gays, Brian Mossop's loss has, not surprisingly, already sparked heated and divided responses.[7] For some, the very result of *Mossop* virtually compels the conclusion that the Court is "homophobic" and that queers constitute the most detested and least legally respected amongst disempowered groups. For others more optimistically inclined, the facts that the decision was a close call (the nay-sayers commanded a slim 4:3 majority) and that the Court was apparently not overtly hostile to Brian Mossop and his claim suggest that *Mossop* is far from being the last word on lesbian and gay equality rights in general or family rights in particular.

In this comment I shall argue that the debate that has been brewing over the meaning and significance of the decision is well-founded; that there are indeed sound reasons both for denouncing and for celebrating *Mossop*. In addition to the Court's unfortunate determination that Mossop's relationship with his lover's father was not "familial" and, hence, that Mossop's grief over his death was unworthy of legal recognition, there are moments in the various opinions, both logical and rhetorical, that can only

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[6] The *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3(1) [hereinafter "the *Act*"] provides:

> For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability and conviction for which a pardon has been granted are prohibited grounds of discrimination.

[7] I refer here to conversations I have had with various lesbians and gays about the decision.

be accounted for through a heteronormative framework. In terms of both its disposition and its reasoning, then, the allure of a cynical reading of the decision seems hard to resist. So also, to deny that *Mossop* offers some respite seems unnecessarily pessimistic when regard is had to the Court's intimations that a more favourable result might be reached in future cases provided they are differently framed. Although I do detail the foundations of these dissonant readings, I make no attempt to harmonize them or to offer some "true" account of what the case actually stands for. Instead, my aim is to add to the multiple understandings of *Mossop* by offering yet another interpretation sounding in a rather different register. The subject of my critical intervention is the attempt by a majority of the Court to forge a new analytic for addressing complex equality claims. Specifically, the majority seems to have signalled that it is prepared to abandon the so-called "water-tight compartments" approach to human rights interpretation, and that it will not construe sexual orientation and other non-discrimination guarantees in the same restrictive way the lower courts have in the past. This is very welcome news not only for lesbians and gays but for other equality-seeking groups as well, and likely will, given the trend in recent proposals to reform anti-discrimination law along similar lines, be lauded in the academic commentary to come.[8] Yet, as important as the Court's comments in this regard may well be, my claim is that a favourable resolution of Mr. Mossop's particular case did not require such a paradigmatic shift in equality thinking.[9]

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[8] The water-tight compartments approach has been the subject of extensive commentary in the United States in recent years (see the references cited *infra* at notes 77-80) and those who have offered ideas for reform have made suggestions quite similar to those proposed by the Supreme Court of Canada. At the time this piece was drafted, *Mossop* has not as yet been discussed in published legal writings. Since its completion, however, at least one author has advocated an approach to complex equality claims — that is, claims which implicate more than one ground of discrimination — consonant with such proposals. See N. Iyer, "Categorical Denials: Equality Rights and the Shaping of Social Identity" (1993) 19 Queen's L.J. 179.

[9] I myself harbour a certain amount of ambivalence, as a political matter, toward the enterprise of securing the expansion of family benefits to gay and lesbian couples, and by extension therefore, toward the loss in *Mossop*. Although space

II. The Decision

Brian Mossop first met Ken Popert in 1974. They became lovers and from 1976 on, lived together in a jointly-owned and maintained home. As a couple, they shared in the day-to-day exigencies and pleasures of life, maintained a sexual relationship, and held themselves out to family and friends as committed gay partners.

In June of 1985, Popert's father passed away and both Mossop and Popert attended the funeral. At the time, Mossop was employed as a translator for the Department of the Secretary of State. His employer and the Canadian Union of Professional and Technical Employees (CUPTE) had entered into a collective agreement which provided to employees up to four days bereavement leave upon the death of a member of their "immediate family". The contract defined "immediate family" to include parents, siblings, spouses (legal and common law), children, mothers- and fathers-in-law, and other relatives who permanently reside with the employee. The day after the funeral, Mossop applied for bereavement leave pursuant to this provision. His application was denied, but he was offered a special day of paid leave — in fact, one of his vacation days — in its stead. Mossop rejected this offer and filed a complaint with the Canadian Human Rights Commission, alleging that he had been discriminated against on the basis of family status in violation of several provisions of the *Canadian Human Rights Act.*[10]

A Tribunal appointed pursuant to the legislation held that, in agreeing to the exclusionary definition of "immediate family" in the collective

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constraints do not permit me to detail my objections, I should at least say that it is my view that legally recognizing lesbian and gay unions because they, but for the sex of the partners, resemble heterosexual unions, will not in the long run transform relations of inequality. Nevertheless, for reasons which follow, I do regard *Mossop* as wrongly decided.

[10] The provisions said to be violated included s. 7 (discrimination in the course of employment), s. 9 (discrimination by employee organization), and s. 10 (discrimination in employment agreements).

agreement, both the employer and the union had committed a discriminatory practice in violation of the *Act*.[11] The Attorney General of Canada successfully applied to the Federal Court of Appeal for judicial review[12] and had the decision of the Tribunal set aside.[13] In the Supreme Court of Canada, a slim majority of the seven member bench held that the Tribunal had wrongly interpreted the provisions of its enabling statute and upheld the decision of the Court of Appeal.

Two interrelated issues were before the Court: the appropriate standard to be applied in reviewing decisions of the Tribunal;[14] and the meaning

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11 *Mossop* v. *Canada* (1989), 10 C.H.R.R. D/6064 (Canadian Human Rights Tribunal). By way of relief, Adjudicator Atcheson ordered that the day Mossop took off to attend the funeral be designated as a day of bereavement leave, that the docking of a day's vacation from his total holiday credits be restored, that each of the Treasury Board and CUPTE pay Mossop $250 for the damage done to his feelings and self-respect, that each cease to apply the bereavement leave provisions of the collective agreement insofar as they do not allow leave to persons in homosexual relationships who would otherwise meet the conditions of the relevant articles, and finally, that the collective agreement be amended so that the definition of common-law spouse (which governed the entire contract) not be restricted to heterosexual couples.

12 *Federal Court Act*, R.S.C. 1985, c. F-7, s. 28.

13 *Canada (A.G.)* v. *Mossop* (1991), 71 D.L.R. (4th) 661 (F.C.A.).

14 Six of the seven judges, (L'Heureux-Dubé J. in dissent) held that the Tribunal was entitled to no curial deference and, therefore, that unless the Tribunal interpreted the meaning of family status correctly, its decision could not stand. For Chief Justice Lamer, the absence of a privative clause in the *Canadian Human Rights Act* was effectively determinative. Although he acknowledged that the Court had in the past afforded some deference to specialized administrative tribunals, even where no specific provision limited the scope of judicial review, he held that the Court had not done so where the decision turned on "findings of law in which the [body] has no particular expertise." The meaning of "family status", he held, was an ordinary question of law.

By contrast, L'Heureux-Dubé J. held that the absence of a privative clause was only one factor in determining the appropriate standard of review. After a thorough review of the jurisprudence, she argued that the Court should show the same deference to human rights tribunals that it extended to labour relations boards and for similar reasons: the statute granted to the Commission broad

(or meanings) to be ascribed to the phrase "family status" in section 3 of the *Act*.[15] Of the six justices who considered that the tribunal's decision must be held to a standard of "correctness", Lamer C.J. (joined by Sopinka and Iacobucci JJ.) and La Forest J. (with whom Iacobucci J. also joined) thought the Tribunal's determination wrong. Cory J. and McLachlin J. thought that the Tribunal's holding met this stringent level of review. L'Heureux-Dubé J. did not go so far: she was prepared to say no more than that the Tribunal's interpretation was not patently unreasonable and should therefore not be quashed.

Both Lamer C.J. and La Forest J. rejected what might be called the "living tree" approach to the interpretation of human rights legislation, and held that the meaning of "family status" was to be determined by reference to Parliamentary intent at the time "family status" was added to the *Act* in

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powers; tribunal members were experts in the area of human rights; and the interpretation of "family status", which lay at the core of its decision adjudicating Mr. Mossop's complaint, involved a mixed question of law and fact. Accordingly, she held, unless the human rights tribunal's interpretation of the *Canadian Human Rights Act* was patently unreasonable, the Court should defer.

La Forest J. in turn, devoted the bulk of his opinion responding to L'Heureux-Dubé J.'s dissent. Rejecting the analogy between labour relations and human rights tribunals, he held that such tribunals were entitled to no curial deference because their expertise, such as it was, related only to fact finding and not questions of law. More cryptically, he held that deference was misplaced because human rights decisions are imposed on parties, and have a direct influence on society and on basic social values.

An analysis of *Mossop*'s administrative law implications is beyond the scope of this comment. I note in passing, however, that the reasons of La Forest J. respecting judicial review of human rights decisions inspire a certain amount of incredulity. His intimations to the contrary, it is simply not the case that the courts have adopted a "hands off" policy toward the decisions of labour bodies. Additionally, the difference he sees between labour and human rights determinations — *i.e.* that the latter have an impact on social values whereas the former do not — I find wholly unconvincing.

[15] The two issues were, of course, interrelated since the answer to the first question determined how much latitude the Tribunal enjoyed in construing the meaning of "family status".

1983.[16] For the Chief Justice, Parliament's intention could be deduced from the *Act*'s legislative history. Had it been the case that the term "family status" was ambiguous, he reasoned, then the Court could have sought out the purpose of the *Act* and adopted a reading of the provision which was most consistent with that purpose. Alas, such was not the case. It was "highly relevant"[17] to him that when the statute was amended to include "family status" within the list of prohibited grounds of discrimination enumerated in section 3, Parliament at that time refused to add sexual orientation as well. Although Lamer C.J. made no effort to define "family status" affirmatively, the legislative history he invoked suggested to him that Parliament did not intend the words "family status" to cover anything like Mr. Mossop's situation.

For La Forest J., by contrast, Parliament's intent could be discerned via the Plain Meaning Doctrine. To his mind, in the absence of evidence to the contrary, the legislature must be taken to have used the words in their "usual and ordinary sense".[18] It was plain to him that in "ordinary parlance" the term "family" embodied the "dominant" conception, the "traditional" family, and perhaps its close (heterosexual) derivatives.[19] True, it might be more "human"[20] to interpret the statute broadly and give the complainant his day of bereavement leave; true, it has been generally accepted that human rights statutes should be liberally construed in light of their purpose; and true, too, some people might actually refer to homosexual couples as a family. However, given that most people did not have homosexuals in mind when they thought of family, he concluded that humanistic impulses and liberal rules of construction had to give way to conventional usage.

L'Heureux-Dubé J.'s judgment concerning the meaning of family was marked by her more dynamic approach to the exercise of human rights

16 S.C. 1980-83, c. 143.
17 *Supra* note 1 at 580.
18 *Ibid.*
19 *Ibid.*
20 *Ibid.*

interpretation. Referring to the long line of Supreme Court authority on the special nature of human rights instruments,[21] as well as those precedents suggesting that *Charter* norms ought to inform the construction of statutes,[22] she took the position that "though traditional interpretational tools ought not to be ignored, they must be applied in the context of a broad and purposive approach."[23] This approach, she continued, would pay special cognizance to the principle of equality enshrined in section 2 of the *Act*,[24] section 15 of the *Charter*[25] and to the threat to social democracy posed by unchecked discrimination. Before applying this interpretive approach, however, she chose first to dismiss, on their own terms, the government's arguments that the Tribunal erred in law when it failed to consider both the textual context of section 3 and its animating

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21 *Insurance Corp. of British Columbia* v. *Heerspink*, [1982] 2 S.C.R. 145; *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536; *Bhinder* v. *Canadian National Railway Co.*, [1987] 1 S.C.R. 1114; and *Robichaud* v. *Canada*, [1987] 2 S.C.R. 84.

22 *RWDSU* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [hereinafter *Dolphin Delivery*]; *Hills* v. *Canada*, [1988] 1 S.C.R. 513; and *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight Communications Inc.*].

23 *Supra* note 1 at 614.

24 Section 2 provides:

> The purpose of this Act is to extend the laws in Canada to give effect, within the purview of matters coming within the legislative authority of Parliament, to the principle that every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age, sex, marital status, family status, disability or conviction for an offence for which a pardon has been granted.

25 Section 15(1) of the *Charter* provides:

> Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

legislative intent. She found no support for the idea that the linguistic structure of *Act* suggested that only legally validated families be protected, since a comparison of the French and English versions of section 3 obviated such a claim. As to legislative history, she noted that in the face of explicit debate about the meaning of "family status" the reach of the 1983 amendment was left entirely unresolved.[26] Parliament, in short, intended to leave its interpretation to the Commission and its tribunals.

Having disposed of the government's arguments, L'Heureux-Dubé J. then turned to the Tribunal's interpretation of "family status". Although it stopped short of holding that all gay and lesbian unions constituted family for the purposes of the *Act*, the Tribunal concluded that "family status" was broad enough not to exclude same-sex couples *prima facie*. In the particular context of Mr. Mossop's case, it held that the denial of bereavement leave constituted family status discrimination in violation of section 3. Tracking the Tribunal's reasoning, she found that both holdings fell within the realm of reasonableness and should not have been disturbed by the Court on review.

Justice L'Heureux-Dubé pointed out that the "unexamined consensus" on the meaning of family "begins to fall apart when one is required to define"[27] it. The traditional family may indeed be the "dominant" conception, but it is by no means the only one. With reference to the definitions of family contained in various social science texts and sundry pieces of legislation, she accepted that the term family "may have varied meanings depending on the context or purpose for which the definition is desired."[28] In addition, she accepted that, as an empirical matter, a large number of Canadians do not, in fact, live within families which conform to the "dominant" or "traditional" conception embraced by La Forest J.. Looking beyond the various forms that family takes and examining instead the values that lie at the base of society's support for it, L'Heureux-Dubé

26 *Supra* note 1 at 620.
27 *Ibid.* at 623.
28 *Ibid.* at 626.

J. found that, with the possible exception of procreative capacity,[29] lesbian and gay families were very similar to their heterosexual counterparts. There was no evidence to suggest that lesbian and gay unions are inherently unstable or unfulfilling for its participants. In other words, they serve the values of stability, intimate and emotional connection, and nurturance of children as heterosexual families do. It followed, as a preliminary matter, that a couple's status as lesbian or gay did not, *ipso facto*, necessitate exclusion from the ambit of "family status".

Having said all that, L'Heureux-Dubé J. preferred not to set out a universal and all-purpose definition of family, finding favour instead with the Tribunal's so-called "functional" approach to family status discrimination claims. This method took as its focus the purpose behind a particular family benefit scheme to determine what factors were relevant in considering who constitutes a family. Applying this method, she concluded that it was reasonable for the employer to limit the availability of bereavement leave to those involved in close relationships but that there was no sound reason to exclude same-sex couples. Given that the purpose of bereavement leave was to allow family members to attend to their own needs and those of close ones at a stressful and painful time and that lesbians and gays experienced the same sorts of needs, it was discriminatory to limit this benefit to heterosexual families.

III. Analysis

Those who regard *Mossop* as a denial of justice and a quintessential illustration of the workings of judicial homophobia will find imperials of

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[29] Rather than addressing lesbians' and gays' procreative potential, Justice L'Heureux-Dubé preferred to dismiss reproductive ability as a viable indicator of family status. At 631 of her reasons (*supra* note 1) she said:

> Though there is undeniable value in procreation, the Tribunal could not have accepted that the capacity to procreate limits the boundaries of family. If this were so, childless couples and single parents would not constitute families. Further, this logic suggests that adoptive families are not as desirable as natural families. The flaws in this position must have seemed self-evident.

support for their reading. Substantively speaking, there is now a tiresome history of courts and adjudicators construing human rights provisions in a heterosexually exclusive way. Indeed, this seems to be so irrespective of the actual wording of the legislation at issue or the specifics of the claims advanced. For instance, the guarantee of protection against sex discrimination has been understood to apply only to relations between males and females in several cases.[30] The reach of "marital status" protection has similarly been construed to benefit heterosexuals only, regardless of the circularity of denying relief to those who suffer discrimination because they are denied the right to marry.[31] Even statutes which contain virtually unlimited "thou shalt not discriminate" provisions have been interpreted narrowly so as not to apply to lesbians and gays.[32] Many of those decisions, like *Mossop*, rely on judicial pronouncements about obvious legislative intent to justify the conclusions they reach. In the face of this history, the Court's conclusion that "family status" applied

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30 *University of Saskatchewan* v. *Saskatchewan Human Rights Commission*, [1976] 3 W.W.R. 385 (Sask. Q.B.) [hereinafter *University of Saskatchewan*]. See also: *Re Damien and Ontario Human Rights Commission* (1976), 12 O.R. (2d) 262 (H.C.J.); *Vogel* v. *Manitoba (No. 1)* (1983), 4 C.H.R.R. D/1654 (Board of Adjudication) [hereinafter *Vogel (No. 1)*]; and *Vogel* v. *Manitoba (No. 2)* (1991), 16 C.H.R.R. D/233 (Board of Adjudication), affirmed (1992), 16 C.H.R.R. D/242 (Man. Q.B.) [hereinafter *Vogel (No. 2)*]. *Charter* sex discrimination claims have also all failed. See: *Knodel* v. *British Columbia* (1991), 58 B.C.L.R. 356 (2nd) (Sup. Ct.) [hereinafter *Knodel*], and *Egan* v. *Canada* (1991), 87 D.L.R. (4th) 320 (F.C.T.D.).

31 See *Vogel (No. 1)* and *Vogel (No. 2)* both *ibid.* See also *Leshner* v. *Ontario (No. 2)* (1992), 16 C.H.R.R. D/184 (Board of Inquiry) [hereinafter *Leshner (No. 2)*]; *Clinton* v. *Ontario Blue Cross (No. 2)* (1993), 18 C.H.R.R. D/377 (Board of Inquiry) [hereinafter *Clinton*]; and *Layland* v. *Ontario* (1993), 14 O.R. (3d) 658 (Div. Ct.).

32 See *Gay Alliance*, *supra* note 2, and *Vogel (No. 1)*, *ibid.* As an example of an unencumbered anti-discrimination clause, consider section 9(1)(a) of the *Manitoba Human Rights Code*, C.C.S.M. 1987, H175, which defines discrimination as including:

> differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit....

only to heterosexuals and not to homosexuals seems part and parcel of an entrenched judicial pattern of denying lesbian and gay human rights claims notwithstanding the context in which such claims are advanced.

Juxtaposing this pattern in general and the Court's response to Mossop's claim in particular with its analysis of equality claims of other disempowered groups makes for a worrying study in jurisprudential contrasts.[33] The disability rights community scored a victory in *Swain* when the Court declared unconstitutional the common law rule permitting the Crown to raise evidence of an accused's insanity against her/his wishes.[34] The interests of racialized and ethnic communities were vindicated in a trilogy of cases[35] where anti-hate propaganda legislation was upheld in the name of equality.[36] *R.* v. *Seaboyer*[37] notwithstanding, "women's" victories have been secured in both the statutory and the

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33 I am aware of the dangers of suggesting, even by implication, that there are hierarchies of oppression. Such assertions often spark bitter resentment between oppressed groups, thereby dividing what could be a most powerful coalition against domination. I am also aware that locating oneself, one's community, at the bottom of the social ladder of privileges and benefits sounds an especially sour note when, comparatively speaking, the conditions endured by other groups is in some respects far worse. I do realize as well, that the hierarchies of oppression debates presuppose membership in only one disempowered constituency, when of course that is not the case. My own view on this issue is that, despite the artificiality of doing so, dominant culture (including the legal system) constructs classes of people like "women" or "homosexuals" as if they were self-contained categories, consigns individuals to them, and ranks groups according to a discriminatory system of "merit". It is that "constructed" reality which I am responding to in this paper.

34 *R.* v. *Swain*, [1991] 1 S.C.R. 933 [hereinafter *Swain*].

35 *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 [hereinafter *Keegstra*]; *R.* v. *Andrews*, [1990] 3 S.C.R. 870 [hereinafter *Andrews*]; and *Canada* v. *Taylor*, [1990] 3 S.C.R. 892 [hereinafter *Taylor*].

36 The legislation at issue in each of these cases was as follows: *Criminal Code*, R.S.C. 1985, c. C-46, s. 319 (wilful promotion of hatred) (*Keegstra* and *Andrews*); and *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 13(1) (promotion of hatred by use of telecommunication) (*Taylor*).

37 *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 (striking down s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, restricting the use of certain types of sexual history evidence in sexual assault trials).

constitutional setting: federal obscenity law survived a constitutional challenge in the name of women's equality;[38] the *Criminal Code* was interpreted in a gender sensitive way to make more meaningful female defendants' access to available criminal defenses;[39] and provincial tort law was constructed so as to make possible access by incest victims to judicial relief.[40]

What distinguishes these equality victories from Mossop's loss is that the Court departed from the interpretive method and the substantive precedent it had pioneered in other recent equality cases, departures which the more cynically minded might understandably regard as inspired by thinly cloaked, or at least unreflective, heterosexism. Obscured by the declaratory, logical and victim blaming rhetoric of the majority decisions, is the fact that, even on their own terms, the Court was not bound to reject Mossop's claim.

For example, despite the assured pronouncements of Lamer C.J. and La Forest J. that legislative intent dictated their interpretation of the *Act*, neither the legislative history cited by the Chief Justice nor the Plain Meaning Rule invoked by his colleague led ineluctably to the conclusion that by using the term "family" in the *Canadian Human Rights Act* the government meant heterosexual family and heterosexual family alone. As L'Heureux-Dubé J. quite rightly pointed out, the meaning of the phrase "family status" was problematic in the debates which accompanied its

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38 *R.* v. *Butler*, [1992] 1 S.C.R. 452 (upholding crime of obscenity, *Criminal Code*, R.S.C. 1985, c. C-46, s. 163(8)). I appreciate that there is some debate over whether *Butler* can legitimately be counted as a victory for all women. In including the decision amongst "women's successes" in the courts, I by no means intend to convey the impression that the controversy over *Butler* is misguided or to suggest what position I take in the debate. I do think that the nature of the dispute over *Butler* is of a completely different order than that which plagues most lesbian and gay human rights litigation, including *Mossop*. In the latter context, the point of difficulty has not been with the quality of rights offered by law, as it has with *Butler*, but rather with their quantity.

39 *R.* v. *Lavallee*, [1990] 1 S.C.R. 852.

40 *M.(K.)* v. *M.(H.)*, [1992] 3 S.C.R. 6.

addition to the *Act* in 1983. The Minister of Justice explicitly noted that it was the government's intention that the definition of the term be left to the administrative body charged with implementing the *Act*.[41] Until very recently, the government has remained studiously silent on the issue.[42] Needless to say, this history suggests that there was neither a specific intent to exclude lesbians and gays from the compass of the guarantee nor a shared and uncontested understanding that "family" is by definition a heterosexual construct.[43]

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[41] See *supra* note 1 at 620, L'Heureux-Dubé J.:

> I refer, in this regard, to the comments of the Minister of Justice as reported in the *Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 114, (20 December 1982) at 17: "It will be up to the commission, the tribunals it appoints, and in the final cases, the courts, to ascertain in a given case the meaning to be given to these concepts." When asked why he was reluctant to define these terms within the Act itself, the Minister responded as follows (*Minutes of Proceedings and Evidence of the Standing Committee on Justice and Legal Affairs*, Issue No. 115, (21 December 1982) at 73):
>
> The reason for my reluctance to have such definitions included, Mr. Chairman, is that it is not in accord with the scheme of the bill. *These words are being interpreted by the Canadian Human Rights Commission. We trust them to interpret and issue regulations.* [emphasis in original]

[42] On December 10, 1992, then Minister of Justice, Kim Campbell, tabled in the House of Commons proposed amendments to the *Canadian Human Rights Act*. Amongst these amendments was a provision adding sexual orientation to section 3 of the *Act* and a provision exempting from challenge employment benefits which accrued only to those in heterosexual relationships. The proposed Bill, however, never made it to first reading.

[43] One might think it strange that in the face of this legislative history, the majority nonetheless seemed able to divine a Parliamentary purpose to protect heterosexual liaisons only. But odd though it may indeed be, it is not all that uncommon. In the *University of Saskatchewan* case, *supra* note 30, for instance, Judge Johnson did more or less the same thing when he held, in the absence of any reference to dictionaries, case law, scholarly commentary or legislative materials, that the word "sex" in the Saskatchewan *Act* could only refer to relations between men and women.

According to the Chief Justice, however, further proof that Parliament could not have intended to protect homosexual couples when it prohibited family status discrimination lay in the absurdity of the legal consequences should "family status" be construed broadly: homosexual couples would be protected by the *Act* but individual lesbians and gays would not. Although he regarded such a result as "somewhat surprising",[44] it is the logic of his position that is more than a little bizarre. If, as he argues, the omission of sexual orientation means that family status discrimination must be interpreted *as a matter of law* in a heterosexual way, what of the other extant guarantees? On this logic, the omission of sexual orientation would also mean that only heterosexual women, heterosexual religious, racial and ethnic minorities, heterosexual people with disabilities, and so on, are covered by the *Act*. Plainly, such an outcome could not have been within the contemplation of Parliament when it declined to add sexual orientation to the *Act*.

La Forest J. advanced an equally untenable proposition more draconian in its implications. While the effect of Lamer C.J.'s position would be to exempt all lesbians and gays from all forms of discrimination, La Forest J.'s would jeopardize virtually all minority rights. It cannot be correct that the meaning given to rights guarantees designed to protect minorities from dominant majorities, should be defined by those same majorities. Does it

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[44] *Supra* note 1 at 581:

> While it may be argued that the discrimination here applies to homosexual couples through their familial relationship or in their "family status" and does not apply to the sexual orientation of Mr. Mossop as an individual as such, I am not persuaded by this distinction. I cannot conclude that by omitting sexual orientation from the list of prohibited grounds of discrimination contained in the *CHRA*, Parliament intended to exclude from the scope of that Act only discrimination on the basis of the sexual orientation of individuals. If such an interpretation were to be given to the *CHRA*, the result would be somewhat surprising: while homosexuals who are not couples would receive no protection under the Act, those who are would be protected.

not defeat the purpose of a human rights instrument if courts interpret its guarantees by reference to what those who do not need its benefits think about those who do? Yet, by resurrecting the Plain Meaning Rule, and equating plain meaning with majoritarian conventions, La Forest J. did precisely that. In so doing, he ignored the Court's own jurisprudence setting out the proper interpretation of human rights statutes,[45] and its rationale.[46] Insofar as La Forest J. adverted to this jurisprudence only to reject its application in Mossop's case, seemingly he did not intend to reverse well-established law. It would appear, then, that he was content to apply a double standard exempting claims like Mossop's from the reach of present equality jurisprudence.

Having located responsibility with Parliament for his inability to redress Mossop's complaint, the Chief Justice went on to fault Mossop and his supporters for the manner in which they chose to frame their case. The appellants had argued that the Court's interpretation of section 3 of the *Act* must be consistent with the Constitution.[47] The Chief Justice flatly rejected this submission. Instead, Lamer C.J. suggested, in somewhat scolding tones, that had the litigants taken up his invitation to frame arguments he was more interested in addressing, he would have been able to fashion "a much more complete and lasting solution to the present problem."[48] Specifically, it was Lamer C.J.'s desire that the parties and

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45 *Supra* note 21.

46 *Canadian National Railway Co.* v. *Canada (Canadian Human Rights Commission)*, [1987] 1 S.C.R. 1114 at 1134, Dickson C.J.:

> I recognize that in the construction of [human rights] legislation the words of the Act must be given their plain meaning, *but it is equally important that the rights enunciated be given their full recognition and effect.* We should not search for ways and means to minimize those rights and to enfeeble their proper impact. [emphasis added].

47 Factum of Égale *et al.*, at 8.

48 *Supra* note 1 at 579. La Forest J. is more inscrutable on this point. At 587 of his reasons (*supra* note 1) he said:

> I underline that the present case is not an action under the *Canadian Charter of Rights and Freedoms* where the Court may

intervenors permit the Court to visit the issue determined in *Haig* v. *Canada*.[49]

In *Haig*, several plaintiffs joined together to challenge, on *Charter* grounds, the omission of "sexual orientation" from the list of prohibited grounds of discrimination in section 3 of the *Act*. The Ontario Court of Appeal agreed that sexual orientation is an "analogous ground" of discrimination within the meaning of section 15 of the *Charter*, that its exclusion from section 3 was discriminatory and, therefore, that Parliament's failure to include it within the scheme of the *Act* was an unconstitutional violation of equality rights of lesbians and gays. Applying the Supreme Court's decision in *Schachter*,[50] the Court of Appeal concluded that the appropriate remedy was to read sexual orientation into the terms of the *Act*. Because the federal government chose not to appeal *Haig*,[51] the current state of the law (at least in the province of Ontario) is that sexual orientation is a prohibited ground of discrimination, along with family status, under the *Canadian Human Rights Act*.

Before addressing whether *Haig* would have guaranteed a different outcome for Mossop, I wish to take issue with the idea that the litigants gave the Court no choice but to approach this case as one purely centering on a simple issue of statutory construction without regard for the *Charter*. According to Lamer C.J., absent pronouncement by the Supreme Court on the efficacy of *Haig*, the Court was bound to construe the meaning of "family status" as if sexual orientation had not been read into the *Act* by the Ontario Court of Appeal. Yet, as the highest court in the land, the Supreme Court enjoys wide latitude to follow, distinguish or overturn

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review the actions of Parliament or the government, and I would refrain from saying anything about the issues such an action might raise.

49 (1992), 16 C.H.R.R. D/226 (Ont. C.A.) [hereinafter *Haig*].

50 *Schachter* v. *Canada*, [1992] 2 S.C.R. 679.

51 Then Justice Minister Kim Campbell announced the government's intentions not to appeal *Haig* on November 9, 1992. Presumably, this decision was predicated on her intentions to table amendments to the *Act* the following month (*supra* note 42).

rulings of the courts below. That is axiomatic. Perhaps also the Court possesses the power to ignore rulings of the inferior courts. In addition, the Court has been known to avoid *Charter* arguments even where the parties have squarely cast their claims in constitutional terms, as it did, for example, in *Singh*.[52] Arguably, then, the Court could have passed comment on *Haig* without offending adjudicative orthodoxy or departing from its past practice of disregarding litigants' preferences. *Haig* aside, Lamer C.J.'s disavowal that the *Charter* should be used as a tool in the exercise of giving meaning to the ground "family status" was a more significant legal choice and an unaccountable one at that. The very same judge has felt obliged to apply *Charter* principles when construing the scope of adjudicators' powers[53] and the common law.[54] To my mind, it is exceedingly difficult to distinguish between these adjudicatory situations and the interpretation of statutory human rights guarantees in a principled way.

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[52] See *Singh* v. *Minister of Employment and Immigration*, [1985] 1 S.C.R. 177. Although the parties had framed their case in *Charter* terms, they were "invited" to address the *Bill of Rights* instead. This invitation having been accepted, three judges of the six member panel confined their reasons to the application of the *Bill of Rights* and expressed no views on the constitutional issues.

[53] In *Slaight Communications*, *supra* note 22 at 1078, Lamer J. (as he then was) noted:

> As the Constitution is the supreme law of Canada and any law that is inconsistent with its provisions is, to the extent of the inconsistency, of no force or effect, it is impossible to interpret legislation conferring discretion as conferring a power to infringe the *Charter*, unless, of course, that power is expressly conferred or necessarily implied. Such an interpretation would require us to declare the legislation to be of no force or effect, unless it could be justified under s. 1. Although this Court must not add anything to legislation or delete anything from it in order to make it consistent with the *Charter*, there is no doubt in my mind that it should also not interpret legislation that is open to more than one interpretation so as to make it inconsistent with the *Charter* and hence of no force or effect.

[54] See *Swain*, *supra* note 34, and *Dolphin Delivery*, *supra* note 22.

If, however, Lamer C.J. is correct in predicting that the application of *Charter* norms could make a difference in claims like Mossop's, this would mark a very positive development in the evolution of lesbian and gay equality rights. Of course, the ways in which the Constitution could be invoked should be distinguished. Since the case involved the federal government acting *qua* employer, it would be possible to bypass the *Canadian Human Rights Act* altogether and challenge its benefits policy as an instance of state action which violates section 15. Alternatively (and this appears to be the approach Lamer C.J. contemplated) the *Charter* could be used, as in *Haig*, to read sexual orientation into the list of proscribed grounds of discrimination in section 3 of the *Act*. With this change in legislative structure, several possibilities arise. A statutory claim could then be made utilizing sexual orientation alone, family status alone, or some combination of the two. In fact, however, there have been plenty of instances in which spousal benefits claims have been advanced under the *Charter* as well as pursuant to statutory sexual orientation and/or family status guarantees, and almost all of them have failed.

Where sexual orientation has been enacted as a statutorily prohibited ground of discrimination, adjudicators have refused to construe it in a way which would require extension of spousal or family benefits to lesbian and gay couples. In *Re Carlton*,[55] for instance, an arbitration panel refused to find two provisions of a collective agreement — one making provision for dental and other benefits to heterosexual spouses and the other guaranteeing that the contract be applied without discrimination, including discrimination based on "sexual orientation" — to be in conflict with one another, relying upon the structural similarities between the collective agreement and the Ontario *Code*.[56] In Manitoba, the addition of sexual

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[55] *Re Carleton University and CUPE, Local 2424* (1988), 35 L.A.C. (3d) 96, aff'd (4 June 1990) (Ont. Div. Ct.) [unreported].

[56] *Human Rights Code, 1981*, S.O. 1981, c. 53, s. 9(g) defines "marital status" as "the status of being married, single, widowed, divorced or separated and includes the status of living with a person of the opposite sex in a conjugal relationship outside marriage." Examples from Ontario, because its *Human Rights Code* defines marital status heterosexually, are perhaps not indicative. Still, the world

orientation has not provided a segue for the extension of family benefits to lesbian and gay unions. *Vogel (No. 2)*[57] provides the most telling illustration of the virtual irrelevance of twofold guarantees to the interpretation of family/marital status and/or sexual orientation. There, the legislature had repealed a clause which had restricted the coverage of family status protection to those involved in heterosexual liaisons at the same time that it added sexual orientation to the list of impermissible grounds of discrimination. The Board of Adjudication concluded that the repeal of the definition effected no change in the meaning of family status. In its view, the (heterosexual) meaning of the term was apparently so self-evident that inclusion of a provision defining it as such was a "redundancy".[58] Further, it held that government benefit programs tailored to reward heterosexuals exclusively did not violate the edict against sexual orientation discrimination because:

> Benefits are provided based upon whether employees are married as defined in the various programs and whether employees have children. The sexual orientation of the employee is irrelevant. A person may very well be married to a person of the opposite sex and yet be homosexual. A person may have children as contemplated in the employee benefit plans and yet be homosexual. Similarly, a person may be heterosexual and yet receive no benefit whatsoever either directly or indirectly from the employee benefit plans because he or she is neither married nor has children as contemplated in the plans. Accordingly, I have concluded that the benefit plans do not discriminate based on sexual orientation.[59]

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of interpretive possibilities is not closed by the structural problems of statutes like the Ontario *Code*. Full protection for lesbians and gays could be accomplished by giving broad scope to the unencumbered guarantee against sexual orientation discrimination by not permitting the marital status provision to define its scope. Despite the fact that there is nothing inherently unharmonious in this reading, adjudicators have been loath to do so. See, *contra*, the dissent by Chairperson Dawson in *Leshner (No. 2)*, and *Clinton*, both *supra* note 31.

57 *Supra* note 30.

58 *Ibid.* at D/240.

59 *Ibid.*

Unfortunately, section 15 of the *Charter*, which covers both sexual orientation and family status as analogous grounds, has not been interpreted any differently than its legislative cousins despite the fact that *Charter* adjudication is unencumbered by the strictures of the rules of statutory interpretation.[60] To date, there have been five occasions when the *Charter* has been relied upon to protect lesbian and gay couples from discrimination. However, only two of these have ultimately been successful. In *Anderson* v. *Luoma*,[61] the British Columbia Supreme Court did not think that limiting the application of the property and maintenance provisions of the *Family Relations Act*[62] to heterosexuals amounted to even a *prima facie* violation of section 15, and went on to hold hypothetically that had there been such an infringement, it would have been justified pursuant to section one. In *Andrews* v. *OHIP*,[63] Ontario's health benefits scheme was challenged on the footing that it discriminated against lesbian and gay couples in restricting entitlement to dependent's benefits to heterosexual spouses and their children. This, too, was unsuccessful. *Egan* v. *Canada*,[64] which involved a challenge to the federal old age pension regime, states more or less the same thing as *Anderson* and *Andrews* v. *OHIP*, notwithstanding that the court applied the non-formalist and substantive approach to section 15 developed by the Supreme Court of Canada in *Andrews* v. *Law Society (British Columbia)*.[65] A short lived constitutional victory was enjoyed by Timothy Veysey, who fought for the right to participate in the federal prison family visiting program with his lover Leslie Beu. The Federal Court Trial

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60 *Hunter* v. *Southam*, [1984] 2 S.C.R. 145, established that the construction of *Charter* rights and freedoms is to be approached in a "purposive" way, having regard to their aims and objects.

61 (1986), 50 R.F.L. (2d) 127 (B.C.S.C.) [hereinafter *Anderson*].

62 R.S.B.C. 1979, c. 121.

63 (1988), 64 O.R. (2d) 258 (H.C.J.).

64 (1992), 87 D.L.R. (4th) 320 (F.C.T.D.).

65 [1989] 1 S.C.R. 143 [hereinafter *Andrews*]. In this case, the Court rejected the similarly situated test as the measure of equality entitlement under section 15 of the *Charter* in favour of a different and more complex framework for determining constitutional violations of equality.

Division allowed Veysey's section 15 claim,[66] but when prison authorities sought to have the decision reviewed, the Federal Court of Appeal expressly refrained from deciding the case on constitutional grounds. In resting its holding on the broad, "unique", and "unusual" provisions of an internal correctional document,[67] the Court cast some doubt on the weight of the Trial Court's decision as constitutional precedent. British Columbia is one jurisdiction where a sexual orientation challenge based on the equality provisions of the *Charter* has succeeded.[68] However, given that a different judge of the same court came to exactly the opposite conclusion in a similar case[69] the weight as an authority of the more liberal decision also remains less than solid.[70]

For most adjudicators who have considered the issue, then, simple inclusion of sexual orientation as a prohibited head of discrimination alongside family status does not in and of itself guarantee that the meaning of each will be read in a mutually reinforcing (as opposed to a mutually exclusive) way. Having failed to refer to existing sexual orientation jurisprudence explicitly, it is difficult to say with confidence whether or not the Court intended to overrule or uphold existing case law denying lesbian and gay equality rights. If the Chief Justice had these failed attempts to secure lesbian and gay family rights in mind when he said that the *Charter* promises "a more complete and lasting solution", *Mossop* may well signal an important breakthrough.

And indeed, some of the real promise of *Mossop* is that the Court seemed prepared to make a break from the method of interpretation which

66 *Veysey* v. *Correctional Service of Canada* (1989), 29 F.T.R. 74.

67 (1990), 109 N.R. 300 (F.C.A.).

68 *Knodel*, *supra* note 30.

69 *Anderson*, *supra* note 61.

70 In *Leshner (No. 2)*, *supra* note 31, a Board of Inquiry declared the Ontario legislation unconstitutional insofar as it defined "marital status" discrimination in a heterosexual way and exempted employee benefit plans which privileged heterosexual relationships from challenge under the *Code*. Although the Board ultimately granted the complainant relief, it remains to be seen whether the courts will agree with the Board's determination.

led to so many of these litigative failures in the past. Lamer C.J. intimated that the grounds of discrimination would not always be interpreted in water-tight ways when he noted that his disposition of the case did "not mean that the hypothesis of overlapping grounds of discrimination should be ruled out in other contexts,"[71] such other contexts presumably including those human rights statutes which expressly prohibit sexual orientation discrimination and indeed the federal *Act*, should it be amended or *Haig* upheld by the Supreme Court of Canada. Although it was not strictly necessary to her disposition of the case, L'Heureux-Dubé J. joined in endorsing a departure from the water-tight compartments approach to human rights interpretation:

> It is increasingly recognized that categories of discrimination may overlap, and that individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be more realistic to recognize that both forms of discrimination may be present and intersect.[72] [footnotes omitted.]

Mossop constitutes an important jurisprudential moment, therefore, not only for lesbians and gays[73] but for other equality-seeking groups as well.

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71 *Supra* note 1 at 582.

72 *Ibid.* note 1 at 645.

73 It is worth pointing out that the water-tight compartments approach was explicitly endorsed in *Vogel (No. 2)*, *supra* note 30. At D/240, the Board of Adjudication said:

> Commission counsel argued that the grounds of marital status, family status and sex should be considered in light of the addition of the prohibited ground of sexual orientation. No authority was given for the proposition. I have concluded that each ground of prohibited discrimination must stand on its own and the addition of a prohibited ground of discrimination is irrelevant to the interpretation of the other grounds.

Interpretive exclusivity has also marked the judicial construction of other statutorily protected heads of discrimination, notably in mixed race and gender contexts. Moreover, of those courts which have directly considered the question of intersecting or overlapping oppressions, none, excepting *Mossop*, has dealt with it altogether favourably. For example, in *DeGraffenreid* v. *General Motors*,[74] several black women sought to challenge the company's seniority system on the footing that it perpetuated discrimination against black women as a class distinct from both black and female employees in general. The evidence revealed that General Motors had not hired any black women until 1964, after the passage of civil rights legislation outlawing race discrimination in the employment sphere.[75] Of those who were taken into its employ thereafter, all lost their jobs under the operation of a seniority-based layoff system put into effect during a subsequent recession. The District Court refused to allow the plaintiffs to bring suit on behalf of black women alone as a class, saying:

> [P]laintiffs have failed to cite any decisions which have stated that Black women are a special class to be protected from discrimination. The Court's own research has failed to disclose such a decision. The plaintiffs are clearly entitled to a remedy if they have been discriminated against. However, they should not be allowed to combine statutory remedies to create a new 'super-remedy' which would give them relief beyond what the

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See, *contra*, the dissent of Chairperson Dawson in *Leshner (No. 2)*, *supra* note 31 at D/213:

> I have no preliminary objection to an approach to grounds which permits them to have a combined or overlapping operation where this is necessary to fully comprehend the dynamics of discrimination.
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> ...
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> I am troubled by a rigid, categorical approach to grounds as being separate or disjunctive. A disjunctive approach can result in a complainant being consigned to an unprotected class and defeating the claim....

74 413 F.Supp. 142 (E.D. Mo. 1976) [hereinafter *DeGraffenreid*].

75 *Civil Rights Act of 1964*, Pub. L. No. 88-352, §§ 1971, 1975a-1975d, 2000a-200h, Title VII, § 701, 78 Stat. 253 (1964). Now codified as 42 U.S.C. § 2000(e) (1988) [hereinafter *Title VII*].

> drafters of the relevant statutes intended. Thus, this lawsuit must be examined to see if it states a cause of action for race discrimination, sex discrimination, or alternatively either, but not a combination of both.[76]

Having forced the plaintiffs to proceed in this way, the District Court then granted summary judgment for the defendant. The sex discrimination allegation was held to be unsubstantiated because prior to 1964 General Motors did hire women — although they were of course white women — who were unaffected by the layoff. Rather than attending to the race discrimination complaint, the Court recommended that the plaintiffs join cause with a group of black men who were also suing General Motors for its racist employment practices.[77]

In *Mossop*, by contrast, opinions offered by members of both the majority and the minority create an opening for judicial recognition of claims precisely like that sought to be remedied by the plaintiffs in *DeGraffenreid*. Although the Court's nascent rejection of the water-tight compartments approach to human rights interpretation is a cause for celebration amongst equality advocates, a close reading of *Mossop* unfortunately reveals that at the level of both legal theory and practical application, the Court betrayed a profound misunderstanding of the

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[76] *Degraffenreid*, *supra* note 74 at 143.

