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BETWEEN DESPAIR AND DENIAL: WHAT TO DO ABOUT THE CANADIAN SENATE

Daniel Pellerin*

Even in the 1880s, the Canadian Senate was mocked as "a bribery fund in the hands of the government, and paddock for the old wheel horse of the party." Expressions of genuine interest in the institution that are not laced with derision or disdain remain rare; real enthusiasm there is none. Yet, if only it were done sensitively, by the consistent application of a clear, realistic, and historically validated principle, reform of the Senate might prove the best strategy for revitalizing Canada's political system and for strengthening the ties that hold the country together. Rather than surrendering to apathy, denial, and despair, or else dreaming of demolition or trusting oversold remedies that ignore all institutional context and tradition, we can find most of the materials for a stately renovation of the Red Chamber in its own founding principles.

Même dans les années 1880, on se moquait du Sénat canadien disant que c'était « un fonds de corruption aux mains du gouvernement et l'enclos du vieux bûcheur du parti ». Des manifestions d'intérêt pour l'institution qui ne soient pas teintées de dérision ou de dédain demeurent rares; il n'y a pas de véritable enthousiasme. Et pourtant, si seulement c'était fait de manière sensible, au moyen de l'application constante d'un principe réaliste, clair et validé historiquement, la réforme du Sénat pourrait s'avérer la meilleure stratégie pour revitaliser le système politique du Canada et renforcer les liens qui unissent le pays. Au lieu de se résigner à l'apathie, à la dénégation et au désespoir ou encore de rêver de démolition ou de se fier à des remèdes survendus qui ignorent le contexte institutionnel et les traditions, il nous est possible de trouver le matériel nécessaire à une digne transformation de la Chambre haute dans ses propres principes fondateurs.

> From despairing of a cure, there is too often but one step to denying the disease.[1]

What could be more appropriate to a self-styled people of the true North than a glacial Senate reform debate? So weary are Canadians

* Department of Political Science, University of California, Davis. Many thanks to David E. Smith for responding to all my challenges in such good humor, and to Duff Spafford and Tom Ruen for their thoughtful comments on the electoral dimension of my argument.

1 John Stuart Mill, "Considerations on Representative Government," ed. by John Gray, *On Liberty and Other Essays* (New York: Oxford University Press, 1991) at 306. The "bribery fund" comment in the abstract was made by Goldwin Smith, as quoted in Robert A. Mackay, *The Unreformed Senate of Canada*, rev. ed. (Toronto: McClelland and Stewart, 1963) at 143.

said to be of constitutional projects, so daunting the odds against constitutional overhaul, that anyone entertaining thoughts of a Senate revitalized along other than the most predictable and exhausted lines must expect to be dismissed as a dreamer. Those who would resign themselves to the status quo on such diffident grounds, however, might be surprised to find themselves opposed by none other than Edmund Burke, for the true statesman's disposition to preserve cannot operate without the concomitant ability to effect improvement: "A state without the means of some change is without the means of its conservation." And this, too: "To make us love our country, our country ought to be lovely."[2]

Those Conservatives who continue to be preoccupied with chasing across the glacier's craggy ridges that elusive beast, the Triple-E Senate,[3] might likewise be astonished to have their

[2] Edmund Burke, *Reflections on the Revolution in France*, ed. by J. G. A. Pocock (Indianapolis and Cambridge: Hackett, 1987) at 19, 68, 138. Though the lessons of the American constitutional experience are often not fully understood (or at any rate not properly applied) by those who invoke them in support of their designs for a reformed Canadian Senate, the fact remains that there is, even today, no more incisive and compelling treatment of how to establish a "well-constituted senatorial institution" than the one offered by Madison in the *Federalist Papers* (in particular, nos. 62-64). See James Madison, Alexander Hamilton & John Jay, *The Federalist Papers*, ed. by Isaac Kramnick (London: Penguin, 1987) at 364-75 [*Federalist Papers*]. It is especially apt for our purposes that Madison viewed the Senate as the most reliable source of stability and steadiness, the truest reflection of a unified national character in the American system, and thus the most powerful antidote to "that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity, and disappoints so many of their flattering hopes. No government, any more than an individual, will be long respected without being truly respectable." *Ibid*., Madison, no. 62 at 368-69.

[3] The demand for an "elected, equal, and effective" upper chamber modeled superficially on the United States Senate has been dominating the Canadian debate ever since it became the rallying cry of disaffected Westerners. Thus David E. Smith: "If ever an illustration were needed of the dictum that events create theory, then the National Energy Policy and several other federal government decisions judged discriminatory to the [West] . . . stand on permanent offer as explanations for the appearance of the Triple-E Senate Campaign." See David E. Smith, *The Canadian Senate in Bicameral Perspective* (Toronto: University of Toronto Press, 2003) at 92 [*The*

credentials challenged on Burkean grounds. For there is nothing conservative about seeking to impose on the Senate features alien to its history, to its traditional function and its place within the wider Canadian political system. In a peculiar reversal, the "total contempt . . . of all ancient institutions when set in opposition to a present sense of convenience or to the bent of a present inclination" appears today to be more at home on the right than the left.[4]

In seeking to remake the Senate into a true "repository of the mature wisdom of the country,"[5] and to make good its claims on the respect and allegiance of all Canadians – as a body fostering national unity while paying heed to the country's provinces and regions – we should place our hopes not in quick fixes, panacea, or visions of perfection, but in the recovery for our own age of that "firm but cautious spirit" which Burke invoked as the guiding light of our dimming constitutional patrimony. Equally wary of complacency and resignation, on the one hand, and of that ruthless spirit of innovation which would cut without hesitation into the fabric of historic institutions, on the other, we should look not to the most drastic remedies, but to Burke's careful regeneration of the deficient part through those parts that remain unimpaired.[6] Ultimately, nothing

Canadian Senate]. The Charlottetown Accord's provisions for an equal, elected, but constitutionally weakened Senate were deemed insufficient by the populist proponents of Triple-E reform, and the Accord was defeated in the Western provinces in 1992. Triple-E reform was a central demand of Preston Manning's Reform Party throughout the 1990s, and it remains a plank in the platform of the merged Conservative Party.

4 Burke, *supra* note 2 at 22.

5 David E. Smith, *The Republican Option in Canada, Past and Present* (Toronto: University of Toronto Press, 1999) at 170 (quoting George Foster) [*The Republican Option*].

6 Burke, *supra* note 2 at 4, 19. As Senator Michael Pitfield puts it in his Foreword to Serge Joyal's recent collection of essays on the Senate, reform ought to be undertaken "with prudence and a reserve of humility" and in a spirit that would seek "to build on the genius of the system itself." See Serge Joyal, ed., *Protecting Canadian Democracy: The Senate You Never Knew* (Montreal and Kingston: McGill-Queens University Press, 2003) at xv. Dulled as that genius may appear, we should hope to see it burnished rather than banished.

less than the basis for living together in a political community at all is at stake in this debate.

I. THE STATE OF THE DEBATE

Any discussion of the Canadian Senate today will have to begin with David E. Smith's study – not only the most recent and sustained, but perhaps also the most diligent and conscientious, and certainly the most studiously solicitous treatment the Senate has yet received, or is likely to receive.[7] Where so many others have found only occasion for disdain, Smith strains to discover overlooked value and virtue,[8] and where he permits himself more "admonitory language" (characteristic of the very Senate he portrays[9]), Smith reserves it for correcting the misperceptions and bad habits that have long been responsible for vitiating intelligent debate over Senate reform. For rather than expressing any genuine interest in the institution, proposals for Senate reform have too often been advanced as little more than convenient vehicles for projecting more general grievances – first as the voice of populist resentment on the socialist left and then, on the equally populist right, as "the voice of regional remonstrance."[10] Where there has been any serious interest in institutional design at all, it has been in search of a thwarting device rather than of an institution that would seek its proper place within the wider context of the Canadian system of government.

At bottom, Smith argues, Senate reform languishes – and will continue to do so – as long as it is dominated by "little constitutional

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7 David E. Smith, *The Canadian Senate, supra* note 3.

8 *Ibid.* The argument for the under-appreciated value of the institution – including but not limited to its good economic value at a cost of about $1.50 annually per Canadian (see *ibid.* at 172) – is central to Smith's purpose; the suggestion that the body is not as devoid of "virtue" as its critics allege is made at 136. The fact that there are senators among the students to whom Smith dedicates his book (*ibid*. at xi-xii) may go some way towards explaining why he adopts such a measured tone in assessing the institution; alternatively, a less adversarial approach may be more in keeping with his gentlemanly inclinations.

9 Compare *ibid.* at 110.

10 Compare *ibid.* at 52, 91-94. See also footnote 19 below.

images," by overly mechanical analogies and the rote application of models whose ramifications are not thought through.[11] Simplistic notions of balance, unconcerned with context or history, will only lead to the misconstrual of constitutions that have their own internal logic and architecture: "Chemistry rather than physics would offer more illustrative metaphors in a study of parliamentary bicameralism, for chemistry suggests an interaction between bodies."[12] Again, Smith surely has a point when he challenges the prevalence of "invertebrate" reform proposals based on historically insensitive, often careless and superficial, and generally "hermetic" analyses that pay no attention to context or tradition, or to the implications that changes in the Senate would have for the system as a whole.[13] Smith is also right to criticize those Senate critics who merely "dream of what might be" and imagine some "hypothetical Senate" that will resolve once and for all the problems bedeviling the Canadian federation and its institutions. Even the most successful reform of the Red Chamber could never hope, by itself, to assuage the myriad dissatisfactions arising from differing visions of the country.[14]

It would likewise be cause for woe, however, if the banal reminder that "an ideal Senate is not possible" were celebrated as a remarkable insight or if it were used to minimize the need for thinking about how to restore a palpably ailing institution to health and vigour.[15] The reminder that perfection is unattainable in human

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[11] *Ibid.* at 155. According to Smith, "theoretical integrity is generally scarce when it comes to Senate reform" (*ibid.* at 101). The Triple-E Senate, in particular, "is all about foreground; there is no depth to the proposal because there is no depth to the analysis" (*ibid.* at 155).

[12] *Ibid.* at 154-55, 176.

[13] *Ibid.* at x, 68, 181. Two other apt images used by Smith are "tunnel vision" and "a lot of echo and not much contemplation." See David E. Smith, "The Improvement of the Senate by Nonconstitutional Means," in Joyal, *supra* note 6 at 229 ["Nonconstitutional Means"]. Serge Joyal speaks of "prefabricated models for Senate reform" (*Ibid.* at xix).

[14] Smith, *The Canadian Senate, supra* note 3 at 63, 105.

[15] *Ibid.* at 18. The "sense of staleness" that according to Smith envelops only the theory of bicameralism cannot be confined so narrowly, but seems to waft around all aspects of the Senate and debate thereof. Compare also Smith, "Nonconstitutional Means," *supra* note 13 at 229: "'Reform of the Senate'

affairs applies to all our actions and institutions, even our thoughts – but always as a call to caution and responsibility, never to indolence or inaction.[16] However valid Smith's analysis may be as a corrective to the superficialities of the Senate debate, his argument errs too much on the side of caution and fails, in the end, to convince. To be sure, Smith never suggests that all is well with the Senate, but only that it is a more credible institution than is commonly recognized and that our energies should be focused on improving it by realistic means.[17] Nevertheless, his disinclination to raise the more fundamental question of constitutional reform saddles his argument with the very "timidity foreign to the Fathers of Confederation" to which he himself alludes with an air of wistfulness.[18]

Smith is only half-right about the reasons why Senate reform regularly fails to get serious. Certainly, reform proposals have tended to be so focused on advocacy that little room has been left for careful, even-handed analysis of the present state of the institution; just as prevalent, however, is a pervasive lack of conviction among most Canadians.[19] It is not only the interests of competing political

must be one of the hoariest topics in Canadian politics."

16 Compare Hamilton's remark on this point in the *Federalist Papers*: "If mankind were to resolve to agree in no institution of government until every part of it had been adjusted to the most exact standard of perfection, society would soon become a general scene of anarchy, and the world a desert. . . . [They who reject a new constitutional proposal] ought to prove, not merely that particular provisions in it are not the best that might be imagined, but that the plan upon the whole is bad and pernicious" (*Federalist Papers, supra* note 2, Hamilton, no. 65 at 384).

17 According to Smith, improvement of the Senate "is both necessary and possible"; instead of the common preoccupation with visions of "sovereign reform," however, the Senate deserves to be recognized as "a more substantial and responsible legislative chamber than its critics allow" and ought to be turned to good account in its existing form rather than radically transformed by the imposition of alien principles. Smith, *The Canadian Senate, supra* note 3 at 172.

18 *Ibid.* at 37.

19 Smith's is only the fourth book-length study of the Senate in English: what Smith finds missing from the first two – Robert A. MacKay, *The Unreformed Senate of Canada* (London: Oxford University Press, 1926) and F. A. Kunz, *The Modern Senate of Canada, 1925-1963: A Re-Appraisal* (Toronto:

actors that stand aligned against reform,[20] but the attitudes of critics on all sides of the debate; it has simply been too convenient for everyone concerned to strike a defiant pose without having to follow up with a truly serious proposal. A credible vision for the Senate would require not only a robust institutional analysis that is mindful of history and sensitive to context, but also a sense of principle and conviction, of real drama and need.

II. IS REFORM REALISTIC?

Much of the diffidence that surfaces in the context of the Senate reform debate is not specific to that institution at all, but is the expression of a deeper malaise resulting from the twin traumas of the failed Meech Lake and Charlottetown accords. What many Canadian commentators have concluded from these unsuccessful rounds of negotiation is that their constitution has become "impenetrable"; that constitutional amendment is not feasible under the formulae with which we are stuck; and that "great expectations" and ambitious designs for the future are therefore futile, mere distractions from the need to learn to live with the institutions we have.[21]

And yet, while previous reform packages did demonstrate the difficulties of amending the Canadian constitution, their failure had specific reasons that hardly doom any and all attempts at reform. The paralyzing fear of anything that might require constitutional amendment is thus no wiser, surely, than the flighty chasing of

University of Toronto Press, 1965) – is "any sense of advocacy," while the third, Colin Campbell, *The Canadian Senate: A Lobby From Within* (Toronto: Macmillan of Canada, 1978), typifies the scathing, ideologically motivated indictment that has been predominant lately. See Smith, *The Canadian Senate, supra* note 3 at 52. The left and right have stood united in their populist contempt for the existing institution, and while a rejoinder to that attitude is perhaps the central purpose of Smith's argument, a clear sense of advocacy is not always easy to glean from his pages.

20 Compare *ibid.* at 177.

21 Thus Smith suggests, *ibid.* at 157-58: "The great expectations associated with large-scale institutional change are as inappropriate as they are unrealizable. Better a gradual, cautious strategy to make the most of the current Senate. ... Much can be done without constitutional amendment to make the Senate a more constructive and credible institution." See also *ibid.* at 151, 162, 170.

constitutional chimeras. It is one thing to recognize that, within any society and under any constitution, there are overlapping interests and differing expectations that make fundamental change difficult; but to say that they make it impossible, that agreement on Senate reform has not only proved elusive in the past, but will do so for all time to come, is as unhelpful and unrealistic as are unduly naïve hopes of transformation.

Smith's reluctance to consider more fundamental Senate reform, for one, seems to owe much to the belief that it would be exceedingly difficult to find an alternative basis for selection – supposedly a more daunting challenge than finding a new basis for the Lords![22] But surely such a claim is untenable, despite the worthiness of Smith's efforts at shielding the Senate from abuse: Canada does not face the unique challenge of redefining a long-established, hereditary aristocracy, and any reform in Canada can draw on credible provincial institutions that offer a way around the alleged dilemmas one hears so much about in the context of the Senate. A proposal that would give the power to elect senators to delegates from the provincial legislatures (gathered, as will be explained below, in joint assemblies in the existing senatorial regions) might cut right across all the familiar objections:

1. Since such a proposal would assign a vital function to the members of the provincial legislatures, why should it not be able to find favor with majorities in at least seven assemblies representing more than half the Canadian population, as the amendment formula requires?
2. Since the provinces have long demanded a say in selecting senators, the proposed mechanism might prove intuitive to many current advocates of reform – especially since it would go a long way towards treating the provinces equally.
3. Since the proposal would base selection strictly on senatorial regions, it would take seriously the claims for regional identities that underlie much of the Senate

[22] *Ibid.* at 167.

debate, while at the same time paying homage to the historical compromise reached at Confederation.

4. Since the new Senate would not be elected directly by the people, it would not be put in a position to compete directly with the Commons, but rather to fulfill more fully its complementary functions;[23] on the other hand, since we may expect it to enjoy more vigour and credibility under the new system, it would no longer be so easy to sideline.

If only we could muster the courage to look beyond the deep-seated dread of constitutional change in Canada, we might discover that the Senate, dysfunctional as it may appear at first sight, is not so much an incorrigible as an underdeveloped institution. As Smith points out, the Senate has shown quite a bit of resilience and adaptability, and in fact stands, if only we looked a little closer, as "an obvious candidate for refurbishment."[24] It is in this spirit, one of recovering the luster of a faded, long-neglected institution with considerable potential for reinvigorating Canada's stolid political system, that the below proposal is proffered.

III. THE CHALLENGES OF REPRESENTATION

Given not only the current state of the debate over Senate reform, but also the political fundamentals of a country "where federalism is the bedrock of national existence,"[25] a proposal to transform the Senate into an accepted, and even a cherished national institution needs to recognize the legitimate demand for a provincial role in

[23] Compare Smith's "political variant of Gresham's Law [good money drives out bad]: officials who derive their authority from election would drive out all other claimants" (Smith, *The Republican Option, supra* note 5 at 88). Thus also Madison's and Hamilton's cautionary reflections on the "irresistible force" of the popular branch of government: "a full match, if not an overmatch" for any upper chamber, which can hope to maintain itself only by the most prudent and enlightened management of the people's affairs. See *Federalist Papers, supra* note 2, Madison, no. 63 at 375, and Hamilton, no. 66 at 386.

[24] Smith, *The Canadian Senate, supra* note 3 at 91, 154, 176-77.

[25] Smith, *The Republican Option, supra* note 5 at 221.

selecting senators. The alternative, raised by the Liberal government of Prime Minister Paul Martin, of giving the Commons a say in making or at least vetting Senate appointments fails to satisfy this central demand and threatens to blur the boundaries between the two chambers in ways that are constitutionally troubling. Rival proposals for popular elections to the upper chamber would not only lack a basis in Canada's constitutional tradition, but would also fit poorly within the wider institutional context, as Smith's work on the Senate demonstrates so well. Any healthy bicameralism depends on maintaining a delicate balance between the two legislative bodies, and the Canadian parliamentary system would be ill-served by a Senate conceived, whether inadvertently or by design, for no better purpose than obstruction.

Instead of recognizing the provinces' claims while disregarding the fundamental terms of Confederation and the traditional parameters of the Canadian parliamentary system, a more historically sensitive proposal would rediscover and reaffirm the principles of the senatorial scheme created by the Fathers of Confederation, as confirmed in 1915 with the formation of the Western senatorial region. For it turns out, upon closer examination, that the historical compromise of senatorial representation by region not only remains workable, but offers as elegant a solution as one could hope for to the quandary of representational formulae. Instead of the current regime of prerogative appointments on the basis of specific numbers of senators assigned to each province (albeit calculated on the basis of a regional formula), the original spirit of Confederation ought to be applied more faithfully and rigorously, and senators should be elected by *regional electoral assemblies* drawn in equal parts from the legislatures of the constituent provinces.[26]

What makes such a renovated scheme of regional representation so attractive – beyond its historical pedigree – is that it would go a

[26] As Smith points out, the case for provincial legislative selection of senators was occasionally made in the nineteenth century, though far less frequently than that for abolition or a curtailment of the Senate's powers (*Ibid.* at 170). The proposed scheme would be quite novel, however, in its insistence on strictly regional rather than provincial selection.

long way towards respecting the claims to equality among the provinces, all the while heeding the historical and cultural differences as well as the vast discrepancies in population between them. Certainly, the simple tallying of population figures has never been central to Canadian politics – and indeed the very impetus behind Confederation has been attributed to the desire to *escape* the "unsettling" dynamics of strict representation by population.[27] Population is evidently not all, and ought not to be all, especially when it comes to the Canadian Senate; that said, plain obliviousness to population amounts to plain disregard for the citizens behind the numbers and for their equal claims to having their citizenship recognized, reflected, and affirmed. As Laurier put it in the 1915 debate over Senate representation for the Western provinces, a scheme consistently yielding results altogether out of proportion to

[27] *Ibid.* at 162-63, 167. That a scrupulous regard for population, and hence for equality at the polls, forms no part of the Canadian tradition even when it comes to the Commons, which a more republican perspective would view as the most popular branch of the government, is as undisputable as it is deplorable. Thus Smith observes not only that mere "numbers" have never mattered much in Canada, but that "haphazard" ("with its suggestion of lack of principle") would describe the history of representation in Canada most aptly and concisely. In sum: "Voter equality and equal protection are not the issue in Canada; they never have been. Instead, the concern is for adequate or effective representation." *Ibid.* at 103, 104.