[77] *Mosley* v. *General Motors Corp.*, 497 F.Supp. 583 (E.D. Mo. 1980). Notably, *Mosley* did not challenge the seniority system itself but instead brought suit against the employer for discriminatory discipline of black workers for engaging in a wildcat strike and for protesting against its racist practices. See also the cases cited in K. Crenshaw, "Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics" [1989] U. Chi. Legal Forum 139; C. Scarborough, "Conceptualizing Black Women's Employment Experiences" (1989), 98 Yale L.J. 1457; P.R. Smith, "Separate Identities: Black Women, Work, and Title VII" (1991) 14 Harv. Women's L.J. 21; J.A. Winston, "Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990" (1991) 79 Cal. L. Rev. 775. For a similar analysis in the Canadian setting, see: N. Duclos, "Disappearing Women: Racial Minority Women in Human Rights Cases" (1993) 6 C.J.W.L. 25.

problem it sought to redress, perhaps confounding future efforts to re-fashion anti-discrimination law to better respond to problems of complex inequality.

As a preliminary matter, notice that Lamer C.J. uses the term "overlapping" and L'Heureux-Dubé J. the terms "overlapping" as well as "intersecting" to describe forms of discrimination which the principle of mutual exclusivity of grounds fails to accommodate. These terminological differences are not without consequence. Indeed, the literature on complex oppression indicates that the concepts of overlapping or intersecting oppressions seek to capture relations of inequality that are really quite distinct.

The most sophisticated analyses of such complex equality claims have focused mainly on the interaction between race and gender and primarily in two contexts: inadequacies in employment discrimination doctrine,[78] and/or white feminist theorizing of the relationship between law and gender.[79] It was out of this body of work that the concept of "intersectionality",[80] a concept used to describe the experiential reality of those for whom existing single-axis analyses of oppression are inadequate, emerged. Strictly speaking, intersectional oppression arises out of the combination of various oppressions which, together, produce something unique and distinct from any one form of discrimination standing alone (at least as each is currently understood[81]). With respect to the interaction of

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78 See the references cited *ibid.*

79 See, for example, A.P. Harris, "Race and Essentialism in Feminist Legal Theory" (1990) 42 Stan. L. Rev. 581, and Crenshaw, *supra* note 77.

80 Kimberlé Crenshaw is to be credited for having coined the terminology of intersectionality, although as a concept, the idea had been expressed by other earlier writers. For an explication of the methodology and aims of the intersectional framework of analysis, see: K. Crenshaw, "Mapping the Margins: Identity Politics, Intersectionality, and Violence Against Women" (1991) 43 Stan. L. Rev. 1241 (forthcoming).

81 The point should be underscored that the necessity of a concept of "intersectionality" arose because extant understandings of "race" and "sex" were defined out of the experience of those for whom their race or gender was the

race and sex, for instance, women of colour may experience subordination which is a product of both forms of discrimination and which is unshared by men of their communities or by women irrespective of their race.

For the most part, intersectionality has been discussed in relation to the direct, intentional or disparate treatment form of discrimination where the defendant has mindfully singled out, for instance, black women, typically invoking some stereotype which is unique to them. Regina Austin's analysis of *Chambers* v. *Omaha Girls Club*[82] provides a good example.[83] There, Crystal Chambers, a young unmarried black woman who had been employed by the Club as an arts and crafts counsellor, was fired from her job when she became pregnant. The Club, which served a constituency that was approximately ninety percent black, justified her dismissal on the basis of a "negative role model rule" whose rationale and impact turned on stereotypes particular to women who are black. Grounding her analysis in the material conditions and cultural practices correlated with black adolescent pregnancy, Austin argues that the decision reduces to a castigation of Chambers for conducting herself as a modern day Jezebel — the stereotypic wanton, libidinous black woman — when she was expected to model the behaviour of a Mammy — the archetypical, asexual, maternal, religious black woman.

The intersectional perspective arose, in part, out of the critique of white feminists' treatment of race as if it stood in an additive relationship to sex oppression. These criticisms were directed at feminist analyses which wrongly assumed that race only made sex discrimination matters worse, as

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only feature distinguishing them from dominant groups. Prior theories thus unwittingly posited that race was essentially a male concept and gender a white concept. It bears noting that there is no obvious reason why the meaning of race or gender discrimination and the legal definition of each could not be gleaned from the experience of, for instance, black women.

82 629 F. Supp. 925 (D. Neb. 1986), aff'd 834 F.2d 697 (8th Cir. 1987), reh'g denied 840 F.2d 583 (1988).

83 R. Austin, "Sapphire Bound!" [1989] Wis. L. Rev. 539.

opposed to different,[84] for women of colour. This is not to say that there are no situations in which race might compound sex inequality or sex might compound race inequality, that is, where these (and perhaps other) systems of oppression combine to produce an additive burden. Elaine Shoben, for instance, cites as an illustration of compound inequality a police recruitment policy which employs a written test that disproportionnately excludes black individuals and a minimum height requirement that adversely affects most women. In combination, the two screens compound the discriminatory exclusion of black women from the workplace.[85]

Still to be addressed in the literature is what I would call "overlapping" oppression. Here, legal proscriptions against different forms of discrimination prohibit the very same action, law, or policy. The discrimination at issue is experienced in neither a compound nor an intersectional way; rather, it simply might be described and litigated under two or more prohibited grounds of discrimination. By way of example, consider the denial of a job to a First Nations man because he has a criminal record. As a legal matter, the discrimination might be categorized as race related or as centering on the fact of his having a criminal record. The latter conceptualization of what happened and why is straightforward and demands no explanation. The former, race-based complaint, depends for its substantiation on a contextual, statistical analysis of the

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84 For instance, in criticizing the work of Catharine MacKinnon, Harris, *supra* note 79, seems to imply that MacKinnon's mistake was to treat race as something severable from and additive to gender. She says at 596:

> [I]n MacKinnon's work black women become something more than women. In MacKinnon's writing, the word "black", as applied to women, is an intensifier: If things are bad for everybody (meaning white women), then they're even worse for black women. Silent and suffering, we are trotted onto the page (mostly in footnotes) as the ultimate example of how bad things are. [citations omitted].

85 E.W. Shoben, "Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination" (1980) 55 N.Y.U. L. Rev. 793. I should note that Shoben uses the term "double" rather than compound discrimination.

disproportionate criminalization and incarceration of Canada's first peoples. Such a disparate impact analysis could reveal the racial dimensions of the "clean record" rule and, absent adequate business justification, could call for the rule to be struck as discriminatory. Although the discrimination experienced by the job applicant could be legally formulated in either of two ways, it does not follow that the denial of employment was experienced as a "double whammy" in the compound discrimination sense, or as a unique thing, in the intersectional discrimination sense, wholly distinct from the experience of convicted offenders or First Nations people in general.

The conceptual confusion engendered by the failure of Lamer C.J. and L'Heureux-Dubé J. to use terminology which reflects the different and various ways that systems of oppression may interact, is compounded further by the way in which the two justices envision the legal determination of complex inequality claims. For instance, although L'Heureux-Dubé J. gives a passing nod to the "particularly complex" situation of those "who confront multiple grounds of disadvantage," she goes on to resolve the problem in what she terms a "practical" fashion. In her view:

> [W]here both forms of discrimination are prohibited, one can ignore the complexity of the interaction, and characterize the discrimination as of one type or the other. The person is protected from discrimination in either event.
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> However, though multiple levels of discrimination may exist, multiple levels of protection may not. There are situations where a person suffers discrimination on more than one ground, but where only one form of discrimination is a prohibited ground. When faced with such situations, one should be cautious not to characterize the discrimination so as deprive the person of any protection.[86]

It is difficult to fault L'Heureux-Dubé J.'s practical solution to those multiple inequality claims pursued under statutes which prohibit some, but

[86] *Supra* note 1 at 646.

not all, forms of discrimination operating to the injury of particular individuals or classes of individuals. Legal recognition that systems of oppression do not operate and are not experienced in isolation should not be used to deny complainants *any* relief simply because a particular statute only covers some of the harm experienced. On the other hand, where all forms of discrimination producing an intersecting or compound inequality claim are recognized in a particular code, to "ignore the complexity of the interaction" and reduce the claim to a simple single head is to return to the flaws of *DeGraffenreid*, and ensures that any remedies fashioned will prove inadequate. The injury to black women caused by the recruitment policy discussed by Shoben, for example, cannot be redressed by eliminating only the racially discriminatory written test or the sexually discriminatory height requirement. Characterizing the complaint as either, but not both, race and sex discrimination thus misses the point altogether. Both rules should fall and compensation, for instance, for emotional suffering and humiliation, should be compounded to relieve what was, in fact, a compound injury.

As a matter of principle, L'Heureux-Dubé J.'s proposed "practical" resolution is also flawed in its lack of understanding of the nature of injury in complex discrimination cases. Take, for instance, the responses generated by the Fifth Circuit's decision in *Jefferies* v. *Harris Community Action Association*.[87] There, a black woman sued her employer under *Title VII* for first failing to promote her and then for wrongful discharge because of her race and sex. The decision of the district court, ordering her to choose between race and sex in litigating her claim, was struck down upon review. However, the manner in which Court of Appeals permitted the plaintiff to go forward obfuscated and trivialized the particular nature of her complaint. The court drew an analogy to what has come to be referred to as the "sex-plus" doctrine first articulated by the United States Supreme Court in *Phillips* v. *Martin Marietta Corp.*[88] In *Phillips*, it was held that all members of a protected class need not be monolithically affected by a rule in order for the rule to violate *Title VII*; the singling out

[87] 615 F.2d 1025 (5th Cir. 1980) [hereinafter *Jefferies*].

[88] 400 U.S. 542 (5th Cir. 1970) [hereinafter *Phillips*].

of a subset of a protected class would suffice.[89] Using this approach, the *Jeffries* court agreed that "an employer should not escape from liability for discrimination against black females by a showing that it does not discriminate against blacks and that it does not discriminate against females."[90] It reasoned that the plaintiff could thus use race as the "plus" and seek relief under the sex equality provision. *Jeffries* and/or the theory which informed it has been labelled "misleading"[91] and criticized for effectively forcing black women "to choose gender as their principal identification,"[92] and for deeming "race unimportant",[93] or only a proxy for sex discrimination.[94]

L'Heureux-Dubé J.'s approach of artificially designating the discrimination to be of one sort or another suffers from the very same shortcomings as the reasoning in *Jeffries*, and is properly subject to the same objections. That these criticisms are of no "practical" significance because the discrimination may be adequately remedied under one head misapprehends the form and shape of complex discrimination. For all three types of oppression, more than symbolic damage is done by reducing an account of "what happened" to unidimensional terms. Law is spared having to engage with the very real injuries of interactive inequalities as they are experienced by multiply oppressed people. Concomitantly, law also reasserts itself as the authoritative interpreter of the social world, and the experience of disempowered groups within it. Thus, the idea that courts

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89 In that case in particular, the employer refused to hire mothers, but not fathers, of pre-school children.

90 *Supra* note 87 at 1032.

91 See Shoben, *supra* note 85 at 804.

92 Scarborough, *supra* note 77 at 1471.

93 See Smith, *supra* note 77 at 44.

94 *Ibid.* Judy Scales Trent similarly takes issue with the sex-plus rationale, making the rather poignant point that, if applied in the context of the Equal Protection Clause, it would lead to the absurd result that discrimination against black men would be subject to strict scrutiny but that if black women were the target, only a standard of intermediate scrutiny would apply. See: J. Scales Trent, "Black Women and the Constitution: Finding Our Place; Asserting Our Rights" (1989) 24 Harv. C.R.-C.L. L. Rev. 9.

can simply deem one or other head as the operative brand of discrimination at issue in any given case is, in other words, a subordinating practice in and of itself.

Chief Justice Lamer's terse discussion of interacting oppressions does not allow for much critical response. Nonetheless, it would appear that like his colleague, he has muddied the conceptual waters by failing to draw the necessary distinctions between overlapping, compound and intersecting oppressions. He suggests that the interpretation of one statutorily prohibited ground of discrimination is affected by the presence (or absence) of other enumerated grounds such that the meaning of each ground is different in combination from what it would be standing alone:

> [I]f Parliament had decided to include sexual orientation in the list of prohibited grounds of discrimination, my interpretation of the phrase "family status" might have been entirely different and I might perhaps then have concluded that Mr. Mossop's situation included both his sexual orientation and his "family status".
>
> ...
>
> Nor should this decision be interpreted as meaning that homosexual couples cannot constitute a "family" for the purposes of legislation other than the CHRA. In this regard, each statute must be interpreted in its own context.[95]

This novel approach will undoubtedly prove to be very helpful in true intersectional cases, since the principle of exclusivity of grounds partly accounts for their falling through the cracks of human/civil rights guarantees. However, in a situation involving overlap, solving the problems created by a water-tight compartments approach does not require the kind interpretive gymnastics proposed by the Chief Justice. It is true that courts must begin to interpret the grounds of discrimination differently if overlap claims are to secure legal recognition and redress. But all that is or should be required is judicial acknowledgement that the grounds, in some cases, can overlap. In this regard, L'Heureux-Dubé J. is quite right when she points out that simply because one construction of an overlapping claim has not been statutorily enacted does not mean that an equally valid but alternative construction of the discrimination in issue which is covered by

[95] *Supra* note 1 at 582.

statute must be read down to exclude coverage for those claims which might also be conceptualized as falling within the parameters of the unlegislated ground.

Apart from these general criticisms, *Mossop* also seems rather muddled in terms of the application of these principles to the particular claim made in the case. Both Lamer C.J. and L'Heureux-Dubé J. insist that what happened to Mossop happened for different reasons. The Chief Justice quoted the following passage of Marceau J. at the Court of Appeal in holding that the court below had correctly identified the "discrimination at issue in this case":

> ... should it be admitted that a homosexual couple constitutes a family in the same manner as a husband and wife, it then becomes apparent that the disadvantage that may result to it by a refusal to treat it as a heterosexual couple is inextricably related to the sexual orientation of its members. It is sexual orientation which has led the complainant to enter with Popert into a "familial relationship" (to use the expression of the expert sociologist) and sexual orientation, therefore, which has precluded the recognition of his family status with regard to his lover and that man's father. So, in the final analysis, sexual orientation is *really* the ground of discrimination involved.[96] [emphasis added]

By contrast, L'Heureux-Dubé J. took the following position:

> [T]hough sexual orientation may appear to be an issue the central focus is on family status. The Tribunal found that the denial of the benefit was clearly linked to Mr. Mossop's family situation. Mr. Mossop was denied the bereavement benefit precisely because of the "family" nature of his relationship with Mr. Popert. Here, the employer in effect said: "We will not allow you time off to go to your partner's father's funeral because we do not recognize that the relationship you have with him is a family relationship. Because your situation does not fit our definition of what a family should be, we do not think it is a real family and, accordingly, you cannot enjoy this family benefit."[97]

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[96] *Ibid.* at 581.

[97] *Ibid.* at 646-47.

What type of discrimination is at issue in any given case depends on the defendant's reasons for discriminating and/or the impact of the defendant's actions on the complainant. Thus, the purpose or effect of an exclusionary rule, policy, or law is a question of fact; the meaning and scope of statutory human rights guarantees is, by contrast, a question of law;[98] and the application of those facts to those laws is, of course, a mixed question of fact and law. Once having found, as a matter of fact, that the reason animating the denial of bereavement leave was unidimensional, there was simply no reason to discuss how the Court might proceed with an complex claim. More fundamentally, how the denial of bereavement leave, which on one version stemmed from Mossop's homosexuality and on another stemmed from the type of family relationship he had constructed with Popert, could be transformed into a different legal claim in a different legislative context is a matter of some mystery.

In the final part of my paper, I wish to argue that the claim advanced in *Mossop* could have been conceptualized as an overlapping one, analogous to the hypothetical "clean record" case I sketched out earlier. Legally cognizable within the present legislative scheme of the *Canadian Human Rights Act*, requiring neither the assistance of *Haig* nor the kind of conceptual reconfiguration believed necessary by the majority, I suggest that Mr. Mossop could therefore have been granted the relief he sought.

I believe we intuitively appreciate that "family status" is somehow unlike most[99] of the other grounds of discrimination contained in the federal *Act*

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98 By positing a bipolar relationship between questions of fact and questions of law, I have perhaps inaccurately conveyed the impression that the two do not influence one another. This, of course, is not the case. As Kimberlé Crenshaw, *supra* note 77, notes, the litigation and articulation of discrimination claims has been the *de facto* province of the most privileged members of various subordinated groups — white women vis-a-vis sex discrimination and black men vis-à-vis race discrimination — which accounts for why the legal meaning of such guarantees as race equality and so on map more precisely their experiences.

99 I use the term "most" self-consciously because I do not intend here to make sweeping claims about all the other legally recognized grounds of oppression. It may be that religious discrimination, for example, has a history and takes a form

and other similar statutes, but articulating precisely how this is so proves rather difficult. Biology, for example, may be one vector along which family status may be distinguished from the other guarantees in that the latter may be conceptualized as corporally based whereas the former may not. Leaving aside, for the moment, the challenge of recent theories contesting body-bound conceptions of, for instance, the categories "race" and "sex",[100] and assuming these categories to have some substantial connection to real bodies, biology proves a problematic point on which to set family status apart. Contemporary discourse, particularly of the right-wing variety, has emphasized the biological foundations of family. "Family", some contend, is reserved for sex-differentiated dyads (male-female couples), who engage in sexual relations in a "natural" manner (penile penetration of the vagina), and who bear and/or rear children. Regardless of whether the majority of families, even of the mainstream sort, meet these requirements as an empirical matter, and irrespective of whether such arguments concerning the nature of "real" families satisfy, more generally, the fact that biological arguments have entered and enjoy wide circulation within popular discourse suggests that "biology" cannot serve as an unproblematic conceptual pivot for solving the problem of difference posed here.

No less significant deficiencies plague the understandings of "family status" as a category brought into being through the operation of law. It could be said that family status is unique in that it describes a class of people who are constituted as a class via legal intervention. That is, whatever a family might be, it does not have a status, as such, until it has earned state imprimatur by conforming to legally established norms and following state-sanctioned procedures. By contrast, it seems readily apparent that to be recognized as female, Italian, disabled or what have you does not turn on state involvement of any kind. One just "is" these things, so to speak. Certainly, however, there have been moments in our legal history where the issue of an individual's status as a member of these

quite different than the types of discrimination I discuss here. I leave an analysis of these potential distinctions to another day.

[100] I shall return to this point shortly. See *infra* at notes 103-105.

sorts of groups has been the subject of legal proscription and sometimes adjudication: what "counts" as a disability for legal purposes is a standard question in human rights jurisprudence;[101] what sufficed to classify a person as "black" for the purposes of Jim Crow laws was a common legal concern during the Reconstruction era;[102] and the advent of medical terminology has made more difficult the definition of sex in the civil rights arena.[103] Provided these examples are not dismissed as mere exceptions to a more general truism, then, the bright line test of legality proves of dull lustre indeed.

Framed more broadly, can it be said that the phrase family status captures classes of people created through the operation of social forces (of which law is one) whereas sex, race, ethnicity and so on are biologically determined? Plainly, family status does describe the product of a social relation: it derives from individuals' intimate connections with other individuals and these connections in turn attract support, legal and otherwise, in a wide panoply of situations. Provided we take seriously the argument that these other classes are the product of social relations, "the social" proves as uncompelling an axis along which to differentiate family status from the other classes protected by anti-discrimination law as biology and legality. The social constructionist argument, in perhaps its crudest form, runs as follows. Rather than natural features of natural persons, the characteristics which mark women, people of colour, homosexuals and so on as meaningful groups are an effect of clusters of practices, policies and discourses which converge in different configurations at different historical moments.[104] Thus, "race," for

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101 See, *e.g.*, *St. Paul Lutheran House of Melville, Saskatchewan* v. *Davison* (1991), 16 C.H.R.R. D/83 (Sask. Q.B.).

102 See D. Bell, *Race, Racism and American Law* (Boston: Little, Brown and Company, 1980) at 84.

103 Although the issue seems not to have been litigated as yet in Canada, whether transsexuals are protected by *Title VII's* guarantee against sex discrimination has been the subject of (negative) judicial commentary. See, *e.g.*, *Holloway* v. *Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977).

104 See generally, E. Laclau & C. Mouffe, *Hegemony and Socialist Strategy: Toward a Radical Democratic Politics* (London: Verso, 1985).

example, did not emerge as a consequential category until the advent of slavery.[105] Similarly, "homosexuality" made its first appearance at the close of the nineteenth century with the ascension of the medical profession and sexology in particular.[106] These characteristics, hence, are not essences, not biological "realities," but attributes which are at once ascribed and invested with significance. So understood, the other categories of discrimination cannot be convincingly distinguished from "family status" given that the process of their production is much the same.

Perhaps it is in the nature of intuition to mislead and it may well have in this case. My sense, nonetheless, is that "family status" can be differentiated from the other grounds of discrimination and in the following way. Tellingly, there seems to be a significant relation between those who are subordinated on the basis of race, sex, sexuality and other grounds of discrimination and those whose families are not protected by the guarantee against family status discrimination. That is, those "families" which are devalued as either not real or in some way malfunctional typically are populated by members of other disempowered groups. Family status is connected to the other bases of discrimination, then, in that it has served as a conduit or mechanism by which sexism, racism and homophobia (to name just three) have been secured and perpetuated. To put matters somewhat differently, the families which members of these

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105 L. Outlaw, "Toward a Critical Theory of 'Race'" in D. Goldberg, ed., *Anatomy of Racism* (Minneapolis: University of Minnesota Press, 1990) 58.

106 M. Foucault, *The History of Sexuality Volume I: An Introduction*, trans. R. Hurley (New York: Vintage Books, 1978). Foucault's famous words speak best for themselves (at 43):

> As defined by the ancient civil or canonical codes, sodomy was a category of forbidden acts; their perpetrator was nothing more than the juridical subject of them. The nineteenth-century homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology, with an indiscreet anatomy and possibly a mysterious physiology.

For a related argument with respect to gender, see J. Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990).

groups form are not legitimized as "families" because of the "nature" of their members, not the nature of their families. I do not propose to list exhaustively all the ways in which this is so, but a few examples should demonstrate the point sufficiently.

For instance, one of the historical artifacts of the enslavement of African peoples in North America was the social and legal bar on their forming kinship bonds. Not only did slave codes contain formal bars against slave marriages, but often slave owners would sell or relocate individual slaves to destroy extra-legal kinship networks for the purpose of punishment, control, or simple economic gain.[107] In more recent times, the black family has been targeted as the source and cause of the systemic poverty of black people. As argued by Patrick Moynihan, this condition is a result of the "matriarchal" structure of black kinship relations, a condition which could be traced back to slavery. Only the introduction of patriarchal relations — primarily through the masculinization of the hitherto "emasculated" black male — could rescue the black family from the "tangle of pathology" to which its female dominated morphology had given rise.[108] Just as "family" has been used as an instrument of race oppression, so too has it been a mechanism through which women, as a class, have been subordinated, although admittedly in very different ways. Upon marriage, historically, women lost their civil status, and were unable to contract, to own property, to sue or be sued. While this is of course no longer the case, the subordination of women to their male intimates within the confines of the family continues in other ways, and the law overwhelmingly has been unwilling to intervene. Domestic violence is, of course, the pre-eminent example.[109] Similarly, the denial of legal

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107 See H.G. Gutman, *The Black Family in Slavery and Freedom, 1750-1925* (New York: Pantheon Books, 1976) and E.D. Genovese, *Roll, Jordan, Roll: The World The Slaves Made* (New York: Pantheon Books, 1974). Gutman and Genovese disagree over how prevalent the practice of family fragmentation was, but neither disputes its existence.

108 D.P. Moynihan, *The Negro Family: The Case for National Action* (Washington D.C.: U.S. Department of Labor, 1965).

109 See, *e.g.*, L. MacLeod, *Battered But Not Beaten...Preventing Wife Battering in Canada* (Ottawa: Canadian Advisory Council on the Status of Women, 1987)

recognition of lesbian and gay kinship networks through, for example, restricting the ability to marry,[110] to retain custody of children,[111] and to adopt,[112] has been one of the ways in which domination of lesbians and gays has been secured.

An historiographical analysis of the relationship of family status to other grounds of discrimination leads to a construction of section 3 of the *Act* and consequently a determination of Mr. Mossop's complaint which is quite different from that of the Supreme Court. Clearly, the majority's interpretation of "family status" discrimination ignores these connections between the deployment of the recognition of certain types of families and other systemic forms of subordination. Under the definition proposed by La Forest J. and impliedly accepted by the Chief Justice, the remedial force of the guarantee against family status discrimination has been almost entirely eviscerated. By La Forest J.'s logic, a single mother who bore a child through alternative fertilization would not necessarily be protected by section 3, since arguably her situation does not conform to "dominant" conceptions of what a family is. Nor, for that matter, would an extended family. Indeed, by protecting only the "traditional" family, the majority's definition reinforces and perpetuates "family" as a site of domination.

L'Heureux-Dubé J.'s "functional approach" to family status discrimination claims is preferable, although it still embodies its own set of problems. At bottom, the functional approach reduces to a different, albeit more flexible and purposive, set of criteria for determining what kind of social groupings will be recognized as "families". Over and above

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110 See *Re North and Matheson* (1975), 52 D.L.R. (3d) 280 (Man. Co. Ct.).

111 *Bezaire* v. *Bezaire* (1980), 20 R.F.L. (2d) 358 (Ont. C.A.); *Case* v. *Case* (1974), 18 R.F.L. 132 (Sask. Q.B.); and *Saunders* v. *Saunders* (1989), 20 R.F.L. (3d) 368 (B.C. Co. Ct.).

112 I am unaware of any reported Canadian decisions dealing with the legality/constitutionality of lesbian or gay adoptions. For an American example, see *In re Opinion of the Justices*, 530 A.2d 21 (N.H. 1987) (proposed legislation prohibiting lesbians and gays from adopting or acting as foster parents does not violate constitutional principles of equal protection of laws, due process, nor rights to privacy or freedom of association).

the problem that measuring family against any list of criteria will almost inevitably lead to exclusion of some families,[113] the functional approach

[113] L'Heureux-Dubé J. herself acknowledges this difficulty, but resolves it on the footing that a case-by-case approach will iron out such difficulties. See *supra* note 1 at 638. I note in passing, however, that L'Heureux-Dubé J.'s application of the functional approach in Mossop's case, and its distinction from more orthodox definitions of family, was less than clear. She attempts to distinguish between the scope of "family status" in section 3 in the abstract and its functional application in different factual contexts. In finding that homosexuals are not *per se* excluded from the *Act*'s protection, L'Heureux-Dubé J. appears to be taking a highly formalist rather than functional approach. For instance, her decision quotes expert evidence tendered at trial, the thrust of which appears to be that but for the sex of his partner, Mossop's family was just like conventional heterosexual families (at 639):

> [This] is a relationship of some standing in terms of time with the expectation of continuance. So it's not a relationship that is defined in terms of time. You have the joint residence, you have economic union in many ways as expressed by the fact that the house is jointly owned, that life insurance — the people, the two partners are beneficiaries — that there's joint financing, it's a sexual relationship, housework is shared and it's an emotional relationship which is a very important aspect of familial relationships. And on that basis I would say it has the status of a familial relationship.

Why the individual features of Mossop's relationship were relevant at this stage of a functional analysis is not explained. Additionally, although L'Heureux-Dubé J. identifies the aim behind providing employees with paid leave for bereavement purposes, she does not articulate a definition of family or a set of familial characteristics consistent with that aim. Instead, she simply finds that, but for the exclusion of same sex couples, the article's restriction of bereavement leave to immediate family is reasonable. It also strikes me as contradictory that she would laud an approach which purportedly mandates an article-by-article analysis of the benefit provisions of the collective agreement, and yet uphold a remedy which deems same-sex couples to be common-law spouses for the purposes of the entire contract (see *supra* note 18). This lack of precision in L'Heureux-Dubé J.'s reasoning is underscored by Cory J.'s concurrence. At 648 he opined:

> [B]ased on those factors discussed in the reasons of Justice L'Heureux-Dubé, I have come to the conclusion that the Tribunal was correct in determining that the term "family status" was sufficiently broad to include couples of the same

fails to appreciate the relationship between family status and other systems of oppression. Functional criteria are to be determined by reference to the aims which the impugned benefit system are intended to serve. In those instances where the objects of a benefit system are themselves discriminatory, where, for example, support for "traditional" or "nuclear" families is the intended and often explicit purpose of a benefit regime, the functional approach offers no redress for those whose family forms are marginalized.[114] The crucial question should not be whether a given configuration of human beings is a family, but rather, why and to what effect that arrangement has been denied access to family status recognition and any particular benefits which turn on such recognition. Consistent with equality rights jurisprudence, the issue should be whether the denial, by design or impact, has the effect of creating, or perpetuating the inferior social, legal, or political position of a disempowered group. If the answer to this threshold question is yes, an analysis of whether the scheme should be saved or struck follows and only at this point does the purpose or "function" of the scheme become probative.

Given that the denial of family status or denigrations of certain family forms is, at least for historically disempowered groups, a vehicle through which their subordination is maintained and perpetuated, it also follows that the relationship between the ground "family status" and other grounds of discrimination is an overlapping one. It is nonsensical to ask whether cases which implicate one of these other grounds and family status are "really" about family status, or about race, or sex, or sexual orientation, as if these characterizations were mutually exclusive. Nor is it necessary to try and discern whether family status plus one of the other heads of discrimination in combination produce compound or intersectional inequalities. The nature of the interaction between family status and the other prohibited grounds of discrimination is overlapping.

> sex *that were living together in a long-term relationship* and that Messrs. Mossop and Poppert [sic] came within the scope of this term. [emphasis added]

[114] For an example of an intentionally discriminatory benefit scheme see *Andrews*, *supra* note 63.

On this analysis, then, the denial of bereavement leave to Mr. Mossop "really" was about both his family status and his sexual orientation because his employer's refusal to recognize his relationship with Mr. Popert, and by extension the latter's father, was premised upon and grounded in the systemic subordination of lesbian and gay relationships. Since his claim was neither compound nor intersectional, the fact that the *Canadian Human Rights Act* contained no prohibition against sexual orientation discrimination was neither here nor there. In a post-*Haig* world, Mossop should have been able to litigate under either head, his choice being determined only by his preference as to how his claim should be put and unaffected by considerations of remedial advantage. However, even absent *Haig* or legislative amendment, the Supreme Court could have and should have given "family status" a meaning which would have brought the complainant the relief he sought.

THE DRAFT CONSTITUTION OF UKRAINE: AN OVERVIEW

Keenan H. Hohol*

With Ukraine's declaration of independence from the USSR in 1991 came the creation of a new constitutional document which moves away from Soviet "socialist legality" and Marxism-Leninism and which moves toward Western democratic constitutionalism. This article provides a comprehensive overview of the most recent attempt at constitutional reform, the fourth draft constitution presented for expert discussion in May 1993.

The author indicates that the resulting document, while revolutionary in its attempted application of the rule of law, popular sovereignty, equality before the law, limited government, and an extensive bill of rights, is in need of much further revision before it will truly reflect the Western constitutionalism that it is modelled upon. One example of his concern is the lack of practical separation between executive, legislative, and judicial branches of government. The provisions which attempt to balance control in the new structure of government will in effect produce political stalemates, where no progress is possible. As well, a lack of true judicial independence and several "claw-back" clauses will render the human rights provisions totally ineffective.

The author concludes that to ensure the effectiveness of the document, several contradictory and ambiguous articles in the draft must be revised.

La déclaration d'indépendance de l'Ukraine en 1991 a donné lieu à un nouveau document constitutionnel qui s'éloigne de la «légalité socialiste» soviétique et du marxisme-léninisme, et se rapproche du constitutionnalisme démocratique occidental. Le présent article fournit un aperçu général de la toute dernière tentative de réforme constitutionnelle, le quatrième projet du genre présenté aux spécialistes en mai 1993.

L'auteur indique que le document qui en découle, tout en étant révolutionnaire en ce qu'il s'efforce d'appliquer le principe de légalité, de souveraineté du peuple, d'égalité devant la loi, de gouvernement limité et contient une importante déclaration des droits, doit toutefois subir de nombreuses modifications avant de refléter véritablement le constitutionnalisme occidental dont il se réclame. À titre d'exemple, l'auteur relève l'absence de séparation des pouvoirs (fonction exécutive, législative et juridictionnelle de l'État). Les mesures visant à équilibrer les pouvoirs dans la nouvelle structure provoqueront en fait des impasses politiques interdisant tout progrès. En plus, l'absence d'autonomie réelle de l'organe étatique judiciaire et plusieurs dispositions de récupération rendront les droits de la personne totalement caduques.

L'auteur conclut que, pour assurer l'efficacité du document, plusieurs articles contradictoires et ambigus du projet doivent être révisés.

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THE UKRAINIAN PEOPLE

EXPRESSING	their sovereign will,
RELYING	on centuries of history of Ukrainian nation building,
VALUING	the insurance of the freedom and natural rights of the individual, and the dignity of life,
STRIVING	for the preservation and strengthening of social harmony,
FOSTERING	the growth and development of civic society,
DESIRING	to live freely in a democratic state governed by the rule of law,
GUIDED	by the Act of the Declaration of Independence of Ukraine of the 24th of August 1991, as confirmed by the nation-wide referendum of the 1st of December 1991,
CONSCIOUS	of the responsibility before present and future generations,
ADOPT	this Constitution and declare it the

FUNDAMENTAL LAW OF UKRAINE.

Draft Constitution of Ukraine, May 27,1993

On June 10, 1992, the second draft proposal of the constitution of the newly-independent Ukraine was submitted to the Ukrainian Parliament by its Constitutional Drafting Commission. In mid-July the commission appealed for the submission of written expert and public opinion on the draft, thereby commencing public discussion on the draft proposal which was originally slated to end on November 1, 1992, and setting the drafting commission in motion for the preparation of the final constitutional

proposal.[1] Political and economic instability and the fact that the Ukrainian Parliament was unable to reach a consensus on the constitutional ratification process extended public discussion of the second draft to December 1, 1992, after which a substantially revised draft was prepared by the working group of the drafting commission on January 28, 1993.[2] On May 27, 1993 the working group presented its fourth draft constitution for expert discussion, and Ukrainian President Leonid Kravchuk urged that a final proposal be ratified as soon as possible.[3]

What form of Ukrainian Constitution ultimately prevails is of great importance to the international community, and this is what warrants the discussion that follows. Ukraine constitutes Europe's third largest country, and it has a population of over 52 million. The economic importance of Ukraine is manifested by the fact that it hosted the largest concentration of heavy industry in the former Soviet Union, and although it only constituted 2.7% of Soviet territory and 19% of the population, Ukraine accounted for over 25% of the GNP.[4] Perhaps the greatest concern to the international community is the fact that Ukraine has become the world's third largest nuclear power (behind the United States and Russia), controlling some 1600 nuclear weapons, including 176 strategic nuclear

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1 The appeal was written by Secretary of the Constitutional Drafting Commission, V. Nosov, and disseminated in the Parliamentary daily newspaper *Ukrainskyj Holos* (1 August 1992).

2 Concerning ratification, three alternatives were under discussion: ratification by the incumbent conservative Parliament, by a constitutional congress, or by a newly-elected Parliament.

3 Kravchuk's comments were made during the second International Symposium on the Draft Constitution of Ukraine, which was held in Kyiv, Ukraine, June 20-22, 1993.

4 For details on the Ukrainian economy during Soviet rule see: D. Marples, *Ukraine Under Perestroika: Ecology, Economics and the Worker's Revolt* (Edmonton: University of Alberta Press, 1991); and I.S. Koropeckyj, *Development in the Shadow: Studies in Ukrainian Economics* (Edmonton: Canadian Institute of Ukranian Studies, 1990).

missiles.[5] Accordingly, the ultimate determination of Ukraine's constitutional order is of significantly more importance to the international community than mere academic interest in the constitution-making process of a newly-independent state.

The Draft Constitution has been viewed in Ukraine and the West as an ambitious effort to make a break from Ukraine's Soviet experience and to institute a modern, democratic and independent state based on Ukraine's unique historical experience and the precepts of Western constitutionalism. However, the few Western experts on constitutional law that have been able to comment on the draft have raised serious questions about its form and substance.[6] This discussion is intended to examine the Ukrainian Draft Constitution by way of an overview of its contents. The analysis does not purport to be conclusive in its observations since constitution-making is a dynamic process, however, it does attempt to provide some insight into the major strengths and weaknesses of the current draft, taking into consideration Ukraine's unique historical experience, the revolutionary change Ukraine is currently undergoing and the political and philosophical currents dictating the constitutional drafting process.

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5 This issue was magnified by the January 3, 1993 signing of START II by the US and Russia, which encompasses a drastic reduction in American and Russian nuclear arsenals. Ukraine, though officially having declared its intention to become a nuclear-free state, has yet to ratify START I, and has thus far refused to deliver its nuclear weapons to Russia for destruction under the START II terms.

6 Western constitutionalists have been solicited actively since early 1992 for their advice, and Western nations have been quick to respond in an organized manner to the requests of Ukrainian drafters. In Canada, for example, Justice Walter Tarnopolsky organized an informal, yet distinguished group of commentators to assist him in establishing a Canadian legal opinion on both the drafting process and the draft. The group includes appeal court judges and constitutional law experts from across the country, in addition to Justice John Sopinka of the Supreme Court of Canada.

I. Background

Ukrainians are descendants of Slavic tribes that lived in the area of present day Ukraine from the 3rd to the 8th century B.C., and eventually formed the first Slavic state called Kievan Rus', or simply Rus' (not to be confused with "Russia"), from the 9th to the 13th century. Kievan Rus' laid the foundations of the three East Slavic nationalities: Russian, Byelorussian and Ukrainian. These nationalities each developed their own languages, cultures and distinct, yet inter-related histories.[7]

The Ukraine that emerged from Kievan Rus' after its fragmentation into principalities in the 13th century experienced an extremely complicated succession of foreign occupations and partitions between the 14th and 20th centuries. Lithuania, Poland, Russia, the Ottoman Empire, and the Austro-Hungarian Empire exerted a high degree of influence on Ukraine, such as to deprive it of any real autonomy, and during several periods Ukraine was controlled by two or more foreign powers (*e.g.*, Poland and Russia partitioned Ukraine in 1667, and from 1772 to 1918 the Ukrainian province of Galicia was incorporated into the Austro-Hungarian Empire). After the Bolshevik Revolution in October 1917, Ukraine began working toward independence, which was finally declared on January 22, 1918. However, this independent Ukrainian state barely lasted the duration of the

[7] Ukrainian historiography has been the source of great academic and political debate since the 19th century. Twentieth century historiography has generated numerous distinct schools of thought in and outside of Ukraine, and the recent dissolution of the USSR has widened debate. For a skeptical review of Ukrainian historiography see A. Brumberg, "Not So Free At Last" *New York Review of Books* (22 October 1992) 56-63. Despite Brumberg's criticisms, Western historiography has produced several reasonably balanced surveys of Ukrainian history. Probably the most recent, widely-acclaimed and readable survey is O. Subtelny, *Ukraine: A History* (Toronto: University of Toronto Press, 1988).

Civil War in Ukraine (1918-1922), and by December 1920 the Red Army had succeeded in conquering most of Ukraine.[8]

In 1922 Central and Eastern Ukraine were forcefully incorporated into the Soviet Union, and in 1923 Western Ukraine was ceded to Poland. Ukraine remained occupied and divided until August 23, 1939 when the USSR and Nazi Germany signed a secret protocol (the Molotov-Ribbentrop Pact) which incorporated Western Ukraine, Western Byelorus and the Baltic States of Lithuania, Estonia and Latvia into the Soviet Union. This act united almost all of Ukraine under Soviet rule with small Ukrainian minorities remaining in Czechoslovakia, Poland and Romania. Despite war-time insurgence by Ukrainian nationalists, periodic re-awakening of national consciousness amongst the *intelligentsia* (especially in the early 1960s under Khrushchev's "thaw"), and calculated pressure for cultural, economic and political autonomy, Ukraine remained wholly subservient to Soviet control until the late 1980s and Gorbachev's fateful policies of *glasnost'* and *perestroika*.

The form and substance of the Draft Constitution of Ukraine emanate, in part, from the rapid dissolution of the Soviet Union which occurred between 1990 and 1991. Though the Baltic and Ukrainian independence movements that acted as catalysts to the final dissolution of the USSR are beyond the scope of this paper, it must be stated that these independence movements were instrumental in forming the *Gründnorm*, *i.e.*, mandate or guiding principles, with which the drafting commission was to prepare a new constitution.[9] The Gorbachev reforms generated the formation of numerous wide-spread formal opposition movements in Ukraine, among

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[8] See J.S. Reshetar, *The Ukrainian Revolution, 1917-1920: A Study in Nationalism* (Princeton: Princeton University Press, 1952); and J. Borys, *The Sovietization of Ukraine, 1917-23: The Communist Doctrine and Practice of National Self-Determination* (Edmonton: Canadian Institute of Ukrainian Studies, 1980).

[9] Edward McWhinney describes the *Gründnorm* as a social and political consensus on change; a pre-condition necessary for the drafting or amendment of any constitution. See E. McWhinney, *Constitution-making: Principles, Process, Practice* (Toronto: University of Toronto Press, 1981) at 15-45.

others, the most influential in Ukraine's push for independence being *Rukh* (the Popular Movement of Ukraine for Restructuring), *Zelenyj Svit* Ecological Association (created primarily in reaction to the 1986 Chernobyl nuclear catastrophe), *Memorial'*, the Taras Shevchenko Ukrainian Language Society, and the Democratic Republican Party. For electoral campaign purposes, forty-three opposition groups united under the name of the "Democratic Bloc", which captured about one-third of the seats in the Ukrainian Supreme Soviet during its March 1990 elections despite the quasi-democratic campaign and election processes having been manipulated by communist officials.[10]

Having observed the escalating Baltic independence movements and the Kremlin's reaction to prevent Baltic secession by means of ad hoc legal and quasi-constitutional reform in April of 1990, the Ukrainian Supreme Soviet determined it would have to take legal and political action quickly to appease the national-democratic movements in Ukraine, as well as to defend the gains brought by the Gorbachev reforms thus far.[11]

On July 16, 1990, the Supreme Soviet of the Ukrainian SSR made the *Declaration of the State Sovereignty of Ukraine*, which articulated the Republic's right to national state sovereignty; self-determination and secession from the USSR; popular sovereignty; territorial sovereignty; economic independence; legislative supremacy in areas of exclusive

[10] For a thorough discussion of the March 1990 elections and the development of opposition forces in Ukraine see B. Nahaylo, *The New Ukraine* (London: Royal Institute of International Affairs, July 1992).

[11] In order to deal with Baltic secessionism and growing discontent in other Republics, in April 1990, Soviet President Gorbachev created a constitutional committee, heretofore an anomaly to Soviet Parliament, and enacted an extra-constitutional series of mandatory pre-conditions to secession. See J. Hazard, "Gorbachev's Impact on the USSR Constitution (1985-90)" in A. Blaustein & G. Flanz, eds., *Constitutions of the World*, vol. XVIII, USSR (New York: Oceana, October 1990) at xv-xix.