The case for such "effective" representation would ring less hollow, however, if the Canadian representational calculus reflected some alternative principle, rather than merely the accumulated weight of so many rounds of past constitutional haggling. The very attempt to describe the convoluted results in terms of formulae, unconvincing as it may be, pays tribute to the demands for some semblance of a rationale beyond the contingent logic of historical accommodation. That Canadians seem unconcerned, and that even the Supreme Court has encouraged their indolence and obtuseness on this point, in no way diminishes the fundamental import of the matter: for from a more principled perspective, the demand for equality of the vote is no less fundamental than that for equality before the law and for equal citizenship itself. To speak of "too much equality" in weighting votes is not merely "un-republican," it is absurd. In the short run, the concern for a stricter regard for equality may well seem petty and eccentric to Canadians fancying themselves preoccupied with more pressing worries over national unity; but in the longer run, a robust modern state can be built upon arbitrarily vested privileges no more than a house can stand upon sand. See Smith, *Ibid.* at 69, 106-107, 140, 166, 224, 231.

the respective populations would be just as deficient as one that neglected other important considerations.[28]

A clarified scheme of regional representation would respect and reaffirm the underlying principles currently in operation, but would apply them more strictly, yielding *four equal senatorial regions responsible for selecting twenty-four senators each*: the Western region comprising British Columbia, Alberta, Saskatchewan, and Manitoba; the region of Ontario; the region of Québec; and the Atlantic region, comprising New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland (and Labrador). In addition, again following the existing scheme, *one senator each* would be designated by the legislatures of the Yukon, the Northwest Territories, and Nunavut – for a total of ninety-nine senators. Within the Western and Atlantic regions, each of the four respective constituent provinces would send an *equal* number of delegates from its provincial legislature to constitute the regional electoral assemblies. The scheme might thus be called one of *dual equality* ("Dual-E") – *treating regions equally, and provinces equally within them*.[29]

While the specifics of the senatorial selection process in the regions will be discussed in the next section, a number of immediate concerns need to be anticipated and answered. *First*, it might be

[28] Smith, *The Canadian Senate, supra* note 3 at 72.

[29] The fact that the "Great Compromise" reached at Philadelphia placed the smallest American states on an equal senatorial footing with the largest is the cause for much clamoring among Canadian reformers. Less often observed is the equally telling fact that Madison, for one, resigned himself to it with the greatest reluctance, noting dryly that "the advice of prudence must be to embrace the lesser evil" because the smaller states were simply unwilling to accept what he deemed a more principled solution. See *Federalist Papers, supra* note 2, Madison no. 62 at 365. An American-style compromise would also require strict representation by population in the lower chamber – a principle no less contested in Canada than Senate reform itself. To put it bluntly, the battle for a Triple-E Senate along American lines must begin with an assault on the beaches of Labrador and Prince Edward Island, with a ruthless redrawing of Commons electoral districts for which even hardened constitutional warriors seem to have little stomach. By comparison to *that* constitutional slogging, the Dual-E Senate seems a relatively easy sell.

objected that the proposed scheme would continue to treat Ontario and Québec as regions rather than provinces, giving them considerably more relative weight than the other provinces – to which there are the following rejoinders:

1. That Ontario and Québec (the two original "Canadas," after all) are the indisputable historical nucleus of Confederation, and that the compromise reached about the Senate at Confederation centered on recognizing their special stature. Indeed much of the bad blood directed at these two "overweening regions"[30] implicitly confirms, though in the negative, their unique place and weight within the nation.
2. That the Senate, specifically, was designed to recognize the distinctness of Québec and allay fears of assimilation. To those who object to such special recognition, however, it can be replied that Québec's "distinctiveness" will be mirrored by an equal reflection of the Western identity (and thus of the alleged alienation about which one hears so much). Until "Western" grievances are no longer presented in such regional terms, but rather as the complaints of specific provinces, the logic of countering Québec representation with equal Western representation is surely apt. Indeed a Senate reconstituted along such lines would provide an excellent forum for testing in practice these pervasive claims of antagonistic regional identities.
3. That even leaving aside all considerations of history and culture, Ontario and Québec remain by far the most populous provinces. Ontario's population is almost exactly three times that of British Columbia, the largest non-region province (and four times that of Alberta); Québec's is close to twice that of British Columbia (and 2.4 times that of Alberta).[31]

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30 Smith, *The Republican Option, supra* note 5 at 134.

31 All population figures are based on Statistics Canada/Dominion Bureau of Statistics census data from 1871 (the first post-Confederation), 1921 (the first post-1915), 1951 (the first after Newfoundland's joining), 1976, and 2003.

True, the gap between Québec and the next-largest province has been narrowing over the years. Thus, in the first census after the Western region was created (1921), Québec's population stood at more than three times that of Saskatchewan, the next-largest province, and more than four times that of BC and Alberta, the runners-up; in 1951, the difference was 3.5 relative to BC (now the next-largest province) and 4.3 to Alberta (the follower-up); while by 1976, the figure was down to 2.5 and 3.4, respectively, before falling to the current figures of 1.8 and 2.4.

Those who would focus on the narrowing gap between Québec and the Western provinces ignore, however, that although the Western region as a whole now has a population 27 percent higher than that of Québec, Ontario's population in turn exceeds that of the West by 29 percent. The very same argument that would call for greater weight relative to Québec would thus demand reduced weight relative to Ontario. Finally, the single most remarkable feature of the proposed scheme as it relates to Québec is surely that the *belle province*'s share of senators (24/99) would correspond so closely to its share of the nation's population (24 percent)![32]

Second, it might be objected that an affirmation of the compromise reached at Confederation would ignore the precipitous decline since then in the relative population of the Atlantic region. Thus, at Confederation, the three Maritime provinces were home to 21 percent of Canada's population, but by 2003 that figure had dwindled to a little over 7 percent even after including the population of Newfoundland. While the Atlantic region once boasted almost half the population of Ontario (47 percent), the figure now stands at less than one-fifth (19 percent).

On strictly mathematical grounds, then, the Atlantic region might seem an obvious place to make drastic revisions, while the

[32] This outcome may seem too felicitous to be a mere coincidence: yet it is in no way engineered, but simply follows from the existing principles of senatorial representation – clarified and applied with more rigor, it is true, but in their essentials dating back to Confederation itself.

countervailing argument would be historical and cultural – stressing once again how central the promise of disproportionate representation in the upper chamber was to these provinces' decision to join Confederation.[33] However, the special provisions made for Newfoundland in 1949 were out of keeping with the logic of regional representation even at the time of its joining.[34] In light of the extraordinary population shifts since then, it is unreasonable to insist that anomalous concessions never be revisited. Thus even the most conscientious champion of historical agreements will surely have to allow at least one change, namely the inclusion of Newfoundland in the Atlantic region.[35] No doubt the mere suggestion of such a move will be met with howls of indignation among the parties concerned; nonetheless, painful though it may seem, this change is entirely indispensable to the credibility of the scheme on account of the following considerations:

1. That even after such a change, the Atlantic region's influence on senatorial selection would remain vastly disproportionate to its actual population. Whereas nation-wide, one senator will represent an average population of

[33] Smith and other commentators have long stressed how central the Senate in general, and its regional scheme of representation in particular, was to the "bargain" of Confederation – "the political key to union" in Mackay's words; "the very essence of the compact" in George Brown's. See Mackay, *supra* note 1 at 37-38, 49; Smith, *The Canadian Senate, supra* note 3 at 98, 144, 151, 162, 180; and Smith, *The Republican Option, supra* note 5 at 151, 168.

[34] Thus Turner, who makes much of the historical promises given, observes that "the traditional balance [in the Senate] was upset by the entry of Newfoundland." See John N. Turner, "The Senate of Canada – Political Conundrum," in Robert M. Clark, ed., *Canadian Issues: Essays in Honour of Henry F. Angus* (University of Toronto Press, 1961) 57 at 59. It is telling that the original proposals for the regional scheme envisaged the inclusion of both Newfoundland and Prince Edward Island in the Maritime region! See Mackay, *supra* note 33 at 38.

[35] If the regional principle is to be affirmed despite the disproportionate advantages it confers on the Atlantic provinces, the least the other parties have a right to expect is that the principle be applied consistently and that the provinces concerned show some appreciation for the privileges conferred on them. Newfoundland's acceptance of an equal place alongside the other Atlantic provinces would be such an acknowledgement, as would be its neighbours' willingness to make room for a fourth province in their midst.

319,000, the new Atlantic region will be over-represented more than three-to-one, with one senator for every 98,000 inhabitants.

2. That all the provinces in question were heavily over-represented even at the time of their joining, and that their decline in relative population has been very steep since the original agreements were reached. Thus the relative population of the three Maritime provinces has declined by more than two-thirds since Confederation, Newfoundland's by more than a third since 1951 alone.
3. That despite the Atlantic region's dramatic loss in population, the principle of regional equality will be upheld, thereby continuing to confer considerable privileges on the Atlantic region; and that the revision addresses only the present reservation of *more* senators to this region than to any other, despite its much smaller and long-declining population!
4. That even under the new scheme, the theoretical "share" of senators for each of the provinces would be equal (at six senators) to that of the other provinces that are not also regions, and equal to what Newfoundland enjoys presently.[36]

Third, it might be objected that owing to their small populations, the Yukon, the Northwest Territories, and Nunavut would be massively over-represented even by their single senators (representing as few as 29,000 and no more than 42,000 inhabitants each). Without denying the legitimacy of such concerns, our calculations should also take into account the symbolic significance of including the territories, as reflected in current practice; still more important for the scheme advanced here is the hope that the selection of senators might be transformed from a divisive into a unifying moment in Canadian public life – which would urge that all the country's parts be involved in the process. Once again, the

[36] Since the proposal would apply the regional principle strictly, it does not make much sense to speak of a province's share under the new scheme. It is used here only to illustrate that there is no diminishment of Newfoundland's relative weight within the Senate.

imperatives of population must be taken seriously, but they are not, and cannot be, everything in a system like Canada's.

IV. PRINCIPLES OF SELECTION

Given the pressures and temptations to which anyone who is given virtually unchecked powers of appointment must be liable, efforts at curbing the ill effects of the prerogative system have long focused on setting formal requirements to bound prime ministerial discretion.[37] Thus, a minimum age of forty was set for members at the creation of the Senate and retirement at age seventy-five has been mandatory since 1965; property requirements, while eroded by inflation, continue to be in place, as do provisions against bankrupts. Indeed, advocates of non-constitutional reform, like Smith, have expressed the hope that prime ministerial appointments might be guided to good effect by "a set of objectives" framed to limit his or her discretion.[38]

It is not very likely, however, that such remedies will produce the desired results, and they may well do just the opposite: for the comprehensive judgment of personal qualities such as would go into identifying a nation's most eminent representatives is so complex an exercise that it cannot be reliably reduced to handy formulae. Restricting discretion by formal requirements is likely to yield sound but uninspired choices based on broad generalizations. The difficulty in making the best choices is already implied in speaking of an *exceptional* caliber of senators: for if we take excellence seriously, it will often be found in those who defy expectations. The requirement that senators be between forty and seventy-five years old, for example, may be based on a plausible rule of thumb that

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[37] Formally, of course, the Prime Minister's role is advisory: but since the Governor General's office is itself filled at the Prime Minister's discretion, it seems unlikely that it could be made to yield a check on prerogative appointments. Indeed the present proposal might recommend itself not least on the grounds that it would offer attractive alternative procedures for filling the most prominent state offices, which might help to give them more institutional weight. See Section VI.

[38] See Smith, *The Canadian Senate, supra* note 3 at 169, 173. See also David E. Smith, "Nonconstitutional Means," *supra* note 13 at 260.

would generally be adhered to even if it were not formalized. Yet the prejudice against *anyone* under forty, though not without cause, remains a *prejudice* that might well be proved wrong in specific cases. Meanwhile, at the other end, history both ancient and recent abounds in examples of illustrious statesmen who rendered their countries the greatest services in their eighties, and it would be preposterous to dismiss the possibility that a person over seventy-five year old might make the very best of senators.[39] Likewise, while financial independence and freedom from debt are undisputed goods, other things being equal, it seems short-sighted to rule out, without regard for the specific case, that a history of financial insecurity might as well lead the way to its own kind of wisdom. Bankruptcy will never advertise a candidate to his fellow citizens – but whether, in an increasingly debt-ridden nation especially, it should preclude senatorial qualification altogether is surely a different matter. To push the argument a step further, even the most reasonable presuppositions against an individual on biographical grounds – on account of a serious criminal record, for example – do not prove that someone could not be reformed and go on to make an unrivaled contribution to the country's weal.[40] It may border on the miraculous

[39] It needs to be said, of course, that mandatory retirement was introduced not so much to countenance the impudent equation of age with senility, but rather to counter the vagaries of lifelong appointments. Fixed, non-renewable terms obviate the difficulty far more effectively, however, and there is no good reason why electors should be precluded from choosing either a 30-year-old or an 80-year-old candidate if they should deem him or her the fittest choice.

[40] That many upright citizens have been saddled with criminal records for petty drug-related incidents decades ago illustrates the foolishness of trying to eliminate discretion from judgments of character. Nor does this problem show any signs of abating: according to figures from Statistics Canada, some 92,500 drug-related charges were laid in 2002, two-thirds for drug possession alone. While drug-related charges in general increased by over 40 percent in the previous decade, those involving marijuana jumped over 80 percent. See Norm Desjardines & Tina Hatton, *Trends in Drug Offences and the Role of Alcohol and Drugs in Crime* (Ottawa: Statistics Canada, 2004) at 1, 3. For more specifics on the issue and a heartening illustration of the Senate at work, see also Gérald Lafrenière & Emmanuel Préville, *Reported Incidents, Convictions, Incarcerations and Sentencing in Relation to Illegal Drugs in Canada*, prepared for the Special Senate Committee on Illegal Drugs (Ottawa: Library of Parliament, Parliamentary Research Branch, 2002), online: Parliament of Canada <www.parl.gc.ca/37/1/parlbus/commbus/senate/com-

for a bloodhound to be made into an apostle, but if a Saul could be transformed into a Paul, we can never safely rule out that the very best of men and women might stand before their peers with tarnished records.[41] Given, then, that the best judgment of electors everywhere will naturally gravitate towards the mature and energetic, the accomplished, the well-off, and the locally favored, there should be no reason to mandate these expectations – just so long as electors are enabled truly to pass their best judgment.

Though much political theory cautions against placing unchecked power in anyone's hands, discretion itself is not the problem but the best hope of making wisdom prevail in human affairs. The classic solution to this seeming dilemma is the Aristotelian faith in the collective rather than the individual intelligence of human beings.[42]

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e/ille-e/library-e/gerald1-e.htm>.

41 No one is advocating the election to the Senate of confirmed bloodhounds, of course; nor does the argument turn on the rights of prospective senators. The right to be recognized here, on the contrary, is that of the *electors*, who should not be barred from placing the nation's trust in those who have put a troubled history behind themselves. Thomas Hare, the inventor of the electoral scheme I propose below, argued on just such terms against all legal restrictions placed on those who might be elected from the constituency of the whole nation. Compare Duff Spafford, "PR by the Servants' Entrance: The Electoral System of Thomas Hare" (Paper delivered at the Annual Meeting of the Canadian Political Science Association, Ottawa, 7-9 June 1982) at 9 [Spafford, "Hare"].

42 Aristotle, *Politics*, ed. by R. F. Stalley, trans. by Ernest Barker (New York: Oxford World's Classics, 1995) III.11 at 108, 110. Thus: "There is this to be said for the many: each of them by himself may not be of a good quality; but when they all come together it is possible that they may surpass – collectively and as a body, though not individually – the quality of the few best. . . . When we turn to consider the matter of election, the same principles would appear to apply. To make a proper election is . . . the work of experts. . . . [Provided, however,] that the people is not too debased in character[,] [e]ach individual may indeed be a worse judge than the experts; but all, when they meet together, are either better than experts or at any rate no worse."

For Machiavelli, too, the assembled people, though easily deceived in matters of general policy, can be relied upon to make the best choices when it comes to the particulars of filling offices: "[A] prudent man should never flee from the popular judgment in particular details regarding the distribution of ranks and positions, because only in this matter do the people avoid deceiving themselves; and if they are deceived on some occasions, they are very seldom deceived more often than the few men who have to make such

The decision to place our trust in the collective wisdom of an assembly, with balloting provisions to ensure that the electors' independent judgment will hold maximum sway, offers a classic remedy that would avoid the false assurances of arbitrary requirements for office that may end up depriving us of just what we are seeking: a special caliber of senator.

Whether guiding the decisions of an assembly or of the people at large, the choice of electoral system will be central for promoting senatorial selections qualitatively different from those likely to be made even by the best-intentioned national party machine and its chief engineer. To put it bluntly, not much would be gained if the same manner of decision presently made at the federal level were merely passed down to lower jurisdictions[43] (although, even then, one might argue that the mere decentralization of patronage opportunities would be more in keeping with liberal-democratic principles than the present system). At any rate, more can and should be aimed for than a mere geographical adjustment, or even a greater dispersal of powers presently concentrated in the hands of the nation's dominant party leader: namely a process that not only pays lip-service to the ideal of extraordinary senators, but facilitates and promotes their actual election.

The system of balloting used in the proposed regional electoral assemblies will be central to that end, and the time may have come for reconsidering a proportional voting system, the single transferable vote (STV) – first advanced some 150 years ago, most prominently championed by John Stuart Mill, most widely used in Ireland and Australia today, and endorsed overwhelmingly by British Columbia's groundbreaking Citizens' Assembly.[44] Though Mill

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appointments." See Niccolò Machiavelli, *Discourses on Livy*, trans. by Julia & Peter Bondanella (New York: Oxford World's Classics, 2003) I.47 at 122. Likewise, *ibid*. at 143: "It is also evident that in the selection of magistrates the people make far better choices than a prince."

43 Compare Turner, *supra* note 34 at 73 and Mackay, *supra* note 33 at 185.

44 Compare Mill, *supra* note 1 at 302-25. For a discussion of electoral reform at the federal level and an STV-based proposal predating the Assembly's recommendations, see Daniel Pellerin & Patrick Thomson, "Proportional Representation is Likely to Create More Problems Than It Would Solve; the

championed the system on the grounds that it would protect the equality of the vote by representing the various sections of the electorate more proportionately – ending "the complete disenfranchisement of the minority" by a mere "majority of the majority" – this concern went hand-in-hand with the aim of promoting the election of the most high-minded and public-spirited candidates.[45] For what Mill dreaded even more than compromising the equality of the vote was the crushing weight of "collective mediocrity," the natural tendency of all modern representative government towards the rule of yes-men "without any distinctive peculiarity, any known opinions except the shibboleth of the party." What Mill so cherished about this method of election was its promise to voters of a better choice than that "from the assortment of two or three perhaps rotten oranges . . . offered . . . in [the] local market" – a choice, indeed, from among all citizens, offering the best hope of identifying "the very elite of the country," composed of individuals who would be a true "honor to the nation."[46]

Single Transferable Vote Offers a Better Choice" (2004) 25:9 *Policy Options* 54. For the Assembly's findings, see its Final Report, *Making Every Vote Count: the Case for Electoral Reform in British Columbia* (December 2004), online: B.C. Citizens' Assembly on Electoral Reform <www.citizensassembly.bc.ca/resources/final_report.pdf>. For an interesting account of its conclusions from the perspective of an individual member, see Jack MacDonald, *Randomocracy: A Citizen's Guide to Electoral Reform in British Columbia* (Victoria: FCG Publications, 2005). The reform proposal that had been overwhelmingly endorsed by the Assembly and garnered a clear majority in a referendum failed because it fell narrowly short of the required super-majority of 60 percent.

45 Mill, *supra* note 1 at 303-305, 307. Mill referred to the method as one of "*personal* representation" at 314 [italics added]; Hare spoke of his "system of individual independence" (see Spafford, "Hare," *supra* note 41 at 2, 5) and both would have welcomed its characterization as "quintessentially candidate-based." See David M. Farrell et al., "Designing Electoral Institutions: STV Systems and Their Consequences" (1996) 44 *Political Studies* 28 at 42. A key advantage of voting by STV is that it minimizes the incentive and opportunity for strategic voting and encourages the expression of sincere preferences; see Spafford, "Hare," *supra* note 41 at 15-16.

46 Mill, *supra* note 1 at 306, 311-13, 322. It is vital to the scheme as it recommended itself to both Hare and Mill that it operate on a nation-wide basis: for it is the unrestricted breadth of the choice offered in the country as a whole that serves a guarantee of the highest caliber representatives. The use of STV for city or university councils or local school boards, which has been

V. SELECTION MECHANICS

The proposed scheme would convene the regional electoral assemblies on a fixed four-year cycle distinct from all other elections, rotating the place of gathering among the constituent provinces where applicable.[47] To adjust for the disparate sizes of the provincial legislatures,[48] each would delegate an equal number of electors (perhaps twenty-four, for symmetry's sake) drawn at random from among its ranks.[49] Each cycle would see the staggered election

quite common in the United States, or for other merely local constituencies, or in combination with a restrictive nomination process, compromises the logic of the Millian-Hareian scheme at a crucial point. See Farrell et al., *supra* note 45 at 27; Spafford, "Hare," *supra* note 41 at 14. As will be elaborated below, the proposal of using the system for the selection by regional electoral assemblies from a national pool of possible candidates comes closest to the spirit in which this scheme was first advanced.

47 Perhaps the most even-handed and intuitive principle of rotation would be to follow the course of the sun, holding the first assemblies in the eastern-most provinces within the regions, Newfoundland and Manitoba, and rotating westward every four years: to PEI and Saskatchewan in the second cycle, Nova Scotia and Alberta in the third, New Brunswick and BC in the fourth, and back to Newfoundland and Manitoba in the fifth.

48 The legislative assemblies in Ontario, Québec, and the territories would elect their senators in special sessions on the same schedule. In the former cases, the same electoral rules would apply as in the Western and Atlantic assemblies; in the latter cases, where only a single senator is to be selected, the electoral system used should ensure that a candidate garner the support of a majority and not just a plurality of the respective assemblies. An alternative-vote system allowing electors to rank-order candidates and proceeding by a transfer-mechanism would be one suitable method; another would be to have electors cast single votes, but to repeat balloting until a candidate emerges who is supported by an absolute majority of the electors, a process that could be facilitated by provisions for narrowing the field after a specified number of inconclusive ballots.

49 Selection by lot may seem an odd contrivance, but in an age of easy, tamper-proof electronic randomization, it may be time to re-familiarize ourselves with a mechanism that has the most ancient democratic pedigree of all. For Plato and Aristotle no less than for Montesquieu and Mill, the drawing of lots, not election, was the distinctively democratic mode of selection. Though the thought may be counterintuitive today, it has always been implied in our principles of jury election and may be due for rediscovery in light of the design chosen for British Columbia's Citizens' Assembly on Electoral

of one third of a region's total number of senators[50] – thus eight per cycle in each region – to non-renewable, fixed twelve-year terms.[51] Such a scheme, it is to be hoped, would ensure continuity within the Senate and make elections a feature regular enough not to be anomalous, but rare enough to remain noteworthy and not become burdensome.[52]

Reform. A number of interesting historical examples of political institutions that relied on selection by lot are reviewed in Lyn Carson & Brian Martin, *Random Selection in Politics* (Westport, CT: Praeger, 1999) at 26-33.

It is not widely known that one of Canada's most celebrated sons, Sandford Fleming, was also a committed electoral reformer who saw great promise in the lot as a means of "rectifying Parliament." Compare S. Fleming, *Appeal to the Canadian Institute on the Rectification of Parliament* (Toronto: Copp and Clarke, 1892). In an 1889 paper published in the *Transactions of the Royal Society of Canada* (section III), Fleming advocated a scheme he christened the "Apostolic method," which relied heavily on the lot and for which he found Scriptural warrant in the selection, by the casting of lots, of Matthias as the twelfth apostle to take Judas' place (Acts 1:26). See Duff Spafford, "Sandford Fleming as Electoral Reformer" (Presentation at the Department of Political Studies, University of Saskatchewan, 24 Feb. 2004).

[50] Lest staggering be dismissed as an American (or Australian) import alien to the Canadian constitution, it might be noted that the mechanism is a much older one for which the Republic of Venice was especially admired. Closer to home, elections to the upper chamber for staggered eight-year terms were introduced in the United Canadas in 1856, with one quarter of members scheduled for retirement every two years. Compare Smith, *The Republican Option, supra* note 5 at 43, 88.

[51] Smith, too, favors such terms, which, he points out, would correspond closely to the historic average tenure of senators at just under twelve years. See Smith, "Nonconstitutional Means," *supra* note 13 at 259; compare Smith, *The Canadian Senate, supra* note 3 at 168. At the beginning of the century, G. H. McIntyre advocated limiting senatorial tenure to one term "not to exceed the legal term of three parliaments" (which would today come close to the same twelve years), and in the 1960s Pearson raised the prospect of fixing terms at about fifteen years, or somewhat less than that, before abandoning the idea in favor of provisions for mandatory retirement. See Mackay, *supra* note 33 at 153-54.

[52] Given that the territorial assemblies would have only one senator each to select, staggering is not an option. In view of the vastly smaller population bases of the territories (as low as one-tenth the national average!), it would seem reasonable to bring the selection of these senators into the electoral cycle by mandating four-year terms, twice renewable. It should be stressed that the point of making such a distinction is not to diminish the stature of the affected senators, but to ensure that Senate Election Day will become a truly national

Perhaps the most dramatic and controversial change, though also the one most integral to the proposed scheme, would be the scrapping of all formal requirements (including those relating to residency) restricting the electors' choice, which would instead, at least initially, be made from all Canadian citizens of voting age – excluding only members of the electoral assemblies themselves. Thus electors would gather in their respective assemblies and would cast a first round of secret ballots simply listing, and thereby nominating, any eight citizens for the Senate.[53] A refinement worth considering would require all valid ballots to register the names of four male and four female nominees, discarding as spoiled any that should fail to do so. The objections to be made against sex-based restrictions on electoral judgments in systems with stringent nomination processes are obvious and serious. Under the proposed scheme, however, the electors would face such an immensely expanded range of choices over what we commonly accept as adequate that no elector's best judgment would be compromised. Picking from among so many millions of prospective senators of either sex, how could even the most prejudiced elector fail – whatever the force and direction of his or her animus – to find four individuals who would be a genuine match for their respective counterparts?[54]

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event every four years.

[53] It might be objected that this would leave the system open to confusion, as there are many "Joe Clarks" or "Mike Harrises" or "David E. Smiths" in the country; but this should be easily remedied by adding a short note like "ex-Prime Minister," "ex-Premier," or "Professor emeritus at the University of Saskatchewan." In the case of lesser-known individuals, an address or the name of a spouse, a social insurance number, license plate number, or even phone number would suffice to identify a prospective senator conclusively. After all, the number of ballots to be deciphered will not be very large. Where a name could not be identified without question, it would simply be ignored.

[54] The argument in favor of female guardians in Plato's *Republic* ought to persuade even those least given to dogmatic affirmations of strict equality between the sexes. Plato, after all, argued that women needed to be included in his ideal city's ruling class not because they were to be considered men's equals in general, but because the best among them would be a match for the best among the men (Plato, *Republic*, 451e, 453a-457c). The argument, it might be added, reverses easily to show why even the most stridently feminist

To narrow the field of candidates to a more manageable number, the electors would again list any eight names in a second round of balloting, but this time choosing from among those candidates who had received at least two votes in the first round. The third and fourth rounds of balloting would follow the same procedure, narrowing the choice to those who had garnered four and eight votes in the previous rounds, respectively. At the end of these four preliminary rounds of balloting – with sufficient intervals between ballots to allow electors to take cognizance of candidates they may not have considered seriously – close to a hundred nominees could theoretically remain in the running. Since votes are not likely, in practice, to be so widely dispersed, however, the field of candidates would probably be reduced to no more than half that number in most actual elections. All potential senators at this point will be among the preferred candidates of at least one-twelfth the electors. In the fifth and decisive round, a region's eight senators would now be selected from among the remaining nominees by a single-transferable-vote (STV) system, in which each elector would once again list eight names, but this time ranking them by preference.[55]

The intuition behind using STV would be that *one of eight senators* should be considered elected if he or she were supported by at least *one in eight electors*.[56] It is vital to this system that every ballot be counted once, and once only: any candidate receiving more

elector may be required, without injustice, to cast her ballot for four out of a couple million men.

[55] At this stage, the requirement that an elector's votes be evenly divided between male and female candidates should be lifted. At a minimum, electors should be left free to rank candidates of one sex above those of the other. Compelling serious consideration of candidates of either sex during pre-selection balloting is one thing; mandating quotas for the final selection is quite another. The former is perfectly consistent with the demands of a free society; the latter has no place there.

[56] A different way of putting it would be to describe the scheme as one of proportional representation on the basis of a 12.5 percent (1/8) threshold. (Or about a percentage point lower if the "Droop quota" is used, see next footnote.) This illustrates the difference with more strict systems of proportional representation, which rarely operate with thresholds above 5 percent.

than his or her "quota" of first-preference votes (one-eighth of electors, or twelve votes, in our case[57]) must therefore have his or her "surplus" ballots reallocated to the candidates named as second preferences, and so on down the rank-order of preference.[58] If the available seats are not filled after all surplus votes have been redistributed, the algorithm would be kept going by a corresponding process of eliminating those candidates with no prospect of election and transferring their ballots as well. The actual calculations required in this process are likely to become cumbersome and confusing rather quickly, saddling the method with a reputation for opacity and complexity.[59] So long as its basic principles and implications are understood, however – which should not be too much to ask of anyone entrusted with so demanding and responsible a task as picking senators – its finer technical points, intricacies, and various refinements can surely be left to specialists as safely as are so many

[57] As Henry Droop pointed out in 1868, this straightforward calculation (the "Hare quota") slightly overstates the number of votes necessary to ensure that no more candidates can reach the quota than there are seats to fill: in our case, for example, where a maximum of 96 ballots would be cast by 24 electors from each of four provinces, *eleven* (rather than twelve) votes distributed among each of eight candidates would suffice to prevent any ninth candidate from reaching the "Droop quota" – the smallest integer greater than *votes*/(*seats*+1) – necessary for election.

[58] In general, electors need not fear the transfer of their votes because all such transfers are governed by their own rank-ordering of candidates. It is true, as Spafford points out, that reallocation can set in motion a series of subsequent transfers with results unwelcome to an elector, such that he might have preferred to abstain. While this is no doubt an anomaly of the system, one should not overstate its seriousness for practical purposes. No electoral system can be perfect, as Spafford himself insists, and a more ambitious and sophisticated scheme will naturally produce more startling theoretical curiosities. See Spafford, "Hare," *supra* note 41 at 16-17, 26-27; see also Duff Spafford, Testimony with Supplement, given before the Special Joint Senate-House of Commons Committee on Senate Reform, Regina, 6 Oct. 1983: Testimony at 25:53, Supplement at 2, 8, 12 [Testimony with Supplement].

[59] A commentator for the *Westminster Gazette* in 1907, for example, likened the scheme to a "mysterious 'sausage machine,' which, after involved and incomprehensible processes, turns out batches of finished members." Spafford, *ibid.*, speaks of "a most ingenious, ambitious, and complicated method of election" at Supplement 2. Compare Spafford, "Hare," *supra* note 41 at 1, 14-15.

of the other underpinnings of our contemporary life.[60] The data from less than a hundred ballots would not take long to enter into a computer, which could quickly and reliably run and document the necessary calculations with all their ramifications – all told, the work of no more than half an hour, if that, per round of balloting.

It is true that the proposed electoral mechanism could, in principle, yield preferences so scattered that they would fail to coalesce around any consensus candidates at all; in practice, however, balloting would not take place in a political vacuum, and one would expect the run-up to Senate elections to be rife with lobbying not only by provincial caucuses and political parties, but also by advocacy and interest groups, editorial pages and the assembled punditry, the local constituencies of electors, and many others – all of whose active interest in promoting certain candidates would tend to benefit some more than others and make unpatterned outcomes improbable. Party allegiances, in particular, would not be likely to disappear at the ballot box, although they might well recede before it, at least so long as only secret ballots are used. It is vital for the scheme that electors, though drawn from a party-political background, should be free to express their genuine preferences and be protected from the recriminations of party enforcers. Assuming only that electors would not vote their party lines mechanically, even modest straying would make defectors all but impossible to pinpoint, protecting them from pressures that might otherwise be brought to bear on them. Such electoral dynamics might be more problematic, of course, for an institution requiring stable partisan majorities backed by reliable party discipline. Yet the Senate as envisaged here is not to be a confidence chamber, the domain of party bosses and their whips, but rather a body transcending party confines and ideological boundaries, created regionally but national in outlook, sensitive to minority opinion but ultimately focused on the individual member.

Objections focused on the absence of residency requirements and provincial guarantees would still be mistaking the logic of the

[60] The Citizens' Assembly's slogan – "STV: as easy as 1, 2, 3" – may have been too optimistic, but it was not unwarranted.

proposed scheme, which is not meant to be local. Not only are senators to be created regionally rather than provincially, they are also to be elected to a self-consciously national office. It is likely and unobjectionable that the regional assemblies would tend to focus their attentions on local favorites; but the whole design of the proposal aims to make them into *regional* favorites, at least, who would have a mind to act in the interest of the nation. What is more, the very rationale of the proposal would be undermined if it precluded the Atlantic assembly from electing a Joe Clark to the Senate, for example, or the Western assembly from settling on a Mike Harris, or the Québec assembly from choosing members of francophone minority communities elsewhere in Canada. If the hope for the new Senate is that it might unite the country more effectively, why seek to sever rather than foster such cross-cutting national ties at election time? A more valid objection would be that the envisaged system offers no guarantee that an elected senator would accept the office, or that the same person might not be elected senator by two or more assemblies. As for the first, it is to be hoped that a seat in the revitalized Senate would be perceived as a distinction and an honor that would not often be scorned;[61] as for the second, a senator selected in more than one region would be considered elected where he or she had received the largest percentage of first-choice votes.[62] Slots vacant owing to senators-elect declining the office or being chosen by more votes elsewhere would most simply be filled by reference to the second and further choices on those ballots marking the name in question as their first choice.[63]

Finally, since the electors from the smallest constituent provinces in the Western and Atlantic regions would be represented in the

[61] Senate appointments have not often been refused, after all, even by appointees, such as Sir George Foster in 1921, who deemed the move to the Red Chamber a "warrant of political death." See Mackay, *supra* note 33 at 151; compare Turner, *supra* note 34 at 71.

[62] Ties would be broken by share of second- or third-choice votes. If all eight levels of preference resulted in a tie, as it is hard to imagine they ever would, lots would be drawn.

[63] As all results would be kept on record, eight levels of preference should also be more than sufficient for filling later vacancies resulting from death, incapacity, or resignation.

electoral assemblies on an equal footing with their more populous counterparts, they would be in as good a position as their neighbors to make their preferences felt. The larger provinces would have only one very reasonable advantage: the presumably greater incidence, among larger populations, of candidates with region-wide appeal. Despite the equal number of electors sent by the legislatures of British Columbia and Saskatchewan, for example, one should not be surprised to find more senators elected out of Vancouver than out of Prince Albert. But such divergent outcomes would reflect a freely reached consensus among equal partners and should not be cause for worry. To put to rest any lingering unease, a final refinement might be added to the scheme: once a full slate of senators has been elected by the secret ballots of the individual electors, the slate as a whole could be put to the assembly for assent by a secret vote of ratification. If the slate failed to attract a simple majority, the assembly would be adjourned and a new round of senatorial balloting would be done the next day. If the new slate failed again, the procedure would be repeated. To prevent deadlock, the slate should probably be allowed to stand even without ratification after three (or perhaps a few more) rounds of balloting.

Whatever the precise dynamics of such a system might turn out to be, we could expect a level of democratic drama and excitement rarely seen anywhere in Canada's political system today. Whether J. S. Mill's loftiest hopes would be realized or not, one might anticipate a number of other benefits to the system:

1. The national role that would accrue to provincial legislators under this system might generate more positive sentiments towards Ottawa;
2. campaigning directly for senatorial office would be difficult and probably frowned-upon, and elections would likely be far less partisan than what we are accustomed to;
3. while interest groups and associations, including parties, would likely offer electoral suggestions and perhaps full slates of proposed candidates, they would have few means of pressuring electors or dominating the process;

4. while celebrity and social prominence would offer an advantage, the odds of election for a candidate out of the public eye might well improve over the current system, where most appointees are prominent, or anyway well-connected, figures; given the range of alternatives and the relative preponderance of backbenchers among the electors, the number of regular citizens elected may well increase rather than decrease;
5. finally, one would expect, in any case, a remarkably wide array of candidates, perhaps congregating around a core, but with intriguing exceptions that are rare in party-dominated bodies.

VI. POSSIBILITIES AND OPPORTUNITIES

Unlike so many others before it, the proposed scheme for Senate reform does not envision a dramatically enhanced second chamber boasting a bevy of new powers or a fundamentally new role: the aim is not to augment its legislative powers on the model of the United States Senate, for example, nor to transform it into a House of the Federation like the German *Bundesrat*, or to create a rival chamber of confidence that might engage the Commons in "mandate wars" as does the Australian Senate. Instead, the Senate's function within the Canadian system should remain what it was always meant to be in theory, but what it has rarely been in practice: a chamber truly providing sober second thought, designed to complement and support the Commons, to consult, clarify, and personify, and thus to provide a forum for the unification of the nation.[64] Far from becoming the federation's most regionalized institution, as some have hoped, the Senate should become its most fully and credibly

[64] It might be anticipated that regionally selected senators would also act as spokesmen for regional grievances – alienated Westerners and disenchanted Quebeckers facing each other in blocks, for example. Perhaps the Senate would not be the worst forum for airing these grievances since it would also unite these disparate groups in a common purpose that would not be narrowly governmental and therefore would not threaten to hold the nation hostage as similar divisions in the Commons would. Perhaps hostility across the Senate floor might even clear the way, eventually, for a measure of reconciliation, both of the individuals concerned and of the larger forces they represent.

national body. The fact that the proposed system of senatorial selection may not give rise to reliable partisan majorities is not cause for concern, but cause for hope: the cloud of partisan appointments has been the dark shadow under which the Senate has been labouring for so long, and perhaps its dispersal would at last allow the body to fulfill its historic mission as it has never quite been able to do.[65]

Though the spirit guiding this reform proposal is one of cautious rather than radical innovation, a reconstituted Senate may offer a real remedy to one dimension of the Canadian system that cries out for reform perhaps more than any other. Given the latent constitutional powers vested in the Governor General and the fact that republican aspirations would most effectively aim at increasing that office's profile rather than cutting ties with the monarchy,[66] the present

[65] The fear of deadlock in the Senate would be misplaced so long as the fundamental calculation of this proposal turned out to be correct: namely that an indirect scheme of legitimization would allow the Senate to fulfill its role more credibly, but would not encourage it to abandon restraint in its dealings with the Commons. Given that the Senate is not meant to assume the functions of a confidence chamber, the absence of a solid "governing" majority would not threaten failure at all, but, on the contrary, serve as a reminder of the Senate's proper functions and as a check on ambitions the Senate might otherwise develop.

It is worth considering whether the Senate's intended function would be better served by replacing its absolute with a suspensive veto, or whether provisions for breaking deadlocks in the Senate under the British North America Act should be repealed as would be more consistent with the logic of the revitalized institution. On the other hand, the Senate's very ability to fulfill its constitutional purposes may well depend on the "anticipatory restraint" resulting from the power (rarely and responsibly exercised) of vetoing absolutely. Smith, for one, finds the Senate's absolute veto entirely "appropriate for the purposes of implementing the federal principle in the Parliament of Canada," and Joyal worries that the move toward a suspensive veto would reduce the Senate to a mere "government focus group." Smith, "Nonconstitutional Means," *supra* note 13 at 251 (compare Smith, *The Canadian Senate, supra* note 3 at 112, 117, 120); Serge Joyal, "Introduction" in Joyal, *supra* note 6 at xviii.

[66] As David Smith argues convincingly in his *Republican Option*, the challenge of Senate reform may be best understood as a facet of the broader question of incipient republicanism in Canada. The connection is easily overlooked, of course, if republicanism is reduced to the simple negation of monarchy; yet classical political theory and modern practice alike indicate that monarchies

system of Prime Ministerial appointments appears singularly inappropriate. *The Globe and Mail's* sporadic editorial campaign for having the Companions of the Order of Canada choose the head of state may be too idiosyncratic to be taken very seriously;[67] a Senate reconstituted along the proposed lines, on the other hand, would offer an alternative worth considering.[68] Given that prerogative appointments are formally made by the Governor General, the enhancement that should result from election by a credible Senate might well give the office sufficient weight to act as an effective check on irregular or irresponsible choices, and ensure that its own constitutional responsibilities would be less open to challenge in times of crisis.[69] The selection of Supreme Court justices raises even more complex questions and should be handled with great care: the highly politicized wrangling over confirmations that has become so regular a feature of the American system does not serve the judiciary

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are often constituted popularly, and may even need to be so constituted. The question of whether Canadians will continue to have a king or queen is therefore secondary to that of their republican commitments, which are better tested by whether they will begin to take more seriously the question of institutional design and balance, and nowhere more so than when it comes to renovating their Senate. Thus the fact that Canada lacks an institution that "pre-eminently embraces the national as well as the local interest" – as the U.S. Senate does – is for Smith "a characteristic mark of the non-republican character of Canada." The moribund state of republicanism in Canada and the malaise of its Senate would thus appear as the two sides of the same coin. Smith, *The Republican Option, supra* note 5 at xi-xii, 8, 40, 225-32.

67 *Ibid*. at 15, 31.

68 If the Governor General were to be elected by a reformed Senate, it might make sense to shorten the conventional five-year term (which has never been formally fixed) to four years so as to bring it in line with the Senate cycles. Thus senators might, for example, vote for a Governor General in the second, sixth, and tenth years of their terms.

69 The Governor General's formal power to refuse a Prime Minister's request for premature dissolution of the Commons, for example, should be a real safeguard against narrowly partisan maneuvering, not just a dead letter of the law. Perhaps the most deplorable feature of the Canadian system is its tendency to treat even fundamental constitutional matters as mere reservoirs of party advantage. The Governor General's office would be the most obvious and visible place to set boundaries between party politics on the one hand and the fundamental interests of the state and its people on the other; but this can hardly be done so long as that very office is filled at the discretion of none other than the chief representative of the country's party politicians!

well and may be more damaging than the shortcomings of the status quo. One might nonetheless consider whether a reconstituted Canadian Senate ought not at least to be given a *suspensive* veto over judicial appointments in recognition of the enormous expansion of the Supreme Court's effective powers over the past generation.[70]

VII. CONCLUSION

Perhaps all these reflections can be dismissed by a single rejoinder, namely that none of the above could ever be viable in a country where the mathematics of representation are such, as Smith puts it, "that everyone must be a winner."[71] The implications of such a response go far beyond what is intended, however. For Canada would be facing a far more debilitating problem than an irredeemably moribund upper chamber if:

1. Canadians as a people will not face the fact that the notion of a game generating winners on all sides is plainly illogical and foolish, and if the citizens of its regions and provinces cannot muster the political maturity to content themselves with a share of influence that is defensible in principle;
2. Atlantic Canadians would refuse to acknowledge the absurdity, nay offensiveness, of scoffing at a "merely" equal number of senators and instead would insist on getting *more* senators than any other region, despite the fact that their region has always been the smallest by far and that its relative population has declined so precipitously;
3. Albertans would continue to flaunt the banner of equality between the provinces and invoke "Western alienation" at every turn, but balk at that very equality among eight

[70] No doubt other functions could be entrusted to a reinvigorated Senate; but many of these would not require constitutional amendment and could be reconsidered at a later date. A mandate to study the impact of treaties or to monitor their effect after implementation – suggested by Smith – would be one such possibility. See Smith, "Nonconstitutional Means," *supra* note 13 at 255.

[71] Smith, *The Canadian Senate, supra* note 3 at 179.

of the ten provinces, and even among their vaunted Western brethren;

4. Quebeckers would refuse to find their proper place at the national table no matter how equitable and indeed advantageous a place is set out for them.