Republican jurisdiction — all of which would serve as a mandate for the preparation of a new Ukrainian Constitution.[12]

In recognition of this mandate, in October 1990, the Ukrainian Supreme Soviet created a 59-member Parliamentary Constitutional Commission, chaired by the moderate-communist-reformist President Leonid Kravchuk. The commission's initial task was to draft a "conception" of a new Ukrainian constitution. The Conception of the New Constitution of Ukraine was ratified by the Ukrainian Parliament on June 19, 1991.[13] It should be noted that at this stage, neither the *Declaration of State Sovereignty*, nor the creation of the drafting commission and its work on the Conception were necessarily perceived as grave threats by Moscow because it was assumed that the reform movement in Ukraine could be persuaded to simply pursue a redefinition of the Soviet federation by constitutional amendment and a redrafting of the Union Treaty of 1922, as opposed to an as yet inconceivable secession of Ukraine. Indeed, the actions of the Ukrainian Supreme Soviet were thought to be in line with Gorbachev's antecedent April 1990 reforms.[14]

Though the composition of the Parliamentary Constitutional Commission reflected the Ukrainian *nomenklatura*, as the Ukrainian democratic-nationalist reform movement gained momentum under the centralizing influence of *Rukh* (Movement for an Independent Ukraine), *Zelenyj Svit*, *Memorial'*, *Tovarystvo Ukrainskoi Movy* and others, reform-minded communists in the drafting commission began to reflect some of the aims of the independence movement. As commission-member Petro Martinenko recounts, "...[T]he committee constantly faced heated arguments both from the newly formed national-democratic parties and

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12 *Declaration of State Sovereignty of Ukraine*, Supreme Soviet of the Ukrainian Soviet Socialist Republic, July 16, 1990.

13 L. Yuzkov, "Vid Deklaratsii pro Derzhavnyj Suverenitet Ukrainy do Kontseptsii Novoi Konstytutsii"[From the Declaration of State Sovereignty of Ukraine to the Conception of the New Constitution of Ukraine] (Kyiv: Ukrainian Legal Foundation, 1993).

14 Hazard, *supra* note 11.

members of the old party *nomenklatura*."[15] However, Martinenko also commented that the conservative elements of the commission generally prevailed during the early stages of work, as is clear from the first draft's inclusion of "selecting socialism as a way of life for the Ukrainian people," even though the *nomenklatura* was already claiming, for propaganda value at home and abroad, that the Soviet body politic had already achieved political pluralism.[16] This demonstrated the dominance of conservative elements in the Supreme Soviet as well as the drafting commission, and more importantly, the limitations of the *Declaration of State Sovereignty* which did not openly turn its back on Soviet socialist ideology — either as ideology strictly so-called or simply as an instrument of political legitimization.

The commission entered an essentially new and unexpected stage of its work after the attempted coup d'état against the reformist government of President Gorbachev on August 19, 1991. The failed coup resulted in totally discrediting the CPSU, which ironically implicated the Gorbachev government itself, even though it was the target of the coup, and perhaps more importantly in Ukraine, the coup was perceived as a threat to Ukraine's drive for independence. On August 24, 1991, the Supreme Soviet of Ukraine declared outright independence, subject only to confirmation by a national referendum and based on its inherent right to self-determination and the guiding principles of the *Declaration of State Sovereignty* of July 1990.

II. *Act Proclaiming Independence of Ukraine*

> Taking into account the mortal danger that threatened Ukraine as a result of the coup d'état which occurred in the USSR on August 19, 1991,
> Developing the centuries-old tradition of the State formation in Ukraine,
> Proceeding from the right to self-determination provided for in the UN Charter and other international legal documents,

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[15] P. Martinenko, "New Constitution Reviewed: Papers Publish Ukraine's Constitution for Public Scrutiny" *The Ukrainian Weekly* (20 September 1992) 2.

[16] *Ibid.*

Implementing the Declaration of State Sovereignty of Ukraine,
the Verkhovna Rada of the Ukrainian Soviet Socialist Republic solemnly proclaims the INDEPENDENCE OF UKRAINE and the formation of a sovereign Ukrainian State — UKRAINE.
The territory of Ukraine is indivisible and inviolable.
From now on only the Constitution and laws of Ukraine are effective in its territory.
This Act comes in force upon its adoption.

Verkhovna Rada of Ukraine, August 24, 1991[17]

This *Act* was a crucial departure in the constitutional commission's work. Prior to its declaration, the commission was restricted to the self-inclusive principles of "socialist legality" (a term preferred over the otherwise self-contradictory term "socialist constitutionalism," discussed below) as defined by the supra-constitutional Politburo and Central Committee of the CPSU as well as the Soviet Congress of Deputies itself (the all-Union Parliament). As such, Western and other non-Soviet precepts of constitutionalism were theoretically inaccessible to the drafting committee. After the *Act*, the constitutional commission began to examine the possibilities and concepts of Western democratic constitutions, and not merely through the eyes of Soviet socialist legal interpretation, though a complete departure from that paradigm has yet to occur. After the Ukrainian referendum on independence December 1, 1991, which resulted in an overwhelming 90.3% vote in favour of independence, the Ukrainian Parliament voted to nullify the Union Treaty of 1922 which incorporated Ukraine into the USSR as a Union Republic.[18] The results of the referendum finalized Ukraine's move to independence and, in addition to the independence movements of other Soviet Republics, indeed sealed the fate of the Soviet Union.

The Constitutional Drafting Commission was under pressure to entrench these gains in a new constitutional document as quickly as possible, under

[17] *Act Proclaiming Independence of Ukraine*, Verkhovna Rada of Ukraine, August 24, 1991.

[18] *Ukrainian Parliamentary Communiqué*, December 5, 1991.

the direction of new norms of state independence and territorial integrity, political pluralism, limited government, the rule of law, ascendancy of civil society, popular sovereignty and constitutional supremacy — a clear departure from the norms of socialist legality, with a view to Western democratic experience in constitutional democracy. This shift was demonstrated by the immediate ties the constitutional commission made with experts on Western constitutionalism. In early spring 1992, the first draft constitution was sent to constitutional experts and government officials in Germany, France, Canada, the United States, Britain and several East European countries for comment. In March 1992, the commission held an international working seminar on the first draft in Prague; and in April, commission member and Parliamentary Deputy Serhiy Holovaty visited Washington, New York and Toronto in this regard. On June 10, 1993 the commission presented a second draft, which received further commentary and recommendation by Western experts during the first International Symposium on the Draft Constitution of Ukraine, which was held in Kyiv, Ukraine, July 3-5. This was followed by another international conference in Kyiv, July 23-25, specifically on the judicial system proposed in the draft. From October 18-23, 1992, the World Congress of Ukrainian Lawyers was held in Kyiv with the constitutional draft and its provisions for commercial and private law, the Procuracy, private property, a property registration system, and human rights being the primary foci of discussion.[19]

The advice of Western constitutional and legal experts given to this point was met with a considerable degree of skepticism.[20] This skepticism

[19] It should be mentioned that the Council of Advisors to the Parliament of Ukraine also played a role in the development of the June 10, 1992 Constitutional Proposal. However, the Council acts independent of the President and the Government of Ukraine and as such its recommendations are entirely non-binding. The Council is financed by the George Soros Foundation.

[20] During the symposium, working sessions were replete with skepticism about Western advice, especially regarding suggestions for further limitation of Presidential and executive powers, the creation of an independent judiciary, and the withdrawal of numerous limitations on human rights; Ukrainian Legal Foundation; "Symposium Notes" (International Symposium on the Draft

has been explained by conservative and liberal drafters alike as being a product of Ukraine's unique historical experience and the political and economic difficulties accompanying the dissolution of the Soviet empire.[21] Nonetheless, the willingness to even solicit Western and domestic democratic-oriented advice manifested a new departure in the Ukrainian constitution-making process. According to Leonid Yuzkov, Chairman of the Constitutional Drafting Commission's working group, approximately one-third of the recommendations given by Western experts have been accepted into the May 1993 draft.[22] Similarly, Yuzkov claims that the public discussion the second draft received was an unmitigated success in public participation, contributing greatly to the formation of the current proposal.

To understand the forces engaged in the intellectual and political battle to exert decisive influence over the constitutional drafting process in Ukraine, before examining the contents of the current draft itself, it might be insightful to examine very briefly the triggering mechanisms of this ongoing struggle for influence, namely, the traditional conceptual differences between Western and Soviet constitutionalism.

Constitution of Ukraine, 3-5 July 1992) [unpublished]. Symposium transcript and related materials reproduced in Ukrainian by the newly-established Ukrainian Legal Foundation in the first volume of its new legal publications series; S. Holovaty, ed.; "Konstitutsiia Nezalezhnoi Ukrainy" *Mizhnarodnyj Symposium* ["The Constitution of Independent Ukraine" *International Symposium*] (Kyiv: Ukrainian Legal Foundation, 1992). The October 1992 World Congress of Ukrainian Lawyers held in Kyiv met similar resistance to Western input as the conservative Union of Ukrainian Advocates boycotted the Congress (though several of its members remained as official speakers at the Congress).

21 The seemingly popular Chief Justice of Ukraine's new Constitutional Court, Leonid Yuzkov, noted in this regard that Western experts should exercise patience with their Ukrainian counterparts because the current reform process is as much a learning experience as it is a result of recent history. Ukrainian Legal Foundation, *ibid.*

22 L. Yuzkov, "Proekt Novoi Konstytutsii Ukrainy Pislya Vsenarodnoho Obhovorennya" [The Ukrainian Draft Constitution After National Discussion] (Kyiv: Ukrainian Legal Foundation, 1993).

III. Western and Soviet Concepts of Constitutionalism

Given that modern constitutions come in a wide variety of forms, it is difficult, if not intellectually dangerous, to make sweeping generalizations about their characteristics. The historical circumstances from which constitutions or major amendments emanate have profound effects on their ultimate form, nature and implementation. Of course, the degree of societal consensus necessary, if any (as in the case of authoritarian regimes), before any constitutional revision occurs is just the departure for differences between constitutions. Beyond that, one finds that constitutions may be "evolutionary" in the sense that they positively reflect the historical and political development and customary practice of a society, or they may be "revolutionary" in the sense that they endeavour to entrench entirely new societal norms in order to defeat an authoritarian, colonial or simply unsavoury past.[23] Of these possibilities, the result may be programmatic, directive, and perhaps even idealistic, or the constitution may be a realistic "working" instrument which merely codifies pre-existing accepted norms — the difference being, as aptly noted by Bogdanor, between "states with a constitution" and "constitutional states."[24] Further, these variants may be wholly written, partially so, or unwritten, though modern constitutions tend to be at least partially written.[25]

As to form, written constitutions can be "flexible" in the sense that the legislature can repeal, amend or change the constitutional document(s) by virtue of legislative responsibility to societal consensus, and by means of the resource a constitution gives for amendment through some form of

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[23] V. Bogdanor, ed., *Constitutions in Democratic Politics* (Aldershot: Gower, 1988) at 8-9. Bogdanor uses the term 'reactive' as opposed to 'revolutionary', but given how the former might be confused with the term 'reactionary' (*i.e.*, unreceptive to change), the term 'revolutionary' shall be used henceforward for its practical utility.

[24] *Ibid.* at 386. On programmatic constitutions see McWhinney, *supra* note 9 at 45-51.

[25] See A.V. Dicey, *Introduction to the Study of the Law of Constitutions*, 9th ed. (London: MacMillan Press, 1948) at 1-35.

amending formula. Alternatively, a constitution may be "rigid" in so far as it alleges to entail an exhaustive enumeration of rights, responsibilities, and limitations on both government and society, leaving little room for either judicial interpretation or constitutional amendment. Finally, the kind of governing system a constitution entrenches varies radically from state to state, extending across a spectrum from strict societal and governmental subordination to fundamental constitutional laws (and conventions), to societal subordination accompanied by governmental or oligarchical supra-constitutionality. Of course, regardless of where a constitution lies in this spectrum, constitutional entrenchment of a particular social and political order is by itself no guarantee of success.

Despite the vast possibilities of social order constitutions present, it is nonetheless possible that, at the very least, all constitutions serve a primary function of enshrining the fundamental organizational principles (*Gründnorm* or *modus operandi*) of a society, which have either been achieved by general consensus of the populace, forced on the populace from above by the ruling elite, or some mixture of both. All substantive laws and administrative rules are then derived from and justified by the fundamental or organic laws which form the basis of the constitution. Constitutions can then be observed to serve a positivistic function as "[c]odes of rules which aspire to regulate the allocation of functions, power and duties among the various agencies and offices of government, and define the relationships between these and the public," including for example: rules that define state power and identify both its arbiters and their prerogatives, rules that regulate the inter-relations of such individuals and the exercise of state power, determination of the form and powers of legislature and the mode of elections, and proclamation of territorial integrity and the defence thereof.[26] Conversely, the same allocation of functions may serve a negativistic function by expressly limiting by definition the nature and exercise of state power.

[26] S.E. Finer, "Notes Towards a History of Constitutions" in Bogdanor, *supra* note 23 at 17. See also Dicey, *ibid.* at 23.

Similarly, it can be stated that the organic laws that form constitutions are codified simply as an omni-present and tendentious reminder of the norms set by the incumbent society. The *French Declaration of the Rights of Man and the Citizen of 1789* contains one of the clearest pronouncements of this proposition: "This declaration, perpetually present to all members of the body social, shall be a constant reminder to them of their rights and duties; So that, since it will be possible at any moment to compare the acts of the legislative authority and those of the executive authority with the final end of all political institutions, those acts shall thereby be the more respected."[27] As such, constitutions serve the very important function of legitimizing the incumbent political regime as well as the socio-political system it endeavours to codify as fundamental law, both for present and future generations. This is not to suggest that the fundamental laws are necessarily intended to be entrenched for all time, for as the inclusion of amending mechanisms in almost all modern constitutions would demonstrate, "...once the constitution is written it is *always* written thereafter" in order to keep abreast of any significant changes a society undergoes with the passage of time.[28] As Edward McWhinney commented in this regard:[29]

> A principal task and responsibility of a constitutional-governmental élite...becomes one of anticipating and correcting in advance the attrition or decay of the constitutional system. Constitutional systems must always include an in-built quality of change; and constitutionalism itself becomes not merely the substantive values written into the constitutional charter, but the actual processes of constitutional change themselves. That is why constitutional style — the respect for the constitutional rules of the game, and their respect in the spirit as well as in the letter — becomes ever important in the ultimate evaluation of a constitutional system.

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27 Cited in Finer, *ibid.* at 21.

28 *Ibid.*

29 McWhinney, *supra* note 9 at 132. For an interesting analysis on the philosophical underpinnings of constitutional amendment see P. Suber, *The Paradox of Self-Amendment* (New York: Peter Lang, 1990) at 17-27.

Having considered briefly what most modern constitutions functionally have in common, one can go further to list some of the main concepts identified with most Western democratic constitutions. Most importantly, perhaps, is the principle of Rule of Law. While the term itself is now generally understood and utilized by most modern societies to justify their respective legal systems, Dicey explains that in the paradigm of Western democratic constitutionalism, Rule of Law entails the supremacy of ordinary prescribed laws as opposed to arbitrary power, which may entail selective enforcement of or disregard for prescribed law in addition to the exercise of powers simply not granted by law — organic or ordinary.[30] Under Rule of Law, one may be punished for a breach of law and nothing else. Further, Rule of Law implies that all are equal before the law without exception, save for the regulated exclusions proffered by administrative law and modern Parliamentary immunity.[31] Finally, constitutional rules are not necessarily the source of laws, but rather, the result of existing or intended norms, as would be interpreted and enforced by an independent judiciary.

Other concepts fundamental to Western constitutionalism include "popular sovereignty" and "representative government," as well as the sovereignty of the legislature.[32] Simply stated, the latter provides the elected legislature with the right (exclusive in a unitary state; shared in a federal state) to make or unmake any law, subject only to judicial review to ensure that the enactment or suspension of ordinary laws are in harmony with the letter and intent of the constitution. Of course the very notion of "judicial review" stems from the general principle of a "separation of powers," that is, a separation of "state power" into legislative, executive and judicial branches, in which there may be some overlap between the first two branches, but in order to enhance their checking power in relation to the constitution, the judicial branch must be entirely independent of the first two branches. Because legislative supremacy may suggest the legal

30 Dicey, *supra* note 25 at 202-205. See also preceding pages 183-202 which provide an in-depth discussion of Rule of Law.

31 *Ibid.*

32 *Ibid.* at 41-110.

impotence of individual rights and freedoms, Western constitutionalism also entails further checks and balances purporting to limit the powers of government vis-á-vis the public at large ("limited government"), in addition to obtaining a balance between the rights and freedoms of individuals and the public at large.[33] Indeed, the protection of the people from the government and tyranny of the majority, as well as the protection of individuals from themselves, may be the very essence of Western constitutionalism. As Ghita Ionescu comments, democratic constitutionalism is "the theory which posits first the reciprocal toleration by all citizens of the rights and freedoms of the other citizens, and secondly the limitation of government by means of checks and balances."[34]

As demonstrated above, Western constitutions are preoccupied with the primary task of limiting state power. Typical communist, and particularly Soviet-style, constitutions differ dramatically from Western constitutions in that "limited government" as it is understood in the West is an alien concept, in part, due to the complete monopoly of power of the communist party, and because of the different view Marxism-Leninism (and its revisionist variants) holds of what a constitution is and what functions it performs. Indeed, the Soviet socialist perception of law in its entirety differs radically from, and wholly rejects, the philosophical basis of Western concepts of law as a result of the self-inclusiveness of Marxist-Leninism.[35] But this should not be taken as a rejection of law

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33 While Dicey contended that neither morality, prerogative, *stare decisis*, nor social demand could limit the supremacy of the legislature, the modern view posits that all of the foregoing place considerable restraint on legislature in constitutional democracies.

34 G. Ionescu, "The Theory of Liberal Constitutionalism" in Bogdanor, *supra* note 23 at 33.

35 The Marxist-Leninist ideological basis of Soviet law is discussed in detail by two of the most prolific Western experts on Soviet law, John Hazard and Olympiad Ioffe. See J.M. Hazard, W. Butler & P. Maggs, *The Soviet Legal System: Fundamental Principles and Historical Commentary*, 3rd ed. (New York: Oceana, 1977); and O.S. Ioffe, *Soviet Law and Soviet Reality* (Dordrecht: Martinus Nijhoff, 1985).

either philosophically or in its normal utilitarian capacity. Soviet law and reality have merely forwarded a new school of legal thought, with its own terminology and interpretation. Common Western legal terms can carry entirely different meaning in Soviet legal parlance. "'[D]emocracy', 'election', 'parliament', 'federalism', 'trade union', and 'collective agreement', for example, take on a very different meaning because of the existence of an all-powerful communist party; the words 'property', 'contract', and 'arbitration' denote different realities because of the collectivization of the means of production and state planning."[36]

From the Soviet perspective, law and constitutions are part of the superstructure and an instrument of the ruling class: in capitalist society, the bourgeoisie; in socialist society, the proletariat. As noted in Grigoryan and Dolgopolov's classic Soviet legal text: "The constitution is a class category and it expresses the interests of the ruling class."[37] In ideological terms what this means is that given the objective laws of social development proffered by Marxism-Leninism, insight into which only the CPSU was capable of an advanced social consciousness of these historical processes, the CPSU should have a monopoly of power, acting as 'vanguard of the proletariat', and because it's decisions are intended to secure the path to the ultimate achievement of communism, the CPSU's dictates are, in fact, law.[38] The CPSU is neither subordinated by law, since all laws were derived from the Party, nor could it be said that the Constitution, or "Fundamental Law", in any way diminished the Party's power. Obviously, this is a radical departure from any Western notion of constitutionalism. Indeed, the Soviet reluctance to incorporate the term "constitutional law" into its legal vocabulary, opting instead to utilize the

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36 R. David & J.C. Brierly, *Major Legal Systems in the World Today* (London: Stevens, 1978) at 144 and Ioffe, *ibid.* at 2.

37 L. Grigoryan & V. Dolgopolov, *Fundamentals of Soviet State Law* (Moscow: Progress, 1977) at 23-24.

38 T. Rakowska-Harmstone, "Communist Constitutions and Constitutional Change" in K.G. Banting & R. Simeon, eds., *The Politics of Constitutional Change in Industrial Nations: Redesigning the State* (London: Macmillan Press, 1985) at 204.

terms *gosudarstvennoe pravo* (state law) and *sotsialisticheskaya zakonnost'* (socialist legality), accentuates Lenin's proposition that "law is a political measure, it is politics."[39]

Though in practice the Communist Party functioned entirely outside the ambit of the constitution, the formal document was nonetheless required for programmatic purposes, that is, to legitimize the existing socialist and political order and to institutionalize the successive stages of their development.[40] The importance of this function from the perspective of Marxism-Leninism should not be underestimated. Moreover, the concept of state power flowing from the constitution goes far beyond a merely utilitarian allocation and regulation of the functions of the agencies and offices of government and the respective rights and responsibilities of citizens. The rational-legal foundations the constitution provided for state power, of course, had indispensable propaganda value domestically and abroad, and as such, proved an essential instrument of both domestic control as well as foreign policy.

Legitimization of the existing social and political order necessarily entailed a rejection of the Western conception of Rule of Law, as alluded to above, since Marxism-Leninism justified the Communist Party in acting outside the ambit of the constitution, and indeed, it made no pretense of doing otherwise as Soviet legal theory in practice has demonstrated.[41] Socialist legality is inconsistent with Western notions of democratic constitutionality, because in the Soviet system the constitution is not the validating test of the legality of either legislative acts of the Soviet legislature or the highest organs of state power (the Politburo and the Central Committee of the CPSU). Accordingly, the concepts of "equality before the law," which is essential to the Rule of Law, as well as "limited

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39 W.E. Butler, *Soviet Law* (London: Butterworths, 1988) at 143; V.I. Lenin, "Concerning a caricature of Marxism and concerning imperialist economism" *23 Collected Works*, 4th ed. (Moscow, 1949) at 36.

40 Rakowska-Harmstone, *supra* note 38 at 205-207; Butler, *ibid.* at 145-46.

41 See G. Brunner, "The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments" (1977) 3 Rev. Soc. L. 121.

government," "popular sovereignty," and "separation of powers" as understood in the Western world rang hollow in communist states.[42]

As to the rights of individuals as against both the state and communal rights, despite the seemingly bold guarantee of individuals' rights enumerated in the successive Soviet Constitutions of 1922, 1936 and 1977, again, such enumeration lay impotent in the face of Marxist-Leninist ideology which explicitly subordinates the rights of the individual to the collective. The 1977 Soviet Constitution devotes over thirty articles to defining the rights and freedoms of individuals, however, such rights can only be exercised "in accordance with the aims of communist construction" and "in accordance with the interests of the working people and with a view to strengthening the legal system."[43] Moreover, such rights could only be realized through the State or collective, and therefore, were not dependent on a limitation of state power. Adding to this the Soviet rejection of a separation of powers, particularly the notion of an independent judiciary, Soviet conceptualization of the rights of individuals differs radically from the particular balancing of state, communal and individual rights aspired to in the Western democracies. Unable to see things from the Marxist-Leninist perspective, in the West, the whole realm of human rights in the Soviet Union appeared to be measured by a completely arbitrary standard.

Having noted some of the similarities and differences between Western and Soviet constitutionalism, it should be repeated that in theory the relative strengths and weaknesses of both conceptualizations stem from their different ideological bases, as well as their implementation. It was with respect to implementation that the fundamental precepts of Marxism-Leninism and socialist legality have been discredited in current

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42 On Soviet "popular sovereignty" see Rakowska-Harmstone, *supra* note 38 at 206-07; and on the wholesale Soviet abandonment of "separation of powers" see Butler, *supra* note 39 at 143-46.

43 Butler, *ibid.* at 150-53; *Konstitutsia (Osnovnoi Zakon) Soiuza Sovietskikh Sotsialisticheskikh Respublik 1977* [Constitution (Fundamental Law) of the USSR, 1977] (Moscow: Progress, 1978).

times, though philosophically, polemics continue unabated. However, the question that deserves to be asked at this juncture is, given the likelihood that Ukrainian constitutional drafters could not easily escape the paradigm of Marxist-Leninist ideology, to what degree, if any, has this affected the drafting of Ukraine's new and allegedly 'revolutionary' and democratic constitution? Can vestiges of Soviet socialist legality be detected in the Draft Constitution of May 27, 1993? And if so, does this disqualify the draft from being revolutionary and democratic? How would one categorize it? Is it *sui generis*? The answers to these questions must be sought by a general examination of the Draft Constitution itself.

IV. Overview of the Ukrainian Draft Constitution

A. General Principles

At the outset it should be reiterated that the May 27, 1993 Draft Constitution analyzed for the purposes of this discussion is the result of three previous drafts: January 1992, June 10, 1992 and January 28, 1993. The following discussion originally began with in depth analysis of the second draft, and proceeded further once first-hand information about subsequent versions presented itself. The discussion that follows primarily examines the May 1993 draft, though, where necessary, comment will be made on previous drafts in order to capture the essence of relative successes and failures in the drafting process. Further, this analysis is based primarily on the English translations of the Ukrainian originals, which were prepared by the Council of Advisors to the Parliament of Ukraine with subsequent edits by the Ukrainian Legal Foundation.[44] In some instances, references to constitutional provisions emanate from an independent translation, necessitated by the questionability of the Council of Advisors' translations.

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[44] *Draft Constitution of Ukraine*. Submitted by the Constitutional Drafting Commission of the Parliament of Ukraine, January, 1992, June 10, 1992, January 28, 1993, and May 27, 1993. English translations provided by the Council of Advisors to the Parliament of Ukraine, with edits by the Ukrainian Legal Foundation.

The Draft Constitution has been heralded both in Ukraine and the West as a Western-style democratic constitution, and therefore, in its historical context, also a 'revolutionary' constitution. Not surprisingly, however, respective Western and Ukrainian constitutional experts manifest subtle differences in their assessments. Justice Walter Tarnopolsky of the Ontario Court of Appeal commented that the draft attempts to create a democratic government subject to a bill of rights, and that "[o]n the whole, [he and other Western advisors] were all impressed with the work they had done. It is a very detailed constitution, attempting to establish a democratic state reflecting somewhat the historical experience of Ukraine."[45] In contrast, Ukrainian drafting commission member Petro Martinenko wrote that "[t]he draft Constitution finally submitted for public discussion envisions a complete democratization of society, including the establishment of a socialist-oriented market economy, that will at last destroy the totalitarian order of the past."[46] Justice Tarnopolsky's more reserved characterization of "attempting to establish a democratic state" stands apart from Martinenko's declaration of "complete democratization of society" and destruction of the "totalitarian order of the past," and this distinction underlies Western reaction to the drafting project in its entirety.

With respect to Justice Tarnopolsky's comment that the second draft was very detailed (comprising some 258 multi-clause articles), one should note that the fourth draft is little shorter — 231 articles. While the intent may have been to produce an articulate constitutional document that would minimize the opportunity for arbitrary interpretation by the state, even a cursory glance at the document reveals the inclusion of numerous articles which were clearly ill-conceived, perhaps the product of amateur drafting (Ukraine has no experienced professional legal drafters) or time constraints, yet as a result the document is replete with redundancy, contradiction, ambiguity and in certain instances unenforceability. While these problems are capable of being overcome, the fact that two-thirds of the recommendations given by Western experts in response to the second

45 O. Zakydalsky, "Canadian Judge Offers Assessment of New Ukrainian Constitution" *The Ukrainian Weekly* (9 August 1992) 7.

46 Martinenko, *supra* note 15.

draft were rejected in subsequent drafts raises doubt. With respect to form alone, one wonders whether the length and inclusiveness of the document will allow it the flexibility to react to social change over time and, indeed, whether many of its provisions will be practically justiciable at all.

On the surface, however, the Draft Constitution does seem to engender the major components identified with Western democratic constitutions. Article 2 of the draft proclaims that Ukraine is a "democratic and social state which adheres her activity to the Rule of Law." Rule of Law is referred to again in Article 6, though with the words "supremacy of law on which this Constitution is based," and the draft provides for a Constitutional Court and a system of judicial review to determine the constitutionality of legislative acts of Parliament and the activities of the Government and President. One should note that the Ukrainian version lacks any reference to "socialist legality," and this demonstrates the formal attempt to adopt "Rule of Law" as understood in the West. This alone is perhaps one of the most important departures the drafters have taken in an effort to create the conditions for the growth of Western democracy in Ukraine.

Of course much more is required to make the Rule of Law a reality, and the Draft Constitution is careful to include explicit adoption of the following: "popular sovereignty" (Art.3); political, economic, and ideological pluralism — emphasized with a statement that "No ideology...may be recognized as the official state ideology" (Art. 9: presumably a clear refutation of even Marxist-Leninist supremacy and extra-legality); equality before the law (Art. 15); "limited government" by a system of checks and balances on the organs of state power in addition to clear reference to division of powers into legislative, executive and judicial branches (Art. 3); and, perhaps second in importance only to Rule of Law, the adoption and specific assertion of the "priority of human and civic rights and freedoms" (Art. 1), which appear on their face to adhere

to the International Covenant on Civil and Political Rights of 1966.[47] The latter is a fundamental departure from the communal supremacy central to Marxist-Leninist ideology.

If the *prima facie* adoption of these concepts were sufficient to characterize the Draft Constitution in any particular way, then one would have to submit that the draft truly reflects the general precepts of Western constitutionalism and, as such purports to establish an entirely new constitutionally-governed democratic society. However, before one concludes that the draft is a complete departure from the past and is wholly 'revolutionary', closer examination is required to determine whether the constitutional document itself (particularly irrespective of the political will of the incumbent and future governments) can actually fulfil the general principles of Western constitutionalism. Given the excruciating detail of the document, is it in fact legally sound from the Western perspective?

B. State Power and Structure

The Draft Constitution proposes a parliamentary-presidential governing system based loosely on that of France, though with considerably more power vested in both the legislative body and the Office of the President. The draft explicitly calls for a requisite division of powers into legislative, executive and judicial branches, though there are numerous instances where the divisions are rather obscure. The Parliament (or *Verkhovna Rada*) is elected by the populace in direct, multi-party elections, while the government is appointed by the President (through the Office of the Prime Minister) and subsequently approved by the Parliament. Structurally, Ukraine is described as a democratic "unitary" state (Art. 181), however, provisions which provide for a limited degree of local and regional self-government, especially for defined territorial administrative units (*e.g.*, the City of Kyiv and the Republic of Crimea), have led some

[47] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976).

commentators to define Ukraine as a "decentralized unitary state."[48] Whether or not such a characterization is truly warranted will become evident in the discussion that follows.

C. Legislative Power

Legislative power in Ukraine is vested in the National Council, or *Vsenarodna Rada* (Art. 100). The draft envisions a bicameral National Council consisting of a State Rada comprised of 200 Deputies (previously 350) elected in equally authoritative constituencies with approximately equal numbers of voters, and a Rada of Territories, which would serve as a territorially representative body with three Deputies (previously five) elected from each of Ukraine's twenty-four Oblasts, the Republic of Crimea and the City of Kyiv.[49] The choice of a bicameral legislature was widely debated in early constitutional discussions, and the inclusion of a one-house National Council option in the draft proposal would indicate that the issue remains contentious.

Proponents of the one-house option are primarily concerned with the fact that the enumeration of powers of the National Council (Arts. 109-114) and the exclusive powers of the State Rada and Rada of Territories (Arts. 115 and 116 respectively) fail to demonstrate a special need for a second house. While the State Rada executes the prerogatives of the National Council in general, the enumerated functions of the Rada of Territories only concern the formation of administrative territorial units, appointment of judges and approval of legislative activity at the Oblast level, and termination of the authority of Oblast councils and other bodies of local self-government upon the recommendation of the President and Prime Minister. Given this limited enumeration of the powers of the Rada of Territories and the fact Ukraine will constitute a unitary state, the necessity of a second house is questionable.

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[48] See Martinenko's remarks, *supra* note 15.

[49] "Oblast" can be loosely described as an administrative unit similar to a province, albeit in the context of a unified state.

Perhaps one of the more surprising constitutional anomalies that manifests itself in the draft is a provision which gives the legislature power to "enact the Constitution of Ukraine and *to carry out any changes and additions (filling in)*" (Art. 109).[50] Though the May 1993 draft is more polished than its predecessors, it is still replete with drafting oversights, for example, references such as "as defined by constitutional law." With the exception of Article 110 (which vaguely enumerates over what matters the "Constitution and laws of Ukraine have exclusivity") the draft fails to articulate what exactly is meant by constitutional law. The same criticism may be raised regarding deferrals (*e.g.*, the common deferral clause used throughout the draft is "as will be defined by law," where the draft gives no direction as to where "the law" can be found). The combination of Article 109 and such drafting oversights seem to negate the idea of the constitution comprising the fundamental law. This is a serious shortcoming, one which will be addressed again below.

Another problem which has raised the eyebrows of Western constitutional experts is the power the legislative branch of government wields in relation to the executive and judicial branches. For example, Article 111.3 allows the National Council to "implement control over executive power"; Article 111.4 gives the National Council sweeping powers of investigation; and Articles 111-113 give the legislature power over foreign affairs. While these are certainly questionable intrusions into executive powers, a more foreboding intrusion by the legislative branch occurs in the judiciary. Article 109 provides that in addition to the legislature's powers to "enact the Constitution of Ukraine and to carry out any changes and additions (filling in)," the legislature "*shall officially interpret [them]*" [emphasis added]. Article 113.10 also gives the National Council the power to reject a resignation of the Chief of the Constitutional Court. These provisions diminish the relevance of conflicting assertions elsewhere in the constitutional draft of a requisite separation of powers.

[50] Translation of the Ukrainian word *dopovnennia* has ranged from the overly optimistic translation "amendment," to "addition," to the more likely "filling in" [emphasis added]. Given the ambiguity of the draft in general, the latter translation seems appropriate.

Indeed, by preventing the judiciary from being self-regulating and free of legislative interference, the concept of a separation of powers is rejected.

The legislative process envisioned in Articles 127 to 133 allows for the introduction of draft legislation by the public (supported by 300,000 voters), the President and executive, and the National Council. The process roughly equates the American Congressional passage of legislation between the two houses, joint committees, and the role of Presidential recommendation and veto.[51] One difference from the American system is that if the President resorts to the stipulated veto deferral power (Art. 133) at the end of a session of the National Council, an extraordinary session shall be convened for a second reading of the bill. In reference to legislation introduced by "people's initiative," the assertion in Article 127 that such draft legislation "shall have priority of consideration" raises questions of the priority of legislation, as well as whether the drafters fully understand the principle of representative democracy. In relation to the latter criticism, the Draft Constitution provides too many opportunities to pass legislation by referendum. While recourse to popular referenda may be the ultimate expression of democracy, the same question arises: whether ordinary law need be subject to referendum at all given the principles of responsible government, and if so, whether such access to the referendum mechanism is fiscally and politically efficient.

Adding to earlier commentary about the verbosity of the Draft Constitution, one might posit that certain provisions on legislative power are superfluous. For example, Article 106 prohibits members of the National Council from undertaking private business, and Article 108.3 prohibits members from continuing to fulfil their mandates upon "conviction by a court sentence that has come into force." Does this mean any conviction, including traffic violations or driving while intoxicated? On the other end of the spectrum, Article 107, which establishes parliamentary immunity, deserves criticism for the added limitation "except

[51] See M. McNeil, ed., *How Congress Works* (Washington: Congressional Quarterly, 1983) at 37-79.

in cases...of slander and insult." This limitation has been criticized by Western experts as completely unnecessary, for its inclusion mocks the very principle of parliamentary immunity.[52]

D. Executive Power

Part VI of the Draft Constitution states that as head of state and executive power, the President shall be elected for a five year term in a universal, equal and direct secret ballot election, in which freely nominated candidates run for the Office of the President. No one can be elected President for more than two consecutive terms. Demonstrative of the Ukrainianization process and national self-identification process currently taking place in Ukraine, Presidential candidates must have lived in Ukraine for at least ten years and must speak the Ukrainian language fluently (Art. 142). This provision, while clearly a reaction to the Russification of Ukraine in the Soviet period, seems superfluous by Western constitutional standards. Similarly, requirements that the President suspend all of his or her political and business associations may be unnecessary in a constitutional document.

The Office of the President is bestowed with considerable power, particularly the broad powers of decree in Article 147, despite Ukraine's experience with authoritarian rule. However, the Presidential system presented in the draft has been justified by Ukrainian and Western observers as politically expedient both in order to press for an incremental increase in the rate of reform, as well as to provide political stability by avoiding a rapid succession of governments that might otherwise stem from a newly-emancipated country with many political parties and movements and a weak Presidency.[53] Moreover, the proposed Presidential system would institute a complicated series of checks and balances insofar as the legislative branch retains oversight of governmental and judicial

[52] Ukrainian Legal Foundation, "Second Symposium Notes" (International Symposium on the Draft Constitution of Ukraine, Kyiv, Ukraine, 20-22 June 1993) [unpublished].

[53] Zakydalsky, *supra* note 45.

appointments and, as indicated above, the Parliament would have considerable control over the executive itself.[54] However, it must be stated that on the surface the tenacity of this alleged system of checks and balances might be all too dependent on the good faith of the Presidential incumbent. Another problem might be political gridlock between the President, Prime Minister and the Cabinet of Ministers.

Article 144 of the Draft Constitution enumerates the powers of the President in some twenty clauses, and this enumeration is expressly inexhaustive. The list of powers requires little description here clause-by-clause because in general it merely represents an exercise of executive power. As such, one wonders whether it might be better to state that "the President exercises executive power."[55] This suggestion is even more plausible since some of the enumerated powers seem excessive, while others hold the potential of being interpreted arbitrarily and, therefore, little protection against the arbitrary exercise of power is gained by enumeration in a constitutional document.

One of the more striking of these provisions is 144.11, which gives the President power to impose martial law or even commence mobilization "in the event of a threat of attack," and this power is limited only by a *subsequent* requirement of Parliamentary approval. Obviously, "threat of attack" requires definition, and the subsequent approval of Parliament is hardly sufficient to prevent abuse of this power. Criticism is also warranted regarding powers allowing the President to declare emergency laws in Ukraine or in particular areas "if necessary" subject to National Council

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[54] This became glaringly obvious in July 1992 as Parliamentary pressure grew for the resignation of Prime Minister Fokin and his government, which culminated in September 1992 with Prime Minister Fokin's resignation and the ultimate formation of a new government in October 1992 (19 former government members, 13 new). In June 1993, the Prime Minister was first denied an extension of temporary decree powers over the economy by the Parliament, and then he was denied the right to resign.

[55] This suggestion emanated from Western constitutional advisors during the International Symposium on the Draft Constitution of Ukraine, Kiev, July 3-5, 1992. See Ukrainian Legal Foundation, *supra* note 20.

approval in two days (Art. 144.14); to propose to the Rada of Territories the dissolution of separate bodies of local self-government (Art. 144.17); and to annul the acts of Ministers, heads of central and local executive power, and the Government of the Republic of Crimea if they conflict with the Constitution and laws of Ukraine, or Presidential Decrees (Article 144.15). In the last example, one wonders how constitutionality is to be determined since the Constitutional Court is not mentioned. Moreover, by what standard is "accordance with ordinary law and Presidential Decree" to be measured?

To return to the wider issue of state structure and particularly local self-government, Ukraine is divided into twenty-four Oblasts, the Republic of Crimea, and the City of Kyiv, all with their own order of executive and legislative powers. Each Oblast and Crimea is divided into *raiony* (loosely translated as counties though the English translation of the draft uses the word region, in addition to district), *regiony* (regions), and municipalities and villages. As noted above, Article 144 places considerable limitations on the principle of local and regional self-government despite the fact that Article 4 guarantees local self-governance, in addition to Article 207, which provides "intereference by state organs...shall not be allowed." Internal contradictions of the Draft Constitution with respect to what exactly is within the competence of local and regional self-government could lead either to excessive constitutional litigation in this regard, particularly in border areas or areas dominated by non-Ukrainian national minorities, or it may simply nullify any significant exercise of self-government. Further examples of the disruptive powers of the Presidency are manifest in Articles 206 to 213, which effectively give the President power to appoint and dismiss chairpersons and nullify legal acts of local and regional governments. Article 212 expressly grants the President authority to terminate the mandate of bodies of self-governance if they conflict with the Constitution, normative laws or Presidential decrees, and again, it is not stated who determines unconstitutionality. Similarly, the Cabinet of Ministers is empowered by Article 157 to "direct" the work of local and regional self-government. In this light, it is clear that the Draft Constitution has serious reservations about allowing either democracy or self-government at the local levels and therefore, to

characterize Ukraine as a 'decentralized' unitary state would be entirely misleading were it not for the special case of Crimea.

The Draft Constitution embodies the fundamental political accommodation made to Crimea over the spring and summer of 1992 to curb the threat of Crimean secession.[56] Perhaps because the threat of succession has quelled somewhat since then, Crimea has lost its designation as the "Autonomous Republic of Crimea" as proposed in the June 1992 draft. The current draft merely proposes that Crimea have "special legal status" and that it constitute the "Republic of Crimea," a state-territorial organization of power and self-government with its own Constitution, subject to the Constitution of Ukraine. As well, Crimea is granted limited control over its natural resources, land, waterways, territorial citizenship, and local taxes (Articles 187 and 188). What special legal status Crimea is granted in the draft is unclear. In fact, what normative legislative powers the Crimean Parliament would have is so unclear that the word "law" [*zakon*] has been avoided altogether. Though the draft indicates Crimea is somewhat different than an Oblast, it fails to clarify the issue of residual powers between the central and local bodies of legislative power, as well as between the governments of Ukraine and Crimea. It was recently implied by Western experts that Ukraine has purposely tried to obfuscate the division of powers between Ukraine and Crimea in an attempt to distract secessionist forces in Crimea (as well as agitative forces from Moscow, particularly regarding Sevastopol). Regardless, as Marc Lalonde commented, Ukraine is trying to be

[56] The political problem the Republic of Crimea posed over the summer of 1992 was incredibly complex and should not be over-simplified, however, for the same reasons it cannot be given even adequate cursory consideration here. For a background to the tenuous (insofar as the threat of Crimean secession from Ukraine can still be raised at any time) arrangement between Ukraine and Crimea see: M. Kolomayets, "Ukraine's Parliament Votes More Autonomy for Crimean Republic" *The Ukrainian Weekly* (5 July 1992) 1; and R. Solchanyk, "Crisis Cools in Crimea But Independence Question Still Open" *The Ukrainian Weekly* (6 September 1992). More recent events involve the Russian Parliament's attempt to lay claim to the Crimean city of Sevastopol. See "UN Security Council Dennounces Grab at Sevastopol" *The Ukrainian Weekly* (25 July 1993).

"half-pregnant" with respect to Crimea; it is attempting to establish a federal system (but only with Crimea) and a unitary system (which affects Crimea's position) at the same time. This, Lalonde concluded, is asking for years of constitutional litigation and political instability between Ukraine's central government and Crimea — in a word, disaster.[57] Western experts recommended Ukraine not brush the question of Crimea under the rug so quickly. Ukraine must find a mutually-acceptable structural solution or face continued pressure from secessionist forces, Russia, and to magnify the problem, from the emergent Tatar *Medzhlis* in Crimea, which is lobbying both Ukrainian and Crimean legislatures to protect the rights of the indigenous Tatar peoples.[58]

Returning to the issue of Presidential powers, despite the seemingly excessive power envisioned in the Draft Constitution, the Presidency is nonetheless accountable to the legislative branch. In fact, there are instances where the National Council drastically limits the President's executive powers. For example, Articles 148.3 and 150 empower the National Council to determine the fitness of the President to carry out his or her functions on the basis of health. The potential for Parliamentary tyranny in this respect is obvious. Similarly, Article 153 allows impeachment upon criminal violation of the Constitution or laws of Ukraine without clarifying precise grounds for impeachment. Finally, Article 113.8 would require the President to seek the approval of the National Council to appoint *and dismiss* the Prime Minister. Given the current struggle between the President, the Prime Minister and the Parliament — a struggle which first appeared in October 1992 with the

[57] Ukrainain Legal Foundation, *supra* note 52.