If, in sum, all these and more of the same were the reactions one would have to expect, then one must also ask what basis there could be for living together in one country at all. For without complaisance and respect for equality, without a will among the citizens to accommodate themselves to each other, there can be neither justice nor lasting peace,[72] and certainly no state in the more profound sense of the word.[73] What is more, such unsociable postures would make a mockery of all demands for greater democracy, since a citizenry

[72] Compare the terms that Hobbes deems necessary for the maintenance of peace: "A fifth law of nature is *complaisance*, that is to say, *that every man strive to accommodate himself to the rest*." See Thomas Hobbes, *Leviathan*, ed. by Edwin Curley (Indianapolis: Hackett, 1994) at 95 (XV.17). "If nature therefore have made men equal, that equality is to be acknowledged; or if nature have made men unequal, yet because men that think themselves equal will not enter into conditions of peace but upon equal terms, such equality must be admitted. And therefore for the ninth law of nature, I put this, *that every man acknowledge others for his equal by nature*. . . . On this law dependeth another: *that at the entrance into conditions of peace, no man require to reserve to himself any right which he is not content should be reserved to every one of the rest*." *Ibid*. at 97 (XV. 21-22) [emphasis in original].

[73] Just as a church, properly understood, is not made of brick and mortar, but of the faith and commitment of its believers; and just as a university has its true meaning not in committee meetings, governing councils, or even lecture halls, but in the intellectual life kindled in the minds of its students and teachers; just so the state is ultimately constituted not by its forms and institutions of government (important as they are for its proper functioning), but rather by its citizens' disposition to think of themselves as members of a political *community*, to accept duties corresponding to their rights, and to take responsibility and make sacrifices for one another where necessary. Thus understood, the state can never be taken for granted, but stands as one of the highest ethical achievements that human beings are capable of – or can become, or else cease to be, capable of over time. *That* is the core of what Hegel is talking about when he characterizes the state in terms of "the actuality of the ethical Idea." See T. M. Knox, trans. & ed., *Hegel's Philosophy of Right* (New York: Oxford University Press, 1967) at 155.

that acted thus would be proving itself manifestly incapable of self-government and plainly too immature to be entrusted with any form of democracy at all. It is hard to believe that things should really have come to such a pass, but perhaps Canadians do need reminding that no less is in fact at stake.

DOES THE *CHARTER* MATTER?

Harry Arthurs and Brent Arnold*

This article investigates whether Canada has changed in ways the ways that proponents of the Charter desired and anticipated. We examine the progress of groups that the Charter was intended to benefit (Aboriginal peoples, women, visible minorities, and immigrants); areas of state action that the Charter was intended to regulate (the criminal process and bureaucratic behaviour); and aspects of our communal and public life that the Charter was intended to animate and enhance (politics and inter-group cultural relations). We rely on a significant number of studies of Canadian social development during the period from1982 to the present. Available evidence suggests that progress towards the vision of Canada inscribed in the Charter has generally been modest, halting, non-existent, and, in some cases, negative. What we claim is that the Charter does not much matter in the precise sense that it has not – for whatever reason – significantly altered the reality of life in Canada.

Cet article examine si le Canada a changé par rapport à ce que les auteurs de la Charte voulaient et prévoyaient. Nous étudions le progrès des groupes que la Charte devait avantager (Autochtones, femmes, minorités visibles et immigrants), les zones d'action de l'État que la Charte devait régir (régime pénal et comportement bureaucratique), ainsi que des aspects de notre vie commune et publique que la Charte devait animer et améliorer (politique et relations culturelles intergroupes). Nous nous fions à un nombre important d'études sur le développement social canadien pendant la période allant de 1982 à aujourd'hui. Les éléments de preuve disponibles font penser que le progrès vers la vision du Canada qui est inscrite dans la Charte a généralement été modeste, hésitant, non existant et, dans certains cas, négatif. Nous prétendons que la Charte ne compte pas vraiment dans le sens où elle n'a pas considérablement modifié la réalité de la vie au Canada.

In this article, we investigate whether it can be said that Canada has changed in ways the ways that proponents of the *Charter* desired and anticipated. We examine the progress of groups that the *Charter* was intended to benefit (Aboriginal peoples, women, visible minorities, and immigrants); areas of state action that the *Charter* was intended to regulate (the criminal process and bureaucratic behaviour); and aspects of our communal and public life that the

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I. INTRODUCTION

The introduction of the *Canadian Charter of Rights and Freedoms*[1] in 1982 marked a transformation in Canadian legal doctrine, practice, and culture. Who would deny it? But did this legal transformation in turn accomplish – or even coincide with – measurable changes in the social and political life of Canada and Canadians? The answer to this question is by no means clear. What is clear, however, is that (for reasons we explore) there have been surprisingly few attempts to investigate social data that might provide an answer. We have shifted through a great deal of such evidence covering the period from the enactment of the Charter to the present.[2] Our very tentative conclusion is that the *Charter* does not in fact seem to have mattered very much in the sense that Canada today differs in relevant respects only modestly, if at all, from Canada as it was in 1982. We are much less tentative, however, about our second and more important conclusion: Canadian constitutional scholars ought to have asked the questions we have raised, ought to have begun to develop the tools to answer those questions, and, absent such tools, ought to be less celebratory or condemnatory about *Charter* judgments, culture, and politics. In other words, this essay is as much about the intellectual life of *Charter* scholarship as it is about the *Charter* itself.

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 Our initial research was completed in mid-2004 and has been selectively updated to incorporate important data sources that became available prior to October 2005. References in the text to "the *Charter* era" or "the past two decades" cover the period from 1982 to 2005; specific dates are provided in footnote references to "snapshot" studies that identify trends and developments during those years.

II. THE CHARTER: ASPIRATION, ACHIEVEMENT, ASSESSMENT

The *Charter* has become a preoccupation of legal scholars[3] and appellate judges,[4] and a staple of public law and criminal litigation practices, although perhaps less so than of commercial or conveyancing practices. Moreover, the *Charter* is generally perceived to have redefined the roles and altered the fortunes of various political actors and institutions, though precisely which and how is a matter of controversy. Some contend that the *Charter* has empowered rights-seeking citizens;[5] others that it has favoured corporations,[6] a "Court Party" of identity-based groups,[7] or the

[3] A survey of Canadian full-time law school faculty members found that 35 percent indicated a teaching and/or research interest in constitutional law including the *Charter*, the most frequently indicated area of interest; four of the top five areas of research interest were related to constitutional law. See Department of Justice Canada, *Research Report: Canadian Law School Faculty Survey* Prepared by Anna Paletta, Christopher Blain & Daniel Antonowicz (Ottawa: Canadian Council of Law Deans and Research and Statistics Division, Department of Justice Canada 2000) at 3-5. See also Theresa Shanahan, *Legal Scholarship: An Analysis of Law Professors' Research Activities In Ontario's English-speaking Common Law Schools* (Ph.D. Thesis, University of Toronto, 2002) [unpublished] at 203-204 and Appendix D [Shanahan]. Quicklaw's online 'JOUR' database for articles containing "Charter" in the title or in any field retrieved 303 results. This database includes thirty-seven academic journals and collections of research papers, plus twenty-two legal newsletters, but not specialist constitutional journals such as the *National Journal of Constitutional Law* or the *Review of Constitutional Studies.* Only a few publications contain references dating back to 1986; most date back only as far as the early to mid-1990s; some go only as far back as 2000. The total number of scholarly publications concerned with the *Charter* is therefore seriously understated, even more so when publications on the constitution in general are included.

[4] The Ontario Court of Appeal alone decided 167 *Charter*-related cases over the 2000-2002 period (6 percent of its 3,702 reported and unreported decisions), while the Supreme Court of Canada decided ninety such cases (28 percent of its 253 decisions). Quicklaw online database.

[5] Lorraine E. Weinrib, "The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution" (2001) 80 Canadian Bar Rev. 699 [Weinrib].

[6] Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1994) [Mandel]; Judy Fudge & Harry Glasbeek, "The Politics of Rights: A Politics

courts themselves.[8] The consequences of these changes for Canada's political processes are also debatable. Has the *Charter* launched a constructive dialogue between courts and legislatures[9] or undermined electoral democracy?[10] Has it reinforced social movements[11] or promoted identity politics?[12] Has it become a symbolic rallying point for Canadian patriotism[13] or exacerbated

with Little Class" (1992) 1 Social and Legal Studies 45.

7 F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

8 Allan Hutchinson, *Reading Between the Lines: Courts and Constitutions* (2002) [unpublished; on file with the authors].

9 Peter W. Hogg & Allison A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall Law J. 75.

10 A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Don Mills, Ont.: Oxford University Press, 1994) [Bogart, *Courts and Country*].

11 Weinrib, *supra* note 5; Miriam Catherine Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999).

12 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

13 A recent commentary argues that "the Charter can be understood as the capstone of an institutional process that has helped to raise the intensity-level of Canadian nationalism as a whole." John Wright, Gregory Millard & Sarah Riegel, "Here's Where We Get Canadian: English-Canadian Nationalism and Popular Culture" (2002) 32:1 The American Review of Canadian Studies 11. The authors point out that "[a] number of observers have noted how the Charter has strengthened Canadians' sense of identification with their constitution," citing as examples Alan C. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, ed. Douglas E. Williams (Toronto: McClelland and Stewart Inc., 1991) [Cairns, *Disruptions*]; Alan C. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992); and Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas E. Williams (Toronto: McClelland & Stewart Inc.); as well as Peter H. Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?* (Toronto: University of Toronto Press, 1992); and David Milne, *The Canadian Constitution* (Toronto: James Lorimer and Co. 1991), especially Chapter 8. Michael Bliss is more expansive in arguing that "by the end of the century. . . it was clear that Trudeau's vision of a pluralistic society of free men and women, as expressed in the Charter and evolving multiculturalism, had become the Canadian state's core value. His very spirit had become the essence of his country." Michael Bliss, "Citizen Trudeau" *Time* (Canadian Edition) 156:15 (9 October 2000) 20. An earlier evaluation

regional, social, religious, and linguistic conflict?[14] Has it become a strategy of last resort for groups denied access to the political process[15] or a first principle shaping the behaviour of all political actors and institutions?[16] Public attitudes towards the *Charter* and its custodians – judges and lawyers – exhibit similar ambiguities. On the one hand, two decades-worth of *Charter* good works by judges and lawyers has not much improved their reputation,[17] nor has it persuaded Canadians that courts should displace legislators as the authors of public policy. On the contrary, a significant majority (54

held that "the 1982 Charter of Rights and Freedoms must be regarded as a manifesto of Canadian nationalism rather than a symbol of the triumph of liberal individualism." Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill-Queen's University Press, 1995) at 136, cited in David Taras, "Mass Media Reporting of Canadian Supreme Court Decisions: Mapping the Terrain" (2000) 25:3 Canadian Journal of Communication 397.

14 David Abraham, "Citizenship Solidarity and Rights Individualism: On the Decline of National Citizenship in the U.S., Germany, and Israel" (2002), online: The Center for Comparative Immigration Studies <http://www.ccis-ucsd.org/PUBLICATIONS/wrkg53.PDF>.

15 Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998).

16 Mandel, *supra* note 6.

17 The percentage of those who have high or moderate confidence in judges and lawyers has not changed significantly over almost twenty years. The figures stood at 15.2 percent (high) and 57.7 percent (moderate) in 1983 and at 18.2 percent and 53.1 percent, respectively, in 2001. The moderate category has consistently comprised the vast majority of respondents and has never dipped below 45.3 percent. Canadian Opinion Research Archive, Kingston, Ontario, "Confidence: Judges and Lawyers" (20 January 2003), online: Canadian Opinion Research Archive, Queen's University, Kingston, Ontario <http://www.queensu.ca/cora/trends/tables/ConfidenceJudges&Lawyers.htm>. However, given the public's well-known mistrust of lawyers, it is reasonable to assume that support for judges alone might be higher than these statistics suggest. While historical data is unavailable from the same source, an Ipsos-Reid/CTV/Globe and Mail poll from 2001 noted that, although 50 percent of Canadians believed that "some Supreme Court rulings are influenced by partisan politics," 91 percent of Canadians had a "great deal or a fair amount of respect for the Canadian judiciary," and 88 percent had "a great deal or a fair amount of respect specifically for the Supreme Court bench." These results compared favourably with U.S. results holding that 85 percent of Americans have "a great deal or a fair amount of respect" for their own Supreme Court. Kirk Makin, "Canadians Feel Supreme Court Tainted by Partisan Politics" *The Globe and Mail* (3 July 2001) A1, A4.

percent) believes that judges have too much power.[18] However, Canadians do seem to be exceedingly positive about the *Charter* – in principle at least.[19] They exhibit a considerable appetite for media coverage of *Charter*-related issues,[20] they maintain a decent regard for jurists as compared to "government" in general,[21] and they accept that judges must make legally binding decisions that give effect to the constitution – including the *Charter*.[22] In what sense, then, are we

[18] Ipsos-Reid poll July 2003, cited in Jeff Sallot, "Public Against Judges Making Laws, Poll Says" *The Globe and Mail* (11 August 2003) A5 [Ipsos-Reid].

[19] "Eighty-eight percent of Canadians have heard of the *Charter*, and the same number say it is a good thing for the country. Only 4 percent say the *Charter* is a bad thing for Canada. Approval is growing: among those who have heard of the *Charter*, 92 percent say it is a good thing – a 10-point increase over 1987 and 1999." Centre for Research and Information on Canada, "The Charter: Dividing or Uniting Canadians?" (April 2002), online: <http://www.cric.ca/pdf/cahiers/cricpapers_april2002.pdf> at 8. While support for the *Charter* is clearly broad – it is "viewed favourably by large majorities in all regions" and as of 2002 was "higher than in previous years" – the same study suggests that this support may not be 'deep,' inasmuch as there are significant differences in public opinion regarding the actual content or significance of *Charter* rights. For instance, 54 percent oppose the existence of the "notwithstanding" clause, while 41 percent support it, suggesting a significant split on the fundamental issue of paramountcy of elected bodies versus paramountcy of the country's supreme law; in addition, 56 percent support greater police powers to fight crime even at the expense of civil rights, while 41 percent are opposed, at 2.

[20] A search for "Charter of Rights and Freedoms" in the *Canadian Index*, an online database available to Canadian university researchers encompassing "Canadian journals, magazines, newspapers and business sources" with coverage from 1982 to 2003, retrieved fully 2,658 results. Of these, 308 were for articles or news stories published in 2003; 460 were published in 2002. A similar search of the Canadian Broadcasting Corporation's online archives produced 482 results dating only as far back as 1999. Presumably a specialized search of terms related to topics and groups affected by Charter rulings – criminal justice, gays and lesbians, women, unions – would turn up additional references.

[21] Those with "a lot" of confidence in government in general between 1983 and 1995 never amounted to more than 6.9 percent (in 1985) and those with even a "fair" amount peaked at 51.8 percent (also in 1985) and by 1995 had dwindled to 33.8 percent (compared to judges' and lawyers' 46 percent). Queen's University Canadian Opinion Research Archive, "Confidence: Government" (30 August 2003), online: <http://www.queensu.ca/cora/trends/tables/Confidence-Government.htm>.

[22] Ipsos-Reid, *supra* note 18.

asking "does the *Charter* matter?" The original promise of the *Charter* was made not only to academics, judges, legal practitioners, and political actors,[23] but ostensibly to all Canadians:

> We must now establish [said Prime Minister Trudeau in 1981] the basic principles, values and beliefs which hold us together as Canadians so that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country which has given us such freedom and such immeasurable joy.[24]

This was also the expectation of at least some scholarly, judicial, and professional commentators who predicted that "the Charter will fundamentally change the Canadian political system and the very identity of the Canadian citizenry,"[25] and that its guarantees would

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[23] Joel Bakan notes that enactment of the *Charter* "was widely celebrated by social activists and equality seeking groups. They saw the *Charter* as a vehicle for advancing social justice and equality." Joel Bakan, "What's Wrong with Social Rights?" [Bakan, "Social Rights"] in Joel Bakan & David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 85 at 85 [Bakan & Schneiderman]. Among other things, "[i]t was claimed that, as an enforceable statement of values and aspirations, the *Charter* would help emancipate Canadians and, by increasing their political power, give them a stronger voice in their society." Harry Glasbeek, "The Social Charter: Poor Politics for the Poor" in Bakan & Schneiderman, *ibid.* at 116 [Glasbeek, "The Social Charter"].

[24] Statement inscribed on copies of the *Charter* widely distributed by the federal government following its formal adoption by in 1982. This statement is also excerpted on the Government of Canada's website celebrating the twentieth anniversary of s. 15 of the *Charter*: see Government of Canada, Department of Justice, "Equality: The Heart of a Just Society" (28 October 2005), online: <http://www.justice.gc.ca/en/s15/d_instrument.html> [Department of Justice]. The new constitution, *Charter* included, was first introduced in Parliament in November of the previous year: *House of Commons Debates*, 12 (20 November 1981) at 13013 (Hon. Jean Chretien).

[25] Alan C. Cairns, "An Overview of the Trudeau Constitutional Proposals" in Cairns, *Disruptions* (*supra* note 13) 58 at 62. Justice Thomas Berger described the *Charter* as "a valuable and uniquely Canadian undertaking" which would serve as "Canada's contribution to evolving notions of liberal democracy and political pluralism." Thomas R. Berger, "Towards the Regime of Tolerance" in Stephen Brooks, ed., *Political Thought in Canada: Contemporary Perspectives* (Toronto: Irwin Publishing Inc., 1984) 83 at 83 [Berger]. Even those writing in the mainstream legal literature, generally more circumspect in their assessments than their social science peers, were optimistic: "[a]n entrenched Charter of Rights and Freedoms should ensure that fundamental

"offer minorities a place to stand, ground to defend, and the means for others to come to their aid."[26] It is therefore appropriate to ask whether "the basic principles, values, and beliefs" proclaimed by the *Charter* have indeed been "established" in any practical sense, whether a new national pride has emerged "beyond regional loyalties," whether our political system has "fundamentally changed" for the better, and whether minorities' newly defined "place to stand" has in some tangible way enhanced their communal identity and dignity or the social and economic conditions of their members.

These are difficult questions to answer: first, because of a fundamental ambiguity about what we mean when we speak of the *Charter*; second, because such questions are seldom asked; and third, because when they are, inappropriate or incomplete strategies are employed to probe for answers. We address each of these difficulties in turn.

What is the *Charter*? It is both an aspirational statement about the fundamental values that ought to define Canada as a polity and a

rights and freedoms will not be set aside by a transient majority. . . . [T]he Charter should also promote national unity by defining the common threads that bind us together." J.-G. Castel, "The Canadian *Charter of Rights and Freedoms*" (1983) 61:1 Canadian Bar Rev. 1 at 1-2. Justice David C. McDonald testified to the *Charter*'s pervasiveness a mere two months after its signing into law: "The Charter is like an incoming tide. It flows over our plains and forests and into our own streets, our homes, our police stations, our seats of government and our courts. It cannot be held back." Mr. Justice David C. McDonald, "Notes for Overview – Introductory Remarks" in Gerald L. Gall & Legal Education Society of Alberta & Canadian Institute for the Administration of Justice, eds., *Charting the Charter: Papers Prepared for Seminar Jointly Sponsored by the Legal Education Society of Alberta and the Canadian Institute for the Administration of Justice for Presentation in Calgary June 15, 1982, and Edmonton June 16, 1982* (Calgary: Legal Education Society of Alberta, 1982) 1 at 5. Prime Minister Trudeau, speaking of the draft *Charter,* boasted confidently that "[i]t will confer power on the people of Canada, power to protect themselves from abuses by public authorities. . . . Equal treatment for all, without discrimination due to sex, colour, or origin, will be enshrined." Canada, Prime Minister Pierre Elliott Trudeau, *Statement by the Prime Minister, Ottawa, October 2, 1980 on the Constitution* (Ottawa: Office of the Prime Minister, 1980) at 6.

[26] Berger, *ibid.* at 96.

symbolic projection of those values.[27] It is an operational blueprint for relations between citizens and the state as well as among state institutions and agencies.[28] And it is a juridical text – Part I of the *Constitution Act, 1982* – that comprises "the supreme law of Canada" and renders "of no force and effect" inconsistent legislation and executive action,[29] if not necessarily judge-made law.[30] Each of these different *Charters* acquires different meanings, excites different expectations, engages different constituencies, evokes different responses, and implicates different social outcomes. Of course, in asking "does the *Charter* matter?" in the context of a legal publication, we place particular emphasis on the effects (including non-effects and perverse effects) of the juridical *Charter* – the *Charter* of lawyers, judges, legal scholars, and litigants. However, the aspirational and relational *Charters* exhibit effects (including non-effects and perverse effects) that are at least as significant. We will note these as well, where appropriate.

This emphasis on the juridical *Charter* poses a special analytical problem that is captured by the confession of one legal scholar that the twentieth anniversary of the *Charter* in 2002 evoked in her sentiments of "equivocation and celebration."[31] Others might characterize their feelings as "disappointment" or even, in Prime Minister Trudeau's phrase, "immeasurable joy."[32] While such responses suggest that the *Charter* does indeed "matter" to the legal actors who work with it on a daily basis, their reactions are decidedly juridico-centric. Thus, all of the contributions to the *Osgoode Hall Law Journal's* 2002 symposium issue, devoted to assessing the *Charter*'s legacy,[33] evaluated the impact of the *Charter* by

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27 See Jeremy Webber, "Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform" (1999) 21:2 Sydney Law Rev. 260.

28 Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994).

29 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11at s. 52(1) [*Constitution Act, 1982*].

30 *Charter*, *supra* note 1. See *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd*., [1986] 2 S.C.R. 573.

31 Diana Majury, "The *Charter,* Equality Rights, and Women: Equivocation and Celebration" (2002) 40 Osgoode Hall Law J. 297.

32 Department of Justice, *supra* note 24.

33 (2002) 40:3 Osgoode Hall Law J.

examining the case law generated by it or by focussing on the court's philosophy, logic, or doctrine in specific areas of law. Absent from this symposium, and from virtually all *Charter* scholarship over the past twenty-odd years, has been any empirical examination of its concrete, real-life effects as experienced by its intended beneficiaries. Even when, occasionally, quantitative methodologies are employed, it is legal behaviours and outcomes that are generally quantified, not the social phenomena that are, supposedly, their ultimate consequence and justification. Thus, decisions are tallied according to given categories of outcomes:[34] the *Charter*-friendliness of specific judges and courts[35] or the win/lose record of particular groups of litigants.[36] The focus of scholarship, in other words, has been primarily on the status and well-being of *Charter* rights, not of the rights-holders themselves. Empirical measurement is mobilized to assess particular features of the litigation process rather than to evaluate its social consequences. The reaction of even scholarly legal actors to the *Charter* is thus informed by a skewed, not to say self-regarding, perspective on whether the *Charter* "matters."

However, the same might be said about most evaluative questions posed to legal practitioners, functionaries, judges, and academics. As revealed by *Law and Learning,*[37] a comprehensive report on legal

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[34] See *e.g.*, F. L. Morton, Peter H. Russell & Michael J. Withey, "Judging the Judges: The Supreme Court's First One Hundred Charter Decisions" in Paul W. Fox & Graham White, eds., *Politics: Canada*, 7th ed. (Toronto: McGraw Hill Ryerson Ltd., 1991) 59; Cynthia L. Ostberg, "Charting New Territory? Fifteen Years of Search and Seizure Decisions by the Supreme Court of Canada, 1982-1997" (2000) 30:1 American Review of Canadian Studies 35; and James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 Osgoode Hall Law J. 625.

[35] F. L. Morton, Peter H. Russell & Troy Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982-1992" (1994) 5 National J. Of Constitutional Law 1 [Morton, Russell & Riddell]

[36] See *e.g.*, F. L. Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" (2001) 34 Canadian J. of Political Science 55.

[37] To make full disclosure, Harry Arthurs, one of the authors of this article, was chair and principal author of this report, *Law and Learning: Report to the Social Sciences and Humanities Research Council by the Consultative Group on Research and Education in Law* (Ottawa: Social Science and Humanities Research Council of Canada, 1983), though not of the Research Reports that

research and education prepared and issued more or less contemporaneously with the adoption of the *Charter*, the dominant paradigms of Canadian legal research in the early 1980s were doctrinal and theoretical. The principal object of scrutiny was legal texts; few legal scholars used empirical or other social science methodologies, and even fewer were trained to use them. While Canadian legal scholarship has no doubt advanced some distance beyond the modest ambitions of that period (in part stimulated by the *Charter*, it must be said), it has not yet accepted the need to put law's claims routinely and rigorously to the test.[38] While more Canadian legal scholars now have doctoral degrees, more have training in the social sciences, and more are interested in what such research might tell us, studies of law's causes and consequences are still relatively rare. For example, a recent study of legal academics showed that only 3 percent were engaged in empirical research of any description.[39] True, for some twenty years the *Canadian Journal of Law and Society* has published studies of legal institutions and processes that are informed by social science methodologies including (but by no means restricted to) empirical methodologies. Other Canadian legal periodicals also do so, and important qualitative assessments of legal phenomena have been undertaken in reports and monographs. But empirical studies of constitutional law – arguably the cornerstone of any legal system – are rare indeed, both in Canada and in other countries.[40] This is not to deprecate other methodologies. They may, of course, yield important insights and they have been utilized by scholars to ask questions about the impact of the *Charter* that could not be pursued by examining conventional

provided evidence for its conclusions. See Alice Janisch, *Profile of Published Legal Research: A Report to the Consultative Group on Research and Education in Law based on a survey of Canadian Legal Publications* and John S. McKennirey, *Canadian Law Professors: A Report to the Consultative Group on Research and Education in Law based on the 1981 survey of full-time law professors in Canada* (Ottawa: Social Science and Humanities Research Council of Canada, 1982).

38 For differing views see Symposium Issue: *The Arthurs Report on Law and Learning 1983-2003* (2003) 18:1 Canadian J. of Law & Society.

39 Shanahan, *supra* note 3 at 204.

40 A leading American example is Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1993) [Rosenberg]. For a review of the literature, see Idit Kostiner, "Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change" (2003) 37 Law & Society Rev. 323 [Kostiner].

decisional materials.[41] Still, empirical evidence does offer an important way of confirming, challenging, or amending findings concerning the effects of the *Charter* based on more impressionistic approaches. That is why it is surprising, for example, that Canada's *National Journal of Constitutional Law,* founded in 1991, has yet to publish a single empirical study of the social consequences of constitutional litigation.[42] Nor do such studies abound elsewhere in the literature of constitutional scholarship. Indeed, William Bogart's *Courts and Country* and his more recent *Consequences: The Impact of Law and Its Complexity*[43] represent two of the very few Canadian attempts to assess such consequences, either in the constitutional field or more generally.[44] An examination of his work may help to explain why other scholars have hesitated to embark on similar endeavours.

III. HOW WOULD WE KNOW IF THE *CHARTER* MATTERS AND WHY SHOULD WE WISH TO?

In *Courts and Country*, Bogart notes the difficulty of measuring the impact of litigation and, especially, of disaggregating its effects from those of other societal developments and state interventions. Moreover, he continues, compliance with court rulings is highly variable and their effects are often indirect and sometimes unintended.[45] And, he concludes, even assuming litigation effects

41 See *e.g.*, Mandel, *supra* note 6; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

42 It has published several empirical studies. On *Charter* related topics. See *e.g.* F.L. Morton & Ian Brodie, "The Use of Extrinsic Evidence in *Charter* Litigation before the Supreme Court of Canada" (1993) 3 National J. of Constitutional Law 1; Morton, Russell & Riddell, "A Descriptive Analysis," *supra* note 35. However, while such studies provide statistically-based descriptions of court procedures and decisions, they make no attempt to assess their ultimate social effects.

43 Bogart, *Courts and Country*, *supra* note 10; W.A. Bogart, *Consequences: The Impact of Law and Its Complexity* (Toronto: University of Toronto Press, 2002) [Bogart, *Consequences*].

44 Michael Mandel's 1994 effort provides another notable exception, though empirical effects form just one aspect of a larger argument about the impact of the *Charter* on Canadian politics. *Supra* note 6.

45 See also Jeremy Webber, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms" (1993) 5:2 Canterbury Law Rev. 207.

could be clearly identified, there is no "objective" method of assessing their costs and benefits.[46] Nonetheless – drawing on Gerald Rosenberg's controversial book *The Hollow Hope* – Bogart is willing to concede that, in principle and under specified conditions, courts may be "effective causes of significant change."[47] Not surprisingly, he reminds us, such conditions are rarely encountered.

In *Consequences*, Bogart aspires to a more empirically grounded account of the effects of law. While the paucity of Canadian legal impact studies forces him to treat experience with our *Charter* largely as counterpoint to Rosenberg's study of American Bill of Rights litigation, which draws upon a rather more extensive body of socio-legal scholarship, this is by no means the only difficulty identified by Bogart. Indeed, he catalogues the conceptual and methodological difficulties that bedevil all attempts to assess the impact of law, in general, and of constitutional litigation, in particular.[48] To begin, defining the "problem" for which a law or legal ruling is required or desired is a politically charged and value-laden task.[49] To argue that particular outcomes are produced or caused by, or even related to, a specific statute, court ruling, or administrative intervention requires that: (i) "the types of influence and their relationships . . . be indicated clearly," (ii) "the evidence that could substantiate these sources and connections . . . be ascertained," and (iii) "all other possible explanations for the change

[46] Bogart, *Courts and Country*, *supra* note 10 at 46-49.

[47] Rosenberg, *supra* note 40 (as summarized here by Bogart in *Courts and Country*) suggests that court decisions will be influential when: (1) there is ample legal precedent for change; (2) there is support for change from substantial numbers in the Congress and from the executive; and (3) there is either support from some citizens or at least minimal opposition from all citizens and (a) positive incentives are offered to induce compliance, or (b) costs are imposed to induce compliance, or (c) court decisions allow for market implementation, or (d) key administrators and officials are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind. Bogart, *Courts and Country*, *ibid.* at 51. However, says Bogart, Rosenberg concludes through a number of case studies in the U.S. that "courts can *almost never* be effective producers of significant social reform" and that, while he found no evidence of decisions mobilizing social reform (in Bogart's paraphrase) "litigation may actually galvanize opponents who are already very aware of the issues and related developments." *Ibid.* at 55.

[48] See generally, Bogart, *Consequences*, *supra* note 43.

[49] *Ibid.* at 84-86.

other than the law being examined. . . be explored and evaluated."[50] This last requirement appears particularly difficult to satisfy, as myriad factors are capable of generating "plausible rival hypotheses."[51] Optimally, of course, impact studies would be designed in advance, to test controlled legal "experiments" in "multiple time series" in which the effects of law are assessed across several similar jurisdictions (some of which have enacted the law in question, others of which have not and serve as controls) at several time points in time.[52] Unfortunately, Bogart notes, this ideal situation is seldom available, and studies must therefore often "be done in some compromised fashion."[53] The importance of determining the effect of laws, he suggests, is only reinforced by the frequency with which their most dramatic consequences turn out to have been unintended.[54]

Fully conscious, then, of the difficulties entailed in any attempt to gauge the impact of the *Charter*, we have set ourselves a somewhat different question. That question derives from the often-euphoric and -overstated claims of those who conceived, promulgated, embraced, and used the *Charter*. Those claims come down to this: that adoption of the *Charter* would effect significant improvement in the individual and collective lives of Canadians; that equality rights would improve the life chances of members of the groups named in section 15 (and, as we now know with hindsight, of "analogous groups"); that the rights guaranteed to Aboriginal peoples and linguistic and cultural minorities – both under section 15 and elsewhere in the *Constitution Act, 1982* – would enable them to enjoy a less precarious and more complete communal existence; that legal rights were enumerated with some specificity so that no one who confronts the coercive power of the state – exercised by the police, public agencies, and civil servants – need fear abusive or illegal treatment; that fundamental freedoms and democratic rights would promote and protect a more robust Canadian political culture; and that even the relatively anemic and anomalous guarantees of mobility rights would ensure that Canadians could come and go more freely without having to risk their human capital or social entitlements.

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50 *Ibid.* at 91-92.
51 *Ibid.* at 93-94.
52 *Ibid.* at 98.
53 *Ibid.* at 99.
54 *Ibid.* at 99-109.

Against this background, then, we pose the questions that animate this study: Does the *Charter* matter? Is Canada a more equal country than it was in 1982? Are Canadians less likely to encounter abuse at the hands of the state? Has the communal life of Aboriginal peoples and linguistic minorities been enhanced? Is our political culture more robust? Is it easier for us to cross international and provincial boundaries? Or is the contrary true? Have inequalities proliferated and intensified? Are police and welfare officers more abusive? Is communal life more impoverished? Is the quality of political debate more anemic? Do we encounter more obstacles when we cross borders? And not least: Why have *Charter* scholars been so seldom tempted to answer these questions – or even to ask them?

These are complicated questions. Most of them, frankly, cannot be answered. For reasons elaborated by Bogart, qualitative judgments – what constitutes a robust political culture, for example – depend on carefully defined benchmarks, but definitions are not easily agreed-upon. Quantitative judgments, as he notes, depend on longitudinal studies – of, say, the number of police assaults on citizens in 1982 and 2005, or the widening or narrowing of the wage gap between otherwise comparable workers of different ethnic or racial groups – but few such longitudinal studies exist. Worse yet: assuming benchmarks can be agreed, and studies undertaken, the issue of causation seems almost irresolvable. If there are fewer (or more) police assaults, is that because of the *Charter* or because of better (or worse) training or discipline, greater (or diminished) fear of tort claims by victim, changes in the demography of the police force or of those arrested, or the effect upon Canadian police and popular sensibilities of American television dramas? If gays and lesbians enjoy greater dignity and suffer less discrimination in the workplace or in their legal and social entitlements, is this a triumph for the *Charter*, or is it attributable to social and cultural changes, including some changes that high-profile *Charter* litigation may have helped to publicize? Or have other legal regimes such as human rights commissions and tribunals actually done the heavy lifting with more frequent and more practical interventions? Have similar or greater changes occurred in other countries that are comparable to Canada but have no *Charter* or equivalent legal regime? Finally, evidentiary issues and issues of causation aside, serious issues of periodicization arise. Why, after all, should we confine our inquiries to the period during which the *Charter* has been in force? Conceivably, extending our inquiries to an earlier period might

reveal that the *Charter* – far from bringing about social or legal transformations – merely codified, ratified, or legitimated tendencies and processes under way for decades. And if we could look into the future, would we find that famous *Charter* victories – whether in courts of law or of public opinion – did not in the long term actually achieve the anticipated positive outcomes because their holdings were narrowed by a new, less bold generation of judges; because further reflection revealed flaws in the original holding; or because supervening political, economic, or social developments frustrated implementation of judicial remedies?

It is hugely difficult, then, to *know* whether the *Charter* matters. But it can hardly be irrelevant. If, as a society, we are asked to invest considerable financial resources, institutional energies, intellectual effort, and moral credibility in important public policy initiatives – in health care, education, policing, auto safety, labour and environmental standards, and even culture – we ought ideally to begin by asking: What is it we are attempting to achieve, and is this new initiative likely to achieve it? And after more than two decades, hopefully sooner, we would surely revisit the program in order to undertake a cost-benefit analysis, however imperfect. Of course, that is an idealized version of the way in which public policy is made. Of course, emotive and symbolic arguments, special pleading, entrenched interests, unshakeable prejudices, coincidence, opportunism, and sheer inertia are often more powerful determinants of public policy than informed calculations of efficacy. But that does not mean that they are appropriate determinants.

If it could be shown that the *Charter* does not matter, that it is not accomplishing what it was intended to, would that not be a good reason for rethinking the whole enterprise? Perhaps some might propose – as did Mao Zedong on the effects of the French Revolution – that it is too soon to tell. This is a sensible response, but it implies that at some future date the question should be asked and answered. Perhaps some might argue that, even if it does no good, at least the *Charter* – unlike, say, rent control or public education – does no harm. This too may be a sensible response, but it treats the absence of harm as a factual conclusion, rather than as a hypothesis to be investigated. Perhaps some might argue that the good that the *Charter* accomplishes is non-quantifiable, that it becomes manifest not primarily in measurable outcomes produced by explicit legal commands, but more subtly and symbolically by

transforming our fundamental values, our comprehension of relations between citizens and the state, and our grammar of civic discourse. This may be the most sensible and sophisticated response of all. But to accept it at face value is to rely on a map of society that locates law at the centre ("the rule of law"), assigns the material forces of political economy to the periphery, ascribes great symbolic and didactic powers to legal institutions and actors, but, oddly, disavows precisely the characteristic of law that is conventionally thought to distinguish it from other normative systems: its ability to mobilize the coercive power of the state. This, to put it unkindly, but not unfairly, is a map drawn by lawyers. It is therefore subject to obvious frailties.

We do not rely on such a map. Our ambition is not to show that the *Charter* has in fact produced (or failed to produce) specific outcomes. It is simply to investigate whether it can be said that Canada has changed in ways the ways that proponents of the *Charter* desired and anticipated. We have examined a significant number of studies of Canadian social development during the period from 1982 to the present, most of which were not prepared with a view to proving or disproving any particular hypothesis about the *Charter*. These studies, taken individually, have many obvious flaws: few precisely bracket the two decades under review, most reflect the particular professional or personal preoccupations of their authors or sponsors, some suffer from methodological flaws, and others lack clear-cut conclusions. Our summaries doubtless fail to do some of them justice and we do not claim to have exhausted all original sources, even though we have tried to be fairly comprehensive in our use of secondary materials. However, taken collectively, we do believe we are proffering some of the best evidence available about the extent to which Canadians during the *Charter* era have become more equal; more politically engaged; more comfortably ensconced within minority communities, cultures, and language groups; more mobile; and more justifiably confident of proper treatment by police and bureaucrats.

To anticipate our findings, available evidence suggests that progress towards the vision of Canada inscribed in the *Charter* has generally been modest, halting, non-existent, and, in some cases, negative. And to anticipate objections to those findings, we neither assert nor deny that these disappointments might be attributable to any or all of: inherent defects in the *Charter*; perverse interpretations by judges; a lack of commitment to *Charter* values by the legislative

or executive branches of government; intractable illiberal tendencies in our institutions and people; or the eruption of international or domestic crises affecting our political economy, natural environment, or public security. We do not even deny the possibility that however bad things may have been in the recent past, they might have been even worse without the *Charter*, or that they might become better in the near future because of it. What we do claim, to reiterate, is that the *Charter* does not much matter in the precise sense that it has not – for whatever reason – significantly altered the reality of life in Canada.

To recapitulate: this study selectively examines the progress of groups that the *Charter* was intended to benefit (Aboriginal peoples, women, visible minorities, and immigrants); areas of state action that the *Charter* was intended to regulate (the criminal process and bureaucratic behaviour); and aspects of our communal and public life that the *Charter* was intended to animate and enhance (politics and inter-group cultural relations). It relies on empirical studies that purport to document developments in each of these areas. Most of these studies were not undertaken with a view to assessing the effects of the *Charter*, and, indeed, many of them do not even mention it. Rather, they focus on how things have actually changed, if at all, in each area since 1982. And to reiterate: this selective focus based on the availability of evidence has had several limiting effects. First, we have used only longitudinal studies (or series of studies), which allows us to evaluate the extent and direction of change; and we have had to accept the periodicizational, methodological, and other limitations of these studies. Second, we have therefore failed adequately to investigate some fields where the *Charter* may indeed have had dramatic effects, such as the standing of gays, lesbians, and disabled persons,[55] but where social data are lacking. Third, we have

[55] Limitations of time, space, and available data have prevented us from investigating the experience of persons with disabilities, which, we suspect, approximates that of visible minorities and Aboriginal peoples. Persons with disabilities have been trapped in the cycle of economic deprivation that we explore in our conclusion in part VII. Indeed, their economic position may be more dire, since their full participation in economic life requires investments in the retrofitting of housing, schools, workplaces, and public facilities, as well as profound alterations in entrenched attitudes and procedures in those and other venues. See the groundbreaking, but largely non-empirical, research of M. David Lepofsky: "The Long Arduous Road to a Barrier-Free Ontario for People With Disabilities: The History of the *Ontarians With*

not thoroughly documented certain phenomena, such as growing income inequality, which, though of great concern to many *Charter* beneficiaries, are not addressed by the juridical *Charter* itself. And finally, we have tended to downplay speculation about what has caused the trends we are documenting, especially speculation about the role of law and legal institutions. While such speculation is not only legitimate but also central to any debate over the long-term effects of the *Charter*, the premise of this study is that speculation and debate will both improve if we first focus on data that may suggest how, if at all, Canadian society has actually changed.

IV. THE PROGRESS OF EQUALITY-SEEKING GROUPS

A. Aboriginal Peoples

On a purely theoretical level, it has been argued that the logic of entrenching recognition of Aboriginal rights within the body of an essentially liberal, Western, and individualistic legal device was tenuous if not innately dysfunctional.[56] It is hardly surprising, then, that the actual impact on the lives of First Nations peoples of the *Charter* (and of the simultaneous recognition and affirmation of their "existing aboriginal and treaty rights")[57] has been ambiguous at best.

Various indicators suggest a lack of progress towards social and economic equality for First Nations peoples in the *Charter* era. An Assembly of First Nations (AFN) report[58] noted in 2001 that "a

Disabilities Act – The First Chapter" (2003-2004) 15 National J. of Constitutional Law 125; "A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years: What Progress? What Prospects?" (1997) 7 National J. of Constitutional Law 263; and "The Charter's Guarantee of Equality to People with Disabilities: How Well Is It Working?" (1998) 16 *Windsor Yearbook on Access to Justice* 155.

[56] Mary Ellen Turpel argues that the exercise of Aboriginal rights under the *Charter* requires claimants to work within an alien discourse that is ill-suited to their reality and their needs. "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences" in Richard F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991) 503 at 517-19.

[57] *Constitution Act,* 1982, *supra* note 29 at s. 35(1)

[58] Assembly of First Nations Communications Unit, "Fact Sheet: Socio-Economic Exclusion of First Nations in Canada" (2001), online: <http://www.afn.ca/Programs/Treaties%20and%20Lands/factsheets/see_fact.htm> [AFN, "Socio-Economic Exclusion"].

glaring socio-economic disparity between First Nations and Canadian citizens" still existed despite the *Charter* and the constitutional entrenchment of Aboriginal and treaty rights. This disparity existed because "Canadian authorities very often flout the rights of First Nations and/or fail to follow up on certain judgments made by the Supreme Court" regarding these rights. The unemployment rate for non-native Canadians in 1996 was 9.8 percent, compared to 28.7 percent for Indians on reserves. Federal spending on Aboriginals through the Department of Indian Affairs and Northern Development (DIAND) represented only 0.5 percent of Canada's gross domestic product (GDP) in 1999, while natural resources taken from First Nations' ancestral lands accounted for 11.1 percent of GDP. A 1998 United Nations (UN) report found "little or no progress in the alleviation of social and economic deprivation among Aboriginal people" in Canada.[59] In 2002, Aboriginal representation in the federal public service has improved somewhat, but to a lesser extent than for women, visible minorities (2.4 percent), or persons with disabilities (1.3 percent).[60] While Aboriginal peoples' representation improved from 1989 to 1998 in the categories of management and administrative support (by 0.9 and 1.2 percent, respectively), it dropped for scientific and professional positions in the mid-1990s and only returned to its 1989 level (1.6 percent) by the period's end. Overall, Aboriginals continued to be less well-represented than any other group in each of the three categories.[61]

Despite the universal applicability of *Charter* equality provisions, employment equity policies produced highly variable results for Aboriginal peoples as between the federal and provincial jurisdictions and as among the provinces, no doubt due to variation

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[59] *Ibid*.