[58] Following Ukraine's *Declaration of Independence*, the Ukrainian Parliament moved swiftly to open the door to Tatars who had been forcefully evicted *en masse* from Crimea by Stalin. This gesture was made purposely to comfort non-Ukrainian minorities in Ukraine, as well as international human rights organizations, that the cultural rights of all nationalities in Ukraine would be protected. Since the Tatars returned to the Crimean peninsula, they have been lobbying hard to ensure that both Ukraine and the Russian-dominated Crimean parliament address Tatar concerns.

dismissal of Prime Minister Fokin and almost half of his Cabinet, and then again in June 1993 when Parliament denied the Prime Minister decree powers over Ukraine's stumbling economy and then prevented him from either resigning or being dismissed by the President — the current draft proposal is a sure recipe for political gridlock. This is particularly disappointing since Ukraine's chances of succeeding in its reform process depend on its ability to make timely, albeit painful and unpopular decisions.

E. Judicial Power

The judicial system proposed in the Draft Constitution reflects civil law traditions of having separate criminal, civil and constitutional courts, and a Supreme Court as the highest court of appeal on non-constitutional questions, in addition to a Constitutional Court. The draft also provides for a system of judicial review and a plan for the continued role of the Office of the Procuracy. A departure from Soviet judicial process, extraordinary courts and special extra-judicial bodies are forbidden (Article 164.2).[59] Most importantly, Article 168 proclaims that "Judges shall be independent and shall be subordinate only to the Constitution and the law."

However, given the numerous Presidential and Parliamentary encroachments on judicial independence already identified above in reference to Parliamentary and Presidential disruptive powers, judicial independence is clearly a misnomer. Article 168 itself is no guarantee of judicial independence given the internationally accepted pre-conditions for an independent judiciary: 1) security of tenure; 2) self-regulation; and 3) financial security.[60] The draft allows the National Council to create a

[59] What the drafters presumably had in mind was the eradication of show trials staged by the CPSU. Of course, the draw-back of Article 164.2 (if it were interpreted broadly) would be that tax courts, martial law courts, human rights tribunals, *et cetera* might also be prohibited.

[60] As formally declared during the 1983 International Conference of Independent Judiciaries held in Montréal. Referred to by Justice Walter Tarnopolsky during the International Symposium on the Draft Constitution of Ukraine, Kyiv, July

Certification and Disciplinary Commission, whose purpose is to make inquiry into judicial performance and to impose disciplinary measures and impeachment. This constitutes a violation of the pre-condition of judicial self-regulation, which also may have an effect on the security of tenure. The second pre-condition may also be violated by Article 168.3, which stipulates that a judge may be relieved of his duties only under the circumstances and according to the procedures set forth by law, though such procedures are not, in fact, defined in the Draft Constitution nor is there any reference to where "the law" might be found. Finally, if the judiciary is to have financial security, it would seem obvious there should be a constitutional provision guaranteeing the judiciary its own budget. The May 1993 draft provides a protected budget appropriation for the judiciary, but it fails to clarify who controls the budget (presumably the legislature) and whether the budget can be decreased by Parliament.[61] Accordingly, it is difficult to suppose there is any real fiscal security for the judiciary.

Before examining the proposed Constitutional Court, it should be mentioned that some Ukrainian drafters present during the International Symposium on the Ukrainian Draft Constitution held in Kyiv in July 1992 had serious reservations about the very idea of an independent judiciary.[62] First, they were concerned that the present judiciary is trained upon Marxist-Leninist principles of jurisprudence, and therefore, would be unable to adjudicate on the basis of new legal concepts without Parliamentary guidance (the presumption being that the incumbent Parliament is more progressive, or at least more populist, than the judiciary). Second, comments were made that many members of the judiciary were simply political appointees — members of the *nomenklatura*, who were either poorly educated in general or severely

3-5, 1992. See conference transcript in Holovaty, *supra* note 20 at 246-47.

61 This criticism was emphasized during the first International Symposium on the Draft Constitution of Ukraine, where Western advisors noted that adequate and protected remuneration for judges, and a system of "tenure during good behaviour" were essential to the creation of an independent judiciary. See Ukrainian Legal Foundation, *supra* note 20.

62 *Ibid.*

corrupt, or both. Third, questions were raised about the very issue of re-education and the eventual replacement of the current judiciary. Similar positions were taken during the second International Symposium on the Ukrainian Draft Constitution in Kyiv, June 20-22, 1993, though to a lesser degree.

The Constitutional Court envisioned in the Draft Constitution is similar to the German Constitutional Court, where courts of first instance determine whether a law is unconstitutional but are not empowered to give a remedy when constitutionality is raised. Instead, they send the issue to the Constitutional Court for adjudication, which then sends the issue back to the general court for a judgment in light of the constitutional ruling.[63] As the foregoing discussion has demonstrated, Western advisors have questioned the suitability of this model for Ukraine, particularly on the ground that in its initial stages, the Constitutional Court will be overburdened by having to clarify constitutionality in light of a Constitution which is incomplete. Western commentators initially suggested Ukraine adopt a model more similar to the Portuguese system, wherein constitutionality can be raised in the general courts, and then challenged and appealed in the constitutional courts.[64] This, of course, differs from the common law tradition of allowing constitutionality to be ruled on by any court of superior jurisdiction. More recently, Western experts have suggested that constitutional issues be addressed in courts of first instance as well as appellate courts to reduce the incidence of litigation.[65]

Other concerns include the selection process of the Chairperson of the Constitutional Court, who is elected by the National Council upon nomination of the President and Chairperson of the National Council (Art. 215), and whose resignation can be legally rejected by the National Council . One wonders whether the Constitutional Court should select its own Chairman to avoid the politicization inherent in parliamentary

63 Zakydalsky, *supra* note 45.
64 *Ibid.*
65 Ukrainian Legal Foundation, *supra* note 52.

selection. The same may hold true for the Parliamentary selection of the members of the Court itself. However, when contrasted with the appointment system in Canada, or the electoral process of the United States, it is difficult to assess whether election by the legislature would really cause a greater degree of politicization. Even if it did, at least it would occur openly in a house of elected representatives. Criticism also might be raised at the rather large and cumbersome fifteen person membership of the Court. Another problem is that if Article 220 was intended to be drafted as it appears, a decision of a "collegium" of the Constitutional Court (consisting of three members appointed by the Chairman) might be overruled by the Constitutional Court Plenum (*i.e.* all fifteen members), in which case the majority of the Plenum would not have heard the case at all.

With respect to local and regional self-government, particularly that of the Republic of Crimea, Article 218 empowers the Court to rule on the Constitutionality of the Republic, again raising the fundamental question of what Crimea's "special legal status" really means. Yet another criticism can be raised about the Constitutional Court, in this instance due to the influence of Soviet ideology: Article 221.4 (and 176 for other courts) dictates that compensation must be granted where "material and moral damage" is inflicted on the people by unconstitutional acts. Without further clarification this could mean that every successful constitutional appeal warrants compensation by the State.

Another difficulty arises from the wide referential powers the court is burdened with in Article 218, which essentially provides all central and local legislative and administrative bodies with access to the court's reference capabilities, and in Article 219 which states the Court shall provide "consultations" regarding issues authorized by the Constitution. The Draft Constitution is replete with other such authorizations. Moreover, Article 218 warrants judicial review upon the request of the President, Chairpersons of both houses of the National Council, Chairpersons of the Supreme and Economic Courts, the Procurator-General, the Supreme Council of the Republic of Crimea, Oblast councils and general courts, and where otherwise stipulated by the Constitution. Given the ambiguity of the

Draft Constitution and the frequent occurrence of clauses placing reliance on "the laws of the Constitution" or "as defined by law," it seems obvious that the Constitutional Court's responsibilities go far beyond determining constitutionality on the basis of established constitutional law. In fact, the Court is not only given the added responsibility of actually establishing constitutional law to offset the shortcomings left by the drafters, in addition, it seems the Court actually has the power to introduce legislation. But if this interpretation is wrong, then perhaps the post-ratification establishment of fundamental law (not to be confused with amendment) is the responsibility of the legislative branch itself, as made implicit by Article 109 wherein the National Council is empowered to enact the Constitution and carry out any amendments or "filling in", and shall officially interpret them.

The very notion of "filling in" where the Constitution is unclear or silent, and the inclusion of legislative prerogative to interpret constitutional law indicate a demonstrated rejection of the principle of judicial independence. When added to the fact that, in effect, the Draft Constitution does not even meet the rather loose international standards for the establishment of an independent judiciary, the integrity of the draft constitution in its entirety is in question. As Justice Walter Tarnopolsky of the Ontario Court of Appeal stated in response to the June 10, 1992 Draft Constitution: "You can draft a beautiful constitution and a detailed bill of rights, but if you don't have an independent judiciary, it isn't going to mean very much."[66] This warning obviously fell on deaf ears in the drafting commission since the May 1993 draft not only failed to delete offensive provisions, indeed, it obfuscated the division of powers even more.

F. Human and Civil Rights

In accordance with the principles of limited government and the necessity of entrenching natural rights in a constitutional document to

[66] Zakydalsky, *supra* note 45.

ensure their inviolability, the Draft Constitution presents a detailed and seemingly all-encompassing Bill of Rights consisting of over 90 articles. The bill of rights is allegedly based on the International Covenant on Civil and Political Rights of 1966 and, indeed, Ukrainian drafters have claimed that their human rights provisions comply with international norms.[67] Content analysis of the draft verifies that at least in principle it contains the majority of political, legal (including *habeas corpus*), egalitarian and economic rights envisioned by the 1966 International Covenant on Civil and Political Rights. Of particular importance, the draft also provides for protection of private property, freedom of contract, and the right of private enterprise, amongst other economic freedoms noticeably absent in former Soviet Constitutions. Illustrations of 'new' liberties include the right to travel freely inside and outside Ukraine, the right to privacy of correspondence and telephone conversation, the right to access government information about one's self, freedom from censorship, and freedom from being used in scientific experiments without permission, among others liberties heretofore denied. As Judge Bohdan Futey of the US Claims Court noted, all these protections demonstrate the Ukrainian people's fears of the reemergence of a Soviet-style regime.[68]

Indeed, if one were to draw a conclusion at this point, it might be posited that the Draft Constitution envisions a Western-style bill of rights intended to provide a measure of certainty about the inviolability of human rights according to international standards in addition to ensuring their longevity by constitutional entrenchment, and to serve as an instrument of protection for individuals against arbitrary action of the state and tyranny of the majority. However, closer scrutiny of the human rights provisions

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[67] *International Covenant on Civil and Political Rights*, *supra* note 47. Ukrainian Constitutional Drafting Commission Chief and Chief Justice of the Ukrainian Constitutional Court indicated during the International Symposium on the Ukrainian Draft Constitution in July 1992 that the Commission used the ICCPR as the primary standard for drafting its human and civic rights provisions.

[68] Judge Bohdan Futey, "Comments on the Proposed Draft of Ukraine's Constitution" (Submitted during the Second International Symposium on the Draft Constitution of Ukraine, June 20-22, 1993, Kyiv, Ukraine) [unpublished].

in the Draft Constitution reveals several fundamental shortcomings which, without revision, could effectively render many of the provisions impotent.

At the outset it should be mentioned that during the first International Symposium on the Ukrainian Draft Constitution held in Kyiv in July 1992, some Ukrainian commentators reacted skeptically to Western criticism of the draft on grounds of human rights.[69] In an attempt to explain the Ukrainian reaction, Chief Justice Leonid Yuzkov of the Constitutional Court encouraged Western experts to be patient with their Ukrainian counterparts and to understand the political and ideological circumstances behind the drafting of human rights provisions. Yuzkov noted that the people of Ukraine, including drafting commission members and elected Deputies, have an incomplete understanding of the function of human rights legislation from the Western perspective since Soviet ideology was antithetical to Western notions of the protection of the rights of individuals. Their only experience is with detailed, impotent Soviet legislation and the resultant arbitrary observance of constitutionally guaranteed human and civil rights and international standards. Second, as indicated above, Yuzkov reiterated that there remains a distinct mistrust of the current judiciary, if not the idea of an independent judiciary in general. He stated that this contributed to the burdensome, perhaps even idealistic enumeration of rights and freedoms in the current draft.

Commentary during the second International Symposium on the Ukrainian Draft Constitution in June 1993 confirmed the continued relevance of Yuzkov's justification. This became obvious when Western experts were unable to hide their disappointment and frustration with Ukrainian reluctance to adopt the recommendations given the year before regarding human rights. Gael Graham of the Central European University in Budapest fumed that the draft merely displays a desire to satisfy Western powers that the letter of human rights is observed in the

69 "Symposium Notes", *ibid.*

Constitution, but without any sincere intention to guarantee them.[70] In some respects, the most recent Ukrainian Bill of Rights proposal is worse than its predecessors, yet certain members of the drafting commission stand behind it fully.[71]

The large number of human and civil rights provisions enumerated in the Draft Constitution immediately give rise to the concern that there is redundancy, inconsistency and unenforceability. With respect to the latter there is confusion whether certain provisions should be justiciable or merely directive. For example, Articles 40, 41, 44, 47 and 21 guarantee the respective "rights" to work, rest and leisure, housing, an ecologically safe environment, and life (which is internally inconsistent since Article 21 guarantees the right to life, yet maintains capital punishment). Here, the drafters should be more careful to articulate only what the government of Ukraine can truly guarantee, in other words, these provisions should merely be directive. There are numerous other provisions that raise doubt about the practicality of the state's obligations. For example, while citizens have the right to education, including the right to receive general and free access to primary and secondary education, the drafters went as far as to guarantee that the state will provide free post-secondary education for orphans and children from lower income families (Article 46). Another signpost of such socialist idealism is Article 40. The article not only guarantees citizens of Ukraine the right to work, but it goes on to burden the state with the obligation to "create conditions for the full employment of the able-bodied population" (discrimination on the basis of physical disability). Finally, the provision guarantees that remuneration for employment be no lower than the "scientifically based physiological and socio-cultural needs of the human being"[!] As Judge Futey of the US

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[70] Graham concluded on the following note: "I don't mean to offend; this is not my country, it is yours...I want to see you succeed, so Good Luck." See American Bar Association, "Notes on the International Symposium on the Draft Constitution of Ukraine" [Unpublished, July 1993].

[71] Secretary of the Constitutional Drafting Commission Vladislav Nosov tried to justify the inadequacies of the draft as (Soviet) Ukraine's unique tradition of protecting human rights. Indeed. Ukrainian Legal Foundation, *supra* note 52.

Claims Court commented: "A constitution which gives rights that cannot be enforced would not be a serious legal document."[72]

Though the inclusion of non-justiciable rights seriously weakens the Draft Constitution, a more significant problem is the vast number of Soviet-style limitations or "claw-back" clauses on human and civil rights. To illustrate, Article 29 guarantees the right to freedom of expression and then includes the following limitation: "Abridgment of this right shall be defined by law and shall be only for the purposes of protecting state or other legally protected secrets as well as the rights and freedoms of other individuals." The possibility for the wide application of this limitation clause in the Ukrainian politic is obvious, even though it seems to comply with Article 19 (3) of the *International Covenant on Civil and Political Rights*, depending on the interpretation of what is "necessary" for the protection of the rights of others, national security and public order, and public health and morals:

International Covenant on Civil and Political Rights

§19. 1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally; in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;

[72] Futey, *supra* note 68.

> (b) For the protection of national security of public order (*ordre public*), or of public health or morals.[73]

A more offensive limitation can be found in Article 34, which merely "recognizes" the right of peaceful assembly (which was "guaranteed" in the second draft) but requires that the state receive notice of public assembly (meetings, rallies, marches, demonstrations) in advance, in order to "ensure public order." To make things worse, the provision goes on to state that "the law establishes requirements for the realization of this right." Though this provision appears to fit within the ambit of Article 21 of the *International Covenant on Civil and Political Rights*, its deferral clause leaves too much opportunity for the state to "establish requirements for the realization" of the right of assembly arbitrarily. Article 21 of the *ICCPR* reads:

> §21. The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 34 also places objectionable limitations on spontaneous public assembly, and in light of the numerous excesses of the OMON (the Ukrainian "demonstration police") since its creation in the Gorbachev era, it is an unacceptable violation of international standards and should be redrafted.[74] Similar problems exist in Ukrainian "protection" of freedom of association (Articles 85-89) and freedom of information (Articles 91-93).

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[73] *International Covenant on Civil and Political Rights*, *supra* note 47 at 178 [hereinafter ICCPR].

[74] An example of OMON excesses occurred in October 1992 when the OMON violently attempted to dissipate a large student sit-in protest directed at former Prime Minister Fokin.

In addition to the fact that the Draft Constitution fails to provide sufficient provision for the protection of commercial rights, such provisions as are included demonstrate the influence of Marxist-Leninist economic theory. Article 9 of the General Principles of the Constitutional System guarantees the equality of various forms of ownership, entrepreneurship, and the social orientation of the economy, while Article 70 boldly protects "workers collectives." While current privatization legislation prohibits foreign ownership of land, Article 67 of the Draft Constitution disappointingly entrenches this reluctance to adopt free market principles by expressly prohibiting foreign ownership of land (though "objects" are not prohibited). No right of disposition is explicitly stated, though Article 39 implies the right to undertake profit-oriented business activity on domestically-owned property. Another signpost of the reluctance to abandon Soviet attitudes toward the market economy is imbedded in Article 66 which proclaims "the social function of property" and then states that to ensure "universal state interests" (whatever those are) "the law shall establish a complete list of objects of ownership that will be the exclusive property of the state," but of course, no reference is made to where such law might be found. Article 69 on "entrepreneurship" adds to this comedy by guaranteeing "non-excessive competition."

Accordingly, the draft provides little or no protection to private owners of property, or entrepreneurs of domestic (that is, excluding the post-Soviet mafia) or foreign extraction. Corporate legal principles are not defined in the draft, leaving the status of business associations unclear. The fact that state and communal ownership are placed at par with individual ownership in the Draft Constitution illustrates the resilience of socialist economic theory within the Ukrainian decision-making apparatus. Given this attitude, it is no surprise that scarcely 63,000 private farmers exist in Ukraine, that small and large-scale privatization schemes have generally been a dismal failure thus far, and that foreigners remain reticent about investment in Ukraine.

International reaction to the presence of these "claw-back" clauses has been met with considerable criticism. In addition to asking for the outright deletion of several of the clauses noted above, Western experts suggested

that Ukrainian drafters consider the inclusion of a general limitations clause, such as that which exists in the *Canadian Charter of Rights and Freedoms*, s. 1.[75] The utility of such a clause is that while acknowledging that human and civil rights are not absolute, *i.e.*, there are circumstances in democratic society which warrant the denial of certain rights, an onerous burden is placed on the state to justify the denial of any rights. A general limitations clause should set out clear (yet flexible) guidelines and standards for an independent judiciary to determine the constitutionality of such restrictions. Subsequent or secondary limitation clauses, if any, must necessarily be very specific as to the circumstances giving rise to their application.

The Ukrainian Draft Constitution does contain what might resemble a general limitations clause, namely Article 59:

> Article 59. Constitutional rights and freedoms shall not be restricted, except in cases stipulated by this Constitution and in laws adopted on its basis, with the aim of defending the rights and freedoms of other individuals, protecting health, and ensuring public security and social morality.
>
> Such restrictions must be minimal and must correspond with the principles of a democratic society.
>
> In cases of martial law or states of emergency, the rights stipulated by articles, 24, 25, 29, 34, 37, 38, 40, 41 and 42 of the Constitution can be limited and restricted only for the time period and to the degree which is necessitated by the severity of the given situation.

However, there are factors which prevent the Article from functioning effectively like a Western-style general limitations clause. First, noticeably absent in current Ukrainian legal thought is the notion of "reasonability," which serves as a guideline for the articulation of circumstances giving rise

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[75] Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. See Ukrainian Legal Foundation, *supra* note 20.

to limitations. Second, subsequent constitutional provisions making reference to established fundamental and normative law widen considerably the possible scope of application of human rights limitations, since there are many legislative gaps that remain to be "filled in," subsequent to ratification of the constitution. Third, secondary limitation clauses in the Draft Constitution are ambiguous and thereby contravene the presumed need for specificity in light of the alleged general limitations clause. Therefore, Article 59 can hardly be deemed an effective general limitations clause according, at least, to Canadian standards.

Given the numerous limitations clauses of the Ukrainian Draft Constitution, in addition to the fundamental weakness of the proposed judiciary due to its servitude to the National Council, the President and the Government, the guarantees of human and civil rights in the draft strain to be characterized as "guaranteed." When one considers that the draft contains many undefined constitutional issues, leaving them to be resolved until after the Constitution is ratified, the enforceability of the Ukrainian Bill of Rights is even further imperiled.

G. Constitutional Amendment

Given the weakness of the bill of rights provisions noted above, and the mechanical and philosophical shortcomings of the judiciary as manifested in its servitude to the National Council, the President and the Government, the fate of the Constitution itself may rest with the ability of the legislative organs to amend, and as stated in the Draft Constitution itself, to "fill in" the gaps left by its drafters. While the functions of amending mechanisms have not been dealt with at length in this paper, suffice it to say that they are absolutely crucial to the ultimate utility of a constitutional document. If a constitution can be amended almost at will, it subordinates itself to the character of the incumbent leadership and is therefore little more than an instrument of political control by the ruling elite. On the other hand, if it cannot be amended in a timely manner so as to reflect fundamental changes in societal consensus, then a decidedly constitutional society runs

the risks of stagnation and the resulting apathy, or the opposite — revolution.[76]

Amending provisions are included in Part XII of the Draft Constitution. Amendments can be introduced either by one-third of the majority of each house of the National Council, or by written petition of no fewer than one million voters. Ratification of a proposed amendment requires acceptance by two-thirds of the members of each house of the National Council (then ratified by referendum), or if a motion is made by the public, by referendum. In both cases, Presidential approval is not required. If taken as described so far, this amending formula would seem to give the constitution the reasonable security against dramatic change it requires, while at the same time not making it impossible. It should be noted that fundamental law may also be introduced, approved or amended on the recommendation of the Constitutional Court (Article 231).

This latter provision seems to be something of an anomaly by Western standards, which require judicial neutrality in legislative matters (that is, the courts can only be asked to rule on existing legislation). Given the incomplete nature of the constitutional proposal, one wonders whether or not the inclusion of this anomaly was a deliberate effort to allow the Constitutional Court — which is allegedly more liberal than the Parliament — to aid pro-actively in the "filling in" of the Constitution. If this is true, then even though it fulfils the function of making the constitution more complete (which should have been the responsibility of the drafting commission), it renders the constitution practically meaningless as fundamental, inviolable law. Moreover, while the requisite two-thirds majority may seem workable under current political conditions where the Parliament has approximately a two-thirds moderate-ex-communist majority, this may not always be the case, and new elections will be called after ratification of the Constitution. It is possible that the present majority will be reduced, thereby accommodating the influence of a host of more

[76] See McWhinney, *supra* note 9 at 132; and A.C. Cairns, "The Politics of Constitutional Review in Canada" in Banting & Simeon, eds., *supra* note 38 at 95.

progressive, yet fractionalized parties. Under such conditions, a two-thirds majority of both houses may not be so easy to obtain. What then of the seemingly unfinished nature of the Constitution? A paper tiger?

V. Ratification

The issue of how the Draft Constitution of Ukraine will be ratified once a final proposal is drafted was recently discussed in detail during the second International Symposium on the Ukrainian Draft Constitution in June 1993.[77] Petro Martinenko, Constitutional Drafting Commission member and Professor of Comparative Law at Kyiv University, introduced the matter of ratification as central to the creation of a constitutional democracy. Given Ukraine's new independence, by what procedure should the constitution be ratified so as to ensure its legitimacy? The former Soviet Ukrainian Constitution of 1978 is still in force, less the fundamental socialist primacy clauses. Accordingly, Article 97 stipulates that the constitution should be ratified by the Parliament (*Verkhovna Rada*). However, noting the revolutionary nature of Ukraine's political development since independence, Western observers and some Ukrainians seemed to agree that Article 97 is a remnant of the past Soviet practice of adopting laws by a unanimous vote of the Parliament and, therefore, it should be dispensed with. When President Kravchuk and the Chairman of the Parliament, Ivan Pliusch, were asked what their preference was in this regard, they both indicated that the question of legitimacy troubled them, and that a new constitution should be ratified as soon as possible — appropriately by the encumbent Parliament (which would ratify a draft prepared by the Constitutional Drafting Commission) or only if absolutely necessary by referendum (which would ratify a draft prepared by a specially-elected constitutional assembly).

Western experts urged that Ukraine need not comply with the dictates of the old constitution given the revolutionary conditions in Ukraine — a completely new order needs to be established. Though there was some

[77] Ukrainian Legal Foundation, *supra* note 52.

debate centred around parliamentary ratification, which was generally preferred only by Canada's former Minister of Finance, Marc Lalonde, this discussion occurred on the premise that the current Parliament could only ratify the constitution if it received a vote of confidence in the Ukrainian referendum on September 26, 1993. If the Parliament were to receive a vote of non-confidence, then the constitution could only be ratified by Parliament following new elections.

A majority of Western experts agreed with Gregory Stanton of the U.S. State Department that, "created by political decisions, a Constitution then becomes the framework to house the making of political decisions from then on."[78] Stanton went on to argue that legitimization of a constitution as the fundamental law of an independent nation must come from the people, by referendum. As to the final drafting process he suggested that, (1) new elections for Parliament be held, (2) a constitutional assembly be elected solely for the purpose of drafting the constitution upon the mandate provided by the new Parliament, and finally (3) a nation-wide referendum be held to ratify the constitution. The constitutional assembly would dissolve itself once a constitution is ratified by referendum. By and large, most participants in the symposium were persuaded by Stanton's arguments in favour of the constitutional assembly, particularly because it would somewhat protect the drafting process from the disruptive powers of a self-interested Parliament.

Another problem which surfaced during this discussion was what exactly the populace should consider for ratification if a referendum were the chosen vehicle. While the majority of Western participants suggested that nothing less than the entire document should be voted on, several Ukrainian participants felt that only a synopsis akin to the aforementioned *Conception of the New Constitution of Ukraine* should be considered. Western experts were clearly discouraged that several Ukrainian experts placed so little faith in democracy and the power of the people to make free choices. As Gael Graham of the Central European University in

[78] *Ibid.*

Budapest urged, the Parliament requires a "political reality check" — it must include the people of Ukraine in the state-building process, or the whole independence movement is for naught. Put more bluntly by Judge Futey of the US Claims Court: "Unless legitimacy is established, and it goes to the people, the Constitution goes nowhere."[79]

VI. Conclusions

The Ukrainian Draft Constitution has been heralded as a revolutionary constitution, measured against Soviet constitutional norms, which attempts to transform Ukraine into a modern, democratic, constitutional state. In general terms, the draft seems to comply with the basic tenets of Western constitutionalism: Rule of Law, equality before the law, limited government, popular sovereignty, separation of powers, and a lengthy bill of rights. The fundamental principles of Marxism-Leninism are generally rejected in favour of Western democratic constitutional theory. No mention is made of Marxism-Leninism, socialist legality, or even socialism for that matter, though by its form and content, the Draft Constitution envisions the creation of a democratic welfare state which retains vestiges of Soviet ideology. This socialist residual can either be explained as a political question yet to be resolved, or the drafters either failed to react to or had no social consensus (*Gründnorm*) upon which to base its drafting decisions — and the *Conception of the New Constitution of Ukraine* was of no assistance in this regard. The unsettling mixture of Western and Soviet constitutional norms in the draft demonstrates the intense ideological debate still raging in post-Soviet Ukraine.

The foregoing analysis demonstrates that the Ukrainian Draft Constitution suffers problems symptomatic of most revolutionary constitutions. First, the constitution is too long, making various provisions redundant, contradictory, idealistic or simply unenforceable. Of course, given the fact that the constitution is only at a draft stage, it should have been expected that many provisions would be poorly drafted; wording is

[79] *Ibid.*

unclear and ambiguous; remedial provisions making references such as "in accordance with the law" give no direction as to where "the law" can be found (if not in the constitution, where?); the state's obligations have not been given adequate consideration with respect to its guarantees of civil and political rights.

Though the draft proclaims its neutrality, insofar as ideology is concerned, since political and economic pluralism are adopted expressly, it suffers the demon of politicization by virtue of provisions that attempt to solve short term or transitory political problems. This is a fundamental problem with the draft because no constitution should be a substitute for political action. In this respect, the draft attempts to guarantee the impossible, especially in the protection of human rights. The attempt to provide an all-inclusive list of guarantees is understandable given Ukraine's history. However, such enumeration often results in constitutional rigidity, which in the face of rapid societal change could render the constitution less meaningful.

Though the above are shortcomings expected in almost any revolutionary constitution, post-colonial African constitutions and post-Soviet East European constitutions serving as examples, the Ukrainian Draft Constitution contains a few more serious problems whose ultimate determination depends, to a large degree, on political activity yet to unfold. One of the most serious setbacks, particularly concerning process, is the fact that the draft envisions a "filling in" of fundamental law subsequent to ratification of the constitution. This obviously deflates the importance of the constitutional document as "fundamental law" in any sense, since it can be amended almost as easily as ordinary law. The question then becomes whether Ukraine will be a constitutional state, or merely a state with a constitution? To a large degree, the answer depends on the goodwill of the President and ruling government.

Another serious problem is the tenuous separation of powers between the executive, legislative and judicial branches of government. As indicated earlier, the parliamentary-presidential system envisioned in the draft grants the President intrusive powers over Parliament, while the Parliament itself

exercises considerable disruptive power over the Presidency and the government. It is unclear at this point whether the President, the Cabinet of Ministers or the National Council will ultimately have more control, and as posited earlier in this discussion, the current Draft Constitution presents a sure recipe for political gridlock at a time when decision-making efficacy is most critical. In addition to this confusion about the separation of powers, it is clear that the legislative and executive bodies have unacceptable powers to encroach upon the judiciary (indeed, they control it), denying any practical measure of judicial independence. The noticeable lack of judicial independence in the draft, the express reluctance of some drafters and Parliamentarians alike to adopt without reservation the principle of judicial independence, and the excess number of Soviet-style "claw-back" clauses throughout the draft leave the long enumeration of civil rights and liberties virtually impotent. Again, with respect to the fact that the Draft Constitution empowers Parliament and the Constitutional Court to "fill in" fundamental law where gaps exist, one needs little imagination to consider how potentially devastating this judicial subordination to the legislative and executive branches might be.

The rather obscure separation of powers noted in the Draft Constitution also raises the question of the wisdom of characterizing Ukraine as a "decentralized unitary state," as some Ukrainian statesmen have been inclined to do. Executive and legislative powers to unilaterally nullify the offices and acts of local self-government and the Republic of Crimea surely negate any realistic assertion of self-government in the Ukrainian context. Accordingly, Ukraine might be more appropriately characterized simply as a unitary state.

Despite the numerous shortcomings indicated, the Ukrainian Draft Constitution represents a major step toward the creation of conditions that will allow Western-style democracy to eventually flourish in Ukraine. As compared with Soviet constitutional norms, the draft may be characterized as 'revolutionary', albeit with slight reservation since the document manifests problems expected during the draft stage. It is encouraging that Parliament is likely to extend the period for discussion on the current draft (necessary given the political gridlock on certain issues) and that the

Constitutional Drafting Commission and the President continue to seek Western advice despite the harsh criticism it brings. Sincere and substantive criticism is necessary for a process as important as the building of a new democracy.

NUDE DANCING AND THE *CHARTER*

June Ross*

In this article the author argues that prohibitions of nude dancing, as evidenced by regulatory prohibitions of nudity in striptease dancing in licensed establishments and other similar venues, clearly infringe s. 2(b) of the Canadian Charter of Rights and Freedoms. *Nude dancing is seldom considered an expression worthy of constitutional protection, nor serious debate; however, the author illuminates an important underlying issue which becomes evident when one underrates the seriousness of such expression. What type of protection, if any, does such 'important' expression deserve?*

To answer this question in the context of prohibitions of nude dancing, the author first examines both the provincial and federal regulatory provisions in the area. The author then examines the past unsuccessful Charter *challenges to these provisions, and through an examination of the leading Supreme Court of Canada cases on freedom of expression, points to inconsistencies between the decisions in these challenges and the general principles for the application of s. 2(b) set out by the Supreme Court. Finally, the author undertakes to analyze the application of ss. 2(b) and 1 of the* Charter *in light of current Supreme Court jurisprudence. In conclusion, the author shows that prohibitions of 'unimportant' expression which is not clearly harmful are constrained by the* Charter *in the same way as are restrictions on 'important' expression.*

L'auteure du présent article soutient que les interdictions de danser nu, notamment la réglementation visant à proscrire la nudité des danseuses-effeuilleuses dans les établissements autorisés et autres lieux de même type, constitue une violation évidente de l'art. 2(b) de la Charte canadienne des droits et libertés. Bien que l'activité visée soit rarement perçue comme un mode d'expression digne de protection constitutionnelle ou de débats sérieux, l'auteure met en lumière un problème sous-jacent important qui devient évident quand on sous-estime le caractère sérieux d'une telle forme d'expression. Mais en admettant qu'elle soit digne d'un quelconque intérêt, quel type de protection mérite-t-elle?

Pour répondre à cette question dans le contexte de l'interdiction de danser nu, l'auteure examine d'abord les dispositions réglementaires provinciales et fédérales. Elle étudie ensuite les contestations qui se sont soldées par un échec et les arrêts importants de la Cour suprême concernant la liberté d'expression. Elle relève un manque de continuité entre ces décisions et les principes généraux de l'art. 2(b) énoncés par la Cour suprême. Finalement, l'auteure analyse l'application des paragraphes 2(b) et 1 de la Charte à la lumière de la jurisprudence de la Cour suprême. En conclusion, l'auteure montre que les interdictions visant les modes d'expression «mineurs» dont le caractère nuisible reste à démontrer sont tout aussi assujettis à la Charte que les restrictions relatives aux modes d'expression importants.

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I. Introduction

An assertion that a prohibition of nude striptease dancing gives rise to constitutional issues may face the response that this is too trivial a subject to have constitutional dimensions:

> The true reason I think for wanting to exclude striptease dancing from the protection of the First Amendment...is a feeling that the proposition, "the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples," is ridiculous.[1]

> ...I am satisfied that the "freedom of expression" guaranteed by the Charter does not include the public exposure of female pubic areas for the primary purpose of selling larger quantities of liquor.[2]

Debates about the legitimacy of prohibiting nude striptease dancing tend to focus on freedom of choice, in the sense of competing conceptions of legitimate occupations or lifestyles, but not on freedom of expression. Are there constitutional issues raised by such prohibitions? If so, what accounts for the tendency to underrate these issues?

In this paper I will argue that serious constitutional issues are raised by prohibitions of nude dancing, that such prohibitions clearly infringe s. 2(b) of the *Canadian Charter of Rights and Freedoms*,[3] and that their justification under s. 1 raises significant difficulties. Why is the seriousness of these issues not immediately apparent? It may be simple bias:

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1 *Miller* v. *Civil City of South Bend*, 904 F. 2d 1081 at 1099-1100 per Posner J. (U.S.C.A. 7th Cir. 1990), rev'g (*sub nom. Glen Theatre, Inc.* v. *Civil City of South Bend*) 695 F. Supp. 414 (N.D. Ind. 1988), rev'd (*sub nom. Barnes* v. *Glen Theatre, Inc.*) 111 S. Ct 2456 (U.S.S.C. 1991).

2 *Re Koumoudouros and Metropolitan Toronto (City of)* (1984), 45 O.R. (2d) 426 at 436 (Div. Ct.), rev'd (1985) 52 O.R. (2d) 442 (C.A.).

3 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

> [The assertion that nude dancing is constitutionally protected] strikes judges as ridiculous in part because we tend to be snooty about popular culture, in part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans — which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven...[4]

The reaction may be more broad-based, however. An assertion that advertising jingles are constitutionally protected might receive a similar response. In this case, the question becomes one of what, if any, constitutional protection is warranted for "unimportant" expression. I will argue that such expression both is and should be protected under the *Charter*.

Another reason for the failure to recognize constitutional issues may be that a prohibition of nude dancing does not on the face of it appear to involve censorship of a particular message. Indeed, the determination of whether such a prohibition interferes with freedom of expression raises doctrinal issues relating to form and content of expression, speech and conduct, and purposeful or incidental effects-based restrictions of expression. But a careful analysis of these issues strongly supports a prima facie infringement of s. 2(b) of the *Charter*, requiring justification under s. 1.

This paper will deal with a common form of regulation, the prohibition of nudity in striptease dancing in bars and similar establishments. Such prohibitions exist at both the provincial and federal levels in Canada. The regulations may seem somewhat anachronistic, but are generally not perceived as conflicting with the freedom of expression guarantee in the *Charter*. The few Canadian cases that have dealt with the issue have dismissed or at least avoided the argument. But a Canadian court faced with such a case today, provided the case is properly presented in that freedom of expression issues are addressed in the evidence, will find that

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[4] *Miller* v. *Civil City of South Bend*, *supra* note 1 at 1110.

s.2(b) jurisprudence clearly indicates that such regulations do interfere with freedom of expression. This does not, of course, deny the possibility of justifying any infringement under s. 1, but depending on the scope of the regulation and the evidence presented in the case, it may be that the s. 1 requirements would not be met.

The paper will first outline the relevant context, describing provincial and federal laws that may prohibit nude dancing and cases that have considered, albeit briefly, the impact of s. 2(b) of the *Charter* on such regulations. American law applying the first amendment to nude dancing will be described by way of comparison. Principles governing the interpretation of s. 2(b) and the justification under s. 1 of laws that infringe freedom of expression are then analysed and applied to the regulations previously described. Concerns relating to and justifications for a broad scope of protected expression are discussed. As indicated above, doctrinal issues relating to form and content of expression, speech and conduct, and purposeful or incidental effects-based restrictions of expression are also considered. The harms that may be addressed by the regulations, including harms to social order, to morality, and to the right to equality, are described. An analysis of the contextual nature of the s. 1 test and the different degrees of strictness with which it is applied in various circumstances, forms a background for a consideration of the rationality and proportionality of addressing these harms through a prohibition of nude dancing.

II. Regulation of Nude Dancing

A. Provincial Regulation

The provinces have the legislative authority to prohibit nude dancing, at least in bars and probably in other adult entertainment establishments,[5]

[5] *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick* (1987), 58 C.R. (3d) 378 (S.C.C.) [hereinafter *Rio Hotel*] upheld provincial subject matter jurisdiction pertaining to the prohibition of nude dancing in premises licensed to sell liquor. Dickson C.J.C. for the majority held that the provinces have

and have exercised this authority on occasion. The liquor licensing board in the province of New Brunswick has required dancers in bars to cover their genital areas, buttocks, and (in the case of female dancers) breasts.[6] The liquor licensing authority in Saskatchewan has prohibited all erotic or exotic dancing in bars.[7] During the 1980's a number of municipalities in Ontario prohibited nude dancing. Some of these prohibitions applied to licensed premises only, some to unlicensed adult entertainment establishments as well. Typically, the prohibitions required that dancers

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legislative authority to regulate conditions for the sale and consumption of alcohol within the province pursuant to their power over property and civil rights in the province (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, s. 92(13)). They may attach conditions for the "good government" of liquor outlets, including conditions prohibiting specified kinds of entertainment. A prohibition of nude entertainment does not change this provincial aspect. Public nudity laws relating to public morality are in the federal criminal law domain, but the regulation of "the forms of entertainment that may be used as marketing tools by the owners of licensed premises to boost sales of alcohol" involves provincial characteristics as important as any federal characteristic of the subject matter. There is thus a double aspect and both provincial and federal legislation are valid. There was no conflict in the legislation considered by the court so paramountcy could not be invoked.

Estey J., Lamer J. (as he then was) concurring, gave broader reasons for finding the regulation to be valid, relying on the provinces' authority to regulate or license businesses. In the context of regulating businesses the province may seek to create conditions to prevent crime or may legislate in relation to morality without entering the criminal law area.

6 The *Liquor Control Act*, R.S.N.B. 1973, c. L-10, as amended S.N.B. 1983, c. 47, s.63.01(5) provides that the Licensing Board may, in the form of conditions attached to a licence "regulate and restrict the nature and conduct of live entertainment and may prohibit specified kinds of live entertainment." See the consideration of this provision and licence conditions issued thereunder prohibiting the exposure of genital areas, buttocks or breasts in *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick, ibid.*

7 The *Alcohol Control Act*, S.S. 1988-89, C. A-18.01, s. 13(h) provides that the Liquor Licensing Commission may "regulate and restrict the nature and conduct of entertainment at any place where a licence is or is to be issued." The Commission's policy is to prohibit *any* erotic or exotic dancing (per telephone call between the author and a member of the Commission staff).

wear opaque clothing covering the pubic area.[8] Some municipalities in British Columbia have passed similar by-laws.[9] These are simply examples and do not represent a comprehensive survey of such regulations.

Alberta has recently conducted an inquiry into the issue.[10] The Beverage Alcohol Advisory Committee was appointed under the *Liquor Control Act* to review nude dancing as a form of entertainment in licensed premises.[11] The Committee "attempted to determine whether nude dancing in licensed premises caused negative conduct or produced any other negative effects." As a result of its inquiries the Committee recommended that "male and female nude stage dancing be permitted to continue as a form of entertainment in licensed premises" but that it should be subject to certain conditions.[12]

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8 See the by-laws referred to, and struck down by the Ontario Court of Appeal on subject matter jurisdiction or paramountcy grounds in *Re Koumoudouros and Metropolitan Toronto (City of)*, *supra* note 2; *Nordee Investments Ltd.* v. *Burlington (City of)* (1984), 27 M.P.L.R. 214 (Ont. C.A.) [hereinafter *Nordee Investments*]; *Re Sherwood Park Restaurant Inc. and Markham (Town of)* (1984), 48 O.R. (2d) 449 (C.A.). The holdings on subject matter jurisdiction are suspect since the Supreme Court decision in *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick*, *supra* note 5.

9 Beverage Alcohol Advisory Committee, *Report on Entertainment in Licensed Premises, Specifically Nude Dancing* [hereinafter *B.A.A.C. Report*] (Edmonton, Alberta; April 1992) noted that Port Alberni and Nanaimo in British Columbia had passed such by-laws, although the Port Alberni by-law had been defeated in a court challenge.

10 *B.A.A.C. Report, ibid.*

11 R.S.A. 1980, c.L-17, as amended S.A. 1990, c. 27. Subsection 58(gg) of the amended *Act* enlarges the regulation-making authority to include the prohibition or restriction of specified types of entertainment in bars. Section 12.1 provides for the appointment of an Advisory Committee to "provide advice, as requested by the Minister or the Board, on any matter within the scope of the Act."