[60] Abigail B. Bakan, Audrey Lynn Kobayashi & Status of Women Canada, "Employment Equity Policy in Canada: An Interprovincial Comparison" (2000), online: Status of Women Canada <http://dsppsd.pwgsc.gc.ca/Collection/SW21-46-1999E.pdf> at 67 [Bakan, Kobayashi & SWC]. Another study similarly notes an increase in representation from 1.8 percent in 1986 to 2.2 percent in 1995. See T. John Samuel & Aly Karam, "Employment Equity for Visible Minorities" [Samuel & Karam] in Leo Driedger & Shiva S. Halli, eds., *Race and Racism: Canada's Challenge* (Montreal: Published for Carleton University by McGill-Queen's University Press, 2000) 134 at 139 [Driedger & Halli].

[61] Bakan, Kobayashi & SWC, *ibid.* at 68.

"in the demographic structure of the work force, in economic conditions that affect job availability and work force needs, and variations in cultural and political practices" within each jurisdiction.[62] For example, Ontario's provocatively entitled *Job Quotas Repeal Act 1995*[63] put an end to a brief statutory experiment designed to promote employment equity for Aboriginals (as well as for women, visible minorities, and disabled people).[64] Legislation apart, Ontario Aboriginals continued, in general, to experience far higher unemployment than non-racialized groups at all levels of education,[65] as well as lower employment rates two years after post-secondary graduation.[66] Aboriginal peoples made modest gains in occupational status in areas such as management and the professions,[67] but they remained under-represented relative to foreign and Canadian-born racial minorities. They remained most heavily concentrated in sales/service or semi-skilled occupations.[68]

While under-represented in the workforce, Aboriginal peoples were over-represented in the penal system.[69] Despite comprising

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62 *Ibid.* at 23.

63 *Job Quotas Repeal Act 1995,* S.O. 1995, c. 4

64 Contrary to what is implied by the polemical title of the repealing statute, the repealed statute – the *Employment Equity Act, 1993*, S.O. 1993, c. 35 – did not actually mandate the use of quotas to advance employment equity. The repeal statute was unsuccessfully challenged on *Charter* grounds by the four intended beneficiary groups: *Ferrel v. Ontario (Attorney General)* (1997), 149 D.L.R. (4th) 335, aff'd. (1998), 42 O.R. (3d) 97(C.A.), appeal dismissed [1999] SCCA No. 79. See Bakan, Kobayashi & SWC, *supra* note 60 at 32.

65 See Jean Lock Kunz, Anne Milan & Sylvain Schetagne, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income A Report Prepared for Canadian Race Relations Foundation by the Canadian Council on Social Development* (Toronto: The Foundation, 2000) at 19 [Kunz, Milan & Schetagne].

66 *Ibid.* at 20.

67 The percentage of Aboriginals in senior and middle management increased from 6.3 percent in 1991 to 6.9 percent in 1996, while in it increased from 9.4 to 11.1 percent in the professions. *Ibid.* at 21.

68 For instance, by 1996, 19.7 percent of Aboriginals were employed in the category of "Sales/Service-Other Manual Workers," compared to just 9.6 percent of Canadian-born visible minorities. *Ibid.* at 20-21.

69 See generally, Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993); Correctional Services Canada Aboriginal Issues Branch, "Demographic

only 2.8 percent of the population of Canada (according to 1996 Census data),[70] Aboriginals contributed a multiple of this figure to populations admitted to provincial/territorial custody (17 percent) or on probation (13 percent) during the 1990s.[71] During approximately the same period, Aboriginals rose from 11 percent to 17 percent of the federal prison population.[72]

The 1998 UN report cited by the AFN[73] decried continuing problems with housing and the persistently high suicide rate among Aboriginal peoples. The issue of Aboriginal suicide occupied a prominent place in the analysis of the Royal Commission on Aboriginal Peoples (RCAP), whose studies revealed that suicide rates of Inuit and Indians were respectively 3.3 times and 3.9 times higher than the national average for the preceding ten to fifteen years.[74] This rate fluctuated wildly from 1979 to 1991, reaching its highest points in 1981 and 1987, while tracking trends in the general population from 1985 to 1991.[75]

RCAP also documented the deplorable state of housing for

Overview of Aboriginal Peoples in Canada and Aboriginal Offenders in Federal Corrections" (20 July 1999), online: <http://www.csc-scc.gc.ca/text/prgrm/correctional/abissues/know/10_e.shtml> 2.1 [Correctional Services Canada].

70 *Ibid.* at 1.0.

71 The overall rate in each category has not varied by more than 2 percent over ten years, despite greater fluctuations within each province/territory. Canadian Centre for Justice Statistics, "Aboriginal Peoples in Canada" (2001), online: Statistics Canada <http://www.statcan.ca:80/english/freepub/85F0033MIE/85F0033MIE01001.pdf> at 18.

72 Correctional Services Canada, *supra* note 69 at 2.1.1.

73 AFN, "Socio-Economic Exclusion," *supra* note 58.

74 Canada, Royal Commission on Aboriginal Peoples, *Choosing Life: Special Report on Suicide Among Aboriginal People* (Ottawa: Minister of Supply and Services Canada, 1995) at 11 (Co-chairs Rene Dussault & Georges Erasmus). Given the increase in population since the 1960s to the Commission's report in 1995, this translated into an increase of "about 70 percent" in "absolute numbers" for the period. This does not take into account estimates to the effect that "up to 25 per cent of accidental deaths among Aboriginal people are really unreported suicides." *Ibid.* at 17.

75 *Ibid.* at 13. This suggests there was no correlation between the inception and operation of the *Charter* and conditions affecting suicide rates in Aboriginal communities or the country as a whole.

Aboriginal peoples.[76] Most significant for our purposes are the changes that occurred during the *Charter* era.[77] RCAP noted that – despite escalating need – federal and provincial funding had actually declined from 1988 to 1995,[78] which reduced the supply of new fully financed, on-reserve homes from 1,800 in 1991 to 700 in 1995.[79] From 1986 onwards, funding for low-income housing on reserves was less than that available elsewhere,[80] while subsidies for building and repairs between 1988-1989 to 1993-1994 succeeded in bringing just 46 percent of homes to "adequate" status according to the modest standards of the Department of Indian Affairs and North Development (DIAND).[81] Further, DIAND's capital subsidy housing program budget had not been increased since 1983.[82] However, by 1993-1994, 92.1 percent of on-reserve households had water service and 85.6 percent had sewage service[83] – in both cases, a measurable improvement.

Many studies have documented the poor state of Aboriginal health. While Aboriginal life expectancy has improved over the past few decades and has moved somewhat closer to that of the general population, the gap remained significant throughout the *Charter* era. Thus, in 1978-1981, immediately before the advent of the Charter, Indian men had a life expectancy of 61.6 years compared to 71 years for non-Indians; by 1990, the gap narrowed from 9.4 years to 7;[84]

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76 Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* vol. 3, (1 August 1996) s. 4 (Co-chairs René Dussault & Georges Erasmus), online: The Commission <http://www.ainc-inac.gc.ca/ch/rcap/index_e.html>

77 RCAP does not suggest a *Charter*-based obligation to provide housing, but does suggest such an obligation might exist under s. 36(1) of the *Constitution Act, 1982*. *Ibid.* vol. 3, s. 4 at 2.2.

78 *Ibid.* vol. 3, s. 4.

79 *Ibid.* vol. 3, s. 4 at 1.2.

80 *Ibid.* vol. 3, s. 4 at 2.2.

81 The level of funding allocated should have been sufficient to bring this number to 95 percent. *Ibid.* at vol. 3, s. 4.

82 This was supplemented by funding provided under Bill C-31 (*infra* note 87) in 1994. *Ibid.* at vol. 3, s. 4 at 4.1.

83 An improvement from the 1990-1991 figures of 86.4 and 80 percent, respectively. *Ibid.* at vol. 3, s. 4 at 3

84 *Ibid.* at vol. 3, s. 3 at 1.1.

but by 1996 it had widened again to 7.5 years.[85]

Related to concerns about the social and economic well-being of Aboriginal peoples are concerns about language, culture, and identity. An AFN report relying on census data from 1981 and 1996 describes the "steady erosion" of Aboriginal languages. Respondents who reported speaking an Aboriginal mother tongue rose by 24 percent, but those speaking it in the home grew by only 7 percent; consequently, the incidence of those speaking an Aboriginal language at home declined from 76 percent to 65 percent. The decline was particularly pronounced for "endangered" languages, and home use of some had "practically disappeared by the 1990s."[86] More obviously attributable to the *Charter* is the effect of Bill C-31,[87] passed in 1985 as the result of *Charter* challenges to citizenship provisions of the *Indian Act*[88] that discriminated against Aboriginal women. A former president of the Congress of Aboriginal Peoples describes C-31 as "the Abocide bill" because its now-gender-neutral provisions eliminated Indian status for Aboriginals after two consecutive generations of marriage to non-status Indians. Although the bill restored status to many women who had lost it, it also empowered bands to deny "C-31 Indians" the right to live on the reserves. Approximately 40 percent of bands, including some of the country's largest, have availed themselves of this authority, thus making them ineligible for the majority of benefits associated with status under the *Indian Act*.[89]

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85 Renée Dupuis, Robert Chodos & Susan Joanis, *Justice for Canada's Aboriginal Peoples* (Toronto: James Lorimer & Company Ltd., 2002) at 26. This study provides a second indicator, the incidence of tuberculosis per 100,000 population: even after a dramatic decline from 58.1 in 1991 to 35.8 in 1996, incidence among registered Indians on reserve was, at its lowest, still six times as high as for the general population.

86 Assembly of First Nations, "Canada's Aboriginal Languages 1996" (20 July 2002), online: <http://www.afn.ca/PressReleases&Speeches/canada.htm>.

87 Bill C-31, *An Act to Amend the Indian Act*, enacted as R.S.C. 1985, c. 32 (1st Supp.).

88 R.S.C. 1985, Chap. I-5 [*Indian Act*].

89 Harry W. Daniels, "Bill C-31: The Abocide Bill" (19 July 1998), online: Congress of Aboriginal Peoples <http://www.abo-peoples.org/programs/C-31/Abocide/Abocide-2.htm#Overview>.

While not exclusively *Charter* concerns,[90] debates over the well-being of Aboriginal peoples have often implicated issues relating to their lands, resources, and governance. Some significant milestones have been passed in recent decades – the founding of Nunavut and the ratification of the Nisga'a Treaty in British Columbia, for example – but there have been many setbacks as well. An AFN assessment of the land claims and treaties processes in 1991 bemoans the federal government's "obvious failure to adequately address the land rights issues of Canada's aboriginal peoples" and argues that "[its] approach to aboriginal matters has remained fundamentally unchanged" despite the entrenchment in the *Constitution Act, 1982* of Aboriginal and treaty rights.[91] The AFN estimated that, in addition to the 578 specific claims acknowledged by government, approximately 1,000 more were in the course of preparation. However, AFN noted, only forty-four claims had been settled between 1973 and 1991, and of 275 claims at various stages in the settlement process, probably "not . . . more than a dozen" were in active negotiation as of 1991.[92] As of March 2003, Indian and Northern Affairs Canada reported 251 claims settled, out of a

[90] To clarify the authors' position, our discussion of equality, land claims, and treaty and self-government rights of Aboriginal peoples does not depend on s. 35 of the *Constitution Act, 1982*, which is technically not part of the *Charter,* although enacted contemporaneously with it. Rather, we are exploring the benefits to Aboriginal peoples of s. 15 equality rights, and of the protection of land claims and treaty rights under s. 25 of the *Charter,* which the federal government itself recognizes as mandating the inherent right of self-government as a factor in *Charter* interpretation. Indian and Northern Affairs Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>. Aboriginal groups have declared that the inherent right is enshrined in s. 25. See Assembly of First Nations, "Implementation of Treaty Rights and the Inherent Rights to Self-Government-November 19, 1992," online: <http://www.afn.ca/resolutions/1992/con-nov/res11.htm>.

[91] Assembly of First Nations, "A Critique of Federal Government Land Claims Policies" in Frank Cassidy ed., *Aboriginal Self-Determination: Proceedings of a Conference Held September 30 - October 3, 1990* (Lantzville, B.C.: Oolichan Books & The Institute for Research on Public Policy, 1991) 232 at 232.

[92] *Ibid*. at 241.

total of 1,185 specific claims considered since 1973[93] Only fifteen comprehensive claims have been settled over the same thirty-year period.[94] In British Columbia, where the majority of comprehensive claims originate, progress has been slow. The B.C. Treaty Commission's Annual Report 2001 lists two First Nations at the second stage of negotiation, four at the third stage, forty-two at the fourth stage, and just one at the fifth stage.[95] The following year, the numbers were unchanged except that the number of nations at the second stage had risen from two to six[96] (meaning only that the government had accepted statements of intent to negotiate from four additional nations, and held an initial meeting with each). The Commission, in explaining its lack of progress, blamed the Supreme Court's 1997 ruling in *Delgamuukw v. British Columbia*[97] (which forced all parties into a lengthy reconsideration of their positions), the 2000 federal election, the 2001 British Columbia provincial election, the B.C. government's suspension of negotiations pending a referendum, a general overload of the treaty-negotiating system, and a high turnover of negotiators participating in the process.[98] In short, institutions at all levels of the process had – deliberately or inadvertently – frustrated progress on land claims settlements.

Progress toward Aboriginal self-government has been equally halting. Explicit constitutional recognition of an Aboriginal right of self-government was delayed indefinitely with the failure of the *Charlottetown Accord* in 1992. In the interim, federal policy has come to focus on recognition of self-government under the umbrella of section 35 of the *Constitution Act, 1982*, as part of the negotiation

93 Indian and Northern Affairs Canada. Implementation Branch, "National Mini Summary: Specific Claims Branch" (26 July 2003), online: <http://www.ainc-inac.gc.ca/ps/clm/nms_e.html>.

94 Indian and Northern Affairs Canada. Implementation Branch, "Comprehensive Policy and Status of Claims, February 2003" (February 2003), online: <http://www.ainc-inac.gc.ca/ps/clm/brieff_e.pdf> at 3.

95 The fifth stage involves finalizing a treaty. B.C. Treaty Commission, "Annual Report 2001: The Year in Review" (2001), online: <http://www.bctreaty.net/files_2/pdf_documents/2001_annual_report.pdf> at 7.

96 B.C. Treaty Commission, "The Changing Landscape: Annual Report 2002" (2002), online: B.C. Treaty Commission <http://www.bctreaty.net/files_2/pdf_documents/2002_annual.pdf> at 6.

97 [1997] 3 S.C.R. 1010.

98 B.C. Treaty Commission, "LookingBack, Looking Forward: A Review of the B.C. Treaty Process" (2001), online: <http://www.bctreaty.net/files_3/pdf_documents/review_bc_treaty_process.pdf> at 5.

of comprehensive agreements and new treaties, and as an additional dimension to existing treaties.[99] A 1999 parliamentary research report, updated in 2000, complained that "[m]any years of negotiations have, to date, produced relatively few self-government agreements."[100] To little avail: no new agreements were reached between 1999 and 2002.[101] Shortly afterwards, the federal government introduced – and, in the face of strong AFN protests, promptly withdrew – the highly interventionist *First Nations Governance Act.* [102]

In short, progress for Aboriginal peoples during the *Charter* era has been non-existent in some respects, such as rates of incarceration; glacial in others, such as land claims and self-government; perceptible but still modest in regard to health and life expectancy; and positive but uneven in regard to living standards and employment prospects. However, there is no evidence to suggest the *Charter* was responsible for any improvements that did occur. Indeed, it seems far more likely that any modest gains realized were the product of a prolonged campaign of grassroots mobilization through coalition-building, the leverage of double-edged judicial pronouncements,[103] temporary and fickle public support engendered

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[99] Mary C. Hurley & Jill Wherrett, "Aboriginal Self-Government" (1 August 2000), online: Library of Parliament, Parliamentary Research Branch <http://www.parl.gc.ca/information/library/PRBpubs/prb9919-e.htm>.

[100] *Ibid*.

[101] Indian and Northern Affairs Canada, "Agreements" (28 October 2005), online: <http://www.ainc-inac.gc.ca/pr/agr/index_e.html#FinalAgreements1>. The process evidently lurched forward in the year of the *Charter*'s twentieth anniversary: whereas only twelve final self-government agreements were achieved between 1992 and 2002, an additional ten were completed between 2002 and 2005. Given that the *Charter* itself has not changed in this time, it would appear that progress in this area has been more a function of political whim or will.

[102] Assembly of First Nations, News Release "Standing Committee Forces End to Debate on Governance Act in Spite of Wide-Spread Opposition" (27 May 2003), online: Treaty Justice <http://www.treatyjustice.org/docs/billc7/articles/enddebate.html>. At the time of writing, the incoming Paul Martin Liberal government had cancelled this initiative – at least in its then-current form – in keeping with promises made to First Nations leaders during Martin's 2003 party leadership bid.

[103] For example, *Calder v. British Columbia (A.G.),* [1973] S.C.R. 313, which was ambiguous in its result but sufficiently supportive of a hazily defined concept of Aboriginal title to prompt the federal government to negotiate

by the awareness-raising RCAP report, and militancy taken very occasionally to the extreme of armed confrontation and conflict.

B. Women

It is perhaps telling that many surveys of women's progress toward equality, at least with respect to material factors, seem not to consider the *Charter* as an appropriate event or starting place from which to measure their current status.[104] Julia O'Connor, writing in 1998 about representation of employment equality strategies in the political process in Canada, begins instead with the year 1970 and attributes changes over three decades to a list of "key factors" from which the *Charter* is notably absent. These include "royal commission reports, the policy machinery related to women's issues, the federal government's obligations under key UN and [International Labour Organization] treaties, the women's movement, labour unions, and, to a lesser extent, political parties."[105] The "limited impact of the equality strategies" that has been realized has been "advanced primarily through bureaucratic policy machinery rather than through parliamentary or industrial relations channels"[106] or, presumably, *Charter* litigation.[107] Among the changes noted:

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rather than take its chances with an unpredictable Supreme Court. These negotiations would drag on for more than twenty years, culminating eventually in the Nisga'a Treaty (brought into force by the *Nisga'a Final Agreement Act,* S.C. 2000, c.7)

104 See, however, Sarah Lugtig & Debra Parkes, "Where Do We Go From Here?" (Spring 2002) 15:4 Herizons 14 at 15-16 [Lugtig & Parkes]. Lugtig and Parkes assess gains and losses for women specifically during the *Charter* era. They identify *legal* victories including rights to abortion, rights of disabled women to health care, and rights of Aboriginal women respecting votes in band council elections – as well as *political* defeats – including the revocation of the *Canada Assistance Plan*, decreased access to unemployment insurance, and cuts to welfare in Ontario.

105 Julia S. O'Connor, "Employment Equality Strategies and Their Representation in the Political Process in Canada, 1970-1994" in Manon Tremblay & Caroline Andrew, eds., *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) 85 at 85 [O'Connor].

106 *Ibid.* at 106.

107 O'Connor notes that the introduction of *parental* leave in 1990, extending the maternity leave and benefits won in earlier decades to men, followed a *Charter* equality challenge to parental leave provisions for adoptive parents brought by a natural father. *Ibid.* at 87. In this instance, the *Charter* was used to deny women a monopoly over a right won by other means.

labour participation of women with young children increased from 50 percent in 1981 to 63 percent in 1993. Within this group, those with preschool-aged children increased their participation from 42 to 56 percent, and those with children under three years moved from 39 to 55 percent.[108] Women's representation in the public service (regardless of parental status) increased from 43.4 per cent in 1986 to 47.4 percent in 1995.[109] Another study measuring participation in the federal public service from 1987 to 1998 describes a gradual increase from 42.4 to 50.5 percent in this period.[110] The percentage of paid maternity leaves increased from 77 percent in 1980 to 89 percent in 1991, though most of this 1991 figure was accounted for solely through unemployment insurance.[111]

Has the *Charter* era witnessed significant improvements in the ratio of female-to-male earnings and in women's participation in particular occupational groups? With respect to earnings, women's earnings rose from 64.2 percent of men's in 1980 to 71.8 percent in 1992. While the aggregate improvement is marked, there remains a wide disparity between private- and government-sector percentages.[112] Moreover, the gain was short-lived and not indicative of even a slow but steady improvement in women's prospects: by 1994, women working full-time earned 68.5 percent of what their male counterparts did, and while the figure would vary a few percentage points from year to year,[113] by 2002 and 2003 it had settled at 70.2 and 70.5 percent, respectively.[114] It should be noted

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[108] *Ibid.* at 86.

[109] Samuel & Karam, *supra* note 60 at 139.

[110] Bakan, Kobayashi & SWC, *supra* note 60 at 67.

[111] O'Connor, *supra* note 105 at 86-87. O'Connor notes that despite this, some collective agreements had begun to include maternity leave and benefit provisions that exceeded national standards. She attributes the introduction of paid maternity leave and benefits to action taken pursuant to a recommendation the Royal Commission on the Status of Women made in 1970.

[112] Private-sector female employees in 1980 earned 60.6 percent of men's wages compared to 73.8 percent for female government workers; in 1992 they earned 67.9 and 79.8 percent, respectively. Wendy Robbins, "Pay Equity Laws Provide Patchwork of Remedies" (Spring 2002) 15:4 Herizons 10.

[113] It would crest at 72.4 percent in 1995, dropping sharply by 4 percent within two years. Statistics Canada, "Average earnings by sex and work pattern (Full-time, full-year workers)," online: < http://www40.statcan.ca/l01/cst01/labor01b.htm>.