12 *B.A.A.C. Report*, *supra* note 9. The conditions include confining performances to a stage separated from patrons, permitting only one person on stage at a time, prohibiting real or simulated sex acts or simulated violence, and prohibiting animals on the stage. Performers and audience must be at least 18 years of age. The same conditions apply to male and female dancers. Some of these conditions would have no or only a trivial effect on expression; others (*e.g.*, allowing only

B. Federal Regulation

Parliament has undoubted subject matter jurisdiction under its criminal law power to restrict nude dancing.[13] The *Criminal Code* regulates striptease entertainment through two provisions. Section 167 prohibits any "immoral, indecent or obscene performance, entertainment or representation" in a "theatre", which is "any place that is open to the public where entertainments are given, whether or not any charge is made for admission."[14] Further, s. 174 makes it an offence to be "without lawful excuse, nude in a public place" and provides that "a person is nude who is so clad as to offend against public decency and order."[15]

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one person on stage at a time) are more significant and would be subject to *Charter* challenge. Many of the arguments, for instance as to the expressive quality of the performance and the purpose and effect of the restriction, would be similar to those presented here pertaining to the regulation of nudity.

13 *Rio Hotel, supra* note 5 at 382, referring to the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 [hereinafter *Criminal Code*], ss. 167 and 174 among others, indicates that it was common ground that these provisions were intra vires Parliament.

14 *Ibid.* ss. 150, 167.

15 *Ibid.* s. 174. The consent of the Attorney General is required for a prosecution: s. 174(3). There is also the potential for conviction for public nudity or partial nudity as an "indecent act" under s. 173 of the *Criminal Code*, as occurred in *R.* v. *Jacob* (17 January 1992), (Ont. Ct. Prov. Div.) [unreported], aff'd. (26 June 1992), (Ont. Ct. Gen. Div.). A defence under s. 15 of the *Charter* was raised, unsuccessfully. Section 2(b) was not raised, as Ms. Jacob did not purport to be attempting to convey a message through her action. In the subsequent *R.* v. *Arnold* (25 February 1993), (Ont. Ct. Prov. Div.) [unreported] involving charges under s. 173 against 5 women who exposed their breasts at a demonstration, s. 2(b) of the *Charter* was raised, in addition to s. 15. However, McGowan J. held that their actions were not indecent in the circumstances and therefore did not deal with the *Charter* issues, other than to comment that "while the application of criminal sanctions in these circumstances can be a justifiable infringement of s. 15 of the *Charter* ... it cannot be justified as an infringement of the right to freedom of expression. It is my view that it is unreasonable to censor expression of this sort unless it is proven to be harmful."

Immorality or indecency under s. 167 is determined, like obscenity under s. 163, by a community standard of tolerance test, and takes into account the circumstances of the performance (locale, audience, posted warnings, etc.).[16] Nudity per se in a theatrical performance does not constitute immorality or indecency.[17]

The public nudity offence has been held to apply to performances in a "theatre."[18] Complete nudity is an offence without proof that it offends

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16 *R.* v. *Popert* (1981), 19 C.R. (3d) 393 (Ont. C.A.); *R.* v. *MacLean and MacLean (No. 2)* (1982), 1 C.C.C. (3d) 412 (Ont. C.A.), leave to appeal to S.C.C. refused *loc. cit.* Accord, *R.* v. *Tremblay*, [1993] 2 S.C.R. 932 (S.C.C.) (dealing with indecent acts in the context of s. 210 of the *Criminal Code* (keeping a common bawdy house)). This may be contrasted with the interpretation of obscenity under s. 166: *R.* v. *Butler*, [1992] 2 W.W.R. 577 reviewed and clarified the interpretation of obscenity under s. 163. Its interpretation of this section is discussed *infra* in the text accompanying notes 103-107. The majority in *Butler* held that material not otherwise obscene "does not become so by reason of the person to whom it is or may be shown or exposed nor by reason of the place or manner in which it is shown. The availability of sexually explicit materials in theatres and other public places is subject to regulation by competent provincial legislation."

17 *Johnson* v. *The Queen* (1973), 13 C.C.C. (2d) 402 (S.C.C.) held that nudity was not immoral, but left open the question as to whether a nude or partially nude performance might be indecent. Assuming that s. 163 will be interpreted in a manner consistent with *R.* v. *Butler*, *ibid.*, nudity per se should not be sufficient to constitute either immorality or indecency. *R.* v. *Tremblay*, *ibid.*, supports this view. See the text, *infra*, accompanying notes 163-167.

Outside the theatrical context, it may be that nudity or partial nudity per se is sufficient to constitute indecency. Different issues are raised than in a theatrical context, as there may be exposure to young or unwilling onlookers. The context has been determinative: see *R.* v. *Jacob* and *R.* v. *Arnold*, both *supra* note 15, and the cases discussed therein. The importance of context was also discussed in *R.* v. *Tremblay*. Nude dancers performed in individual cubicles for clients who were permitted to undress and masturbate. Freedom of expression was not raised or discussed by the court. The majority found that these were not indecent acts. In reaching this conclusion the majority relied on the context in which the acts were performed, in relative privacy and between informed and consenting adults.

18 *R.* v. *McCutcheon* (1977), 40 C.C.C. (2d) 555 (Que. C.A.).

public decency, so that the only defence is a "lawful excuse", which has been held to include a "legitimate theatrical performance."[19] On the other hand, partial (and even substantial) nudity is not an offence unless it offends against public decency.[20] This is determined, like immorality, by a community standard of tolerance test.[21] Thus, while there is a potential for criminal prosecution of a nude dancer, it is limited by the requirements

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19 *R.* v. *Verrette* (1978), 40 C.C.C. (2d) 273 (S.C.C.) (in dicta); *R.* v. *Zikman* (1990), 37 O.A.C. 277 (C.A.).

20 The result of the distinction between complete and partial nudity was described by the Fraser Committee on Pornography and Prostitution in Canada in the *Report of the Special Committee on Pornography and Prostitution* (Ottawa: Minister of Supply & Services Canada, 1985) [hereinafter the *Fraser Report*] at 130, as leading to:

> rather unusual behaviour. "Exotic dancers", while sequentially exposing every part of their bodies, are careful always to retain some small piece of clothing so as to avoid being completely nude. As one would expect, this has given rise to much argument in the cases about what exactly constitutes complete nudity. Will any speck of clothing suffice, or must the coverage be reasonably substantial?

The Committee described decisions in which dancers wearing "a thin transparent veil attached at the neck" and a "see-through negligee which was open in the front" were found not to be completely nude, while a dancer wearing "only a brassiere open at the front" was found to be completely nude.

An example of the operation of the *Criminal Code* provisions in the context of a striptease performance in a bar is found in *R.* v. *Traynor* (16 July 1987) O.J. No. 1943 (Q.L.) (Ont. Prov. Ct.). A dancer wearing boots and a G-string around her neck was found to be partially clad. Her dance had been found not to be indecent under s. 163 (now s. 167), taking into account factors such as the location of the performance in a tavern with warnings posted at the entrance (ensuring that the audience was adult and consenting), the professional skill involved in the performance, and the fact that the performance was "essentially funny, upbeat and comic." The same factors meant that she was not clad so as to offend against public decency. This decision was quoted with approval by the majority in *R.*v. *Tremblay*, *supra* note 16.

21 *R.* v. *Giambalvo* (1982), 70 C.C.C. (2d) 324 (Ont. C.A.). See the comments re the effect of *R.* v. *Butler*, *supra* note 16.

of immorality or offence against public decency, or by the legitimate performance defence.

III. *Charter* Challenges to Restrictions of Nude Dancing

Charter challenges to regulations of nude dancing have failed to date. In some instances the courts have refused to deal with the constitutional issue on the basis that it had not been properly raised. Where the merits have been reached, the courts have denied that the *Charter* applies, or upheld regulations under s. 1.

Section 2(b) of the *Charter* was referred to briefly in *Rio Hotel.*[22] The court declined to deal with the issue, stating that the record was "woefully inadequate" for the purpose as it contained no description of the nude dancing, "the extent of the alleged nudity, the nature of the "expression" in question, or anything else of a factual nature germane to this issue."[23]

Re Koumoudouros and Toronto (City of)[24] dealt with a municipal by-law that required burlesque entertainers in licensed premises to wear opaque clothing fully covering the pubic area. The applicants sought a declaration of invalidity. In the Divisional Court, Eberle J. for the majority found that freedom of expression was not implicated. While an affidavit filed by an entertainer stressed the artistic nature of her performance, she

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22 *Supra* note 5. The legislation in issue did not specifically prohibit nude dancing, but gave the Liquor Licensing Board the authority to prohibit specified types of entertainment. The Board in exercising its discretionary power prohibited nudity, through conditions attached to liquor permits. This may affect the form, but does not affect the substance of *Charter* review. The legislation itself may not infringe the *Charter*, but the exercise of the discretionary authority is subject to *Charter* review: *Slaight Communications Inc.* v. *Davidson*, [1989] 1 S.C.R. 1038.

23 *Ibid.* at 395, per Estey J., with the concurrence of Dickson C.J.C. on this point.

24 *Supra* note 2 (Ont. Div. Ct.). In the Court of Appeal the judgment was reversed on subject matter jurisdiction grounds. This aspect of the appellate decision was described by Estey J. in *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick*, *ibid.*, as incorrect. The Court of Appeal declined to express an opinion on the s. 2(b) argument.

also stated that businesses where dancers must be covered drew fewer customers. Eberle J. stated that s. 2(b) might protect only political and not artistic expression, but that even if artistic expression were protected, it had not been infringed. Sales figures "put the matter in perspective."[25] The right claimed was not to free artistic expression but "to expose performer's pubic areas for the purpose of stimulating liquor sales."[26] Freedom of expression, the majority held, did not include "public exposure of female pubic areas for the primary purpose of selling larger quantities of liquor."[27]

Osler J., concurring, held that artistic expression was included in s. 2(b):

> Nothing is more common in the artistic world than to hear an individual express the desire to "make a statement", and this may be by means of the written or spoken word, the painted canvas, the etched stone, or a print thereof, a musical composition, or an idea conveyed through the medium of dance. While the word burlesque may be thought by most to describe a form of expression that is perhaps more vulgar than most of the artistic endeavours I have mentioned, it is, nevertheless, a form of expression, and to insist on a quality or quantity of clothing for persons expressing themselves in that form does, in my view, limit a freedom of expression otherwise guaranteed by the Charter.[28]

In *R.* v. *Zikman*,[29] the Ontario Provincial Court found that nude burlesque dancing was a form of expression, but that given the Canadian community's concern for the exploitation of women in such circumstances, the prohibition in s. 170 (now s. 174) of the *Criminal Code* was not arbitrary or unfair so was justified under s. 1 of the *Charter*. The conviction was upheld by the District Court but reversed by the Court of Appeal. Finlayson J.A. for the majority held that *Charter* did not apply, but that the trial judge should have considered the statutory defence of lawful excuse, which would include legitimate entertainment:

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25 *Ibid.* at 435.
26 *Ibid.* at 436.
27 *Ibid.*
28 *Ibid.* at 428. Osler J. would have upheld the by-law under s. 1.
29 (1986), 16 W.C.B. 451 (Ont. Prov. Ct.), rev'd *supra* note 19.

> Dancing is clearly a mode of expression, but it is hardly necessary to say that the appellant had a *Charter* protected right to dance, or even to dance in the nude. She could do whatever she wished, provided it was not prohibited by law. Section 174 does not purport to extinguish any right of self-expression. It prohibits nudity in a public place when no lawful excuse is shown.[30]

Galligan J.A. in dissent was prepared to assume without deciding that nude burlesque dancing might constitute an exercise of freedom of expression, but found that the appellant's dance was not constitutionally protected because it was of such a nature as to offend against public order or decency.

In *Nordee Investments Ltd.* v. *Burlington (City of)*,[31] Cory J.A. as he then was speaking for the court, found invalid on subject matter grounds a municipal by-law similar to that at issue in *Re Koumoudouros*.[32] Again s. 2(b) of the *Charter* had been raised. Cory J.A. held:

> It was argued that dancing cannot be a protected form of expression, yet it would seem that dancing can express ideas and emotions just as forcefully and artistically as do the written word, the graphic arts, or music. The lissome dancer has long been a symbol of grace and beauty. Whether one thinks of the performance of the chaste temple dancers of Cambodia, Salome dancing before King Herod, or ballet companies and dance troupes, they have all attempted to express ideas and to interpret or engender emotions by means of the dance. The fact that a dance is performed for profit should not be a basis for the denial of the freedom granted by the Charter. Artists through the ages have sought to make a wage or profit from their paintings as did Shakespeare from his plays. However, in this case, there is simply not sufficient evidence available to base a decision upon an interpretation of the Charter. To attempt to do so would be unwise and demean the principles enunciated in the Charter.[33]

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30 *Supra* note 19 at 278.

31 *Supra* note 8. This holding was referred to by Estey J. in *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick*, *supra* note 5, as in error.

32 *Supra* note 2.

33 *Supra* note 8 at 219.

In summary, while the *Charter* has not been successfully relied on to strike down government restrictions on nude dancing, there is dicta in the cases that supports the proposition that dance, like other art forms, can be a *Charter*-protected form of expression. Generally this is not treated as self-evident, but as a fact that must be addressed in the evidence. Only one case holds that s. 2(b) does not apply to this form of expression. The reasons advanced in that case are that the *Charter* does not protect artistic expression, or alternatively that it does not protect performances engaged in purely for financial profit. Both of these reasons are inconsistent with statements in other decisions, and, as will be demonstrated, with general principles relating to the interpretation of s. 2(b) as subsequently established in the Supreme Court of Canada.

IV. United States Jurisprudence — Nude Dancing and Free Speech

The American case law pertaining to the regulation of nude dancing and its impact on protected speech under the first amendment falls into two categories. The first category of cases deals with regulation of nude entertainment in a liquor licensing context. The second category includes all other forms of regulation of nude dancing.

The liquor licensing cases rely on the 21st amendment to the United States Constitution, which gives the states jurisdiction over intoxicating liquors.[34] This grant of jurisdiction has been held to confer "something

[34] The first of the United States Supreme Court decisions on point was *California* v. *La Rue*, 34 L.Ed. 2d 342 (U.S.S.C. 1972). Rehnquist J. (as he then was), for the majority, referred to evidence from hearings of the California Liquor Commission that linked nude dancing and other entertainment in bars and nightclubs with incidents of sexual conduct between dancers and customers, prostitution in and around the bars, and indecent exposure and assaults around the bars. The court was considering regulations that prohibited simulated sexual acts or nudity in performances in bars. Rehnquist J. held that the state had a wide latitude as to the choice of means to regulate the sale of liquor, and was entitled to prohibit these forms of visual presentation. While the form of entertainment was not completely without first amendment protection, such "bacchanalian revelries" were not the "constitutional equivalent of a performance by a scantily

more than normal state authority over public health, welfare and morals,"[35] and has not only strengthened the case for state regulations, but has essentially created an exception to the free speech guarantee.[36] The case law relating to the 21st amendment is not helpful in the Canadian context. While regulation of the sale of liquor is within provincial authority, it is just one aspect of general provincial authority.[37] There is no textual basis to suggest that this power is immunized from *Charter* review. However, to the extent that the 21st amendment decisions have been motivated by "a perception of a detrimental (and potentially crime-inducing) synergy between sex or nudity and alcohol,"[38] we can expect the same perception to affect *Charter* analysis, at least with regard to justification under s. 1.

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clad ballet troupe in a theatre" (at 352).

This position was affirmed, again relying heavily on the 21st amendment and demonstrating a deference to state legislatures not typical in first amendment cases, in *New York State Liquor Authority* v. *Bellanca*, 69 L. Ed. 2d 357 (U.S.S.C. 1981) and *Newport (City of)* v. *Iacobucci*, 93 L. Ed. 2d 334 (U.S.S.C. 1986).

Concurring judgments in the three decisions raised other grounds for the refusal to find a violation of the free speech guarantee, arguing that the regulations simply controlled the sale of liquor as opposed to interfering with free speech or that the state's power to ban the sale of liquor completely included a lesser power to ban sales where nude dancing occurred. Dissenting judgments protested the illogicality of setting aside the usual rules of first amendment analysis, and pointed out the potential for interference with the "legitimate" theatre, in that theatres serving liquor during intermission could be made subject to the same type of regulation.

35 *California* v. *LaRue*, *ibid.* at 352.

36 L. Tribe, *American Constitutional Law*, 2nd Ed. (Mineola, N.Y.: Foundation Press, 1988) at 917, n. 89, comments that the usual sensitivity to the possibility that sexually explicit materials or productions may have redeeming artistic or other merit is "notably absent in one set of cases: those in which sexually explicit (or even merely nude) performances are accompanied by the sale of alcohol."

37 As noted, *supra* note 5.

38 L. Tribe, *supra* note 36, offers this as an explanation of the cases relying on the 21st amendment.

The American decisions dealing with nude dancing in other contexts, in particular the recent decision of *Barnes* v. *Glen Theatre, Inc.*,[39] are more instructive. Outside the context of liquor regulation, the United States Supreme Court initially seemed sympathetic to the expressive elements of nude dancing, and invalidated state bans.[40] However, the *Barnes* decision reversed that trend.

The case concerned the application of an Indiana public indecency law to prevent nude dancing in a bar and in a booth in an adult bookstore. The majority held that "nude dancing of the kind sought to be performed here is expressive conduct within the perimeters of the First Amendment," although "only marginally so."[41] However, the majority also held that the state had not regulated the message of eroticism or sensuality, but only the "conduct" of public nudity.[42] Where government regulates conduct, with only incidental impact on expression, the level of protection is less than where government regulates expression directly.

Characterizing the law as a regulation of conduct with indirect effect on expression, rather than a direct regulation of expression, placed the case

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39 *Supra* note 1 [hereinafter *Barnes*].

40 *Doran* v. *Salem Inn*, 45 L. Ed. 2d 648 (U.S.S.C. 1975) involved a town ordinance prohibiting entertainers from appearing topless. The Supreme Court held that although customary bar room nude dancing may involve only the "barest minimum of protected expression" it was nonetheless entitled to protection in some circumstances. The case was distinguished from *California* v. *LaRue*, *supra* note 34 as the ordinance applied not only to establishments that served liquor, but to any public place. It was therefore invalid. In *Schad* v. *Mount Ephraim (Borough of)*, 68 L. Ed. 2d 671 (U.S.S.C. 1981) an adult book store that contained a coin-operated booth to watch nude live dances had been found to violate a zoning ordinance under which live entertainment, including but not limited to nude dancing, was not a permitted use anywhere in the Borough. In striking down the ordinance, the Supreme Court held that entertainment was protected expression and did not lose that quality by nudity alone.

Further, see the lower court decisions annotated in "Topless or Bottomless Dancing or Similar Conduct as Offense" (1973) 49 A.L.R. 3d 1084.

41 *Supra* note 1 at 2460, per Rehnquist C.J.

42 *Ibid.* at 2462-2463.

on what Laurence Tribe has described as "track two" of first amendment analysis.[43] Track one applies whenever government seeks to control the conveyance of certain messages. Such laws, referred to as "content-based" presumptively violate the first amendment. Only narrow categories of content-based laws are upheld by the courts, for example laws that satisfy the "clear and present danger" test, or that implicate only unprotected speech, such as obscenity.

Track two applies when government has aimed at noncommunicative impact, but the regulation has an adverse effect on the flow of communication. "Content-neutral" laws with an adverse effect on expression may restrict the time, place or manner of expression, or may restrict conduct and have only an incidental impact on expression. Such laws are more frequently upheld, by means of a balancing test. To uphold a law that incidentally affects free expression, the court must be satisfied that the law "will further an important or substantial government interest" that is "unrelated to the suppression of free expression", and that the "incidental restriction on free expression is "no greater than is essential to the furtherance of that interest."[44] While the track two test sounds much like justification under s. 1 of the *Charter*, there are substantial differences in application. As will be discussed at a later point, the s. 1 test varies in strictness in different contexts. This is also the case with balancing in first amendment jurisprudence. The very factors that place a case on track two analysis mean that a much more relaxed scrutiny is applied by the courts.

The relaxed form of scrutiny is apparent in the majority decision in *Barnes*. Rehnquist C.J. for the plurality held that the public indecency statute was justified because it furthered a substantial government interest in protecting societal order and morality, and that this interest was

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[43] See L. Tribe, *supra* note 36 at 785-804, 974-986, for a general description of the two tracks of first amendment analysis. A similar conclusion had been reached by a dissenting justice in the Court of Appeal on the basis that only the manner of expression had been regulated, as opposed to its content. *Miller* v. *Civil City of South Bend*, *supra* note 1, per Coffey J.

[44] *United States* v. *O'Brien*, 391 U.S 367 (1968) at 377.

unrelated to the suppression of expression. The message of eroticism was not suppressed, only nudity was prohibited. The restriction was the least restrictive means because it required only the wearing of a minimal amount of clothing.[45]

The four dissenting justices agreed that non-obscene nude dancing performed as entertainment is expressive activity and entitled to protection under the first amendment. Performance dance is inherently expressive, without proof required of the message intended or communicated in a particular case.[46] The dissent, however, characterized the Indiana law, in its application to performance dance, as a regulation of content. The prohibition of public nudity pursued different government objectives in different contexts:

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45 The plurality decision focused on moral issues in the more traditional sense related to acceptable social norms. Neither it nor the other decisions referred to issues relating to the degradation of women. Scalia J. concurred on the basis that the first amendment was not implicated. Souter J. also concurred, but upheld the law because it furthered government interests in preventing the secondary effects of adult entertainment establishments, such as prostitution, sexual assaults, and other criminal activity.

46 The District Court in *Glen Theatre, Inc.* v. *Civil City of South Bend, supra* note 1, had found that the dances in question were not expressive because they were "not performed in any theatrical or dramatic context." Easterbrook J.A., in dissent in the Court of Appeals, 7th Circuit, *supra* note 1 at 1123, referred to evidence of the dancers that they were "just dancing, just entertaining" in order to sell drinks and be paid accordingly. Their counsel had also stated that no "larger political or ideological statement [was] being made" and no "idea being expressed" other than "entertainment" as such. Easterbrook J.A. also held that the first amendment was not implicated. The majority at 1086-1087, held that the trial judge was in error, and that the "parties' characterizations (or the lack thereof) of their artistic endeavours as expressive or nonexpressive, while possibly relevant, cannot be determinative nor binding upon this Court for first amendment purposes." The dancers did communicate an emotional theme, "one of eroticism and sensuality." Of the Supreme Court justices, only Justice Scalia suggested that performance dance might not be inherently expressive, and he did not rely on this point.

> The purpose of forbidding people from appearing nude in parks, beaches, hot dog stands, and like public places is to protect others from offense. But that could not possibly be the purpose of preventing nude dancing in theatres and barrooms since the viewers are exclusively consenting adults who pay money to see these dances. The purpose of the proscription in these contexts is to protect the viewers from what the State believes is the harmful message that nude dancing communicates.[47]

The dissent dealt with the relationship of the nudity of dancers to the message they convey, holding that nudity is "an integral part of the emotions and thoughts that a nude dancing performance evokes", and "an expressive component of the dance, not merely incidental 'conduct'."[48] Because the law restricted expression, the dissent held that it was invalid as applied to performance dance. The state could legitimately seek to prevent criminal activity associated with adult entertainment establishments. However, it must do so by more narrowly tailored means, such as requiring that "nude performers remain at all times a minimum distance from spectators, that nude entertainment be limited to certain hours, or even that establishments providing such entertainments be dispersed throughout the city."[49]

How would the *Barnes* reasoning fare under the *Charter*? As will become apparent in the following analysis of freedom of expression jurisprudence in the Supreme Court of Canada, there is a possibility that our courts, too, might rely on distinctions between expression and conduct, or between content and form, to exclude or minimize *Charter* review. It is argued that this approach should not be adopted. A correct application of the law as it has developed would preclude it in these circumstances. Further, distinctions of this nature threaten central free expression values. The majority analysis in *Barnes* could equally permit public nudity laws to prohibit nudity in any theatrical performance, or nudity as a political demonstration. While the majority did comment that the dances in question had only marginal first amendment value, the reason for granting a limited

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47 *Supra* note 1 at 2473, per White J.

48 *Ibid.* at 2474.

49 *Ibid.* at 2475.

degree of protection was the characterization of the law as directed at conduct and affecting expression only indirectly. Further, the "substantial" government objective of maintaining moral standards is not necessarily limited to the context of adult entertainment establishments.[50]

I will argue that the dissent in *Barnes* was correct in its assessment that a prohibition of nude dancing is a regulation of expression. I will also argue that such a regulation, at either the provincial or federal level, may not be justified under s. 1 of the *Charter*. The latter analysis, however, is markedly different than that undertaken by the dissent in *Barnes*, as Canadian jurisprudence takes a distinctive approach to evaluating the justifiability of limitations on expression.

There is a significant value in adopting an approach that recognizes that a restriction of expressive content is involved, even if the restriction is ultimately justified under s. 1. This avoids the danger to artistic freedom posed by the majority approach in *Barnes*, which could deny protection to nude performances even in a serious theatrical context.

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[50] While the application of the constitutional analysis in a theatrical context follows logically from the majority judgment, in fact, as noted in the dissent, the Indiana Supreme Court had held that the statute, as a matter of interpretation, did not prohibit nudity in theatrical or similar contexts: *ibid.* at 2473, citing *State* v. *Baysinger*, 397 N.E. 2d (1979). Many comments on the decision have been critical: S. Carlyle, "Ban on Nude Dancing Strips Away First Amendment Rights to Protect "Order and Morality" in *Barnes* v. *Glen Theatre, Inc.*" (1992) Pepp. L. Rev. 1337 (discusses the chilling effect of the decision, and the potential for application to theatrical performances, the display of artworks, and other forms of symbolic expression); Note, "*Barnes* v. *Glen Theatre, Inc.*: Nude Dancing and the First Amendment Question" (1992) 45 Vand. L. Rev. 237; Note, "*Barnes* v. *Glen Theatre, Inc.*: Application of Indiana's Public Indecency Statute to Nude Dancing - Is the Supreme Court Stripping Away First Amendment Protections to Reveal a New Standard?" (1992) Loy. L. Rev. 595; Note, Case Comment on *Barnes* v. *Glen Theatre, Inc.* (1991) St. Mary's L. J. 563; J. Taylor, "Nude Dancing's Marginal Status under the First Amendment" (1992) 44 Fla. L. Rev. 141. Contra (supporting the decision): J. Curran, "Stripping the First Amendment? G-Strings, Pasties, and the Constitution — *Barnes* v. *Glen Theatre, Inc.*" (1992) 26 Suf. U. L. Rev. 237.

V. The Supreme Court of Canada and Freedom of Expression

A. The Meaning of Section 2(b)

The first Supreme Court decision to provide a comprehensive definition of freedom of expression was *Irwin Toy Ltd.* v. *Quebec (Attorney General)*.[51] The majority's analysis, which has been closely followed, sets out two steps to determine whether s. 2(b) has been infringed. The first involves an assessment of the restricted activity, to determine whether it is within the sphere of conduct protected by freedom of expression. The second is to determine whether the legislation or other government action restricts free expression.

1. Form and Content of Expression

a. Content

The *Charter* in s. 2(b) protects expression, which is any activity that "conveys or attempts to convey a meaning."[52] The meaning sought to be conveyed is the content of expression. Expression also involves a medium or form. All meaning or content is protected, because:

> Freedom of expression was entrenched...to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is... 'fundamental' because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.[53]

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51 (1989), 58 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Irwin Toy*]. The specific issue before the court was whether commercial expression fell within the scope of s. 2(b). The court held that it did, consistent with its earlier determination in *Ford* v. *Quebec (Attorney General)* (1988), 54 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Ford*] that choice of language was protected in a commercial context.

52 *Ibid.* at 607.

53 *Ibid.* at 606.

The court has strongly maintained the position that the scope of s. 2(b) is not limited in terms of content. *Irwin Toy* itself established that commercial expression was protected. In *R.* v. *Keegstra*[54] and in *R.* v. *Zundel*[55] both majority and minority judgments held that hate propaganda and deliberate falsehoods were entitled to s. 2(b) protection. Conflict with other *Charter* provisions and international human rights standards, or prejudicial effects, should be dealt with under s. 1. In *R.* v. *Butler*[56] the court unanimously held that obscenity was entitled to s.2(b) protection, thus exceeding the scope of protected expression recognized in the United States.[57] Meaning was conveyed through the medium of film, magazine, written matter, or sexual gadget. Neither the lack of redeeming value nor the depiction of purely physical activity removed it from the scope of s. 2(b).

Artistic expression is clearly within the scope of s. 2(b) in terms of its content. In the *Butler* discussion of the "artistic defence" to obscenity, the court held that artistic expression "rests at the heart of freedom of expression values."[58]

The unlimited scope of freedom of expression in terms of content has been criticized as extending beyond the values underlying s. 2(b), relating to the search for truth, participation in social and political decision-making, and individual self-fulfilment.[59] These values are significant at the s. 1 stage of analysis, but may seem to have little connection with the definition of protected expression under s. 2(b) because of the court's

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54 [1991] 2 W.W.R. 1 (S.C.C.).

55 [1992] 2 S.C.R. 731.

56 *Supra* note 16 at 602-603 [hereinafter *Butler*].

57 First amendment jurisprudence definitionally excludes certain narrowly defined types of speech, including obscenity, from constitutional protection. Nudity is not obscene and this exception has therefore not affected the consideration of the constitutional protection of nude dancing. L. Tribe, *supra* note 36 at 904-919.

58 *Supra* note 16 at 601.

59 *Irwin Toy*, *supra* note 51 at 612.

commitment to include all content.[60] But this ignores the role played by the inclusive definition in achieving those underlying values, by ensuring that *presumptively* government must respect *all* expression. To ensure that truth may be sought, politics freely discussed, and individual self-fulfilment fully explored, s. 2(b) must encompass expression that is "unpopular, distasteful or contrary to the mainstream."[61] A presumption of constitutional protection helps to ensure that this goal is met:

> Attempts to confine the guarantee of free expression only to content which is judged to possess redeeming value or to accord with the accepted values strike at the very essence of the value of the freedom, reducing the realm of protected discussion to that which is comfortable and compatible with current conceptions. If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society.[62]

The presumption of protection may be met, under s. 1, by a contextual analysis that may determine that in view of all of the circumstances, including but not limited to the relationship of the content of the expression to the values underlying s. 2(b), free expression is reasonably and justifiably circumscribed. Section 1, as noted by Dickson C.J.C., is

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60 In *R.* v. *Keegstra*, *supra* note 54 at 114, McLachlin J. (dissenting on other grounds), in response to the argument that hate propaganda does not further the values underlying free speech indicates that these values should be considered under s. 1, and have only a limited role in the interpretation of s. 2(b). K. Mahoney, "*R.* v. *Keegstra*: A Rationale for Regulating Pornography?" (1992) 37 McGill L. J. 242 at 247-249 criticizes the s. 2(b) analysis in *Keegstra* for this reason, as does L. Weinrib, "Hate Promotion in a Free and Democratic Society: *R.* v. *Keegstra*" (1991) 36 McGill L.J. 1416 at 1419-1425. L. Weinrib, "Does Money Talk? Commercial Expression in the Canadian Constitutional Context" in D. Schneiderman, ed., *Freedom of Expression and the Charter* (Toronto: Carswell, 1991) 336 makes the same criticism relating to the Supreme Court's protection of commercial expression.

61 *Irwin Toy*, *supra* note 51 at 606.

62 *R.* v. *Keegstra*, *supra* note 54 at 115, per McLachlin J. (dissenting on other grounds) in an additional response to the argument referred to *supra* at note 60.

suited to a contextual analysis.[63] Under s., 1 the court considers all relevant factors, including the nature of the affected expression and the characteristics of the challenged law. In contrast, definitional exclusions from the scope of protected expression would more likely become categorical and focus on the characteristics of the unprotected expression only; and not on other relevant factors.[64]

The importance of a full contextual analysis can be seen by comparing *Keegstra* to a companion case, *Taylor* v. *Canadian Human Rights Commission*.[65] Hate propaganda was the object of both the criminal and human rights legislation considered in those cases, but it was differently defined. The definition in *Taylor* was broader; for example, there was no requirement of intention. If hate propaganda is not protected expression, does hate propaganda include the unintentional propagation of hatred? Because it was using a contextual analysis, the court did not have to answer this question in the abstract. Intention was present in the definition of the criminal prohibition, and was an important element in the reasonableness of that prohibition.[66] Intention was not necessary in the regulatory human rights legislation, because the scheme of the legislation ensured that no one would be penalized for expression until the concerns relating to that expression had been clearly brought to the attention of the

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63 *Ibid.* at 32.

64 This is what the American jurisprudence suggests: L. Tribe, *supra* note 36 at 793, 832 and following. The result is that the excluded categories are very narrow, as they attempt to define expression that is in no circumstances legitimate. In the American approach expression outside the excluded categories is subject to a very strong presumption of constitutional immunity from content-based regulation. See, *supra* test accompanying and following note 43. See also, *R.* v. *Zundel*, *supra* note 55. McLachlin J., for the majority, responding to an argument that deliberate falsehoods should not be protected because they serve none of the s. 2(b) values, held that it could not be shown "categorically" that deliberate lies are unrelated to such values, and that definitional difficulties in determining the meaning and truth of statements made these unsatisfactory criteria for denial of constitutional protection.

65 (1990), 75 D.L.R. (4th) 577 (S.C.C.) [hereinafter *Taylor*].

66 *Supra* note 54 at 64.

speaker. Punishment would follow only after an inquiry, a cease and desist order, and a violation of the order.[67]

Such a contextual analysis could be performed by the court under s. 2(b) rather than s. 1, but this would leave little or no role for s. 1, and would not significantly change the essence of the analysis. The court must still recognize the need for and engage in a careful analysis, whenever even a potential violation of free expression exists. The *Irwin Toy* approach to the scope of s. 2(b) points out this potential, and the need for such an analysis.

b. Form

The court's initial language in *Irwin Toy* suggests that not only the written or spoken word, but all expressive activity is equally protected.[68] However, distinctions subsequently drawn between form and content of expression, and the purpose and effect of government action, indicate that expressive "conduct" may involve different considerations and is not in all circumstances protected under s. 2(b).

With regard to the form/content distinction, in *Irwin Toy* the court gave as examples of forms of expression the written or spoken word, the arts, and physical gestures or acts that are performed to convey content. The court went on to hold that while all content of expression is protected, certain forms may not be, such as violence and threats of violence. In *Keegstra* the majority confined this exception to actual violence, stating that even threats of violence should come within the scope of protected expression as they are defined by reference to content.[69]

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67 *Supra* note 65 at 603.

68 In the text, *supra* accompanying note 52.

69 *Supra* note 54 at 31-32. In *Committee for the Commonwealth of Canada* v. *Canada* (1991), 77 D.L.R. (4th) 385 (S.C.C.), Lamer C.J.C., Sopinka and Cory JJ. concurring, held that forms of expression incompatible with the principal function of government property will not be protected in that context. This is a much broader application of the exception than has been previously approved. The other four justices in the case concurred in the result, but for different

Forms of artistic expression were discussed in *Reference re s. 193 and 195.1(1)(c) of the Criminal Code*[70] and *Butler*.[71] Earlier, in *Ford*,[72] the court had found choice of language to be protected by s. 2(b), referring to the intimate relationship between expression and language. "[L]anguage is not merely a means or medium of expression; it colours the content and meaning of expression" and is "a means by which a people may express its cultural identity" or an individual may express "his or her personal identity."[73] The protection of expression thus goes beyond content in a narrow or technical sense and includes more subtle aspects, such as the emotive quality of expression.

In the *Prostitution Reference*, Lamer J. (as he then was) in a concurring decision, in *obiter*, compared the relationship between form and content of expression in language and art:

> Art may be yet another example of where form and content intersect. Is it really possible to conceive, for instance, of the content of a piece of music, a painting, a dance, a play or a film without reference to the manner or form in which it is presented?...artistic forms colour and indeed help to define the product of artistic expression. As with language, art is in many ways an expression of cultural identity, and in many cases is an expression of one's identity with a particular set of thoughts, beliefs, opinions and emotions. That expression may be either solely of inherent value in that it adds to one's sense of fulfilment, personal identity and individuality independent of any effect it may have on a potential audience, or it may be based on a desire to communicate certain thoughts and feelings to others. I am of the view, therefore, that

reasons.

70 (1990), 77 C.R (3d) 1 (S.C.C.) [hereinafter the *Prostitution Reference*]. All members of the court agreed that a prohibition of communication for the purpose of prostitution infringed free expression, although a majority found the infringement to be justified under s. 1. All members of the court except Lamer J. (as he then was) also agreed that the offence of keeping a common bawdy house did not limit communicative activity and did not violate s. 2(b) of the *Charter*. Lamer J. did not reach the latter issue.

71 *Supra* note 16.

72 *Supra* note 51.

73 *Ibid.* at 604.

art and language are two examples where content and form are inextricably linked, and as a result both merit protection.[74]

In *Butler*, it was argued that a distinction should be drawn between film and the written word; that while the latter is inherently an attempt to convey meaning, film can be used for a purpose "not significantly communicative." Sopinka J. for the majority held:

> [T]his submission cannot be maintained...in creating a film, regardless of its content, the maker of the film is consciously choosing the particular images which together constitute the film. In choosing his or her images, the creator of the film is attempting to convey some meaning. The meaning to be ascribed to the work cannot be measured by the reaction of the audience, which in some cases, may amount to no more than physical arousal or shock. Rather, the meaning of the work derives from the fact that it has been intentionally created by its author.[75]

2. Purpose and Effect of the Government Action

The second element required in the *Irwin Toy* analysis to show a violation of s. 2(b) is a demonstration that the purpose or effect of the challenged government action restricts freedom of expression:

> [I]f the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity.[76]

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74 *Supra* note 70 at 50.
75 *Supra* note 16 at 604.
76 *Supra* note 51 at 612.

All content-based restrictions violate s. 2(b) in their purpose. Content-neutral rules may violate s. 2(b) in their effect. A review of both the purpose and effect of government action is not new to *Charter* analysis,[77] but the distinction between purpose and effect acquired a new significance in *Irwin Toy*. The court held that if the complaint is as to effect only, there is an additional burden on the party asserting a *Charter* violation. He or she must demonstrate the effect with reference to the values underlying free speech, the search for truth, participation in social and political decision-making, and individual self-fulfilment. It must be shown that the meaning sought to be expressed would relate to these values.

The scope of protected expression is thus restricted where the infringement is in the effect of legislation.[78] This contradicts the initial assertion that all expression is protected. The reason for this is not stated and is not self-evident.[79] An infringement based on the effect of a law may be more likely to be justified under s. 1, or even to be so trivial as not to warrant consideration.[80] But this is only a generalization. A law

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77 Purpose and effect of the law were held to be relevant in determining a *Charter* violation in *R.* v. *Big M Drug Mart Ltd.* (1985), 18 D.L.R. (4th) 321 (S.C.C.).

78 This part of the test in *Irwin Toy*, *supra* note 51, was applied by McLachlin J., Gonthier J. concurring and La Forest J. indicating that he would tend to approach future cases in this manner, in *Committee for the Commonwealth of Canada* v. *Canada*, *supra* note 69. She held that content-neutral rules precluding the use of government property for expressive purposes would violate s. 2(b) if the use of the forum in question for the dissemination of the expression in question were linked to one of the purposes underlying free expression. She further found that the use of the public areas of an airport for the dissemination of political views had such a link. The other four judges involved in the case reached the same result for different reasons (see the reference to the judgment of Lamer C.J.C., *supra* at note 69).

79 D. Gibson, Case Comment on *Attorney General of Quebec* v. *Irwin Toy Limited* (1990), 69 Can. Bar Rev. 339 at 343-346 criticizes this aspect of the decision.

80 *R.* v. *Edwards Books and Art Ltd.* (1986), 35 D.L.R. (4th) 1 (S.C.C.), as compared with *R.* v. *Big M Drug Mart Ltd.*, *supra* note 77; *Jones* v. *The Queen* (1986), 31 D.L.R. (4th) 569 (S.C.C.).

that violates freedom of expression in effect can nonetheless have a very significant impact on the ability to communicate.[81]

The distinction between content and form of expression and between laws that infringe free expression in their purpose or effect, are analogous to the American distinctions between regulations of the content of expression, and regulations of conduct or of the time, place or manner of expression. However, there is an important difference. The *Irwin Toy* analysis employs these distinctions to completely exclude certain activities or regulations from *Charter* review. One would expect such exceptions from the scope of protected expression to be narrowly defined, and the case law to date generally supports this view. If expression is protected, the rigour of the s. 1 review has not depended on these distinctions. The American approach, on the other hand, while recognizing that the first amendment is implicated, employs these distinctions to significantly decrease the level of protection provided. The American approach also more broadly defines the areas calling for decreased protection. As a result the level of constitutional protection of nude dancing is arguably higher in Canada than in the United States. This point will be explored later.

B. Section 1

Freedom of expression jurisprudence has introduced elements to the test in *R.* v. *Oakes*[82] which give it flexibility or, more specifically, are used to justify a deference to legislative decisions not found in *Oakes*. The *Oakes* case set out the criteria to be considered under s. 1 of the *Charter*: whether there is a pressing and substantial government objective, and whether the means are proportional, in that they are rationally connected to the objective, impair as little as possible the right in question, and there is a balance between the extent of the infringement of the right and the importance of the objective. The *Oakes* case further dealt with the standard

[81] McLachlin J. makes this point in *Committee for the Commonwealth of Canada* v. *Canada (Treasury Board)*, *supra* note 69, in her s. 1 discussion. See the quotation *infra* accompanying note 126.

[82] (1986), 26 D.L.R. (4th) 200 (S.C.C.).

of proof required, proof on a balance of probabilities applied "rigorously" and supported by "cogent and persuasive" evidence.[83] While the same criteria continue to be referred to by the Supreme Court, the degree of proof, or the manner of determining whether the criteria are met, has changed significantly at least in certain types of cases. The tendency to defer to government decisions is particularly apparent at the second stage of the proportionality test, in assessing whether the right or freedom in question has been impaired as little as possible.

To date, the Supreme Court of Canada has referred to two types of factors that determine whether the s. 1 analysis will be performed strictly or deferentially: those relating to the nature of the legislation; and those relating to the value of the restricted expression. A third potential factor, the restriction of form or conduct as opposed to the content of expression, has not been seen to decrease the government's s. 1 obligations.

1. The Nature of the Legislation

The first factor that may call for deference is the nature of the legislation being challenged. In *Irwin Toy*, the court distinguished situations where the legislature mediates between "the claims of competing groups" to protect "vulnerable groups" or to distribute "scarce resources", and situations in which "government is best characterized as the singular antagonist of the individual whose right has been infringed."[84] In the latter case, the court should be able to assess "with some certainty whether the "least drastic means" for achieving the purpose have been chosen, especially given their accumulated experience in dealing with such questions."[85] But in the former situations, the "same degree of certainty may not be achievable", and further the court lacks the institutional resources and capabilities possessed by the legislature for designing social and economic schemes. The court should therefore restrict its role to

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83 *Ibid.* at 226-227.

84 *Supra* note 51 at 625-626. The prosecution of crime is provided as the paradigmatic example of the latter.

85 *Ibid.* at 626.

determining whether the evidence supports the reasonableness of the chosen means.[86]

2. The Value of the Content of the Expression

In *Edmonton Journal* v. *Alberta (Attorney General)*,[87] Wilson J. labelled the flexible approach to s. 1 "contextual", and included in the relevant context an assessment of the importance of the particular exercise of freedom of expression. The contextual approach was adopted by a unanimous court in *Rocket* v. *Royal College of Dental Surgeons of Ontario*,[88] and the value of the commercial expression involved in the advertising of dental services was discussed in setting the context.

The contextual approach was also applied in the *Prostitution Reference*.[89] The majority held that expression relating to an economic transaction of sex for money was not at or near the core of the guarantee of freedom of expression,[90] and accordingly demonstrated little concern that the prohibition of such communication applied in circumstances in which the harm sought to be alleviated (the public nuisance of street solicitation) was most unlikely to occur. The majority held that the prohibition of all such communication was rationally connected to preventing a social nuisance that is frequently, although not necessarily,

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86 *Ibid.* G. La Forest, "The Balancing of Interests under the *Charter*" (1992) 2 N.J.C.L. 133 points to this factor as the major factor underlying a more flexible approach to the balancing of interests under s. 1.

87 [1990] 1 W.W.R. 577 (S.C.C.).

88 (1990), 71 D.L.R. (4th) 68 (S.C.C.).

89 *Supra* note 70.

90 Not only the economic nature of the expression, but also the perceived harmfulness of the underlying transaction contributed to the lack of value of the expression: Dickson, C.J.C. for the majority and Wilson, J. in the dissent both referred to harm, particularly to children, arising from "the public display of the sale of sex," *ibid.* at 12-13 and 73. D. Dyzenhaus, "Regulating Free Speech" (1991) 23 Ottawa L. Rev. 289 distinguishes the case from *R.* v. *Keegstra*, *supra* note 54, and criticizes it, on the basis that the harm sought to be avoided was morally based and not grounded in the equality principles of the *Charter*.

associated with it. The minimal impairment branch of the test was addressed only by an indication that alternative means seeking to eradicate this nuisance had not succeeded. The less restrictive alternative suggested by the dissent (limiting the public places covered by the prohibition), was not specifically addressed by the majority.

In *R.* v. *Keegstra*,[91] a contextual approach led to quite different conclusions as to the strictness with which s. 1 should be applied in the majority and minority decisions. The majority found that there was very little connection between hate propaganda and the search for truth; that "[t]here is very little chance that statements intended to promote hatred against an identifiable group are true, or that their vision of society will lead to a better world."[92] There was also a tenuous relationship to participation in the democratic process or individual self-fulfilment. While hate propaganda may forward the speaker's interests in these values, it limits the same interests of target groups.

Dickson C.J.C. for the majority concluded that the importance of the expression should therefore not be accorded the greatest of weight, so that infringements in relation to it would be "easier to justify than other infringements."[93] In applying the minimal impairment branch of the *Oakes* test, he rephrased the test, stating that Parliament need only show that the means employed (creation of a criminal offence) were not redundant when considered in the light of other available means (education, provisions in human rights statutes).

The minority, on the other hand, considered not just hate propaganda *per se*, but a broader context, holding that because the hate propaganda offence strikes at the content of speech in artistic, social and political domains, the

91 *Supra* note 54.
92 *Ibid.* at 55, per Dickson C.J.C.
93 *Ibid.* at 58.

infringement of s. 2(b) values was serious. A stricter application of the s. 1 test was evident in the minority decision.[94]

In the majority decision, a narrowly focused context resulted in a significantly lesser degree of protection. The approach can be criticized for not giving appropriate weight to the potential for a chilling effect.[95] However, the approach does not pose a wide-ranging threat to free expression. It is limited in two ways: first, a careful and narrow definition in context[96] of the less valuable expression; and second, the connection

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94 D. Dyzenhaus, "Regulating Free Speech" *supra* note 90, suggests that McLachlin J. for the dissent in *R.* v. *Keegstra*, *ibid.* also differed in her assessment of the nature of the harm connected with hate propaganda. He argues that while Dickson C.J.C. found the harms to directly interfere with the *Charter* right to equality, McLachlin J. held that there was no violation of s. 15 as there was no state-imposed inequality. My own view is that this overstates the differences between the two as to the nature of the perceived harm. Dickson C.J.C. never referred to hate propaganda as constituting a technical violation of s. 15. His references to s. 15 were as follows: he did not rely on it as a basis to definitionally exclude expression from the scope of s. 2(b) (at 32); rather s. 15 (and s. 27 of the *Charter*, and provisions in international human rights instruments) contributed to his assessment of the importance of the objective pursued by government (at 44-51), and *Charter* values (including those related to equality) contributed to his assessment of the low value of the expression (at 54-58). McLachlin J. noted that there was no actual violation of s. 15 in her discussion of the scope of s. 2(b) (at 108-110); her conclusion that s. 15 did not limit that scope agreed with the majority. She further agreed with the majority as to the importance of the objective of prohibiting hate propaganda (at 119-120), and rejected any requirement for a showing of "actual harm or incitement to hatred" (at 127). Her disagreement with the majority was founded in her assessment of the effectiveness (or lack thereof) of criminal sanction (at 123-124), and the provision's overbreadth and potential to chill valuable expression (at 128-129).

95 Per McLachlin J., *ibid.* See also A. Borovoy, "How Not to Fight Racial Hatred" in D. Schneiderman, ed., *supra* note 60 at 243.

96 In the context of criminal legislation, see the text, *supra* accompanying notes 65-67. The majority referred to the requirement of wilfulness, the requirement that there be a propagation of the extreme emotion of hatred, and various defences as confining the prohibited expression to that which is of "discounted value" and

of that expression to a special type of harm. The relationship to harm is likely not empirically provable, and was not proved by the s. 1 evidence presented in the case. But it is supported by evidence and is the subject of a significant consensus.[97] Further, the type of harm undermines other *Charter* protected rights and freedoms, particularly s. 15 equality rights.[98] It is not harm to government as an institution, giving rise to suspicion related to government's efforts to suppress it. Rather, it is harm to the freedom, security and equality rights of minority groups in society.[99] Both the narrow definition and the nature of the harm were relied on in characterizing hate propaganda as a "special category of expression which strays some distance from the spirit of s. 2(b)."[100]

This point was repeated in *Taylor*, dealing with a legislative prohibition in human rights legislation of communications likely to expose a racial or religious group to hatred or contempt. In finding that such expression was not central to s. 2(b) values and did not require the most stringent protection, the majority noted that "expressive activities advocating unpopular or discredited positions are not to be accorded reduced constitutional protection as a matter of routine: content-neutrality is still an influential part of free expression."[101] Again, the prohibited expression was a special category because of the same relationship to the same kind of harm, and because it was narrowly circumscribed. In contrast, in *R.* v. *Zundel*, the majority held that the statute's failure to define harm to the

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thus ensuring a minimal impairment of freedom of expression: see the summary, *ibid.* at 72.

97 *Supra* note 54 at 41-51, refers to a number of public reports and international human rights instruments, as well as *Charter* provisions, providing such evidence and demonstrating a significant consensus as to the harmfulness of hate propaganda.

98 See generally D. Dyzenhaus, "Regulating Free Speech" *supra* note 90.

99 This is a part of the relevant context; see the text under the heading "The Nature of the Legislation" *supra*.

100 *Supra* note 54 at 57.

101 *Supra* note 65 at 596.

public interest meant that the expression prohibited was not restricted to that of lesser value.[102]

In *R.* v. *Butler*, the court divided pornography into three categories:

> (1) explicit sex with violence; (2) explicit sex without violence but which subjects people to treatment that is degrading or dehumanizing; and (3) explicit sex without violence that is neither degrading nor dehumanizing.[103]

Violence "includes both actual physical violence and threats of violence."[104] "[D]egrading or dehumanizing materials place women (and sometimes men) in positions of subordination, servile submission or humiliation."[105]

The first two categories of pornography are prohibited by s. 163 of the *Criminal Code*. The third is not, unless it employs children in its production. This is because there is a community consensus that

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102 *Supra* note 55. The majority struck down s. 181 of the *Criminal Code* due to its conflict with s. 2(b) of the *Charter*. The dissent, which would have upheld the section, did so by reading down or interpreting the statute's reach to be consistent with the hate propaganda provisions dealt with in *R.* v. *Keegstra*, *supra* note 54.

103 *Supra* note 16 at 600.

104 *Ibid.* at 600.

105 *Ibid.* at 596. Examples of degrading scenes referred to by Ferg J. in *R.* v. *Ramsingh* (1984), 14 C.C.C. (3d) 230, and described by Sopinka J. as "the type of material that qualified for this label" (*i.e.*, degrading or dehumanizing), were:

> They are exploited, portrayed as desiring pleasure from pain, by being humiliated and treated only as an object of male domination sexually, or in cruel or violent bondage. Women are portrayed in these films as pining away their lives waiting for a huge male penis to come along, on the person of a so-called sex therapist, or window-washer, supposedly to transport them into complete sexual ecstasy. Or even more false and degrading, one is led to believe their raison d'etre is to savour semen as a life elixir, or that they secretly desire to be taken forcefully by a male.

pornography of either of the first two categories causes harm in the sense that "it predisposes persons to act in an anti-social manner as, for example, the physical or mental mistreatment of women by men."[106] This community consensus does not exist with regard to sexually explicit pornography that is neither violent nor degrading. The community standard of tolerance test is essentially a measure of this community consensus as it applies to particular material.[107]

In the s. 1 determination that the prohibition of violent, degrading or child pornography was justified, this limited type of pornography was characterized as a category of expression unrelated to the values underlying s. 2(b) and therefore not "on an equal footing with other kinds of expression which directly engage the "core" of the freedom of expression values."[108] This conclusion as to the lack of value of the expression was further supported by the economic motive for most expression in this category.

The assessment of the value of pornography must be set in context. First, in defining the categories of prohibited pornography, the court looked for a connection to harm. As in *Keegstra*, the connection to harm may not be empirically provable and was not proved, but was supported by evidence[109] and a substantial consensus.[110] Further, it is again a

106 *Ibid.* at 600-601.

107 *Ibid.* at 600-601.

108 *Ibid.* at 612.

109 *Ibid.* at 612-613 referred to social science evidence heard and assessed in *R.* v. *Fringe Product Inc.* (1990), 53 C.C.C. (3d) 422 (Ont. Dist. Ct.), the conclusions of the *Fraser Report*, *supra* note 20, which found no causal relationship between pornography and harm and the conclusions of the Attorney General's Commission on Pornography, *Final Report* (United States, 1986) [hereinafter the *Meese Report*] and the Report on Pornography by the Standing Committee on Justice and Legal Affairs (1978) [hereinafter the *MacGuigan Report*] which found a link between obscenity and harm. Further, in an earlier portion of the judgment dealing with degrading and dehumanizing material the court referred to the *Meese Report* and other public reports that together provided a "substantial body of opinion that holds that the portrayal or persons being subjected to

harm related to *Charter* values. Pornography that degrades or dehumanizes its subjects "run[s] against the principles of equality and dignity of all human beings."[111]

Where there is no consensus connecting expression to this kind of harm, as in the case of pornography that is merely sexually explicit, it is not prohibited, and, implicitly, could not be prohibited. This follows from the court's holding that the objective of advancing a particular conception of morality, absent a connection to harm of the type described, is not a "legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*."[112]

The lack of a community consensus that material is harmful is in and of itself sufficient to render the material immune from criminal prosecution. Pornography that is merely sexually explicit need not be artistic; it is unpunishable without regard to an artistic defence. It also need not be positively valuable in its portrayal of human relationships; the Supreme Court of Canada defined it by an absence of violence or degradation and did not suggest, as one trial court has, that it must portray "positive and affectionate human sexual interaction, between consenting individuals participating on a basis of equality."[113]

In effect, while *Butler* adopts a feminist perspective in its definition of the harm caused by pornography, the concern with harm is tempered to restrict the scope of the decision and protect free expression. A very

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degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole" (at 597).

110 *Ibid.* and see also the discussion of the community standard of tolerance test, *supra* in the text accompanying notes 106-107.

111 *Ibid.* at 596.

112 *Ibid.* at 606.

113 *R.* v. *Wagner* (1985), 43 C.R. (3d) 318 (Alta. Q.B.), aff'd (1986), 50 C.R. (3d) 175 (Alta. C.A.), leave to appeal to S.C.C. denied (1986), 50 C.R. (3d) 175n. A. Young, "From Elvis's Pelvis to *As Nasty as They Wanna Be*: Freedom of Expression and Contemporary Popular Music" 1 M.C.L.R. 155 at 172 refers to this as "pure censorship."

significant restriction is that the potential to cause harm is recognized and may be acted upon only where a community consensus exists. Thus while some may consider Playboy poses degrading,[114] they are not and could not be prohibited because no community consensus extends that far.

Two additional factors circumscribe the nature of the expression that may be prohibited.[115] There is the requirement that undue exploitation of sex (explicit sexuality plus violence, degradation or child actors) be the dominant theme of the prohibited material.[116] Further, there is the role of the "artistic defence." The "undue exploitation of sex" ceases to be such if it has a justifiable role in advancing a plot or theme.[117] The court held that the *Charter* requires that the artistic defence be generously applied,[118] and that it be available notwithstanding an economic motive for the work, provided the "defining characteristic is that of aesthetic

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114 The Indianapolis ordinance drafted to provide a harm-based definition of pornography, and struck down in *American Booksellers Assn., Inc.* v. *Hudnut*, 771 F. 2d 323 (U.S.C.A. 7th Cir. 1985), aff'd 106 S. Ct. 1172 (U.S.S.C. 1986), defined pornography as "the graphic sexually explicit subordination of women" including depictions that combine sex and specific forms of violence or clearly degrading treatment, and more generally depictions of women "as sexual objects for domination, conquest, violation, exploitation, possession, or use, or through postures or positions of servility or submission or display." While the central theme of the definition matches that adopted in *R.* v. *Butler*, *supra* note 16, its extension to "positions of display" with its implication that Playboy poses are degrading goes beyond the community consensus as to what is harmful, as referred to in the *Butler* approach. Such material would be at most considered sexually explicit, and therefore neither prohibited nor constitutionally subject to prohibition.

115 Some feminist authors have criticized the requirements of a dominant theme of undue exploitation of sex, and the artistic defence, which reflect civil libertarian rather than feminist concerns. See, *e.g.*, S. Noonan, "Pornography: Preferring the Feminist Approach of the British Columbia Court of Appeal to that of the Fraser Committee" (1985), 45 C.R. (3d) 61 at 62-63; K. Lahey, "Obscenity, Morals and the Law: A Feminist Critique" (1985) 17 Ottawa L. Rev. 33.

116 *R.* v. *Butler*, *supra* note 16 at 594, 601.

117 *Ibid.* at 599, 601.

118 *Ibid.* at 601, 615.

expression and thus represent[s] the artist's attempt at individual fulfilment."[119] While these words arguably carry somewhat contradictory messages as to the scope of the artistic defence, the strongest impression is that the imperative of the *Charter* will result in a broad application of the defence.

The courts are thus put in the role, not of arbiter of taste, but of determiner of whether there is *any* serious or legitimate artistic merit in particular material. While the court's qualifications for this task may be doubted by some, it is a task that both Canadian and American courts have undertaken for many years in dealing with the regulation of obscenity.[120] Further, there is an effort to minimize subjectivity in this context as well as with regard to other aspects of the definition of prohibited pornography by reference to the community standards of tolerance test.[121]

The *Butler* decision will not completely satisfy either feminist or civil libertarian interests. As indicated above, the feminist definition of harm is truncated by the factors of community standards, the dominant theme requirement and the artistic defence. Civil libertarians will be concerned with the breadth, subjectivity and vagueness of the definition of prohibited expression, due to the continuing reliance on community standards, and the use of concepts such as degradation and dehumanization. In my view, the decision is a commendable effort to balance these concerns and one that, while it will require definition and elaboration, may in the long run be workable. To feminists it offers the prohibition of at least more extreme

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119 *Ibid.* at 615.

120 *Ibid.* at 598-599 for Canadian jurisprudence; L. Tribe, *supra* note 36 at 908-913 for American jurisprudence. C. Sunstein, "Pornography and the First Amendment" [1986] Duke L. J. 589 at 605-608, 626 argues that "it would be difficult to imagine a sensible system of free expression that did not distinguish among categories of speech in accordance with their importance to the underlying purposes of the free speech guarantee," and that, despite the "traditional lawyers' facility in identifying the difficult intermediate case, or the seemingly contrary hypothetical," pornography is distinguishable from other speech.

121 *Ibid.* at 600-601.

forms of harmful pornography. Further, framing the analysis in terms of harm to women's position in society has an educational value. To civil libertarians, it offers the considerations referred to above which limit the scope of affected expression. Further, the focus on harm and the exclusion of reference to moral standards should add a degree of certainty to the community standards test.[122] I also agree with the point made by the majority in *Butler* that efforts to define pornography more specifically, and less contextually, are destined to fail.[123]

In summary, in *Keegstra*, a special category of less protected speech was defined by a substantial connection to a particular type of harm and by a narrow definition, considered in the specific context. In *Butler*, a special category was defined by a similar connection to a similar harm and by

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[122] Prior to *Butler*, a number of authors argued that the objectiveness of the community standard test could be improved by a focus on harm: D. Dyzenhaus, "Should Community Standards Determine Obscenity?" (1990), 72 C.R. (3d) 49 at 56-58; D. Dyzenhaus, "Obscenity and the Charter: Autonomy and Equality" (1991) 1 C.R. (4th) 367 at 376; B.Baines, Annotation to *Towne Cinema Theatres* (1985) 45 C.R. (3d) 3 at 4; J. McLaren, "Now You See It, Now You Don't": The Historical Record and the Elusive Task of Defining the Obscene" in D. Schneiderman, ed., *supra* note 60, 105 at 132-133, 142-143. Sunstein, *ibid.* at 626 responding to vagueness and "slippery slope" concerns, also argued that a focus on the value of speech and the harm caused by it in defining pornography would "diminish the likelihood of misapplication."

[123] *Ibid.* at 616:

> The attempt to provide exhaustive instances of obscenity has been shown to be destined to fail (Bill C-54, 2nd Sess., 33rd Parl.). It seems that the only practicable alternative is to strive towards a more abstract definition of obscenity which is contextually sensitive and responsive to progress in the knowledge and understanding of the phenomenon to which the legislation is directed. In my view, the standard of "undue exploitation" is therefore appropriate. The intractable nature of the problem and the impossibility of precisely defining a notion which is inherently elusive makes the possibility of a more explicit provision remote. In this light, it is appropriate to question whether, and at what cost, greater legislative precision can be demanded.

other factors which limited the category to a narrow and less valuable form of expression.[124] Special categories of less protected speech must be so confined in order to preserve a general system of free expression.

3. The Form of the Expression

The Supreme Court of Canada has not yet held that regulations of the form of expression, or regulations that affect s. 2(b) in effect only, call for any less stringent review under s. 1. In *Committee for the Commonwealth of Canada* v. *Canada (Treasury Board)*, McLachlin J. discussed this point and rejected any general rule to this effect:

> It is sometimes observed that content-neutral restrictions may be easier to justify than content-based restrictions...But care must be taken to avoid the trap of acceding to limits on expression on the basis they relate to content-neutral consequences rather than content. Denial of a particular time, place or manner of expression regardless of content may effectively mean denial of the right to communicate. Conversely, as abhorrent as arbitrary or unfair content-related limitations may be, it must be conceded that when carefully tailored they may be integrally tied to important government purposes outweighing any interest a speaker may have in communicating a conflicting message...The point is that generalizations are of little assistance. What is essential is that the court in each case undertake the process of balancing and weighing the true interests at stake with a view to determining whether the limit on free expression in

[124] C. Sunstein, *supra* note 120, endorses an approach that considers both the value of the regulated speech (including consideration of the theme of a work as a whole, and whether it has any serious social value) and the connection to harm, as a means to produce socially beneficial anti-pornography legislation that does not pose a significant threat to a system of free expression. But American first amendment jurisprudence does not favour such an approach. A harm-based anti-pornography ordinance was struck down in *American Booksellers Association, Inc.* v. *Hudnut*, *supra* note 114 and L. Tribe, *supra* note 36 at 928, has suggested that "barring a major drift away from the Court's long-standing if not always present suspicion of viewpoint-specific measures, any legislation purporting to designate a preferred or disfavoured perception of male-female relations, or of sexuality and power and the relation between the two, seems likely to meet" the same fate.

question in "reasonable" and "demonstrably justified in a free and democratic society."[125]

The *Barnes* case, discussed above, indicated that restrictions on nudity in performance dance were restrictions of form or conduct, and that the court should accordingly defer to governmental decisions to enact such restrictions. The danger of this analysis is that it could apply equally to bar striptease performers and serious works of art.[126] This is another example of the importance of context, and the risks associated with generalizing about the constitutional implications of content-neutral restrictions on freedom of expression.

VI. Application — Would a Prohibition of Nude Dancing in Bars Violate s. 2(b)? — Would it be Justifiable under s. 1?

A. Interference with s. 2(b)

1. Is There Content?

The case for finding a violation of s. 2(b) in a prohibition of nude dancing is very strong. The expressive nature of the performing arts and dance in particular has been recognized by the courts.[127] The strongly maintained position that expression does not lose its constitutional protection because of its content means that the nature of the message, whether described as erotic or indecent or degrading, is irrelevant at this stage of the analysis.[128] Some courts or judges have held that artistic expression, or expression that offends public decency, or expression with

[125] *Supra* note 69 at 463-464. Gonthier J. concurred with McLachlan J. Lamer C.J.C., Sopinka J. concurring, did not consider s. 1 on the merits, having concluded that the restriction on expression in the case was not prescribed by law. L'Heureux-Dube J., Cory J. concurring, and LaForest J. found that the s. 1 test was not met but did not deal with this point specifically.

[126] See note 49 and accompanying text.

[127] *E.g.*, *supra* notes 30, 33, 58, 74.

[128] *Supra* notes 52-62 and accompanying text.

a purely economic motive, is not protected.[129] These assertions are no longer maintainable. Artistic speech has been referred to by the Supreme Court as a particularly deserving of protection.[130] A public decency exception is based on content and therefore not acceptable. The protection of commercial speech demonstrates that even an exclusively economic motive will not deprive expression of its constitutional protection, and in the context of art or entertainment the economic motive, while it may be important, is not exclusive.

It may be argued that dance is potentially, but not necessarily, expressive and that the expressive element in this context is so diluted as to be unworthy of protection. This argument must be examined closely. Why is nude bar room dancing not expressive? If it is simply that no intellectual ideas are conveyed, the argument is without merit. The emotive quality of expression is and should be protected.[131] While it may be difficult to state in rational terms a specific message being communicated by a striptease, this will also be the case with regard to many nonverbal art forms.

If the argument is not that the conveyance of emotional messages per se is not protected, but that this particular emotional message is not protected because it is "purely physical", the argument is a form of content discrimination that was specifically rejected by the Supreme Court in *Butler*.[132] The real objection is not an absence of content, but the nature or value of the content.

Nonetheless, some forms of dance do not appear to involve protected expression. Social dance is an example. While social dance may be incidentally expressive, communication is not its purpose. If some distinction is to be made between expressive and non-expressive dance, how can it be made? The United States Supreme Court in *Barnes* held that

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[129] *Supra* note 19 (*R.* v. *Zikman*, per Galligan J.A.), and notes 25-27.
[130] *Supra* note 58.
[131] *Supra* note 73.
[132] *Supra* note 16.

wherever dancing is performed as entertainment it is inherently expressive. This contrasts with social dance, which the court had earlier held not to involve protected expression.[133]

In *Butler*, referring to film, the Supreme Court of Canada indicated that film images are protected expression because of their conscious selection. "[T]he meaning of the work derives from the fact that it has been intentionally created by its author."[134] The court did not refer to or require evidence about this process, but accepted it as self-evident, at least as applied to the commercially available materials under consideration. *Butler* could support a general rule that performance dance is expression, or could be used to argue that, in distinction to film, the line between the unconscious, unprotected communication involved in any human movement and the conscious, protected expression of some dance may be more difficult to perceive, and should be addressed by evidence.

There are indications in the Canadian case law that a case-specific approach may be adopted. The Supreme Court of Canada in *Rio Hotel*[135] and the Ontario Court of Appeal in *Nordee Investments*[136] refused to consider freedom of expression arguments in the absence of evidence about, among other things, the nature of the dancing in question.

Assuming that a case-specific approach is adopted, and it is necessary to establish that a bar room striptease is expressive, this should not be difficult to demonstrate. The evidence and admissions in *Barnes* present a "worst case" scenario.[137] The dancers were not professional, had not choreographed their performances, and did not discuss the communicative aspects of their performances in their evidence. While there is still a case to be made that the dancers were attempting to communicate something to their audience, whether or not they realized it or were prepared to admit

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133 *Dallas* v. *Stanglin*, 490 U.S. 19 (1988).

134 *Supra* note 16 at 604.

135 *Supra* note 5.

136 *Supra* note 8.

137 *Supra* note 1, as referred to *supra* note 45.

or define it, there will be many bar room performances in which the expressive aspect has been planned and analyzed to a greater extent and is thus more apparent. A dancer need simply provide evidence that her dance was intended to convey some meaning to the audience. The meaning need not be intellectual; it may be emotional or "physical." The evidence should come from the dancer (or choreographer, if there is one), as the creator of the message. Some may object that, in truth, the message is determined by the proprietor of the bar who pays the dancer, but this is just another way of referring to the economic motive for the dance, which, as indicated above, does not deny its expressive character.

Should we adopt a case-specific approach, and require this type of evidence? One danger in doing this is that we may not adequately protect the nonverbal communication of emotions. Another is that we may impose barriers of taste or class. The attempt to identify expressive dance could become a form of censorship. To treat performance dance, like movies, as a category of activity that is inherently expressive avoids this concern. But if the search for content is conducted openly and with care, it need not censor particular content.

On the side of requiring evidence, it is both consistent with the case law and surely reasonable to confine the protection conferred by s. 2(b) to the intentional conveyance of meaning. If unintentional communication is included, all human conduct would be prima facie protected under s. 2(b). This additional scope for an already broad definition would further dilute the focus on the values underlying s. 2(b). The search for truth, political and social decision-making, and the quest for individual self-fulfilment are primarily purposeful human activities. Overall, it seems to me that it is not an undue onus to require evidence from the dancer of an intent to communicate. If this would operate to exclude from s. 2(b) some bar room dancing, it would also make clear that entertainment such as wet t-shirt contests, or body-building or nude beauty contests, are not included. It would limit s. 2(b) protection to an activity that in at least some manifestations has serious artistic value.

2. Is the Form Protected?

If the expressive activity is defined as nude dancing specifically, rather than erotic dancing, it may be argued that this is an unprotected form of expression. The content of the dance, its sexual message, is not in issue, just its form. One response to this argument is that in the context of artistic speech, content and form are inextricably bound together, so that a restriction of form is the equivalent of a restriction of content.[138] Nudity is integral to the conveyance of the sexual message. Another response is that only very limited forms of expression that are clearly inconsistent with the purpose of s. 2(b) are excluded from the scope of that section.[139] Nudity cannot be so characterized. In some contexts it has obvious artistic or educational value.

3. Does the Purpose or Effect of the Law Restrict Expression?

Assuming the activity of nude dancing is expressive, the next issue is whether the regulation restricts freedom of expression. The prohibition of nudity in the *Criminal Code*, as applied to performance dance, or a general provincial prohibition of nude dancing in "adult entertainment establishments" would clearly have at least the effect of restricting this expressive activity. With regard to a provincial prohibition limited to the bar context, it may be argued that a regulation of bar room entertainment does not restrict expression, but just the sale of liquor. This position has been advanced in some American cases,[140] but has not been generally accepted there, and should not be accepted in Canada either. Cancellation or denial of a liquor license to those who permit nude dancing to occur on their premises is a denial of a government privilege because of an expressive activity. A denial of a privilege, like the imposition of a

[138] *Supra* note 74.
[139] *Supra* note 69.
[140] As noted *supra* note 34.

sanction, can constrain the exercise of constitutionally protected behaviour.[141]

It is important to characterize the infringement of s. 2(b) in terms of whether it exists in the purpose or effect of the law. The distinction is important because of the additional onus that must be met where laws infringe free expression in effect only.[142]

Is a prohibition of nude dancing a content-based law? This brings us back to the argument addressed above that the prohibition relates to form only, and not the content of expression. Again, one response is that form and content are indistinguishable in artistic speech. A restriction of form restricts content, and so is a purposeful violation of s. 2(b). Another response involves an examination of the mischief sought to be eradicated by a prohibition of nude dancing. The harm addressed does not relate to the direct physical consequences of nudity. Health or hygiene is not the issue. Rather the "mischief consist[s] in the meaning of the activity or the purported influence that meaning has on the behaviour of others."[143] It is the perceived arousing or immoral or degrading content that is being regulated.

Thus, there is a strong case that a provincial prohibition of nude dancing in bars, or the application of the *Criminal Code* public nudity prohibition to such performances, purposefully restrict expression. The latter prohibition may seem superficially to present a stronger case for a restriction of form only, in that it applies to public appearances generally,

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[141] This is consistent with the definition of freedom in *R.* v. *Big M Drug Mart Ltd.*, *supra* note 77 at 354:

> Freedom can primarily be characterized by the absence of coercion or constraint...Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.

[142] *Supra* notes 77-78 and accompanying text.

[143] *Irwin Toy*, *supra* note 51 at 612.

whether or not expression is involved. But public nudity per se is not an offense. The defence of lawful excuse requires the court to consider whether the public nudity is acceptable in the circumstances of the case. In its application to public performances, this defence raises the question of whether the nudity occurred as a part of a legitimate theatrical performance, which clearly involves content-based distinctions.[144] A finding that there is no legitimate performance and resulting conviction for public nudity is a content-based or purposeful restriction of freedom of expression.[145] Conversely, if public nudity per se were an offence, without consideration of the effect of this prohibition on legitimate artistic endeavours, the prohibition would be so broad that it would affect clearly valuable expression and accordingly would meet the additional onus of demonstrating an effect on expression that reflects the values underlying s. 2(b).

So, through a content-limited restriction, or through an unlimited and overbroad restriction, the additional onus is either avoided or met. Of course, the value of the expression will, in any event, be a concern in the application of s. 1. But in that context, the value of the expression is not the only concern; as earlier discussed, the *Keegstra* and *Butler* cases go much beyond finding that the expression lacks positive value. Even unimportant expression cannot be restricted if the government's objective is insufficient or its means clearly disproportionate.

144 *Supra* note 19.

145 The dissent in *Barnes* v. *Glen Theatre, Inc.*, *supra* note 1, engaged in a similar analysis at 2473.

B. Section 1

1. Pressing and Substantial Objectives

In the case of a provincial prohibition of nude dancing in bars, there are several possible objectives.[146] A number were outlined in *Rio Hotel*:[147] controlling the marketing of liquor and the use of entertainment as a marketing tool;[148] and preserving orderliness in and around bars and similar establishments.[149] In a similar vein, a number of the American decisions have referred to a concern with the prevention of crime in and around the bars.[150] These objectives are viewed with sympathy and would almost certainly be characterized as pressing and substantial.

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146 *B.A.A.C. Report*, *supra* note 9, outlined the following arguments presented to it in favour of eliminating or restricting nude dancing:

— under age girls are performing as nude dancers;
— nude dancing leads to alcoholism, promiscuity, teenage pregnancy, prostitution, drug addiction and AIDS;
— nude dancing causes destruction of family values;
— viewing nude dancers causes patrons to drink to excess, leading to drunk driving;
— viewing nude dancers causes increased sexual and physical assaults due to mixing alcohol with sexual stimulation, thus lowering inhibitions while raising sexual stimuli, resulting in sexual misconduct;
— represents a degradation of women;
— leads to a breakdown of the moral fabric of the community;
— results in a corruption of youth;
— increases alcohol consumption in licensed premises;
— freedom of choice.

147 *Supra* note 5.

148 *Ibid.* at 383.

149 *Ibid.* at 394.

150 *E.g.*, *California* v. *LaRue*, *supra* note 34. The prevention of crime as such falls within the federal criminal law power, but there is substantial provincial concurrent power flowing from the provincial power over, *e.g.*, property and local businesses: P. Hogg, *Constitutional Law of Canada*, 2nd ed. (Toronto: Carswell, 1985) at 411, 418. *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick*, *ibid.* may be interpreted as an example and others are cited by Hogg.

Consideration of the objective of maintaining moral standards, either in bars or generally, is ruled out by the *Butler* decision.[151] The maintenance of moral standards creates a particularly direct conflict with the premise that all expression, no matter how unpopular or offensive, should be protected, and is appropriately characterized as insufficient to justify an infringement of s. 2(b).[152]

On the other hand, the objectives of preventing the exploitation and degradation of women are without doubt pressing and substantial. Exploitation and degradation of females, including minors, may occur directly to them as performers and indirectly due to the attitudes towards women that may be fostered in the audiences. These objectives go beyond those found to be within provincial subject matter jurisdiction in *Rio Hotel*. Nonetheless, it seems likely that the province has subject matter jurisdiction to pursue such objectives.[153]

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151 *Supra* note 16 at 606.

152 While three members of the United States Supreme Court relied on this objective in *Barnes* v. *Glen Theatre, Inc.*, *supra* note 1, they did so in the context of a lowered standard of review applicable to regulations of conduct as opposed to expression. Such an objective would be insufficient to justify a content-based restriction.

153 The provinces would clearly have subject matter jurisdiction to prevent exploitation of the dancers in their employment. Regarding the exploitation of women due to attitudinal shifts, it can be argued that as a regulation of free expression this is within the federal criminal law or peace, order and good government power. But the creation of discriminatory attitudes towards women has many implications for provincial subject areas, so that legislation aimed at preventing discriminatory attitudes in order to control these implications may be in pith and substance provincial: W.S. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Ontario: De Boo, 1985) at 10-12 — 10-17, and 98-101 of the November 1991 supplement; *Saskatchewan (Human Rights Commission* v. *Engineering Students' Society* (1989), 10 C.H.R.R. D/5636; *Kane* v. *Church of Jesus Christ Christian-Aryan Nations* (28 February 1992) (Alta. Bd. of Inquiry).

The objective of the *Criminal Code* prohibition of nudity may be characterized as public morality or public decency and order.[154] Incidentally it provides protection for unwilling or sensitive viewers, including children, against offence or shock.[155] While public morality and public decency are within the criminal law power, and is thus a legitimate federal objective where legislation does not affect *Charter* rights or freedoms (*i.e.*, the application of the public nudity offence in a non-discriminatory manner and outside the context of performances), they are not, alone, legitimate reasons for interfering with free expression.[156] Further, as applied to nude dancing, assuming entry to the establishments is controlled, minors are prohibited and warnings as to the nature of the performances posted, concerns about public order or unwilling or sensitive viewers do not arise. One must then consider whether the prohibition of public nudity also pursues the objective of preventing the degradation of women. While the terms of the law hardly suggest such a purpose, I will assume that this may be an objective of the law and address difficulties in the proportionality analysis.[157]

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154 *Rio Hotel Ltd.* v. *Liquor Licensing Board for New Brunswick*, *supra* note 5 at 382, seems to assume that all direct or indirect regulations of nudity found in the *Criminal Code* relate to public morality. *Johnson* v. *The Queen*, *supra* note 17 distinguished s. 163 (now s. 167) and s. 170 (now s. 174), holding that the latter related to conduct that could disturb the public peace, rather than morality.

155 The dissent in *Barnes* v. *Glen Theatre, Inc.*, *supra* note 1, referred to similar objectives: see the text, *supra* accompanying note 46.

156 *R.* v. *Butler*, *supra* note 16.

157 In view of the indirectness of preventing exploitation and degradation of women by prohibiting public nudity generally it seems unlikely that the court would actually characterize this as an objective of the provision. In the *Prostitution Reference*, *supra* note 70, only Lamer J. (as he then was) found that one objective of the prohibition of street solicitation was the curbing of prostitution per se together with its attendant harms. Dickson C.J.C. and Wilson J. for the remaining members of the court held that the legislation did not "attempt, at least in any direct manner, to address the exploitation, degradation and subordination of women that are part of the contemporary reality of prostitution" and was aimed simply at "taking solicitation for the purposes of prostitution off the streets and out of public view" (at 12, per Dickson C.J.C.).

There are therefore two types of objectives, those relating to social problems associated with the bars where nude dancing is performed, and those relating to equal treatment of women,[158] that may legitimately inspire a regulation of nude dancing. These different objectives lead to two different approaches to a s. 1 analysis; one analogous to that in the *Prostitution Reference*;[159] and another to that in *Butler*.[160]

2. Proportionality — Rational Connection

Regarding the objective of preventing social problems, government would have to provide some evidence associating problems such as excess consumption of alcohol, prostitution and criminal activity in bars where nude dancers perform. The connection is not as direct as in the case of street solicitation. The court would have to find that the prohibition of a form of entertainment is rationally related to the goal of reducing problems associated with bars that provide that form of entertainment. Rationality is dependent on finding that there is at least a correlation between the form of entertainment and the problems. In fact there may be no such correlation. An Alberta inquiry failed to find one.[161] Lack of evidence of

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158 I refer exclusively to concerns relating to the degradation of women, although some nude dancers are male. I have done this because women are the focus of the arguments as to harm advanced in this area and accepted, with regard to obscenity, in *R.* v. *Butler*, *supra* note 16. The *B.A.A.C. Report*, *supra* note 9, noted that arguments that nude dancing degraded women were presented to it, but that "[s]imilar arguments were seldom, if ever, advanced with respect to male nude dancers." In *Butler*, the court discussed the harm caused by violent or degrading pornography particularly in terms of its effect on women (at 596-597, 609).

159 *Supra* note 70.

160 *Supra* note 16.

161 *B.A.A.C. Report*, *supra* note 9, did not find any such correlation. The Committee found that there was no correlation between nude dancing and sexual misconduct, adding that "[s]everal licensees reported other forms of entertainment cause more negative conduct among patrons." The Committee also found that "[a]ny increase in alcohol consumption in licensed premises would appear to be a result of increased numbers of patrons rather than an increase in the amount of drinking by individual patrons."

a correlation would mean that the s. 1 test, even in a deferential form, is not met. This demonstrates that all expression, whether or not it is clearly related to the values underlying s. 2(b), does receive a degree of protection under the *Charter*.

The objective of preventing the exploitation and degradation of women remains to be considered. Preventing the exploitation of dancers through a prohibition of nude dancing is very indirect. The exploitation of performers depends much more on factors such as their age and on other conditions of their employment, rather than on whether they are nude or minimally clothed. Legislation can deal with the appropriate factors so much more directly, that even the rationality of this connection must be suspect.[162]

With regard to the fostering of negative attitudes about women, nude dancing does not necessarily involve the type of portrayal of women that has been clearly linked to such attitudes. The Supreme Court of Canada in *Butler* accepted evidence and opinions connecting violent or degrading pornography with harm to women. Sexually explicit pornography without violence or degradation was not so connected.

How does nude striptease dancing compare with these categories of pornography? Nude bar room dancing involves nudity in a sexually explicit context. While some may feel this is sufficient to create harm, or is degrading to women because it involves them in performing as sexual objects for the attention of men, this is not a position supported by substantial evidence or a substantial consensus, as is the case with violent or degrading pornography.[163] To find that nude dancing could be

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[162] *B.A.A.C. Report, ibid.* recommended that the minimum age for performers be 18 years, that the stage and access between the stage and the change area be kept separate from patrons, and that physical contact between performers and patrons at any time on the premises be prohibited.

[163] The concern relating to the degradation of women was very briefly referred to in the *B.A.A.C. Report, ibid.* While community consensus as such was not discussed, a lack of consensus may be reflected in the finding that "The issue of

prohibited because it degrades women would make meaningless the holding that sexually explicit pornography is not prohibited and cannot be prohibited.[164]

Sexually explicit pornography involves women performing for the purpose of sexually arousing a predominantly male audience. However one defines "degradation" or "dehumanization,"[165] it must mean something more than sexually explicit performance by women for men. If this is constitutionally protected, as the *Butler* decision indicates, so must be nude dancing in bars. Nude dancing that is performed in a violent or degrading context is prohibited. Nude dancing involving simulated violence or bondage, or other representations sufficiently degrading to fall below the community standard of tolerance, would violate s. 167 of the *Criminal Code*, interpreted in accordance with *R.* v. *Butler*. Absent this context, "mere" nude dancing, like sexually explicit pornography, is protected.[166]

Although neither freedom of expression nor the degradation of women were discussed in the case, the recent Supreme Court of Canada decision of *R.* v. *Tremblay*,[167] considering indecency in the context of a bawdy-house charge, provides support for this conclusion. Nude dancers

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degradation of women is difficult to assess. Some presenters felt that nude dancers, by their existence, represented a degradation of women's image in the eyes of society. Others held the view that nude dancing is a legal and legitimate method for a woman to earn a living."

164 *R.* v. *Butler*, *supra* note 16, and see text, *supra* accompanying note 112.

165 See *supra* note 105, and accompanying text, for guidelines found in *R.* v. *Butler*, *supra* note 16.

166 Sexual depictions involving animals would likely fall in the category of degrading representations. This may account for the *B.A.A.C. Report*, *supra* note 9, recommendation that the use of animals be prohibited. The *B.A.A.C. Report* also recommended that only one person be permitted on the stage at a time. While excluding "duo" acts may prevent some degrading representations, it would not necessarily prevent all, and would also prevent acts that are sexually explicit, but not violent or degrading. As indicated, *supra* note 12, this restriction may be challengeable under the *Charter*.

167 *Supra* note 16.

performed in individual cubicles for clients who were permitted to undress and masturbate. In finding that these acts were within the community standard of tolerance, the majority commented as follows:

> It is clear from the evidence that the actions of the dancers at the Pussy Cat were very similar to those of dancers in strip bars. The performances of the dancers in strip bars were clearly accepted by the public and by the police. This indicates that there was indeed a community tolerance for sexually suggestive acts performed by naked dancers. These actions are not violent and in the milieu of the strip bar they are accepted or at least tolerated by the community. It follows that the actions of the dancers in the Pussy Cat would be tolerated by the community.[168]

Thus, in my view, a prohibition of nude dancing is not rationally connected to the objective of preventing the degradation of women, and the s. 1 test, even applied in a deferential manner, is not met. Alternatively, these same arguments could be raised at the next, minimal impairment, stage of the s. 1 test.

3. Proportionality — Minimal Impairment

Returning to the first objective, the prevention of social problems associated with bars, and assuming that there is evidence of a correlation of social problems with bars where nude dancing is performed, sufficient to meet the rational connection test, would this suffice to uphold a prohibition of nude dancing? The answer depends on the strictness with which the s. 1 test is applied. If a strict s. 1 review required that

[168] *Ibid.* per Cory J., McLachlan J. and L'Heureux-Dube J. concurring. Gonthier and La Forest JJ. dissented, distinguishing these acts from strip bar performances: "The performance [involving the use of a vibrator] was not merely evocative of sexual imagery and sexuality, but was a performance of a sexual act." The dissent did not question the evidence or the majority holding that strip bar performances met the standard of community tolerance.

government establish that its means were likely to be effective[169] (that crime would diminish or drinkers stay home) or were minimally intrusive (that alternative measures, such as restricting the amount of alcohol or stepping up law enforcement, would not suffice), there is a significant possibility that the regulation would be struck down.[170]

Should there be a stricter standard of review or should the deferential standard of the *Prostitution Reference* apply? In my view a stricter standard should apply. In the *Reference*, the expression involved was purely commercial, the proposition of an economic transaction. The expression directly supported the underlying transaction, which was implicitly viewed as harmful,[171] and served no other purpose. It was treated by the majority as possessing an almost complete lack of value.

Entertainment is economically motivated, but potentially has other dimensions as well.[172] To characterize entertainment of any form as possessing no value ignores a real potential for political, educational and artistic values. Nudity in entertainment may contribute to these values in important ways, as in the musical "Hair." Nude dancing, whether or not it frequently achieves this, can have aesthetic value and can explore erotic or other themes. This potential deserves consideration. Such consideration may be provided through a generally stricter s. 1 test, which would likely result in the regulation not being upheld. Alternatively, the minimal impairment aspect of the proportionality test could be directed to require

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169 By analogy to the minority approach in *R.* v. *Keegstra*, *supra* note 54, which considered the effectiveness of a criminal prohibition of hate propaganda under the rational connection branch of the s. 1 test.