[114] *Ibid*.

that the picture becomes uglier when one looks at the ratio for all earners and not just full-time earners, which, from 1994 to 2003, never rose above 63.6 per cent.[115] Moreover, what improvement there has been may the product of negative causes: one analysis maintains that women's average after-tax income rose from 52 percent of men's in 1986 to 63 percent in 1997, but it attributes this change in part to "an 11.4% decrease in men's median earnings over this period."[116]

Moreover, income figures do not fully capture the dynamics of women's status in the job market. As Michael Mandel notes, "women are simultaneously waging a struggle for equality with men *qua* women, and a struggle alongside men for a decent standard of living and quality of working life *qua* working people."[117] A recent review comparing data from 1967 to 1995 argues that little has changed: in 1967, "almost half"of women aged sixty-five and over lived below the poverty line, and by 1995, 43.3 percent were still in poverty. The proportion of single mothers below the poverty line increased from one-third to 57.2 percent. More women were performing non-standard work (i.e., "work that is part-time, casual, seasonal and without benefits or union protection") than previously.[118]

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[115] Statistics Canada, "Average earnings by sex and work pattern (all earners)," online: <http://www40.statcan.ca/l01/cst01/labor01a.htm>.

[116] Karen Hadley, *And We Still Ain't Satisfied: Gender Inequality in Canada – A Status Report for 2001* (Toronto: CJS Foundation for Research and Education and The National Action Committee on the Status of Women, 2001) at 3 [Hadley].

[117] Mandel, *supra* note 6 at 438. Writing in the mid-1990s, Mandel notes that women "continued to be segregated into low-paying jobs," holding only 19.3 percent of the ten highest-paying jobs ("general managers and other senior officials"), while dominating the ten lowest-paying jobs (such as stenographers, typists, and sewing machine operators). They also continued to be "three times as likely as men to work only part-time." Mandel calculates that accounting for such factors reduces women's earnings as a percentage of men's from the official figure of 71.8 percent to an actual figure of 63.8 percent. *Ibid*. 438 at n. 74.

[118] Shelagh Day & Gwen Brodsky, "Women's Economic Inequality and the *Canadian Human Rights Act*" in Donna Greschner *et al.*, eds., *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 113 at 120. The authors express their disappointment with the failure of the *Canadian Human Rights Act* to accelerate the pace of change: "With quasi-constitutional prohibitions against

Women's representation increased in all occupational groups considered from 1984 to 1990. Most notably, the percentage of women managers and administrators rose from 32 to 41 percent, while the percentage of women professionals rose from 46 to 50 percent. As a percentage share of all female employment, however, these categories constituted only 11 and 21 percent respectively. Most women continued to be employed as clerical workers (30 percent in 1990, down from 32 percent in 1984), with a very slight decline in those employed in unskilled service work, the third-largest category (17 percent in 1990, down from 18 percent in 1984). O'Connor characterizes these results as indicative of a "slow rate" of decline in gender segregation, occurring "only at the upper end of the occupational distribution."[119] As Karen Hadley demonstrates,

discrimination in employment and services in place for more than two decades, women could reasonably have expected to see more improvement." While they note that *Charter* litigation has "given life to the minimalist language of the CHRA and provincial human rights laws" (at 137), their rebuke could well be extended to the same failure of the *Charter*'s fully constitutional prohibition against gender discrimination to affect the material impact of such legislation. Karen Hadley presents recent data which supports Day and Brodsky's point about the greater presence of women in non-standard occupations, reporting that 72 percent of part-time workers are women, and that, in 1999, 28 percent of all employed women (compared with 10 percent of men) worked less than thirty hours per week. She notes further disparities between unionized and non-unionized non-standard work: whereas women in the former made just 69 percent of men's wages, they made 86 percent of men's wages in non-unionized non-standard work, "because wages for both were close to the minimum wage floor." Hadley, *supra* note 116 at 8.

[119] O'Connor, *supra* note 105 at 96-97. Recent data suggests that these trends carried forward to 1999, when women constituted 51.8 percent of professionals (up from a 1987 figure of 49.8 percent, but down from 52.2 percent in 1994); participation in management appeared lower than indicated by O'Connor, starting at 28.9 percent in 1987 and rising to 35.1 percent in 1999 – unchanged from its 1994 figure. Statistics Canada, *Women in Canada, 2000: A Gender-Based Statistical Report*, 4th ed. (Ottawa: Statistics Canada, 2000) at 128 [Statistics Canada, *Women in Canada*]. Women's participation in selected trades remained low through the latter part of the *Charter* era: the percentage of women enrolled in apprenticeship programs for the major trades in total stood at 0.6 percent in 1988 and by 1997 was still only at 1.6 percent. *Ibid.* at 96. Mandel somewhat wryly notes one direct connection between the *Charter* and improved representation of women in professions: the flood of *Charter* litigation had increased the presence of women lawyers from 15.5 percent in 1981 to 20 percent by the time of *Symes v. Canada* [1993] 4 S.C.R. 695. Mandel, *supra* note 6 at 444-45. By 1993, women constituted 50 percent

even progress identified at this upper end is problematic in that equality of status is often not translated into commensurate income gains. According to data from 1996, women in the category of management tended to be concentrated in the lower-level management positions, and average incomes for women in this group stood at $39,048 compared to $58,680 for men. Moreover, women's stronger presence in professional roles is due in large part to their dominance in nursing and teaching (in which they hold 95 percent and 69 percent of positions, respectively). [120] Data for 2004 continues to support this thesis, showing the number of women nearly doubling that of men in the field of education, and more than quadrupling it in health care and social assistance, but still lagging behind in the "professional, scientific and technical services" sector.[121] In the federal public service, women's representation in management positions and in scientific/professional roles increased from 14.1 percent and 25 percent in 1989 to 25.1 percent and 32.3 percent in 1998, respectively, but women's overwhelming concentration in administrative support positions had not changed (women constituted 83.1 percent of these workers in 1989 and 84 percent in 1998).[122]

Other measurements, perhaps less direct than employment and income factors but no less material in their effect, suggest the advent of the *Charter* has had relatively little impact on women's lives. Day and Brodsky argue that, as women's socio-economic status makes

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of law students, 28 percent of law professors, and 27 percent of practicing lawyers. *Ibid*. at 445 n. 85.

120 Hadley, *supra* note 116 at 19. Hadley further notes that although women had assumed more positions in higher-paying professions such as medicine, dentistry, and the social sciences, they still represented just 20 percent of professionals in natural sciences, engineering and mathematics. *Ibid.* By 1999, women in the professional category filled over half of all positions in nursing, teaching and the "artistic/literary/recreational" and "social sciences/religion" subcategories. Statistics Canada, *Women in Canada*, *supra* note 119 at 128. It appears these proportions are unlikely to change significantly in the first years of the new century; women's full-time enrolment in university engineering and applied sciences in 1997-1998, while up from its 1992-1993 figure, still only constituted 21.5 percent of program enrolment, and women accounted for just 29.4 percent of enrolment in mathematics and physical sciences. *Ibid.* at 94.

121 Statistics Canada, "Employment by industry and sex," online: <http://www40.statcan.ca/l01/cst01/labor10a.htm >.

122 Bakan, Kobayashi & SWC, *supra* note 60 at 68.

them more likely than men to rely on government programs for their survival, they are disproportionately susceptible to adverse effects from changes to such programs. [123] They argue that the *Canadian Health and Social Transfer* and the *Budget Implementation Act,* "the most drastic changes to social programs of the last 40 years," were presented as purely fiscal measures, unrelated to the rights of women.[124] They then demonstrate through a review of *Charter* cases a disturbing tendency by governments and courts to "[conduct] the discrimination analysis in such a way as to break the cause and effect linkage between the inequality complained of and the *Charter*'s equality guarantees."[125] Thus, recent reductions in government spending have had the effect of reducing both wages and employment in the public sector. This has a disproportionate impact on women, because the public sector offers them better jobs and higher salaries than does the private sector and is less likely to concentrate them in lower-status jobs. Cuts therefore reduce the number of attractive jobs available to women.[126] The availability of child care has risen and fallen over the course of the *Charter* era, marked by an increase in supportive legislation and funding through the 1980s and a levelling or reduction as a result of neo-liberal policies adopted in the 1990s.[127] As fees increased and subsidies

[123] Shelagh Day & Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada's Social Programs* (Ottawa: Status of Women Canada, 1998) at 29-30 [Day & Brodsky]. A recent collection of essays surveys the disproportionate impact that the neoliberal drive for privatization has had on women: see generally, Brenda Cossman & Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002). For international comparisons, see generally Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution, and Gender in Market Reform* (Boston: Kluwer Law International, 2002).

[124] Day & Brodsky, *ibid.* at 30.

[125] *Ibid.* at 82. In spite of this, the authors proceed to make *Charter* arguments against the constitutionality of the *Budget Implementation Act, 1997,* S.C. 1997, c. 26. See *ibid.* at 109.

[126] Isabella Bakker, "Deconstructing Macro-Economics through a Feminist Lens" in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace & Company Canada Ltd., 1996) 31 at 44-45.

[127] Gillian Doherty, Martha Friendly & Mab Oloman, *Women's Support, Women's Work: Child Care in an Era of Deficit Reduction, Devolution, Downsizing and Deregulation* (Ottawa: Status of Women Canada, 1998) at 17-19 [Doherty, Friendly & Oloman].

fluctuated,[128] overall access to child care diminished, as did opportunities for choice among alternative child care services. The consequence was to constrain women's options with respect to their participation in the labour force.[129] Whether recent initiatives by the federal government will reverse these trends remains to be seen.[130]

The availability of affordable housing for women has evidently been unaffected by the entrenchment of equality rights. In Toronto, higher vacancy rates in the 1990s did not ease the problem of homelessness. In fact, shelter use rose from roughly 1,000 per day in the mid-1980s to nearly 5,000 at the end of the 1990s, and "among shelter users the proportion of women has risen dramatically."[131] This is attributable to a combination of rising rents and increasing

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[128] Day care and other fees increased from 1993 to 1995 in most provinces and territories, while family income dropped. The national average after-tax income dropped from $47,300 in 1989 to $43,700 in 1994, measured in constant 1994 dollars. Generally, child care fees increased in all jurisdictions from 1989 to 1995 while provincial/territorial subsidies variously stayed the same, decreased or increased; interview data suggests, however, that regardless of changes in the dollar amounts of subsidies, child care workers in all jurisdictions but Manitoba and the Northwest Terriorties perceived that subsidies had not kept pace with increases in fees. *Ibid.* at 19-25. The number of day care spaces has increased nationally. Statistics Canada, *Women in Canada*, *supra* note 119 at 109.

[129] Doherty Friendly & Oloman, *supra* note 127 at 32-33.

[130] A political compromise between the Liberal minority government and the NDP resulted in increased spending for social programs via revisions to the February 2005 budget. The revised budget, passed as Bill C-48, *An Act to authorize the Minister of Finance to make certain payments,* received royal assent 20 July 2005. The budget sets aside $700 million in trust in 2005 and 2006 for the creation of a national child care program. CBC News, "Indepth: Budget 2005 – Highlights"(24 June 2005), online: <http://www.cbc.ca/news/background/budget2005/>. Details of this initiative are given in the government's summary of the budget plan: Government of Canada, Department of Finance Canada, *The Budget Plan* 2005 (Ottawa: Department of Finance Canada, 2005) at 116-20. Prime Minister Paul Martin described it as a "very important budget for child care." CBC News, "Commons amends budget in surprise midnight vote" (24 June 2005), online: <http://www.cbc.ca/story/canada/national/2005/06/24/newparliament050624.html>.

[131] Centre for Equality Rights in Accommodation, Women's Housing Program, *Women and Housing in Canada: Barriers to Equality* (Toronto: Centre for Equality Rights in Accommodation, 2002), online: http://www.equalityrights.org/cera/docs/CERAWomenHous.htm [Women's Housing Program].

economic inequality over the past two decades,[132] the impact of which was felt disproportionately by women, who comprise by far the largest group of renters requiring assistance.[133]

The availability of abortions for women who want them has been used as an example of the concrete impact of constitutional rights litigation in both the U.S.[134] and Canada.[135] While Bogart, writing in the mid-1990s, speculated that "access to abortions, across the country as a whole, may be decreasing,"[136] the picture is actually more complicated. Abortions per 1,000 women increased in Canada from 11.8 in 1982 to 14.9 as of 2002, while abortions per 100 live births increased from 19 to 32.1.[137] However, the *Charter*'s equality provisions notwithstanding, access to abortions varies widely across the country. From 1996 to 2000, no clinic abortions were reported from the three territories or the provinces of Saskatchewan or Prince Edward Island; the number of clinic abortions per year decreased markedly in Nova Scotia, New Brunswick and Manitoba even as it

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[132] *Ibid*. The cuts to social assistance became the subject of an unsuccessful *Charter* challenge in *Masse v. Ontario (Ministry of Community and Social Service)*, (1996) 134 D.L.R. (4th) 20 (Ont. Div. Ct.). The Centre for Equality Rights in Accommodation makes note of another such case, *Gosselin c. Québec (Procureur général)* (2002) 221 D.L.R. (4th) 257 (S.C.C.), which also proved unsuccessful – and argues that "[t]his type of litigation must continue to be initiated." *Ibid*.

[133] Women's Housing Program, *supra* note 131 at 19.

[134] Rosenberg, *supra* note 40; Bogart, *Courts and Country, supra* note 10.

[135] Bogart, *ibid.* This argument is reproduced in part in W.A. Bogart, "Women's Issues and the Impact of Litigation" [Bogart, "Women's Issues"] in Margaret Jackson & N. Kathleen Sam Banks, eds., *Ten Years Later: The Charter and Equality for Women: A Symposium Assessing the Impact of the Equality Provisions on Women in Canada* (Burnaby: Public Policy Programs Simon Fraser University at Harbour Centre, 1996) 107 [Jackson & Banks].

[136] Bogart, "Women's Issues" *ibid.* at 114. He explains: "It is possible to obtain an abortion if near a clinic and in that regard there maybe more abortions. However, aside from these limited areas abortions across the country may now be less accessible. For example, in Ontario only about half of gynecologists and less than 1% of general practitioners perform the procedure."

[137] For the period of 1982 to 1995, see Statistics Canada, *Women in Canada*, *supra* note 119 at 73. For the period of 1998 to 2002, see Statistics Canada, "Induced abortions by age group," online: <http://www40.statcan.ca/l01/cst01/health43.htm>; Statistics Canada, "Induced abortions per 100 live births (Hospitals and clinics)," online: <http://www40.statcan.ca/l01/cst01/health42a.htm>.

was rising in central Canada and British Columbia.[138] Disparity continued from 1998 to 2002, with the same provinces and territories still not reporting, but clinic abortions did rise at uneven rates in all provinces except Nova Scotia.[139]

This disparity in access to clinical abortions is disturbing since the overall increase in the abortion rate appears to be attributable to a seven-fold increase in such abortions. Most of this increase occurred within two years of the Supreme Court's *Charter*-based ruling in the first *Morgentaler* case.[140] This appears to be a clear instance in which the *Charter* did indeed "matter." However, and certainly contrary to the spirit of the *Charter*, it mattered much more in some parts of the country than in others.

Evidence with respect to changes in the extent of violence against women in the *Charter* era is mixed. Spousal assaults became less common, though not in all provinces;[141] spousal homicides of women

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[138] Statistics Canada, "Induced Abortions by Province and Territory of Report" (Clinics), 1996-2000," online: <http://www.statcan.ca/english/Pgdb/health40c.htm> [Statistics Canada, "Induced Abortions, 1996-2000].

[139] In Nova Scotia, abortions actually dropped in number for this period. The number in British Columbia increased by over 2,500, compared to an increase of just forty-five in Ontario. Statistics Canada, "Induced Abortions by Province and Territory of Report" (Clinics), 1998-2002," online: Statistics Canada <http://www40.statcan.ca/l01/cst01/health40c.htm>[Statistics Canada, "Induced Abortions, 1998-2002"].

[140] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*]. In 1990, the number of abortions performed in clinics nationwide jumped to 20,236 (from 7,059 in the previous year). Similarly, the number of clinic abortions per 1,000 women increased from 1.1 to 3.2 while the number per 100 live births jumped from 1.8 to 5. The trend began, however, immediately after *Morgentaler*. The number of abortions leaped from 4,617 to 7,059 between 1988 and 1989; the 1988 figure was actually down from a pre-*Charter* high in 1980. The difference from 1988 to 1989, while much smaller than that from 1989 to 1990, was to that point the single largest increase in availability of clinic abortions since clinics began in 1978. Statistics Canada, *Women in Canada*, *supra* note 119 at 73. Recent data suggest that the number of clinic abortions per year continued to rise from 1996 to 1998, after which it dropped slightly and recovered by 2000, only to drop again to a lower rate in 2002 than in 1998. See Statistics Canada, "Induced Abortions,1996-2000," *ibid*.; Statistics Canada, "Induced Abortions, 1998 to 2002," *supra* note 138.

[141] Status of Women Canada (SWC) reports that from 1993 to 1999 the incidence of spousal assault against women for the country as a whole dropped from 12 to 8 percent of couples, though it remained the same or rose in three

fluctuated;[142] sexual assaults of lesser severity rose and fell, while those of greater severity dropped somewhat;[143] but stalking of women by intimate partners may well have increased.[144] Status of Women Canada attributes the apparent reduction in spousal assaults and the actual decrease in spousal violence to "improved social interventions, such as the increased use of services by abused women," but cautions that "it is still too early to draw any definitive conclusions."[145]

There is some suggestion that victims of sexual harassment in the workplace have gained greater access to remedies as a result of the *Charter.* Beth Symes, while offering no supporting evidence, attributes this change (and others) in the status of women to the effect, albeit indirect, of the *Charter.*[146] However, the extent of the *Charter's* contribution is by no means clear. As Symes herself notes, harassment "is now specifically prohibited in human rights legislation, has been negotiated into many collective agreements and

provinces. Status of Women Canada & Federal/Provincial/Territorial Ministers Responsible for the Status of Women (Canada), *Assessing Violence Against Women: A Statistical Profile* (Ottawa: Status of Women Canada, 2002) at 12 [SWC, *Assessing Violence*].

142 SWC, *Assessing Violence*, *ibid.* at 17. The report's authors speculate that reductions in the rate have been due to "increased community-based supports, mandatory charging policies and improved training of police officers . . . [and] the fact that women may have developed a lower tolerance for spousal violence and an increased tendency to leave relationships before the violence reaches a critical and deadly stage." *Ibid.* at 17-18. Although changes in domestic legislation are reviewed, the *Charter* is mentioned only once, in the context of a portion of one provincial bill that was revised in response to *Charter* challenges. *Ibid.* at 64.

143 *Ibid.* at 18-20.

144 *Ibid.* at 20-21. Harassment by ex-husbands rose from 900 reported incidents in 1995 to approximately 1,300 in 2000; "boyfriends" began at just over 400 in 1995, dropped slightly in 1997, and had risen to approximately 500 by 2000.

145 *Ibid.* at 21.

146 While noting that these changes cannot be attributed *directly* to the *Charter*, Symes paraphrases Sylvia Bashevkin's argument that "the enactment of the *Charter* in 1982 created an early momentum which generated higher expectations for women in Canada than for [their] counterparts in the United Kingdom in the United States." Beth Symes, "Ten Years Later: Is the *Charter* an Appropriate Tool for Social Change?" in Jackson & Banks, *supra* note 135, 11 at 23.

workplaces have designed workplace discrimination and harassment policies to deal with this issue."[147] This would seem to suggest that the problem is being dealt with largely outside the ambit of the *Charter*. Indeed, a 1999 analysis of sexual harassment complaints to the Canadian Human Rights Commission attributed the increased level of harassment claims not to the *Charter* but to a Supreme Court decision that makes no mention of the *Charter*, even by way of background.[148]

Political representation of Canadian women has clearly increased since the *Charter* was adopted in1982. Trimble and Arscott report that from 1970 to 2000, the proportion of women in provincial legislatures improved from 2.3 per cent to 26 per cent.[149] But the news was not uniformly good. With respect to women's presence in provincial government, the authors note that there is no single pattern of linear progress, but rather four distinct patterns, with some provinces and territories showing steady improvement in women's representation over the last five elections, others showing decline, some trapped in a holding pattern, and still others recovering from recent sharp declines.[150]

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147 *Ibid.* at 21.

148 Sandy Welsh, Myrna Dawson & Elizabeth Griffiths, "Sexual Harassment Complaints and the Canadian Human Rights Commission" in Donna Greschner *et al.*, eds., *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 177 at 189, citing *Janzen v. Platy Enterprises Ltd.* (1989), 58 Man. R. (2d) 1 (S.C.C.). Strangely, other authors cite this same case, which found sexual harassment to be a form of sexual discrimination, as evidence of progress under the *Charter*, again despite the fact that the case does not cite or mention it. See Lugtig & Parkes, *supra* note 104.

149 Linda Trimble & Jane Arscott, *Still Counting: Women in Politics Across Canada*. (Peterborough, ON: Broadview Press, 2003) at 40 [Trimble & Arscott]. See also Donley T. Studlar & Richard E. Matland, "The Dynamics of Women's Representation in the Canadian Provinces: 1975-1994" (1996) 29 Canadian J. of Political Science 269 at 273 [Studlar & Matland], which tracks the progress of women in provincial politics from 1975 to 1993 and concludes that, although progress was considerable in every province (except, perhaps in Newfoundland, which started at 2 percent and never rose above its 1984 figure of 5.8 percent), the final percentage and the rate of growth varied widely from province to province. The highest percentage reached anywhere was in Prince Edward Island at 28 in 1993; in that year, figures were in the double-digits everywhere except Newfoundland and Nova Scotia.

150 Trimble & Arscott, *ibid.* at 53-56.

The percentage of female members of the federal Parliament rose from just 0.4 per cent in 1970 to 20.6 per cent in 2000, while the percentage of women Senators for the same period rose from 4.5 to 40 per cent.[151] Candidacy of females in federal elections increased steadily across the three major political parties of the day, with the most dramatic increases occurring between 1985 and 1994.[152] A similar pattern obtains for female candidates for provincial legislatures.[153] Studlar and Matland cite systemic and policy factors accounting for improvements in women's representation,[154] but also attribute it to the heightened political mobilization of the women's movement in the 1980s and 1990s, a trend in which the adoption of the gender equality clause of the *Charter* was a "watershed event."[155] It is difficult to imagine the *Charter* as a decisive factor, though, when one compares Casnada's progress to that of other countries; while women's representation at the federal level had risen to 18 percent in 1993, it was still below the levels of nine industrialized democracies, including countries (Sweden, the Netherlands, Germany, and Austria) where women won the franchise at about the same time as in Canada.[156] Even as the Canadian figure rose from

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151 *Ibid.* at 40.