170 This was the approach of the dissent in *Barnes* v. *Glen Theatre, Inc.*, *supra* note 1.

171 This point is referred to in *supra* note 90.

172 *R.* v. *Butler*, *supra* note 16 at 612, 615-616 stated that an economic motive should not defeat the artistic defence, but also indicated that the large majority of pornography had an exclusively economic motive and would not engage this defence. Nonetheless, the potential was respected through the provision of the defence.

that nudity integral to valuable expression be exempted from the regulation.

How could this be achieved? At the very least, the regulation should not apply to the "legitimate theatre." Dinner theatres, or theatres serving alcohol during intermission, are subject to liquor licensing regulations. Restrictions on nudity in these contexts could clearly interfere with valuable artistic expression. Any regulation prohibiting nudity should be drafted so as to exclude such potential applications.[173]

One means to protect nudity integral to valuable expression is through an artistic defence.[174] In s. 174 of the *Criminal Code*, such a defence is provided in the case law that has interpreted a "lawful excuse" for public nudity as including legitimate entertainment.[175] Provincial prohibitions of nude dancing do not tend to include such a defence, but attempt to isolate less valuable expression by the nature of the regulated establishments, assuming that the dancing performed in bars or similar establishments lacks any artistic quality. This may be true in the large majority of cases in fact, but is not true as a matter of definition in law, and so gives rise to potentially overbroad and unconstitutional applications of the law. Whether such occasional overbreadth necessitates a remedy is not clear. It may be that the combination of the typically lesser value of the expression and the confinement of the regulation to certain "problem" premises would be sufficient to satisfy the minimal impairment branch of the s. 1 test. Artistic performers would not, after all, be prohibited from performing in the nude in any circumstances, but only in premises found to be associated with particular social problems.

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[173] Apart from the more valuable expression in these contexts, a rational connection with harm (evidence correlating the establishments with social problems) seems highly unlikely.

[174] *R.* v. *Butler*, *supra* note 16, requires a generous interpretation for such a defence; see the text, *supra* accompanying notes 117-119.

[175] *R.* v. *Verrette*, *supra* note 19; *R.* v. *Zikman*, *supra* note 19.

One may object that not only artistic nude dancing should be protected; that all nude dancing is expression and does not cause imminent harm, or any harm associated with it can be controlled without censoring the expression. Accordingly, the argument would conclude that nude dancing should therefore be immune from censorship. But the s. 2(b) jurisprudence makes this classically American approach[176] to free expression not maintainable. Nude dancing is expression and merits s. 2(b) protection; but if its content lacks value the link to harm need be only rationally perceived. Correlative social problems would likely give rise to a sufficient rational basis for regulation. The protection under s. 2(b) of expression that is not related to the section's underlying values does provide some protection, but does not colour such expression with an importance that overrides all other interests.

With regard to the objective of preventing the degradation of women, I have argued that nude dancing is not sufficiently connected with that harm to satisfy the rational connection test. Alternatively, the same arguments could be applied under the minimal impairment test. Some nude dancing, that which is degrading and dehumanizing in its presentation, may cause harm to women's right to an equal position in the community, but not all nude dancing will do this. Prohibiting nudity, without regards to other aspects of the presentation, results in an overbroad regulation. Further, in this context as well, the lack of an artistic defence or other means to protect nudity integral to valuable expression, gives rise to a potential for unconstitutional overbreadth.

VII. Conclusion

I have reviewed provincial and federal regulations of nudity in the context of striptease dancing in bars or similar establishments. I have argued that, notwithstanding some judicial pronouncements to the contrary,

[176] As applied by the dissent in *Barnes* v. *Glen Theatre, Inc.*, *supra* note 1. The stricter approach to s. 1 referred to in the text *supra* accompanying notes 169-170 is comparable and therefore is suggested as applicable only in the event that valuable expression is not deleted from the regulation.

there is a very strong case to be made that these regulations purposefully restrict free expression and constitute a prima facie violation of s. 2(b) of the *Charter*. Recognizing the s. 2(b) implications is particularly important, as it means that government is constitutionally restrained from prohibiting nudity in the "legitimate" theatre or art. The interpretation of s. 2(b) of the *Charter* results in a more significant restraint in this regard than current American first amendment jurisprudence.

I have also argued that the s. 1 test may not be met, although this conclusion is qualified and depends on the evidence and the exact nature of the prohibition. Evidence of social problems happening in and around bars in which nude dancers perform might justify a prohibition, provided the prohibition was limited so as to prevent or minimize any impact on artistic expression. But a lack of such evidence should mean that the s. 1 test would not be met.

I have argued that concerns relating to the degradation of women are not closely enough connected to nude dancing to justify its prohibition, and found support for this in the case of *R.* v. *Butler* and its treatment of sexually explicit pornography. A s. 1 analysis of a prohibition of nude striptease dancing provides an interesting example of the nature of constitutional protection provided to expression that, while not clearly related to the values underlying s. 2(b), is also not clearly harmful. While the *Charter* does not prohibit any restriction or even any content-based restriction of such expression, it does impose some significant limits on permitted restrictions. Restricted expression must be shown to be harmful, and the courts' assessment of this places constraints on both the type of harm and the type of connection to harm that will be sufficient.

THE ACADEMIC AND THE POLITICAL: A REVIEW OF *FREEDOM AND TENURE IN THE ACADEMY*

by William W. Van Alstyne, ed.,
(Durham: Duke University Press, 1993).

Frederick C. DeCoste*

> Freedom is always and exclusively freedom for the one who thinks differently.
>
> Rosa Luxemburg

If Euro-American culture is in crisis — and, for reasons which will become apparent, I want to proceed with this review on the understanding that it is — then surely the university in the West, the very custodian and carrier of that culture, is also in crisis. This diagnosis with respect to the university is of course not novel.[1] Nor is it rare. Indeed, recent years have witnessed a plethora of publications lamenting or prophesying the passing — or, perhaps more accurately, the disintegration — of the university as a singular accomplishment of Western culture.[2] Circumstances such as these would appear to be the happiest of times for a collection such as Van Alstyne's which is devoted in its entirety to freedom and tenure in the modern academy.

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1 See for instance: C. Dawson, *The Crisis of Western Education* (New York: Sheed and Ward, 1961).

2 See for instance: A. Bloom, *The Closing of the American Mind* (New York: Simon and Shuster) 1987); R. Kimball, *Tenured Radicals: How Politics Has Corrupted Our Higher Education* (New York: Harper & Row, 1990); P. Smith, *Killing The Spirit* (New York: Viking, 1990); H. Dickman, ed., *The Imperiled Academy* (New Brunswick, U.S.A.: Transaction, 1993).

Originally published in 1990 as a symposium in *Law and Contemporary Problems*,[3] the collection was occasioned by the fiftieth anniversary of the 1940 Statement of Principles on Academic Freedom and Tenure issued jointly by the American Association of University Professors (AAUP) and the Association of American Colleges (AAC). This two page declaration of norms for academic practice is constitutive of the American view of the academy, a view which has since migrated in some measure throughout the West and in significant measure to Canada. In this review, I want to measure the collection's nine essays as a response to the crisis of the contemporary university and as a contribution to the debate about the university's possibilities and prospects.[4] I will first discuss the dimensions and substance of the situation in which the university presently finds itself; I will then read the collection with a view to determining whether it can be fairly said to provide an articulate defence of the university or whether instead it instantiates the problems the university is facing. Two things will become clear through this exercise. It will become immediately apparent that I take the university to be in a crisis that is so substantial and so wide-ranging and deep that the university's very integrity – its *raison d'être* – is now very much at issue. It will also become clear that I find this collection – primarily because of its everywhere inadequate view of the university – more to evince than to respond to the crisis.

I. The University: Process or Power

The university is currently viewed in two fashions, one traditional, and the other of much more recent origin. The traditional view – which dates from the emergence of the university in twelfth century Europe – offers

[3] (1990) 53 L.C.P. 1-418.

[4] W.W. Van Alstyne, ed., *Freedom and Tenure in the Academy* (Durham: Duke University Press, 1993). In addition to the essays, the collection also contains an unannotated bibliography on academic freedom (at 381-92), a response – which did not appear in the original symposium – to one of the essays (at 419-29), and three appendices containing the texts to the 1940 Statement, to its 1915 precursor, and to its progeny, the 1967 Joint Statement on Rights and Freedoms of Students.

an *idea* or concept of the university according to which the university, though institutionally clothed and embedded, is a cultural *practice* or *process*. In contrast, the newer view – which dates at least from the time of Marx[5] – takes a *position* with respect to what is and what properly ought to be the *function* of the university. These views are not merely different; much more significantly, they stand in contradiction to one another. Indeed, the crisis in which the university finds itself exists to the extent to which the newer functionalist position with respect to the university has displaced the traditional practical idea of the academy. I take it that the displacement has been sizeable indeed. In arguing to this view, I will first describe the views and then draw out their implications in terms of both academic freedom and tenure and the status and significance of the university in societies such as ours.

As traditionally conceived, the university is the practice of *enculturating* generation after generation into the heritage of the West. Under this view, university education is the process through which people become Westerners – literate speakers of a specific cultural idiom (in institutional and political matters, the vocabularies of autonomy and rights), committed members of a certain cultural community (defined not by nation-state citizenship, but by a canon which speaks from the past, is constitutive of the present and the possibilities of the future, and is open to all), and devout believers in a universalist cultural ethos (about which more in a moment). University process is not for this reason a matter of indoctrination or inculcation, nor is its practice orthodoxy just because the heritage which is being enculturated is one of critical inquiry and contest. That is, in the West, culture and philosophy – citizenship and truth, meaning and enlightenment – have been thought to be synonymous within

[5] I identify Marx in this regard because of his insistence that all cultural forms – law, religion, education, family, and so on – exist at a superstructural level which serves to reproduce and to defend the relations of power of which societies are materially constructed. I take this view to be securely a part of the radical imagination which informs much of the functionalism now current in the academy.

(and only within) the academy.[6] For this reason, university practice is not reducible to runic observance of the past, but contemplates at its very core the extension of the heritage through the discovery of new knowledge and the production of new languages and commitments.

The traditional idea of the university is, in consequence, centrally and critically a part of the emancipatory impulse which characterizes the West. Above all else, Euro-American culture resides in the promise of freedom from the contingencies and tyranny of the local and in a commitment to liberation through institutional and political arrangements. Central to this project — and to the university which is foundational to it — is a modest belief in the possibility of truth. This belief is modest because it does not require a commitment to the existence of unchanging, eternal verities or a pledge to any Archimedean epistemology. It demands only a belief in the possibility of adjudication, namely, that it is possible to assess propositions in terms of reason and evidence. Absent such a belief, of course, neither the liberatory project in general nor the university in particular are possible as cultural practices, since in that event, institutional and political arrangements and practices are never really assayable and must be determined instead by power alone or — and this amounts to much the same thing — by groundless persuasion.

If this is properly the location of the traditional understanding of the university, then the university is, according to this view, essentially liberal.[7] It discloses its liberal character not only inasmuch as virtually all

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6 For a contrasting view of the university's cultural and philosophical missions in perpetual tension – as well as for a superlative overview of the idea of the university in Euro-American culture — see: Olsen, "Deconstructing the University" (1992) 18 Faith and Reason 53.

7 It is probably worthwhile to state more directly the implication of this: it means that the university as such — that is, as an at all identifiable practice and institution is incurably liberal in nature. And this in turn means that to the extent the university ceases to be liberal in its practices and in its ethos, it in a very real sense ceases to be a university at all and becomes some other sort of practice and institution, most probably either a forum for indoctrination or for training. In this light, to say that the university is liberal is an unnecessary

of its practices depend upon appeals to reason, but more deeply in that it shares with liberalism specific attitudes towards cultural and historic difference, towards the corrigibility of human affairs and arrangements, and — at the very basis of matters — towards the nature of human personality. The university is egalitarian because it denies the moral, political, and institutional relevance of differences between persons; and it is universalist because it affirms the moral unity — the cosmopolitan nature — of persons despite the particularities of the local and the parochial.[8] Like liberalism more generally, the university is also meliorist. It looks at the past not as a source of dread, but as an invitation to an improved tomorrow. This is the very meaning of the university's maintenance and creation of the canon: in these acts, the university devotes itself to the porousness of the present and to the openness of the future. Human arrangements and institutions are corrigible because we are not condemned either to an imperfect past or to an eternally returning present. Finally, the university is individualist. Because it values the universal over the particular — the cosmopolitan over the local — it stands for the moral and political primacy of the individual over the claims of any collectivity, and this regardless of the particularity — whether race, class, gender, ethnicity, or whatever — in terms of which such claims are made. For the liberal university, the individual is the first and last of matters because it is the individual's freedom to inquire that is foundationally the university's process, practice, and purpose.

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redundancy. We will have cause to consider these implications further when we come to consider the essay on the status of religious universities which is contained in the collection.

[8] By way of abundant caution, I should add that this does not mean that the university nor liberalism itself — is blind to the realities of race, class, and gender. It means only that for the liberal, and for the liberal university, the local is secondary to the universal in terms of political and institutional arrangements and in terms of justice. This is so because liberalism values freedom over equality and values equality chiefly in terms of its service to liberty: which is to say, liberalism and the liberal university — is committed to formal equality, the equality of the noumenal, universal subject.

It is precisely because the university is a liberal practice that it demands an institutional arrangement of academic freedom and tenure. The calculation to this result is straightforward enough. Because the university is the process of enculturating persons into the West's heritage of critical inquiry — which is to say, into its heritage and ethos of freedom — as an institutional matter, it must guard against the appropriation of the process by the local and the parochial. Viewed in this fashion, freedom and tenure are institutional prohibitions: they prohibit private and public tyranny over both the past and the possibilities of the future. No one — no particular interest, party, group, or individual — can appropriate the past in service of a managed and therefore closed future. Freedom and tenure perform this service by rendering sacred and beyond management and regulation the beliefs and conduct of the citizens — professors and students — of the academy.[9] Academic freedom protects conduct and belief by enveloping both in a sphere of inviolability. Tenure achieves the same end by making exceedingly difficult institutional excommunication: institutional citizenship can only be lost for academic treason, namely, the failure to act upon the call to free inquiry. Freedom and tenure, then, serve the academy in precisely the same fashion as rights and citizenship serve liberal political arrangements. Indeed, freedom and tenure are rights and citizenship in the academy.

Freedom and tenure define and structure the whole of the academy's practice. Self-governance and collegiality are ethical corollaries of freedom and tenure. If the university is a practice of freedom and citizenship, then

[9] The only defensible limitation to this freedom is the Millian one. That is, the individual's freedom can, in liberal terms, properly be contained only to the extent that its exercise demonstrably diminishes the freedom of another in politically significant ways. In consequence, in liberal societies and institutions, debates about the propriety of regulation always concern — and only concern — two determinations: first, whether in fact the conduct in question diminishes the liberty of any specific and identifiable individual; and second, if it demonstrably does, whether that diminishment is significant enough in degree and kind to warrant an overall diminution of freedom through regulation. I will argue shortly that in the university, this prescription is observed more by breach than by obedience.

it is axiomatically committed to democratic structure and process since commitments in any other direction would involve the university in gross contradiction.[10] Likewise collegiality: civility and support between and among institutional citizens are practices of recognizing, honouring, and — along with tenure — sustaining the sphere of freedom in which each is enveloped. University teaching and scholarship too finally only make sense in terms of freedom and citizenship. Scholarly life is a vocation: it is a response to the Western call to freedom. Scholars act on that call when they take free inquiry and its wide-spread enculturation as their practice. This they do not just through their research and publication, but equally through their teaching. University teachers are called professors for a reason, at least in the liberal view of the matter. They are professors — and not merely trainers or instructors — because they profess something; and what they profess, through their practices of teaching and their scholarship, is their commitment to freedom, to free and open inquiry in a free and open cultural space called the university. For this reason, teaching and scholarship are irretrievably interdependent. One cannot do without the other: absent scholarship, teaching becomes reduced to training because the teacher will have nothing to profess; and absent teaching, the scholar is without a locale to act on the call to enculturation.[11]

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[10] Democracy in these senses does not prohibit hierarchical governance in the university. Inasmuch as university hierarchy may ensure accountability in terms of the university's mission, it may indeed — and this applies equally to trustee/professorate and professorate/student hierarchies — be a requirement of self-governance. To the extent, however, that university hierarchy performs any role besides or beyond custodianship, it is entirely indefensible in terms of either of the principles — freedom and citizenship — on which university practice alone is based. I take the view that much of what parades as custodianship is instead an exercise of power plain and simple. And I will argue shortly that current illegitimate university hierarchy is much to blame for the sorry state in which the university finds itself.

[11] For these reasons, any nominations concerning the non-teaching scholar or the non-publishing teacher are pure nonsense, as are any number of present practices concerning teaching and scholarship. The notion of student centred instruction which since the 1960s has successfully migrated from the public school system (where, incidentally, it is just as indefensible) to the university is a case in point. This notion has compelled the ludicrous practice of assessing professorship in

I want now to turn to the other view of the university – the functionalist view on which I have already placed the responsibility of threatening the university's cultural existence. The functionalist understanding of the university – make no mistake – constitutes a major shift in consciousness of the idea of the university, because inasmuch as it displaces the traditional view, it fractures the heretofore standing idea of the relationship between the university and the larger culture. For the functionalist, the university is always an institution which exists to maximize some utility – which is to say, the university in its entirety is reducible to the function it serves. Because different utilities are identified and subjected to very different normative assessments, the functionalist view is expressed in a variety of ways and from a variety of quarters. We will, therefore, undertake our exploration of the functionalist view by first identifying its various redactions. This is most readily done in terms of the origin of the views, and more precisely, in terms of whether they arise from within or without the university.

While there may be other sites of prescription external to the university, the state is clearly the predominant and most influential one. The state defines the publicly funded university's function – need I say? – in terms of the economy. This definition takes the form of demands for the production of technologies and personnel of use to the market. State prescription raises two fundamentally important questions, namely, what is the proper relationship between the university and the liberal state, and between the university and civil society?[12] The university's critical

terms of student evaluations which only make sense on the view that students are consumers and teachers suppliers to consumer demand. There is, of course, no room in this view for accountability in the service of freedom or for free inquiry or profession. The practice in assessing scholarship on an annual basis and often in terms of the girth of the annual yield is another. It too debases the scholarly enterprise by characterizing it in an entirely functional fashion. Under this view which, of course, contradicts the ethic of collegiality – scholarship is just a matter of inputs and outputs, a matter of production and not of profession.

12 Besides the political effects and implications to which I will turn in a moment, state definition has affected the public university quite intimately at the organizational and programmatic level. State demands have had the effect of both

contribution to the flourishing of liberal culture defines – and precisely so – the political substance of university/state relations: for the university to make that contribution, the university must be independent from the state, *and* the state must be the guarantor of the institutionally embedded freedom that is the university. By pressing its functionalist demands, the state, of course, has both diminished the independence of the university and forsaken its role as guarantor. With respect to the public university, the state has instead assumed the position of patron and manager. Under this view, the university is but a part – along with community colleges, technical schools, and so on – of the grand fabric of higher education which the state supports and schools. This state of affairs begs the question whether the private university alone is the proper institutional form of the university. Clearly in Canada, where the private university is noted solely by its absence, an affirmative reply to this inquiry would have devastating implications. In my view, the defining conditions of university independence and state guarantee can be accomplished with respect to the public university only if two further conditions are met. First, the state role of guarantor must be preserved and prescribed in law, preferably – as is the case in America – in the law of the constitution. Secondly, the public university itself must be literately and passionately committed to the liberal ethos of the university. While easily stated, this second requirement presents much challenge. Some years ago, in a monograph on the state of academic freedom in Britain, Anthony Arblaster concluded that "the most direct attacks on academic freedom ... come from academic authorities themselves" and that "it is their gross and arbitrary power which ... constitute(s) the most serious threat to educational freedom."[13] When we come to discuss functionalism internal to the university, I will argue that very much the same state of affairs exists in the North American academy. For now, suffice it to say that the welfarist demands of the state have had the impact they have had, primarily through the illiterate connivance of the

proliferating new "disciplines" and of eliminating or diminishing others. Though I do not wish to dwell on the matter here, this has resulted in a fracturing of the academy, especially to the extent that it has led to specialization and isolation.

[13] See: A. Arblaster, *Academic Freedom* (Harmondsworth: Penguin Education, 1974) at 94.

public university's institutional hierarchy. In any event, unless these conditions are met, the public university is not a proper locus for the liberal practice of the university.[14]

The university's cultural mission also defines its proper relationship to civil society. Contrary to the state's functionalist view — which, as we have seen, would reduce the university to a supplier of technologies and scientific knowledge — the relations between the university and civil society are rich, deep, and varied. Habermas points, "above all, [to] relations to culture as a whole, to socialization processes, to the continuation of tradition, and to general issues in the public sphere."[15] This statement of the matter will serve our purposes here. Now, notwithstanding what I take to be a prevalent backsliding in the North American academy — and this especially in the public university's easy accommodation to state inspired functionalism — the university, really quite despite itself, continues to be the repository of tradition and initiation and of inquiry and contest. Yet its failure as an institution to passionately and effectively commit to and defend its cultural mission has had the unhappy consequence of isolating and alienating it from what Habermas calls the "life world" of liberal society.[16] Which is to say, the population and institutions of liberal society exhibit no conscious appreciation of the centrality of the university to liberal culture; civil society, rather, generally takes the university in a fashion as fully functionalist as the welfarist

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[14] The liberal state's attitude towards the courts stands in stark contrast to its pragmatic view of the university. The state takes the independence of the judiciary to be its very substance, and it guards, protects, and indeed guarantees judicial independence by, among other things, refusing to follow even the strongest possible popular calls for the application of various utilitarian measures to the courts. This is the result, of course, of the idea of the judicial — namely, disinterested justice — being firmly anchored in the state's cultural imagination. The idea of the university occupies no such similar place. On the contrary, the public university, at least, is conceived as just another program and expense of government.

[15] See: Habermas, "The Idea of the University — Learning Processes" (1987) 41 New German Critique 3 at 17.

[16] *Ibid.* at 16.

state's prescription. Given the functionalist temper of the times, this result is particularly unhappy. Were civil society committed to the idea of the university, the university would not only have an ally in its mission, but would itself have cause not to so easily accommodate itself to present circumstances.

I have been arguing that the university does much more damage to itself than it suffers from any external source, including the state. I wish now to carry that argument much further by way of investigating the functionalism which is today prevalent within the academy itself. The impulses which ground this reductionism are vastly different from the ethical complacence and compliance — not to mention the crass careerism — which give rise to the university hierarchy's easy accommodation to external pressure.[17] What I will term the radical critique is not fuelled by mere connivance or by ethical sloppiness or sloth. It is propelled, rather, by a principled rejection of the very idea of the university and by a millenarian ethic of a specific sort. I will describe and explain these foundations before proceeding to draw out their implications for the university in general and for academic freedom and tenure in particular.

I mentioned earlier that the possibility of knowledge grounds the liberal idea of the university. This is so because absent the sovereignty of reason and evidence – and the possibility of adjudicating between opinions which reason and evidence alone make possible – the academic is reduced to the political, which is to say, to power plain and simple. At its core, the radical critique of the academy is a rejection of knowledge in these senses. And it is this rejection which informs the radical claim that the academic *is* the political always, everywhere, and all the way down. In order to make sense of that claim, it is necessary to uncover in more precise terms the cause in service to which knowledge is rejected.

[17] The two are, however, related inasmuch as the spread of illiberal views and practices within the academy has been nurtured by the same unprincipled complacence and compliance and the very same gross self-interest.

Under the liberal view of things, knowledge is finally possible because of the moral unity of humanity. This humanism relegates the local and the particular to secondary importance, and in so doing, defines human subjectivity in terms of the cosmopolitan. Central to liberal subjectivity is the notion of objectivity, namely, a belief in the human capacity to put aside the contingencies of the particular and to act and reason autonomously and with a view to the universal. Human persons are not captives of their biographies, and can, in consequence, speak and reason across the contingencies of race, class, and gender. The radical rejection of knowledge and its political claim with respect to the academy issues from a fervent objection to the liberal construction of human personality. The form of the objection is familiar. Contrary to the liberal view, humanity is defined not by the common, but by difference; and in consequence, the local and not the cosmopolitan — about which more in a moment — is primary. It is in terms of our specificities — our race, class, and gender, and our historic associations and cultural location — that we become and are human. This anti-humanism compels the rejection of the liberal idea of knowledge because if we are truly captured by the happenstance of the particular, then there is nothing to appeal to besides the particular and appeals of that sort will have significance — indeed, intelligibility — only for those similarly situated. Incommensurability, of course, renders empty any claim to adjudicative competence: reason cannot exist nor can evidence be sent or received across the inviolable barriers of difference.

The fervency of the objection may be less familiar. In the final analysis, anti-humanists including the radical critics of the academy — reject humanism and make their grand wager against nihilism because they take humanism to be a cruel reification. The liberal assertion of unity and equality among persons not only clothes the facts of power in the mystery of abstraction, but in so doing, it has served as an instrument to sustain and protect the relations of domination and subordination — by race, class, gender, and culture which have been seamlessly the lived experience of

persons throughout history.[18] It is in service of the transformation of this history that radicals reject the liberal politics of unity and adopt in its stead a politics of difference and identity. If the particular has been the locus of subordination in history, then a transformational politics which aims at substantive equality and substantive justice must too be based in the particular. Otherwise, the reality of power can too easily become hidden in the vocabulary of unity, rights, and reason, and radical practice too readily lost to the liberal seductions of accommodation and compromise.

Radical egalitarianism is pursued at great cost to the academy. The politics of identity which are its practice have eroded, and threaten entirely to transform, the idea of the university and the academic practices which are its substance. If the university, like the whole cloth of the past, is contaminated because forever productive of relations of domination and subordination, then it remains to be abandoned or transformed. The radical critique seeks its transformation through a cynical *real politik*. Since the university is a matter of power and not of process, and because the academic is, for that reason, always and already the political, the real question is whose politics – and whose power – will prevail? Viewed in this way, the university, like all other institutions and practices which comprise our heritage, is a locus for the struggle by the victims of history to end their subordination. This understanding begs two very critical

[18] Terry Eagleton has expressed this fervency as eloquently as anyone. In a piece in which he is discussing the crisis in the humanities, he offers the following with respect to reading and politics:

> [T]here is a way of reading – difficult and delicate – which can, so to speak, X-ray the text in order to allow to emerge through its affirmative pronouncements the shadowy lineaments of the toil, misery and wretchedness which made it possible in the first place. The only good reason for being a socialist, in my opinion, is that one cannot quite overcome one's amazement that the fate of the vast majority of men and women who have ever lived and died has been, and still is, one of fruitless, unremitting labour.

See: T. Eagleton, *The Significance of Theory and Other Essays* (Cambridge: Blackwell, 1990) at 32-33.

questions. If the university has been an exercise of power productive of race, gender, and class hierarchies, and if it is yet to be salvaged through radical transformation, then it must have a *raison d'être* within the radical utopian ethic. And indeed it does. Radical transformers within the academy have reconceived the university in terms which conflate the ethical and the functional and according to which the academic is the vanguard for cultural transformation generally. This account asserts a grand instrumentality for the university: if only the culture of the academy changes first, the rest of the culture will follow in obedient suit. For this reason, it also commits the university to welfarist experimentation. To function properly as the agent of transformation, the university must serve as a crucible in which radical strategies for substantive race, gender, and, much more rarely, class justice and equality are tried, selected, and refined.

The other question concerns the calculation of success. If the university is indeed a battleground for power, then determining who is winning the struggle becomes a crucially important matter. Since, however, the traditional calculus of reason and evidence has already been disclosed to be the manner and manipulation of power by the privileged, some real indicia of political success are required. In the radically reconceived university, the answer to this question is immediately apparent: those who succeed in regulating the academy — the content of its practices and the conduct of its citizens — are winners in the cultural battle which is the university. Before proceeding to discuss the impact of the reconceived university on academic freedom and tenure, I wish first to investigate in some detail the practices of regulation within the university, since the "how" and "what" of regulation have very much influenced what I will later argue has been the progressive diminishment of freedom and tenure.

If the silence of the law is, in any significant respect, constitutive of freedom, then the first thing that can always be said of regulation is that to the extent it succeeds, it necessarily diminishes freedom. This, of course, is as true in the academy as anywhere else. To the extent it is subject to regulation, the practices of the academy are less free than they would otherwise be. But this axiom, while true, fails to capture with sufficient precision the politics and practices of regulation within the

academy. In order to get a fuller sense of the matter, it is crucial to recall that radical politics and practice issue from disenchantment. The university is cruel illusion, and all the talk about truth and reason really conceals moves of power which victimize the many and empower the privileged few. These sentiments define the moral character of regulation in the academy which I take to be one of resentment and piety. If the university is sham, then any politics whose aim is to transform the lie will necessarily proceed from indignation. This feeling of having somehow been given offence is everywhere present in the academy. Countless students take the whole process of the university as an imposition, however variously they may conceive of the matter; collegiality is routinely subjected to tests of allegiance and, thereby, rendered an elective ethic; and administrative processes and bodies, both traditional and novel, have been enlisted as guardians ever watchful for offensive conduct or nuance.

Inevitably, these politics of resentment produce regulations of piety and, as a corollary, practices of intolerance and surveillance. Piety exists in fervent and unthinking devotion to some principle or practice, in a moral attitude which takes the absence of offence as virtue, and in a political practice which both produces and becomes pledged to prohibitions. To the extent that radical critique has defined institutional practice — and that definition is contemplating more and more institutional space — the university has become a pious place indeed. In many quarters, including those careerist regions occupied by the university administrative class, various codes of piety are now thought crucial, as indispensable evidence of a properly progressive institutional countenance and practice. These codes issue from and seek to insulate the politics of localism which grounds the radical critique. Their purpose is to regulate speech and conduct in the service of race, gender, and increasingly ethnic welfarism, and this they do by parodying the legal. Like the law, they define offences — here offences against the pieties of difference — command obedience, and prescribe policing. Yet the codes are a weak and poor imitation of the legal. Not only do they tend to the byzantine, they invert the law's logic: instead of seeking always to serve the liberty of the accused, the codes of the re-invented university take as their exclusive concern and focus the welfare of the allegedly subordinated who, without more, are always the

victims. Thus, while the law attempts to define the limits of tolerance case by case, university codes, like all moralism, proceed from a definition of the intolerable and are, in consequence, practices of intolerance which seek to impose what they take to be righteous conduct and not merely to advocate its private cultivation.

Moralism corrodes the integrity of academic freedom and tenure, and not just in the obvious senses that regulation both diminishes freedom and chills its practice. Much more significantly, the politics of piety which are threatening to become the pith and substance of the academy compromise their conceptual and moral foundations and their very possibility as practices. If the university is an exercise in diseased power, then academic freedom and tenure can no longer serve as ideals and must instead be seen as ideologies which produce, defend, and sustain relations of domination and subordination. As with the idea of the university more generally, freedom and tenure are, under this view, pure power moves which have been hidden in the abstractions of freedom and reason. What is called freedom in the academy is in fact an orthopraxy which pursues power not pluralism and promotes uniformity at the price of exclusion. Likewise tenure: never the practice of freedom, tenure is rather a methodology by which those with power protect and perpetuate their status.

If that which parades as truth in the academy is merely the perspective of the dominant by which the many are ideologically seduced and materially victimized, then teaching and scholarship too must be recalculated both descriptively and prescriptively. As re-invented, teaching and scholarship are political practices: despite whatever they may claim to be about, including free and reasoned inquiry, the business of professors is always a matter of taking sides, of allegiance, and of proselytism.[19] On this understanding, what really matters in teaching and scholarship is the political character of the side taken, the fidelity pledged, and the followers

[19] Not taking seriously the life accounts of people is characteristic of radical functionalism generally. The political alchemy of false consciousness works this discrediting without the need to account morally for the paternalism which it expresses.

sought. According to the radical critics of the academy, there are but two sides — and two acts of faith and two directions for practice — available: scholarly life can be pledged either to a transformed future or to the perpetuation of the past.[20] Since the critique condemns the past, this calculation really amounts to a prescription according to which failure to commit to the university as an agent of social transformation amounts to enlistment in the cause of domination and subordination. The morality of all of this explains recent turns in teaching and scholarship. Much scholarship is devoted either to spiteful accusation — against those members of the academic community who are thought not to be pledged to the university's party of hope — or to heartfelt statements of allegiance which are often piously autobiographic in form and content.[21] Teaching too takes on both aspects. Teaching is either a good faith commitment to disclosing the moral error of the past or a morally improper practice of its reproduction. Proper teaching exhibits itself in an egalitarianism which seeks to obliterate any distinction between professor and student. Accordingly, the proper professor no longer professes the truth in terms of reason and evidence, but through acts of confession and declarations of identity, facilitates the student's encounter with that one truth, namely, that truth is a matter only of empowered perspective.[22] None of this should surprise. If the local is alone the authentic, then to be at all defensible,

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20 For a sense of this view, see: H.A. Giroux & P. McLaren, eds., *Critical Pedagogy, the State, and Cultural Struggle* (Albany: State University of New York Press, 1989); and Giroux, "Liberal Arts Education and the Struggle for Public Life: Dreaming about Democracy" in D.J. Gless & B. Herrnstein Smith, eds., *The Politics of Liberal Education* (Durham: Duke University Press, 1992) at 119.

21 In the legal academy, both accusation and confession have become standard tropes. See for instance: M. Kelman, "Trashing" (1984) 36 Stan. L. Rev. 239; and F.R. Elkins, "A Bibliography of Narrative" (1990) 40 J. of Legal Ed. 203.

22 Scholarly literature is rife with incantations of this curious truth. See for instance: F. Lentricchia, *Criticism and Social Change* (Chicago: University of Chicago Press, 1983); S. Welch, *Communities of Resistance and Solidarity* (Maryknoll: Orbis Books, 1985); G. Levine *et al.*, *Speaking for the Humanities* (New York: America Council of Learned Societies, 1989); and Giroux & McLaren, *supra* note 20.

teaching and scholarship must both condemn – or, as it is put, deconstruct – the fallacy of the cosmopolitan and disclose the singular veracity of the provincial.

Mercenary utilitarianism from without and a mix of heady functionalism and crass careerism from within together constitute the crisis of the contemporary university. Not only is the idea of the university being abandoned by many who ought to stand steadfastly for its institutional and cultural flourishing, but their infelicity is providing rare opportunity for success by those who would render the university the handmaid of the capitalist economy. Preoccupied and weakened from within, the university appears both unready and unable to withstand the pressures from without. Indeed, present circumstances are characterized more than anything else by the absence of any one or any body to stand for and by the university. But not only that: doing anything about these matters is fraught with the most profound difficulties, a discussion of which will await the conclusion to this essay. With this sketch of the situation in mind, I want now to turn to the merits of Van Alstyne's collection.

II. The Text: Demonstration or Defence

Does this collection stand for the university? I propose to deploy two conditions in pursuing this inquiry. I will first ask whether the collection proceeds from an adequate understanding of the idea of the university; I will then assess whether it deploys its understanding to address the situation in which the university currently finds itself. I take the first requirement to be a fair measure for any contribution, at any time, to debates about the academy. The second condition, of course, is defined by present circumstances. I take the view that despite the considerable merit of some of its parts – about which more later – the collection fails on both of these counts. In arguing to this conclusion, I will first cull from the collection as a whole the understanding of the university on which it appears to proceed. This undertaking will prove to be instructive in general terms because more than anything else this collection discloses the dangers which attend a functionalist defence of the academy. My review will

conclude with an assessment of certain of the essays as contributions to present debate.

Though it tends to identify the threat in a curious manner, the collection clearly intends to defend the practices of academic freedom and tenure. Predictably, it seeks to mount its defence in terms of what it takes to be the *raison d'être* of the academy. What surprises, however, is the nature of that foundation and the collection's overall unanimity with respect to it. In all of the essays which at all deal with the matter, the university is viewed in a curiously functionalist fashion.[23] According to this view, the university is an *institution* which serves a specific *role* with respect to liberal political arrangements. The text is replete with various expressions of the matter. The university's institutional "function" is sometimes said to be "one of critical review"[24] or the promotion of "critical inquiry in the search for knowledge."[25] At some points, universities are declared possessed by the "democratic role as sanctuaries for unpopular ideas,"[26] and at still others, they are described as "libertarian island(s)."[27] However the matter is expressed, it is clear throughout that the university is an institution "establish[ed]"[28] by liberal societies for peculiarly liberal

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23 Three of the collection's nine essays proceed from no stated view of the academy. On an indulgent reading, however, even they imply an understanding which accords fully with the functionalist view offered by the more reflective pieces. The three culprits are: R.M. O'Neil, "Artistic Freedom and Academic Freedom" in Van Alstyne, ed., *supra* note 4 at 177; R.S. Brown & J.E. Kurland, "Academic Tenure and Academic Freedom" in Van Alstyne, ed., *ibid.* at 325; and M.W. Finkin, "A Higher Order of Liberty in the Workplace" in Van Alstyne, ed., *ibid.* at 357.

24 W.W. Van Alstyne, "Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review" in *ibid.* at 87.

25 D. Rabbon, "A Functional Analysis of 'Individual' and 'Institutional' Academic Freedom Under the First Amendment" in *ibid.* at 276.

26 *Ibid.* at 287.

27 R.A Smolla, "Academic Freedoms, Hate Speech, and the Idea of the University" in *ibid.* at 216.

28 J.J. Thomson, "Ideology and Faculty Selection" in *ibid.* at 155.

purposes. And the overall impression — which is sometimes shaded with republican sentiments regarding the inculcation of citizenly virtue — is that the university functions as an institutional space for the free inquiry which is the lifeblood of liberal political and social arrangements. The university is, then, a public good: it serves liberal society by subjecting conventionalism — and the threat of closure which familiar truths inevitably bear — to the corrosive scrutiny of free and open debate.

Neither of these understandings of the academy is at all adequate. If the university is *essentially* an institution, then it must, above all else, be viewed as a formal organization. Not only does this diminish its integrity as a practice, it also opens debates about the university to a whole host of technical, managerial, and utilitarian questions which quite properly attend any discussion of institution building and maintenance. But issues of this sort do not properly define debates about the university if only because taking them as a focus makes matters about which we really care — not least of which the very idea of the university itself — either recede from view or become subject to prior qualification. Nor is defining the university as a functional requirement of liberal democracy adequate. Of course, on the view I have been recommending, the university as practice is intimately associated with liberalism as both political theory and cultural ethos. Indeed, in the conclusion to this essay, wherein I will again engage the contemporary dilemma of the university, I will characterize the university as inherently both Western and liberal, and suggest that it and the idea and practice of rights are the highest accomplishments of civilization in the West. That said, defining the university as a function of liberal politics remains unacceptable for three reasons. Reducing the academic to a function, any function, has the same unpalatable consequences for debate as does defining the university in institutional terms. It is not only wrong-headed in that it diminishes the interest which the academic can hold for us; it also tends to impair our ability to discuss matters towards which any interest at all will unavoidably lead us. Chief among these is our interest in the cultural meaning of the university's practice, and that interest cannot at all be satisfied by any inquiry we may wish to pursue regarding the university's relationship, in fact or in theory, to contemporary liberal society or state.

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Even, however, if we were to take inquiries of that sort as providing proper direction to our interests, we would find our interests immediately frustrated. First of all, defining the university in terms of its relationship to liberal politics blurs a critical aspect of the university which any interest in the matter will necessarily bear, namely, that whatever it may be and however else it may be viewed, the university cannot be, and cannot be viewed as, an instrument of society or of state. But not only that: a functional definition of this sort tends also to confuse matters which are in fact centrally a part of the university's practice with matters which are just as clearly secondary. The university operates as if its business is the inculcation of knowledge and not as if it intends to transmit skills; yet it is precisely to the transmission of skills which any functionalist definition of the academy, including a liberal one, necessarily leads. This is so because any concession to function inevitably leads – as it has for instance in the legal academy – to demands that the skills requisite for the successful performance of that function be first identified and then vigorously and exclusively perused.

The collection's overall reductionism also structures and impoverishes the sense it provides of academic freedom and tenure. Throughout, each is reduced to purpose, role, and function. We are told for instance that "the commitment to critical inquiry [is] central to the modern rationale for academic freedom."[29] Elsewhere the functional substance is revealed: faculty "is employed professionally to test and propose revisions in the prevailing wisdom";[30] and academic freedom "promotes" that institutional "value of critical inquiry."[31] Accordingly, academic freedom is an institutional characteristic which exists to serve specific institutional purposes. Missing from this easy functionalist arithmetic is, of course, the lived substance of freedom in the academy. For there is, in such a view, no room for and certainly no reason to contemplate – scholarly life as a vocation and scholarly freedom as a practice. Because freedom is defined as strategy and characterized as servant, its cultural and political meaning

29 Rabbon, *supra* note 25 at 237.
30 Van Alstyne, *supra* note 24.
31 Rabbon, *supra* note 25 at 295.

recedes from view: freedom ceases to be a practice and becomes instead a technique. Likewise tenure which is everywhere reduced to purposeful procedure. "Academic tenure", we are told, "serves substantially to protect academic freedom;"[32] and it does so by conferring "a right not to be dismissed except for just cause, as a mutually engendered expectation and as an enforceable obligation."[33] So viewed, tenure becomes entirely "a set of due process rights that go with the acquisition of a certain status."[34] While this is indeed — and thankfully — the institutional form which tenure takes, explaining tenure with reference to its form alone fails to capture the moral and political significance of the matter. More particularly, it fails to provide a basis on which to make sense and to defend the institutional arrangements. Recourse to functionalism is no cure. While its logic is easy — tenure is required because the function which the university serves requires freedom and because freedom in turn requires tenure — the tautology it provides really does not advance matters. What is required rather is a view, missing here, which takes freedom and tenure seriously as cultural practices which instantiate and express what societies such as ours are about. In such a view, tenure would be characterized in the final analysis not as institutional strategy in service to other such strategies, but as a cultural practice and commitment which has everything to do with a way of life and with a calling. As a cautionary note, one could add that unless scholars begin to take scholarly matters such as freedom and tenure more seriously, and less as matters associated with working conditions, the more those matters will be vulnerable in their institutional form to calls — notably functionally inspired calls — for their elimination.

Discussions about the academy, least of all those joined by Americans, are rarely as faint-hearted and as narrow as the discussion this collection in these senses provides. As I read the text, two factors may explain this — the nature of the 1940 Statement itself and much more significantly, since seven of the nine essays were written in whole or in part by

[32] Brown & Kurland, *supra* note 23.

[33] Finkin, *supra* note 23 at 366.

[34] W.P. Metzger, "The 1940 Statement of Principles on Academic Freedom and Tenure" in Van Alstyne, ed., *supra* note 4 at 65.

academic lawyers, a general enthralment with American First Amendment jurisprudence definitions of academic freedom and tenure.[35] For reasons which become abundantly clear on reading historian Metzger's account of its history in the collection's opening essay, the Statement takes a narrow, functionalist approach to the academy generally and to academic freedom and tenure in particular. So too does the constitutional caselaw. In 1952, Justice Frankfurter enunciated the functionalist substance of the constitutional protection accorded universities and academic freedom under the First Amendment. His declaration that protection is premised on "the functions of educational institutions in our national life and the conditions under which alone they can adequately perform them" set the constitutional course of academic freedom in America which continues uninterrupted.[36] But neither that jurisprudence nor certainly the wording of the Statement need or should have set the course for this collection. Which is to say, while these matters may explain its direction, they ought not forgive.

I want now to turn to the substance of the essays themselves. The first two provide historical overviews — Metzger's to the 1940 Statement and Van Alystyne's to the course of First Amendment protection of academic freedom. The three essays which follow are topical pieces — Thompson's "Ideology and Faculty Selection" seeks to defend the integrity of academic staff selection processes; O'Neil's "Artistic Freedom and Academic Freedom" deals with free expression on campus; and Smolla's "Academic Freedom, Hate Speech, and the Idea of a University" canvasses much the same ground. From these varied topics, the collection next turns to the meaning of academic freedom. In a lengthy essay, David M. Rabban provides what he terms a functional analysis of academic freedom under the First Amendment; and, in a curious effort, Michael W. McConnell seeks to establish that despite appearances, academic freedom of a

[35] For details, see the text of the Statement which is reproduced in Appendix B, *ibid.* at 407-09. See also the commentaries offered throughout the collection, particular at 14, 232-234.

[36] Van Alstyne, *supra* note 24 at 108.

respectable sort exists in religious universities.[37] Finally, the collection considers the meaning and practice of tenure. Brown and Kurland's "Academic Tenure and Academic Freedom" attempts to defend tenure as a functional requirement of academic freedom; and Finkin's "A Higher Order of Liberty in the Workplace" seeks to dispel any criticism of tenure as a special claim by comparing and reducing it to provisions commonly contained in collective bargaining agreements. I mentioned earlier that the collection's defence of academic freedom and tenure is in most of its parts curious because of what it takes to be the forces against which a defence is required. It may now be clear that this is so because overall the collection fails as a contribution to the present widely-engaged debate concerning the integrity of the academy as an expression of the culture of the West. Instead of joining that debate, the collection concerns itself with the particular and what I take to be the mundane. Rather than repetitively bemoaning the opportunities lost, I will instead engage those essays in which the chance of joining the debate was taken. Chief among these is the contribution by Judith Jarvis Thomson.

In "Ideology and Faculty Selection," Thomson responds to the radical criticism of orthopraxy in the academy — not in general terms, but elliptically and with reference to collegial processes of faculty hiring. Her question is whether a principled defence of the process is available; and in an illuminating pursuit of principle, Thomson claims that *if* they are met, two conditions provide a complete defence to the radical claim that the academic hiring process perpetuates the academic status quo. That "we have exercised the appropriate degree of care in assessing [the matter], and have made our assessment on scholarly grounds, without excessive love of our own commitments," she claims, constitutes a "principled defence against the charge that in rejecting [a candidate] we have refused to welcome new ideas and behaved like defenders of an orthodoxy."[38] In an engaging analysis, Thomson proceeds to discuss the question of scholarly

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[37] The collection includes a rejoinder to McConnell by Thompson and Finkin in "Academic Freedom and Church-Related Higher Education: A Reply to Professor McCornell" in Van Alstyne, ed., *supra* note 4 at 419.

[38] Thomson, *supra* note 28 at 163.

grounds as applied to an applicant's beliefs — here she claims that two beliefs only provide proper grounds and that without more, neither is conclusive — and to inquire when administrative intervention might be justified on grounds of what she calls "ideological inbreeding" in a department or faculty.[39] Thomson's project, then, is to draw out the premises which justify liberal academic practice. She articulates these premises not in terms of function or in terms of some eternal truth, but in terms of the principled conditions of mature judgment; and she rightly concludes that judgment is acceptable in that sense if it as much as possible forsakes the personal and the particular and serves instead the idea of the university. Her instruction in this regard is timely and concise: those who would defend the university are not required to disprove every charge; but they are required to show that the matter in question was dealt with in a fashion consistent in principle with the university's liberal substance. As she says, the defence "lies in nothing more arcane" than that.[40]

There are two other essays which I think warrant attention. In his timely essay on academic freedom and hate speech, Rodney A. Smolla asks whether university codes which seek to regulate speech on campus would pass First Amendment muster and if so, to what extent? My interest here has less to do with the First Amendment jurisprudence he canvasses than with the illumination Smolla's approach can shed on the whole question of prohibitions in the academy. By hate speech is meant "the use of speech attacks based on race, ethnicity, religion, and sexual orientation or preference."[41] Hate speech codes are typically justified through an ideological reworking of the harm principle. Unless strict attention is paid to originating principle, harm can become a terribly elastic category. Proponents of speech prohibitions on campus play on this elasticity precisely by ignoring principle. Smolla's essay, in contrast, is a curative call to principle. He culls from First Amendment jurisprudence a principled definition of the harm which in societies such as ours alone justifies the regulation of free speech, and he then applies those principles to the

[39] *Ibid.* at 176.

[40] *Ibid.* at 163.

[41] Smolla, *supra* note 27 at 195.

question of university speech codes. His conclusion is instructive. However much we may deplore hate speech, principled regulation is available to us only to the extent that such speech *in fact* harms someone; and it can harm only "when it poses a clear and present danger of violence or when it is intertwined with actual discriminatory conduct."[42] Abandoning the easy route of unprincipled welfarism need not however mean silence. Those of us in the academy who deplore deliberately hateful speech can instead take the much harder and rewarding route of principle by subjecting such speech to an intellectual scrutiny which demands explanation and defence. We can, that is, act on the freedom and commitments which are the academy's moral substance, and in so doing, protect and nurture both.

To the extent that they act on their commitments, religious universities are curious creatures indeed. On the one hand, they present and understand themselves as academies; yet on the other; they are based on appeals to authority and require doctrinal fidelities which contradict the freedom of inquiry and criticism which defines the modern academy. In "Academic Freedom in Religious Colleges and Universities," Michael McConnell seeks to salvage the academic good name of religious academies by characterizing this contradiction as a virtue. His undertaking is interesting not so much for its accomplishments as for the understanding of the academy which it reveals. Curiously enough, McConnell's view is very much the view of the academy's radical critics, and it is in light of that shared understanding that I will seek instruction from the essay. According to McConnell, religious universities are universities indeed because the prevailing view of the academy which compels the contradiction in the first place is just one perspective among others of what the university ought to be. The prevailing view, of course, is the liberal view which claims that the *sine qua non* of the academic is free and open critical inquiry. If this view had special status, then religious universities would fail to qualify as academies to the extent that they are true to and act on their religious commitments. But since it has no validation above and beyond its own understanding, this view – McConnell calls it the "secular"

[42] *Ibid.* at 224.

understanding of the university[43] – need not govern. On this basis, McConnell then claims that religious universities have "a separate intellectual identity"[44] which is based on another, equally as valid perspective, which he terms "the older religious or dogmatic tradition."[45]

This slight of hand requires the same sort of epistemological relativism to which the radical critics of the academy have wedded themselves. Since "all thought inevitably derives from particular standpoints, perspectives, and interests," no single perspective on any matter can claim exclusivity.[46] Absenting the significance of any such claim means, of course, that it is impossible to adjudicate between perspectives. All are equal if only in the thinnest and most unrewarding sense that none is ultimately true. And if this assessment curiously is true, then everything can be anything according to some perspective or another. Nor do the similarities between McConnell's defence of the religious and the radical critique end there. Both his talk about institutional identity and his call for proponents of the secular view of the academy to act on their "antidogmatic principles"[47] are standard tropes of the radical. If everything dissolves finally into perspective, it is critical to provide some account, some genealogy, of perspectives themselves. The radical view offers an oft-repeated perspective on the question of perspectives. According to this story, perspectives are communal and constitutive of personal identity. They are communal not only because language is social, but also because in coming to deploy language we necessarily become situated in what Stanley Fish calls "interpretive communities."[48] It is

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43 McConnell, "Academic Freedom in Religious Colleges and Universities" in *ibid.* at 306.

44 *Ibid.* at 304.

45 *Ibid.* at 313.

46 See: G. Levine *et al.*, *supra* note 22 at 9.

47 McConnell, "Academic Freedom in Religious Colleges and Universities in Van Alstyne, ed., *supra* note 4 at 312.

48 Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989) at 141-60.

apparently through our membership in communities of this sort that we constitute ourselves. Because the self is in this sense socially constructed, there is no pan-community, essential, noumenal self to which freedom can call. We are instead, each of us, captives of our race, class, and gender circumstance. Apparently, McConnell thinks all of this is true as well of institutions. Like us, they too are creatures caught and defined by perspectives bred of their communal past. As is also the case with us, the perspectives by which they are constituted are always merely different and never true or false. We will have cause to visit this theme again in the conclusion to this essay where we will engage the question about what can be done to preserve the academy. Suffice it now to say that what is finally at issue in this debate is the meaning and nature of history.

Throughout his essay, McConnell claims that proponents of the liberal idea of the academy contradict their commitments to freedom and pluralism when they criticize and seek to impose their views on institutions which are possessed of different identities and perspectives. This move too is characteristic of the radical critique. Although all perspectives are equal in epistemological terms and in the sense that each carries the interests and identity of some group or community, they are not equal in other critical aspects, chief among which is power. Just the contrary. Because power is distributed unevenly among groups, some perspectives are marginalized or excluded and still others occupy the centre and exercise hegemony. According to the radical critique, the liberal view of politics, the self, and the academy represents, reflects, and sustains the interests of the dominant groups in the West. So viewed, the free and open criticism which liberals claim is constitutive of the academy becomes an ideological ploy designed to seduce those in subordinate race, class, and gender positions into believing their marginalization and exclusion is proper. Notwithstanding this understanding, critics typically call liberals to account using the vocabulary of freedom and pluralism. It is just this that McConnell is about in his essay. Like the radical critics, his call is a cynical one: because he is pledged to orthodoxy, his purpose is not to preserve freedom for a view, but to acquire power through which that view can be imposed institutionally. We will have cause to revisit this matter, as well, in the conclusion to this essay.

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I have sought to assess this collection on two grounds, and have found it wanting on both. I found the conception of the university from which the collection by and large proceeds entirely pedestrian and all too limiting. I have argued that its conception of the academy determines the collection's overall unsatisfactory character. Because that conception is both narrow and shallow, the collection as a whole is blind to the debates raging about and within the academy, and in consequence, is characterized more by opportunities lost than by any chances taken. Yet, there remains much that is valuable. Besides the three essays which I have canvassed, the essay by Metzger provides an engaging history of academic freedom in America, and the essay by Rabban is an occasionally illuminating jurisprudential discussion of the same matter. Because of essays like these, the collection can be fairly said to provide a convenient introduction to the idea and practice of freedom in the modern academy. What it unfortunately fails to provide is a debate of much overall significance to those who are in the academy and concerned about its present problems and prospects.

III. Defending the Academy

If it is made consciously and literately, a commitment to radical politics proceeds from a dread of the past. For it is dread alone that fuels the desire for transformation. Earlier along, I referenced Terry Eagleton's elegant rendering of this dread. Dread is, for Eagleton, the only proper countenance on history because history everywhere testifies that "the vast majority of men and women who have ever lived and died" have led lives of "fruitless, unremitting labour."[49] He, of course, is not alone in this assessment. Above all others there is Marx who declared history "a nightmare" which demands displacement and not merely reform.[50] If one takes this attitude to history, one not only hopes for revolution, but also becomes intimately possessed by the fear that the utopia which calls will

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[49] *Supra* note 18.

[50] See: Marx, "The Eighteenth Brumaire of Louis Bonaparte" (1852) in *Karl Marx, Frederick Engels: Collected Works, Vol.11* (London: Lawrence and Wishart, 1979) 103.

call too late.[51] Together this hope and this fear account for the nature of radical politics which I take to be characterized, above all else, by suspicion and impatience.

If history is indeed debacle, then vigilance indeed is virtue. The radical must be forever watchful of the danger that is the past for fear of being seduced by it. Radical vigilance takes the form of suspicion; and suspicion, I want to suggest, accounts for the factionalism which everywhere attends radical politics. Suspicion knows no limits. Not only can one be suspicious of the grand vocabularies of the past, one can become wary too of others. For others might not have been suspicious enough, and they may in consequence have become infected with the past. Indeed, it is on the basis of this sentiment that radical politics claims a distinction between collaborators and cadre — which is to say, between those who act to reproduce history and those whose practice is its transformation.

Radical impatience is easily understood. If ridding ourselves of the past is the only defensible ethic and if that ethic fuels existential fear, then it makes plain good sense to be impatient with any proposal which does not call forth the human future which somehow awaits. Anticipation of the human morrow, of course, establishes an incredibly high and illusive standard for practice and discourse. Accordingly, any proposal for change, however deep and however wide, is always open to condemnation on the ground that it either fails to anticipate the future or anticipates one which is improper.

Liberalism offers a different view of history. Liberals find in the past not dread, but reasons to be cautious about the past and fearful about the future. Their caution takes the form of a commitment to subject received wisdom to critical inquiry and contest. Yet that commitment does not

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[51] Lydia Sargent has, I think, put this as forcefully as anyone. In the "Comments By The Authors" which preface M. Albert, *et al.*, *Liberating Theory* (Boston: South End Press, 1986), she expresses the following foreboding: "I am haunted by the fear that I will live out my life as a witness to the continued existence of what I hate, without ever seeing the fruits of a hoped-for revolution."

require liberals to believe that the past is without wisdom, accomplishment, or merit. Indeed, just the opposite is true, for liberals act on their fear of the future by seeking to preserve and to reform what they take to be the accomplishments of history. There is, then, a curious sort of symmetry at play in liberal consciousness. Liberals fear the future because of the inhumanities of the past; yet they think the reproduction of that past can only be avoided if we act on history's human accomplishments.

Sometime ago, E.P.Thompson declared the idea and practice of rights — the rule of law — to be "an unqualified human good" and a "cultural achievement" of "universal merit."[52] Liberals, at least, would not only enthusiastically agree, but would, I think, be moved to nominate the university as another such achievement. If the Western experience of history has been productive of anything to which the world can "look for analogies and for guidance in the creation of new forms" of life, then surely it must be found in the practices of freedom which the rule of law and the university have founded and for which they have provided institutional form.[53] This essay began with the claim that Western culture is in crisis. If it is, then we could expect to find evidence of the matter in the West's accomplishments in law and in the academy. That investigation would not, of course, disappoint the diagnosis. For both the rule of law and the university are now subject to a cultural cynicism and suspicion that in my view threatens their preservation as cultural forms and accomplishments. Throughout this essay, I have attempted to disclose how the academy in particular is increasingly captive of a radical politics of disillusionment and disunity. By way of conclusion, I wish now to consider the question of cure. More particularly, I want to inquire what possibly can be done to defend the academy from within.

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52 E.P.Thompson, *Whigs and Hunters: The Origin of the Black Act* (London, Allen Lane, 1975) at 266-67.

53 I am borrowing here the words of Harold Berman. See: H. Berman, "Religious Foundations of Law in the West: An Historical Perspective" (1983) 1 J. of Law and Relig. 3 at 43.

Richard Rorty has recently characterized the situation of the Left as "one in which the fear of complicity has overcome the fear of impotence."[54] By this, I take him to mean that the politics of suspicion to which the Left is prey has overwhelmed its commitment to practice and its ability to make proposals concerning either the utopian future to which it is pledged or the politics of everyday life which it so desires to dismantle. I suspect that Rorty is right with respect to the political Left generally, although I think his diagnosis fails entirely to capture either the spirit or practice of the cultural Left which inhabits the academy. Whatever the case in those regards, I do want to suggest that his diagnosis indeed aptly describes the situation of scholars who would defend the academy but who feel unable to do so. They too suffer from a fear of complicity which has overborne their fear of impotence. Only the nuance is different: the complicity they fear arises from their understanding of what the academy requires and not from any suspicion or cynicism they carry towards it. I want to argue that unless this fear is first understood and then overcome, nothing at all of principled significance can be done to defend the academy from within.

People who take the university seriously take deadly seriously admonitions of the sort proffered by Rosa Luxemburg with which I prefaced this essay. Like her, they know that the crux of freedom, in the academy and elsewhere, is tolerance of people who think and act differently. Freedom without toleration is sham – conventionalism paraded as licence – because practices of tolerance alone provide cultural space for the dissent, the irreverence, and the profane which are liberty's substance. The fear of complicity which afflicts those who would serve the academy arises from this commitment to toleration in terms of which, for them, the academy is defined. The logic of the matter appears unassailable. If the university is above all a cultural space of toleration, then any engagement with dissenting views – including especially views that take the academy to be the precise opposite of this – must itself be tolerant, otherwise joining those views will to tend to prove them proper and in any case will

[54] R. Rorty, "Two Cheers for the Cultural Left" in Gless & Herrnstein Smith, eds., *supra* note 20, 233 at 235.

compromise the integrity of the academy. This calculation, however, need not compel a fear of complicity. The university is indeed a place of toleration; but the toleration it requires is not faceless nor, in a very relevant and specific sense, is it without limit. Viewed as a practice, the university is a community of commitment; and because freedom is its commitment, it can *never* properly be required to be a community of consensus. In this sense, toleration in the academy is procedurally boundless. But the university is not just a practice: it is a practice which is wedded to an institutional form which alone makes the practice possible. As are the rights of law, the toleration of the academy is an institutional barrier to the impulse to paternalism both in culture generally and within the academy itself. I want to suggest that from *this* institutional perspective, the academy's toleration — which as a procedural matter is necessarily boundless — has specific limitations. More particularly, if we take the university seriously as an institution, toleration ends with proposals which would render it less a barrier to paternalism. To the extent, then, that points of view take the form of proposals which, if implemented, would require the university to become a community of consensus, they ought not be tolerated. I should not be taken here as promoting the prohibition of such views; I should, however, be taken to be declaring as dangerous the institutional proposals which they sometimes produce for the survival of the academy both as practice and as institution.

Separating the practical from the institutional in this fashion dissolves the fears of complicity which otherwise attend motivations to come to the aid of the academy. For distinguishing between what the academy requires as a practice and what it requires as an institution which makes that practice possible permits our commitments to be as complex as the academy always, in fact, requires them to be. More particularly, it permits us to be pledged both to protecting the free expression of ideas and to preserving the university from their institutional implications. We need not, therefore, fear objecting to attempts to regulate the university in accordance with visions of the good because we are at once committed to providing plentiful space for the discovery and articulation of such views. But matters do not end there. If scholars can for these reasons object with

principle, the proper direction and substance of their defence of the academy remains to be identified.

I take salvaging the academic from the political to be the fundamental task confronting those who think the academy a cultural achievement which must be preserved. Clearly, so long as the university is generally thought an object of regulatory contest — and it is so considered more by institutional increments than by any declarative fiat — then its preservation as an institutionally protected cultural process is at issue. What has to be reclaimed is not only the idea of the university; the integrity of scholarship and teaching have also to be rescued from the corrosive embrace of radical welfarism in whose service standards with respect to both have become so trivialized. In all, then, what is required is the recuperation of the academy as a practice of freedom. And that, needless to say, is no easy matter. Yet there is, I think, an order to the difficulties involved. For at the end of the day, the university is in crisis to the extent that it has forsaken its commitment to the possibility of reasoned adjudication and to the degree that it has instead become enthraled with the empty equality of perspectivism. This essay has already been directed in some measure to both of these matters; and because the whole question engages the widest of issues — not the least of which is the sense to be made of the claim that the West is now possessed by a postmodernism which makes unthinkable not only knowledge and critical understanding, but the very possibility of shared identity and justice — this is not the place to pursue the inquiry further. I would like instead to conclude by sketching ever so briefly what I take to be at stake in the question of the university.

I have been claiming that the academy in the West is a cultural achievement of universal significance because its practices are constitutive of cultural and political freedom. This understanding does not, of course, appear unassisted. It requires not only certain characteristically Western beliefs, but large-scale subscription to those beliefs as well. Three beliefs are critical: to sustain the Western understanding of the academy, we must believe that human persons share an identity, that persons in the West share a cultural legacy which is in some significant sense defensible, and that critical understanding and judgment with respect to the first two

beliefs is possible. But, if only because they are so easily recounted, it is not the nature of these values which is in doubt. What is at issue, rather, is whether any one any longer in fact espouses them.

In addressing just this question with respect to the legal tradition of the West, Harold Berman claims that the beliefs required to sustain the law have been so eroded, so "washed away," that "the tradition itself is threatened with collapse." The very postulates of the idea of law – which he identifies as belief in "the structural integrity of law, its continuity, its religious roots, its transcendent qualities" – are, he argues, "rapidly disappearing, not only from the minds of philosophers, not only from the minds of lawmakers, judges, lawyers, law teachers, and from other members of the legal profession, but from the consciousness of the vast majority of citizens, the people as a whole." The absence of such widespread faith and belief deprives law of the support and sustenance which it requires to survive as a cultural phenomenon and practice, and what then remains is a deformed parody of law's idea. As Berman puts it, the law becomes "more fragmented, more subjective, geared more to expediency and less to morality, concerned more with immediate consequences and less with consistency or continuity."[55]

To the extent, and I take it to be considerable, that this absence of faith is true as well of the idea of the university, it too is experiencing decline and deformation. And to the degree that this diagnosis is accurate of both the law and the academy, then the whole of our culture, and not just these critical and formative practices, is at risk. I take the risk to be tyranny; and it is precisely that which is finally at stake in the matter of the academy. For if an institution or a society is uncommitted to truth, it must inevitably become committed to power and to all that power finally entails.

[55] *Supra* note 53 at 41-42.

A REVIEW OF THE *CONSTITUTIONAL LOGIC OF AFFIRMATIVE ACTION*

by Ronald J. Fiscus (Durham: Duke University Press, 1992) ed. by Stephen L. Wasby

On May 18th, 1990, Ronald J. Fiscus died at the age of forty-two. At the time of his death, Professor Fiscus was completing a book offering a theoretical justification of affirmative action which he believed would be compatible with, but would expand upon, United States Supreme Court jurisprudence on the subject. Stephen L. Wasby, a professor at the State University of New York at Albany, took up the challenge of completing Fiscus' manuscript, eventually titling it *The Constitutional Logic of Affirmative Action*.[1] Professor Wasby edited the nearly finished manuscript and wrote a brief preface and an epilogue. The core of Professor Fiscus' ideas are clearly represented in the book, which remarkably is tightly written under the circumstances. All but the epilogue, which is out of step with both the style and the focus of the book, seems necessary and informative.

The Constitutional Logic of Affirmative Action is not as jurisprudential as one might assume from the title. Rather, the author's focus is on developing an elaborate theoretical justification for affirmative action, one which departs significantly from the compensatory justice model that predominates in the United States. Professor Fiscus begins with what might be referred to as first principles and develops a distributive justice rationale for affirmative action. In so doing, he explains how the distributive justice defence of affirmative action overcomes the apparent limitations of the remedial or compensatory view of affirmative action. He then demonstrates how the distributive justice approach fits with the established jurisprudence so as to constitutionally authorize Federal Courts in the United States to order affirmative action as a judicial remedy.

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[1] Ronald J. Fiscus, *The Constitutional Logic of Affirmative Action*, Stephen L. Wasby, ed., (Durham: Duke University Press, 1992).

Professor Fiscus begins *The Constitutional Logic of Affirmative Action* with an exercise describing what society would hypothetically look like if it developed free of racism. This race-neutral society, a society for which Fiscus assumes we should strive, is described as having no race-based patterns deviating from the proportion of members of each race in society. Fiscus argues that if twenty percent of society is African-American, then we should always find twenty percent representation of African-Americans in every circumstance; every industry should include twenty percent African-Americans, as should every state, and every neighbourhood, and every school, and so on. In so far as proportional representation is not achieved, Professor Fiscus attributes the gap between actual representation and proportional representation to racism. He contends that all other explanations ultimately reduce to racial discrimination. For instance, Professor Fiscus anticipates the common charge that personal choice by African-Americans, rather than discrimination, explains deviations from the expected percentage representation. He observes that for personal choice to disturb the correlation between percentage representation in society and percentage representation in a given endeavour, the choice must take race into account. Fiscus argues that in a race-neutral society, there would be no reason to take race into account in decision-making. Thus, it is only when race neutrality is overcome by racism that personal choice results in representation that diverges from the expected proportion.

Fiscus also offers an explanation for why any current departure from the expected proportionality cannot simply be attributed to historical racism which has long since been arrested. He writes that any historically based patterns should be overcome by the randomness of the subsequent changes in society. He observes that the rate of change in our society, even changes in peoples' places of residence, is so dramatic that it should have effectively wiped out any trends resulting from historical discrimination. Professor Fiscus sums up his conclusions from this exercise as follows:

> The genuinely radical import of this exercise in logic is that accepting the nonracist premise of true equality at birth requires the conclusion that racism directly or indirectly accounts for all the behavioral and attitudinal differences between whites and blacks as groups, including all that are relevant to the attainment of the society's generally

> recognized goods. And the significance of that for at least some real-world affirmative action programs is apparent.[2]

The significance, as Fiscus explains, is that to the degree that proportionality has not been achieved, we can legitimately establish programs that will ensure proportionality. Put another way, the members of each race deserve a proportion of the jobs, educational positions, etc., consistent with their proportion of the population. The members of each race deserve no less than this proportion and, importantly for whites claiming to be discriminated against as a result of affirmative action, the members of each race deserve no more than this proportion. Accordingly, where affirmative action programs are designed to satisfy the proportionality principle, they do not in any way unfairly deny positions or opportunities to whites. In Fiscus' own words:

> An affirmative action program does not violate the rights of innocent white individuals when it guarantees to minorities the portion of society's goods that minority individuals would have gained for themselves in a nonracist environment. Even a rigid quota does not violate the rights of whites when the quota does not exceed the portion of the benefit in question that would have gone to minority individuals under conditions of fair competition and given nonracist assumptions about innate equality. Individuals who have not personally harmed minorities may nevertheless be prevented from reaping the benefits of the harm inflicted by society at large. There is no violation of equal protection when society acts to restore the equilibrium that would have naturally occurred under nonracist conditions.[3]

From a distributive justice perspective, whites are not discriminated against or denied equality by affirmative action programs based on the proportionality principle because they are not denied positions or opportunities to which they have a legitimate claim. In short, where an affirmative action program relies on the proportionality principle, apparently innocent whites suffer no disadvantage or discrimination.

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[2] *Ibid.* at 37.

[3] *Ibid.* at 38.

This is a significant conclusion because, as Fiscus explains, the stumbling block for affirmative action before the United States Supreme Court, particularly where quotas are involved, has been the innocent persons argument. That argument, which is tied to a compensatory justice model, holds that affirmative action disadvantages innocent whites and therefore can only be justified in narrowly limited circumstances. While the innocent persons argument has proven to be a serious constraint on affirmative action in the view of the United States Supreme Court, it has not been an absolute bar to affirmative action. The problem is not that the Court has rejected affirmative action in principle or that the Court has struck down most of the affirmative action programs that have been challenged before it. In fact, the United States Supreme Court has accepted affirmative action as a constitutionally legitimate instrument for redressing racial discrimination and has only struck down the challenged program in four of the eleven principle cases argued before it. But, even while affirmative action has been approved in principle, it has been severely circumscribed as a result of the Court's use of a compensatory justice model, a model which gives credence to the innocent persons argument. Only narrowly tailored affirmative action programs have been successful before the Court, and then only when there has been a sufficiently direct connection to past discrimination to permit 'over-riding the rights of innocent whites'[4] or when the burden on innocent whites is sufficiently diffuse.[5]

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[4] See, for example, *Richmond* v. *J.A. Croson Co.*, 102 L. Ed.2d 854 (1989) [hereinafter *Richmond*].

[5] For example, in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267 at 280-281 (1986), Justice Powell remarked:

> In cases involving valid hiring goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employment opportunity is not as intrusive as loss of an existing job.
>
> While hiring goals impose a diffuse burden, often foreclosing only one of several opportunities, layoffs impose the entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives. That burden

In developing a distributive justice rationale for affirmative action, Professor Fiscus answers the United States Supreme Court's strongest articulated objection to and limitation on affirmative action.[6] Of course, to be convincing, Fiscus must show that his theoretical justification is jurisprudentially sound. Is the distributive justice argument relying on the proportionality principle available to the Court in the sense that it can be squared with the existing jurisprudence? Fiscus devotes a considerable amount of space in *The Constitutional Logic of Affirmative Action* to establishing that the approach to affirmative action that he recommends is compatible with the jurisprudence of the Court. Naturally, his arguments on this topic are rather specialized to the American jurisprudence and may not be of tremendous interest to Canadian scholars. In any event, his defence of the compatibility of his distributive justice approach with the existing jurisprudence is sufficiently convincing, although it is not as well constructed or as rigorously worked through as his theoretical discussion of affirmative action.

In my view, *The Constitutional Logic of Affirmative Action* is relatively effective in theoretically and jurisprudentially rebutting the innocent persons argument. However, as he presents it, the distributive justice model offered by Professor Fiscus is flawed in certain respects and is not by itself complete. Although Professor Fiscus pushes his ideas further than most

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is too intrusive.

[6] As Fiscus explains:

> Whether upholding or attacking affirmative action, the Court has "[cast] affirmative action as penance for particular sins of discrimination," and "because corrective justice focuses on victims, and retributive justice on wrongdoers, predicating affirmative action on past sins of discrimination invites claims that neither nonvictims should benefit, nor nonsinners pay." If our central argument is correct, however, questions of innocence and blame are fundamentally irrelevant in affirmative action cases, and the controlling question is always equity (*supra* note 1 at 44-45, citing Sullivan, "Sins of Discrimination: Last Terms Affirmative Action Cases" 100 Harv. L. Rev. 78 (1986) at 91-92).

scholars constructing conventional affirmative action arguments, there are some problematic assumptions which remain unexplored or, worse, have been considered and accepted. From among these, I will discuss two representative examples. The first concerns his unquestioning acceptance of merit as a viable basis for distributing goods or opportunities. The second addresses Fiscus' treatment of the identity of those intended to benefit from affirmative action and his failure to situate their identity in the existing social and political milieu.

Throughout *The Constitutional Logic of Affirmative Action*, Professor Fiscus evinces a firm commitment to merit as the appropriate standard for apportioning goods and opportunities. He believes in "the principle that individuals are entitled to be judged on their merit and not on the basis of irrelevant characteristics."[7] This is not an uncommon assumption; however, in this context it needs to be carefully examined. Fiscus assumes that merit is distributed evenly among all races and then concludes that to the degree that educational and employment positions diverge from proportional representation, discrimination must be to blame. Unfortunately, he does not investigate the connection between merit and discrimination. If he had, it would have been apparent that if merit is incapable of establishing and maintaining proportional representation, merit must have been undermined by discrimination.

To be more precise, there are two possible explanations for the departure from merit leading to disproportional representation: either the merit principle was overridden by direct discrimination, or that principle broke down and merit itself became entangled with discrimination. But since Fiscus clearly does not limit the application of affirmative action to those situations where there is direct, intentional discrimination, he is committed to accepting that merit is bound up with discrimination. If merit is intertwined with discrimination and is therefore not an objectively true test of desert for a particular position, then we lose our yardstick for measuring who should get what position. This does not necessarily call into question

[7] *Ibid.* at 18.

the rule of proportional representation, but it does demand that another concept — perhaps equal dignity as opposed to merit — must serve as the basis for the rule. This has important implications for the distribution of positions within each group. It calls into question whether particular individuals can ever claim to be victims of affirmative action, since they can no longer claim to deserve a position on the basis of their individual merit. Affirmative action then becomes a group-based remedy rather than the individual remedy Fiscus suggests that it is.[8] In short, the entangling of merit and discrimination has broad ranging significance for how we think about, analyze and defend affirmative action.

The second assumption I promised to address involves Professor Fiscus' treatment of the identity of those intended to benefit from affirmative action and his failure to situate their identity in the existing social and political setting. Affirmative action programs generally have boundaries corresponding to the identity of the group intended to be covered by the program. In *The Constitutional Logic of Affirmative Action*, Professor Fiscus concentrates on race-based affirmative action. While he briefly refers to gender and sexual orientation, race is the attribute on which he fixes. This choice may be explained in part by the fact that the United States Supreme Court cases on affirmative action have all concerned race. However, it also appears that Fiscus worried that his analysis would be more complicated if he dealt with gender or sexual orientation because those attributes are, in his view, at least arguably less neutral and therefore less obviously compatible with the principle of proportional representation. Yet even setting aside the shortcomings of Professor Fiscus' narrow focus on race to the exclusion of other attributes on which affirmative action programs might be based, there is an important problem with the way he approaches race. As we will see, Fiscus' treatment of race ultimately highlights the difficulty of traversing the gap between a hypothetical ideal and social reality.

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[8] *Ibid.* at 58-59.

Professor Fiscus compares race with ethnicity, considering the former to be a biological attribute while describing the latter as a socially-constructed or cultural attribute.[9] On this view, Fiscus suggests that ethnicity might exist in a fair world. But, since race neutrality is the standard in Fiscus' ideal world, racial ethnicity could never exist there. This leads Fiscus to conclude:

> The fact that true ethnicity might arguably exist in a fair world means that proportional quotas for ethnic groups cannot be justified by reference to a fair world that levels disparate rates of success and failure for ethnic groups.... It is only because race would not be a determinant of culture in a fair world that it may be discounted as a determinant of relative rates of success and failure in an unfair world.[10]

The problem with this argument lies with the assumption that race is a biological as opposed to a socially-constructed category. Biology, though, is itself a cultural artifact whose classifications are socially defined. There is no natural category or objectively true classification called "race" existing independent of social interactions. In this respect, race, racial ethnicity and even ethnicity are indistinguishable; they are all socially determined.[11] The challenge, and it is difficult but not insurmountable, is to build this recognition into a model defending affirmative action.

On Fiscus' terms, categories that are entirely socially constructed — for him the example is ethnicity — cannot serve as a basis for affirmative action because those categories may legitimately diverge from proportional representation. The distributive justice model of affirmative action cannot, by itself, accommodate attributes that may permissibly depart from the proportionality principle. In my view, race can properly diverge from this

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9 See *ibid.* at 29-36 & 57-61.

10 *Ibid.* at 60.

11 Admittedly, Fiscus attempted to distinguish between the social construct, racial ethnicity, and, what he viewed as a biological concept, race. This is an important distinction, but it does not go far enough. Fiscus suggests that in an ideal world racial ethnicity would not exist but race would. In fact, in an ideal world race would not exist either.

principle precisely because in our society, rather than in an ideal world, race is relevant. Race is significant both in the negative sense of racism and in the positive senses of solidarity and group identity.

Enumerating an ideal world does not offer sufficient direction for determining legal outcomes because it does not tell us how or even whether we can appropriately achieve the ideal. For a book that is about a vehicle for moving us towards a nonracist society, *The Constitutional Logic of Affirmative Action* is strangely silent about how to move us from our current state of racial consciousness to the proposed ideal state of racial obliviousness (or more correctly nonrace). Fiscus simply does not address the issue even though its significance is apparent in passages such as the following:

> Indeed, until racism is completely abolished, the breakdown of black solidarity, in whatever form, is quite dangerous to blacks in general. But in a hypothetical ideal society in which racism had been completely abolished, black solidarity would be neither dangerous nor necessary. It would, however, be anachronistic.
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> Must Black pride be abolished, then? Should the affirmation that "black is beautiful" be discouraged? It depends. The answer is no as long as there is the slightest reason not to be as proud of being black as one would be of being white, as long as there is the slightest doubt that black is as beautiful as white is. But stated this way, the real answer is obviously yes once racism has been abolished.[12]

Fiscus might respond that his ideal society is merely a hypothetical offering, an heuristic device; but that response begs the question. If the hypothetical ideal society cannot be achieved, or cannot be achieved in a just manner, it ought not to be embraced as the standard for justice. A hypothetical society can only be considered ideal if there is an ideal path for realizing that society. It makes more sense, then, to strive for the best

[12] *Ibid.* at 36.

achievable society which can be attained justly.[13] But if that is our goal, it is imperative that we situate our theories and our laws firmly in the prevailing social reality. Accordingly, to construct a defence of affirmative action we must consider the social, political, and historical circumstances of the particular group in society. In this respect, any complete defense of affirmative action must include a broadly compensatory or remedial aspect which recognizes past and present racism. Professor Fiscus, however, excludes all compensatory or remedial justifications from his theory. In his attempt to overcome the weaknesses of the compensatory justice model of affirmative action, Professor Fiscus has developed a distributive justice model that ignores the strengths and fundamental importance of the former model. The merely statistical approach of the distributive justice model recommends affirmative action in a vacuum. Indeed, relying exclusively on a distributive justice rationale without an awareness of the compensatory nature of affirmative action, the proportionality principle would force us to undertake affirmative action programs for whites in those sectors in which they are under-represented.[14] This would only further disempower African-Americans and is contrary to the very essence of both affirmative action and equality.

Relying exclusively on the statistical probability of the distributive justice model commits us, as Fiscus argues, to using proportional quotas to achieve proportional representation out of deference to the innocent

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13. Although he does not explain why, it is clear that Professor Fiscus is of the opposite view:

> Distributive justice, as it relates to race, can only be determined by conceiving of the complete eradication of racism, even if that should prove to be a distant or even idle hope in practice. What is fair and what is realistically to be expected are frequently two different things, and if the one is to have any chance of influencing the other, the calculation of each must be kept separate. There is no extraordinary irony in the claim that justice in real societies is to be determined by first thinking about ideal societies (*ibid.* at 18-19).

14. See *ibid.* at 88ff, 96, 102 & 109.

persons argument.[15] The rationale is that any departure from proportional quotas unfairly places the burden of achieving proportional representation on one segment of the population, namely whites currently in the applicant pool. Unopposed by any compensatory or remedial considerations, this version of the innocent persons argument governs the situation. But if we recognize that adversely affecting otherwise possibly innocent whites may be less pernicious than continuing the effects of discrimination against African-Americans, then disproportional quotas may be appropriate. Even 100% hiring quotas may be proper. If the sins of the past must be borne by a group in the present, it should be done in a manner that promotes equality rather than in a way that sustains existing inequality. Using a remedial or compensatory approach, even the United States Supreme Court has recognized that the innocent persons argument can be trumped in rare circumstances. In that respect, Fiscus' distributive justice model, shorn of the situated understanding of discrimination associated with the compensatory theory, is more conservative and less progressive than the position of the Court he is trying to move forward.

Largely because of the American constitutional and political setting out of which it arises, *The Constitutional Logic of Affirmative Action* does not add significantly to the affirmative action debate in Canada. Both the United States Supreme Court, with its narrow reliance on a remedial or compensatory view of affirmative action, and Professor Fiscus' new book, with its narrow focus on a distributive justice model, lag behind the state of the law in Canada. Justice O'Connor captured the United States Supreme Court's commitment to a remedial or compensatory model in *Richmond* v. *J.A. Croson Co.*, a case striking down a minority set-aside program:

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[15] Professor Fiscus does suggest a narrow and overly complicated analysis based on the rate of job reapplication for a position to determine in what circumstances a departure from proportional quotas might be authorized, but otherwise he remains committed to the presumption that proportionality should govern in all aspects of affirmative action (see *ibid.* at 51ff & 96-103).

> We think it obvious that such a program is not narrowly tailored to remedy the effects of prior discrimination.... Because the city of Richmond has failed to identify the need for remedial action in the awarding of contracts, its treatment of its citizens on a racial basis violates the dictates of the equal protection clause.[16]

Ironically, a similarly unfortunate result was achieved by Mr. Justice Hugessen of the Federal Court of Appeal using a position which can be readily equated with Professor Fiscus' distributive justice theory. Employing an exclusively forward-looking approach, Mr. Justice Hugessen overturned an affirmative action (or employment equity) order issued by a Canadian Human Rights Tribunal:

> There is nothing of prevention in [the order of the tribunal]. The measure imposed is, and is stated to be, a catch-up provision whose purpose can only be to remedy the effects of past discriminatory practices. That purpose is not one which is permitted by s. 41 [of the *Canadian Human Rights Act*].[17]

However, when that decision was appealed to the Supreme Court of Canada, Chief Justice Dickson rationalized these two approaches, using the best aspects of each to uphold the Tribunal's order:

> In any programme of employment equity, there simply cannot be a radical dissociation of "remedy" and "prevention". Indeed there is no prevention without some form of remedy.... To render future discrimination pointless, to destroy discriminatory stereotyping and to create the required "critical mass" of target group participation in the work-force, it is essential to combat the effects of past discrimination. In so doing, possibilities are created for the continuing amelioration of employment opportunities for

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16 *Richmond, supra* note 4 at 891-893.

17 *Re Canadian National Railway Co. and Canadian Human Rights Com'n* (1985), 20 D.L.R. (4th) 668 at 673 (F.C.A.). To be fair, I should point out that Mr. Justice Hugessen was not necessarily endorsing an exclusively distributive justice rationale; rather, he felt constrained to an exclusively forward-looking view by the wording of s. 41 of the *Canadian Human Rights Act*.

> the previously excluded group. The dominant purpose of employment equity programmes is always to improve the situation of the targeted group in the future.[18]

This decision, the lone substantive affirmative action decision issued by the Canadian Supreme Court, was decided under the *Canadian Human Rights Act* and not under the *Charter of Rights and Freedoms*.[19] Nevertheless, there are sound reasons for believing that the thoughtful combined approach introduced by Dickson C.J. in *Action Travail des Femmes* will inform the treatment of affirmative action under the *Charter*. Subsection 15(2), part of the equality guarantee in the *Charter*, explicitly authorizes affirmative action as a legitimate egalitarian device not in conflict with subsection 15(1). Such a direct endorsement of affirmative action should counter any attempts to resuscitate the innocent persons argument in Canada. As well, the Supreme Court jurisprudence under subsection 15(1) adopts an analysis that recognizes the political, social, and historical circumstances of the group in question. This augers well for including a compensatory or remedial component in any review of affirmative action under the *Charter*.[20] The risk, of course, is that the remedial aspect of the

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[18] *Action Travail des Femmes* v. *C.N.R. Co.* (1987), 40 D.L.R. (4th) 193 at 212-215 (S.C.C. overturning the decision of the F.C.A.). Of course, since it was the order of a Human Rights Tribunal that was in question, the analysis of that order was predicated on a finding of discrimination that preceded the order. As well, it should be observed that the Canadian Court was encouraged by the particular language and structure of the *Canadian Human Rights Act* to adopt a view combining a forward-looking approach and a remedial perspective. The fact remains, though, that the Court went out of its way to embrace this more developed combined view in an effort to uphold the Tribunal's affirmative action order.

[19] In *obiter*, four Justices of the Supreme Court of Canada approved an affirmative action plan in *Athabasca Tribal Council* v. *Amaco Canada Petroleum Co. Ltd.*, [1981] 1 S.C.R. 699. The other five justices hearing the case declined to address the affirmative action issue. All nine justices agreed that the case should be dismissed on a jurisdictional point.

[20] See *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143; *R.* v. *Turpin*, [1989] 1 S.C.R. 1296; *R.* v. *Hess*; *R.* v. *Nguyen*, [1990] 2 S.C.R. 906; *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229; *Harrison* v. *University of British Columbia*, [1990] 3 S.C.R. 483; *Stoffman* v. *Vancouver General*

review will develop into a strict requirement. In my view, that is inconsistent with the language of subsection 15(2). It is also, as Ronald Fiscus explains, unnecessary under a distributive justice model of affirmative action. This remains true, even if we choose to supplement that model with compensatory or remedial considerations.

Michael Peirce*

Hospital, [1990] 3 S.C.R. 483; *Tetrault-Gadoury* v. *Canada (Emp. and Imm.)*, [1991] 2 S.C.R. 22; and *R.* v. *Swain*, [1991] 1 S.C.R. 933.

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