152 Studlar & Matland, *supra* note 149 at 281. Progress, not uniform, was greatest in the NDP and least in the former Progressive Conservative (PC) party. *Ibid.* at 280. Trimble & Arscott carry this comparison forward from 1993 to 2000 and reveal that by the latter date, only 13 per cent of PC candidates were women, compared to 22 per cent of Liberal and 30 per cent of NDP candidates. Worst of all was Canadian Alliance, for which only 11 per cent of candidates were women. *Ibid.* at 63.

153 Studlar & Matland, *ibid.* at 283-84.

154 Among these are the "extraordinarily high" turnover rate of Members of Parliament in the House of Commons and provincial legislatures, the weaker incumbency advantage of Canadian politicians due to the "volatility of the electorate," and proactive policies of the NDP, which were "specially designed to improve women's representation." *Ibid.* at 275.

155 *Ibid.* at 291.

156 Non-aboriginal Canadian women gained the right to vote in 1918. In 1995, Sweden had the highest representation at 40 percent, followed by Norway at 39 percent and Finland at 34 percent. Lynda Erickson, "Entry to the Commons: Parties, Recruitment, and the Election of Women in 1993" in Caroline Andrew & Manon Tremblay, eds., *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) 219 at 222 [Erickson].

20.6 percent in 2000 to 21.1 percent in 2004,[157] Canada placed only thirty-eighth out of 127 countries with women elected to national parliaments.[158] The tendency of parties to nominate women candidates in ridings where there was little chance of winning persisted into the mid-1980s, but the practice had diminished considerably and arguably disappeared by the mid-1990s.[159]

Moving from raw numbers to practical explanations, a candidate survey taken after the 1993 election revealed broad discrepancies from party to party with respect to candidates' perception of the need for more women's representation. [160] Despite Studlar and Matland's

[157] The number of women *candidates* rose more sharply, from 20.7 percent in 2000 to 23.2 percent in 2004. However, as a result, the percentage of successful women candidates actually fell somewhat. Gina Bishop, "Women's Representation After the 2004 Federal Election" 6 *Opinion Canada* (21 November 2004), online: <http://www.opinion-canada.ca/en/articles/article_111.html [Bishop].

[158] This 21.1 percent amounted to 65 seats out of 308 in the House of Commons. Inter-Parliamentary Union, "Women in National Parliaments: World Classification," online: <http://www.ipu.org/wmn-e/classif. htm>. Canada's modest record in electing women to parliament accounts in part for its recent decline from first to third to eighth in the United Nations Human Development ratings. Most of the countries ranked higher overall also ranked higher than Canada with respect to percentages of women in government at the ministerial level (24.3 percent in Canada) and representation in parliament at the lower- or single-house level (20.6 percent). Interestingly, Canada had the highest percentage of women in its upper house or senate among those top-ten countries with bicameral federal parliaments (32.4 percent). United Nations Development Programme, *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty* (New York, Oxford: Oxford University Press, 2003) at 327.

[159] Studlar & Matland, *supra* note 149 at 289.

[160] NDP candidates most strongly supported the proposition that "there should be many more women" in Parliament, at 85 percent. Liberal support ran at 59 percent, and Reform support was the lowest at 20 percent. Significantly, 73 percent of female Reform candidates supported it, while only 15 percent of male Reform candidates did. The party with the next-largest gender response gap was the Liberal party in which 91 percent of women supported, compared to 48 percent of men. Erickson, *supra* note 156 at 228-29. Although the political map had been redrawn by the time of the 2004 election, it appears that partisan commitments to this issue had remained static. In 2004, 24 percent of Liberal candidates were women, while only 12 percent of candidates for the new Conservatives – the ideological inheritors of the Reform Party and later the Canadian Alliance – were women. Bishop, *supra*

optimistic findings, Erickson presents survey data indicating that constituency associations still made less effort to recruit women when they assessed their party's chance of electoral victory as "good" than when they considered it "unlikely" or "hopeless."[161] Erickson makes no mention of the *Charter* in accounting for results good or bad; she instead argues that levels of representation are a function of party nomination policies and attitudes, and that the "supply" of women candidates – the paucity of which is part of the problem – is a function of "a system of social practices through which women's lives and resources are constrained by gender-structured opportunities and expectations."[162]

The significance of the *Charter* era for women has thus been marginal at best in the political domain. The *Charter* has no doubt symbolically reinforced the political mobilization of Canadian women. However, judging by the greater electoral progress in other countries that have no such constitutional charter – for example, the Scandinavian countries and the Netherlands – it may have done less than is assumed.

In other areas, the Charter era has either caused or coincided with a considerable enhancement of women's legal rights – for example, with regard to access to abortion and to protection against sexual harassment in the workplace. However, the full enjoyment of these rights apparently remains hostage to the effects of local social structures and attitudes, labour market conditions, and government social policies. This is particularly true in areas that are less

note 157. These results put all parties on the wrong side of public opinion, according to which nine in ten Canadians support increasing the number of women in elected office. Centre for Research and Information on Canada, News Release, "Canadians More Confident in Political Leaders; Still Insist Campaign Promises Must Be Kept" (4 November 2004), online: Queen's University <http://www.queensu.ca/cora/polls/2004/November4-canadians_more_confidant_in_political_leaders.pdf> [CRIC].

[161] Erickson, *ibid.* at 238-39, 244-45. The NDP appears to consistently defy this general trend.

[162] *Ibid.* at 247. Interestingly, Erickson cites evidence from the year of the 1993 election that "[w]hile opinion about women in politics appeared to be generally favourable, there was substantial sentiment in some quarters against projects designed to increase women's representation," and that special measures to do so fell prey to a backlash against "special interest" groups. *Ibid.* at 226-27.

amenable to rights-based arguments. Thus, while it was possible to build abortion rights on a foundation of section 7 *Charter* promises of "security of the person" and gender equality, there has been much less progress with respect to equally fundamental needs such as access to housing and child care – areas where the gendered impacts of policy changes are just as keenly felt but in which *Charter* remedies are unavailable because the *Charter* does not protect economic rights.

Finally, of all equality-seeking groups, women have arguably been the most assiduous and skilful in invoking the *Charter*. It is worth noting that LEAF (Women's Legal Education and Action Fund) – a leading advocacy group for women's rights – has been a major architect of *Charter* jurisprudence.[163] Women are entering law schools in increasing numbers (they now often comprise a majority of entrants) and occupy more and more influential positions on the bench and in the legal profession.[164] Several research centres,

[163] Women's Legal Education and Action Fund, "Leaf Front and Centre at the 20th Anniversary of the *Charter*" (2002) 12:2 LEAFLINES 1, online: <http://www.leaf.ca/leafines-spring2002.pdf>; Women's Legal Education & Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery Publications Limited, 1996); Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004); and Lise Gotell, *Feminism, Equality Rights and the Charter of Rights and Freedoms in English Canada, 1980-1992: "The Radical Future of Liberal Feminism?"* (Ph.D. Thesis, York University, 1993) [unpublished].

[164] At the University of Toronto, for instance, female law students outnumbered men in four of the five academic years 1998 to 2003. Shirley Neuman, *Provost's Study of Accessibility and Career Choice in the Faculty of Law, Presented to the Committee on Academic Policy and Programs of the Governing Council of the University of Toronto, February 24, 2003* (26 March 2003), online: University of Toronto <http://www.newsandevents.utoronto.ca/misc/lawaccess.pdf>. Nationwide, in 2000, more women were called to the bar than men (1,530 compared to 1,308). Janice Mucalov, "Women in Law" *National* 11: 5 (August-September 2002) 12 at 13 [Mucalov]. The number of women called to the bar in Ontario in the same year was equal to that of men and exceeded it for the two years following. Law Society of Upper Canada, "Law Society Honours Role Models at Call to Bar Ceremonies" (26 March 2002), online: Canada NewsWire <http://www.newswire.ca/en/releases/archive/February2002/22/c4512.html>. Recent studies suggest that even in the legal realm, genuine equality remains a distant goal. Although the quantity of women's participation has improved

professorial chairs, academic organizations, and journals now ensure that women's issues receive the attention of skilled scholars in law and associated policy disciplines.[165] But one should not simply ssume that positive results flow from this apparent juridification of the women's movement. On the one hand, similar or superior progress towards women's equality has been observed in many countries where no *Charter* equivalent exists, and where women have successfully pursued strategies of social and political mobilization rather than litigation strategies. On the other, Canadian women have by no means confined their efforts to the legal arena, and the nature of the interaction between legal and other strategies remains to be investigated.[166] The struggle for gender equality in Canada underlines how difficult it is to unravel *Charter* effects from other developments and how careful one must be not to confuse high levels of legal activity and success with measurable social progress.

C. Immigrants and Visible Minorities

While the experience of immigrant and minority groups differs considerably, many appear to suffer greater economic disadvantage relative to other Canadians than they did prior to the advent of the *Charter*. A recent report by the CSJ Foundation surveying the economic position of "racialized groups"[167] reveals that employment

significantly, it appears that the quality of their experience continues to be characterized by discrimination and relative powerlessness. See generally, Mary Jane Mossman, "Gender Equality Education and the Legal Profession" (2000) 12 (2d) Supreme Court Law Rev. 187. It may well be that even the improvement in numbers alone has been chimerical: the persistence in law firms of barriers to advancement and of a wage gap that worsens with seniority has lead to an "exodus" of women leaving the practice of law "60% more quickly than men." Mucalov, *ibid.* at 13.

165 See *e.g.*, the *Canadian Journal of Women and the Law.* Several centres devoted to feminist legal studies have come into being, such as the University of British Columbia's Centre for Feminist Legal Studies and its Chair in Feminist Legal Studies (established in 1992), York University's Institute for Feminist Legal Studies, and Simon Fraser University's Feminist Institute for Studies on Law and Society. The Ontario Bar Association now features a practice section devoted to feminist legal analysis.

166 For a subtle investigation of this point in the American context, see Kostiner, *supra* note 40.

167 The term corresponds to Statistics Canada's "visible minority" category, which includes "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour." Grace-Edward Galabuzi & CSJ

earnings for these groups in 1995 were 15 percent lower than the national average. Within these groups, those who arrived as immigrants between 1986 and 1990 reported incomes 18 percent lower than those of non-immigrants; those who arrived after 1990 earned 36 percent less than non-immigrants.[168] This amounted to a decrease in dollar amounts from $22,538 to $16,673.[169] From 1996 to 1998, the difference in before-tax income of racialized groups relative to non-racialized groups rose from 23 to 26 percent, while the after-tax income difference rose from 20 percent in 1996 to 21 percent in 1997 and dropped again to 20 percent in 1998.[170] The report calculates that this gap has grown from about 2 percent for those immigrating between 1966 and 1975 to 28 percent for the most recent immigrants.[171] Although the national poverty level dropped from 1986 to 1991, the number of distinct ethnocultural minority groups suffering from poverty increased, while the percentage of these groups experiencing unemployment rates higher than the national average rose from 46 to 76 percent.[172]

Foundation for Research and Education, *Canada's Creeping Economic Apartheid: The Economic Segregation and Social Marginalization of Racialized Groups,*, (Toronto: CSJ Foundation for Research and Education, 2001) at 40 [Galabuzi & CSJ Foundation].

168 *Ibid.* at 47. For a useful breakdown of incomes one year after landing by immigrant category and year of landing, see Elizabeth Ruddick, "Trends in International Labour Flows to Canada: Statistics Canada Economic Conference 2000" (2000), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/pdf/research/stats/labour/flows.pdf>. For a detailed profile of the relative performance of immigrant categories, see Citizenship and Immigration Canada, "The Economic Performance of Immigrants: Immigration Category Perspective" (1998), online: Citizenship and Immigration Canada <http://www.cic.gc.ca/english/research/papers/category/category/b.html>. For a single time-point view of the economic participation of recent immigrants as of 1996, see generally, Citizenship and Immigration Canada, *Canada's Recent Immigrants: A Comparative Portrait Based on the 1996 Census* (Ottawa: Minister of Public Works and Government Services, 2001), online: <http://www.cic.gc.ca/english/pdf/research-stats/1996-Canada.pdf>.

169 Galabuzi & CSJ Foundation, *supra* note 167 at 39. The authors note further that "[t]his gap also coincided with the general cutbacks in the levels of government transfers, either in federal employment insurance benefits or provincial social assistance benefits, during much of the 1990s."

170 *Ibid*. at 40-42.

171 *Ibid.* at 47.

172 *Ibid.* at 51.

Prospects for the most vulnerable immigrants – refugees – have most certainly worsened since the 1980s. A 1998 report notes that average earnings for refugees in their first full year after landing have declined appreciably since 1988, and that this drop was not related to the business cycle.[173] The earnings gap between all tax filers (aged 35 to 44) and refugees upon landing increased by 35 percent from the 1980s to 1992.[174] The decline in earnings observed at the point at which they first acquire landed status persists through subsequent years. The rate at which refugee earners close the gap decreased throughout the 1980s so that "more recent cohorts have been 'catching up' to all tax filers at a far slower rate than was previously the case."[175]

Returning to the problem of racialized groups in general, data for 1998 reveal that earnings discrepancies are not merely the result of the average lower education of such groups. While incomes were higher for members of racialized groups with university educations than for those without, the *average* difference in income between those with higher education compared to their non-racialized counterparts was actually higher (at 24 percent) than was the difference between racialized and non-racialized persons with less than high school education (22 percent). The *median* income difference at both education levels was identical at 24 percent.[176] This is significant in light of the fact that data from 1991 and 1996 suggest that even racialized groups who reach higher average levels of educational attainment than the general population are nonetheless concentrated in clerical, service, and manual labour jobs.[177]

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[173] The authors note that government-assisted refugees with paid employment had average earnings of $10,534 at the depth of the 1982-1983 recession, while earnings for the same group at the lowest point of the 1991-1993 recession had declined to $6,260 in constant 1995 dollars. Citizenship and Immigration Canada, "The Changing Labour Market Prospects of Refugees in Canada" (March 1998), online: <http://www.cic.gc.ca/english/research/papers/labour/labour-toc.html>.

[174] *Ibid.*

[175] *Ibid.* The report's authors speculate that the decrease in earnings might be attributable to a combination of factors including a change of the countries of origin or language abilities of recent refugee cohorts and changes in the structure of the Canadian labour market.

[176] Galabuzi & CSJ Foundation, *supra* note 167 at 43.

[177] *Ibid.* at 53. Visible minorities, both Canadian and foreign-born, across most age categories completed post-secondary education in greater numbers in 1996 than in 1991. The percentage of Canadian-born minorities age 35-64 who

Contrary to this last finding, Lautard and Guppy report that "occupational dissimilarity" of visible minority groups from the rest of the labour force actually decreased from 1981 to 1991. However, while this improvement roughly coincided with the first decade of the *Charter*, the authors demonstrate that it is in fact the continuation of trends beginning as early as 1971.[178] A more recent study, tracing changes in status from 1991 to 1996, offers mixed conclusions.[179] Also inconclusive was the percentage of each group in the lowest

completed university rose from 26.6 to 32.3 percent, while foreign-born minorities moved from 31 to 32.6 percent. By comparison, the percentage for Canadian-born non-members of racial groups was 18.2 percent in 1991 and by 1996 had still only reached 21 percent. Kunz, Milan & Schetagne, *supra* note 65 at 16. Despite uniform improvements in educational attainment, employment level trends for university graduates in this time period were inconsistent across groups; the unemployment rate for Canadian-born visible minorities dropped from 6.8 to 6.3 percent, while for foreign-born minorities it began high at 9.3 percent and rose to 10.4 percent in 1996. Only Aboriginals fared worse, beginning at 15.1 percent unemployment and ending at 16.5 percent, while Canadian-born non-members of racial groups dropped from 5 to 4.2 percent. Employment rates for visible minorities two years after graduating from post-secondary studies were lower for visible minorities than for non-members of racial groups in seven out of eight categories of study in 1992; by 1997, employment rates for minorities were lower in all eight categories. *Ibid.* at 19-20.

[178] Hugh Lautard & Neil Guppy, "Revisiting the Vertical Mosaic: Occupational Stratification Among Canadian Ethnic Groups" in Peter S. Li, ed., *Race and Ethnic Relations in Canada*, 2nd ed., (Don Mills: Oxford University Press, 1999) 219 at 235-41.

[179] Although proportionately fewer Canadian- and foreign-born minorities could be found at the senior- and middle-management category in 1996 than in 1991, the same could be said of non-members of racial groups, and the 1996 percentages for each group were comparable (10.2, 8.8, and 10 percent respectively); evidently the number of positions in this category decreased, as the percentage of persons in the category dropped for every racial group. The proportion of each group in the professions increased, and for both years, a higher proportion of Canadian-born visible minorities was employed in the professions than for any other racial group, followed by non-members of racialized groups, then by foreign-born visible minorities; Aboriginals had the lowest concentration in the professions. The trends over time for both categories of minority appear to mirror those of non-members of racialized groups. Kunz, Milan & Schetagne, *supra* note 65 at 21.

income quintile.[180] Racial minority participation in the public sector showed some improvement, with visible minorities increasing their share from 2.7 percent in 1987 to 5.1 percent in 1998[181] and increasing their share of management and scientific/professional positions within the public sersvice.[182] Progress in federally regulated industries was also observed between 1989 and 1994.[183] A detailed analysis reveals, however, that as of 1995, minority representation in public-sector operational and technical positions was still only at 1.8 percent and 2.4 percent, respectively. This last figure is equal to the minority share of executive positions as reported by the same study.[184] By comparison, visible minorities constituted between 9.4 percent and 11.2 percent of the general population.[185]

There are some indications that racial discrimination has indeed decreased in the era of *Charter*-entrenched equality and multiculturalism. Reitz and Breton report that, while a Henry and Ginsberg study in 1984 revealed that a black job applicant in

[180] While Canadian-born non-members of racial groups were generally less concentrated here than were Canadian or foreign-born visible minorities regardless of educational attainment, the percentage difference ranged from less than 1 percent in some categories at some times to as much as 11 percent at others. It is worth noting, however, that from 1991 to 1996 the concentration of Canadian-born non-members of racial groups in the lowest quintile decreased at the highest and lowest levels of educational attainment, while it increased for both categories of visible minority. *Ibid.* at 23.

[181] Bakan, Kobayashi & SWC, *supra* note 60 at 67.

[182] 1.9 percent and 7.6 percent respectively in 1989 to 2.8 percent and 10.1 percent in 1998. *Ibid.* at 68.

[183] Minority share of positions in banking rose slightly from 12.1 to 13.7 percent, in communications from 5.3 to 7.2 percent, in transportation from 3.8 to 4.3 percent, and in 'other' industries (including metal and coal mines, petroleum and natural gas, and industrial chemicals) from 3.7 to 6.2 percent. Samuel & Karam, *supra* note 60 at 146-48.

[184] *Ibid.* at 140. Significantly, the authors of this study do not link progress in employment to the *Charter*, but attribute it instead to the increase of third-world immigration in the 1970s, to the U.S. civil rights movement, and to the 1984 Abella Report and subsequent changes to equity legislation in 1986 and 1995. *Ibid.* at 134-37.

[185] These figures are taken from the 1991 and 1996 census, respectively. Statistics Canada, "Proportion of Visible Minorities, Canada, Montréal, Toronto and Vancouver, 1981 to 2001," online: <http://www12.statcan.ca/english/census01/Products/Analytic/companion/etoimm/tables/canada/vismin.cfm>.

Toronto was five times more likely to be told the position was filled after a white applicant was invited for an interview, the discrepancy had disappeared by the time of a 1989 follow-up study.[186] They also report a shift in Canadian public opinion with respect to black-white marriages, with disapproval waning from 52 percent in 1968 to 35 percent in 1973 and 16 percent in 1988. The authors generalize that these figures represent a drop of roughly 2 percent per year[187] suggesting that while tolerance increased during the *Charter* period, there was nothing conspicuous about the rate at which it did so relative to the decade that preceded it.[188]

Other measures defy generalization about progress in racial tolerance. Public preference with respect to models of racial integration changed over the *Charter* period in a fashion that is not only unexpected, but contrary to the intention of section 27, which explicitly valorizes the "preservation and enhancement of the multicultural heritage of Canadians." Thus, support for a "mosaic" model dropped from 56 percent in 1985 to 44 percent in 1995, while the popularity of the "melting pot" model increased from 27 to 40 percent.[189] The perception that various ethnic groups have "too much power" increased uniformly from 1985 to 1995 with respect to every group except whites (who were perceived to have become significantly less powerful from 1990 to 1995) and East Indians/Pakistanis (against whom the sentiment rose dramatically from 15 percent in 1985 to 22 percent 1990, dropping to 18 percent

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[186] The authors caution the reader, however, that in 1989 the demand for labour was much greater than in 1984, and that "heavy labor demand often temporarily improves the opportunities for disadvantaged groups." Jeffrey G. Reitz & Raymond Breton, "Prejudice and Discrimination in Canada and the United States: A Comparison" in Vic Satzewich, ed., *Racism and Social Inequality in Canada: Concepts, Controversies and Strategies of Resistance* (Toronto: Thompson Educational Publishing Inc., 1998) 47 at 60-61.

[187] Reitz & Breton, *ibid.* at 59-60.

[188] Indeed, the *Charter* does not figure in the overall examination. A comparative look at the U.S. and Canada suggests that "blatant racism is marginal and the social distance between racial minorities and other groups is diminishing" equally in both countries "despite the historical differences between race relations in Canada and race relations in the United States." *Ibid.* at 65. Among these differences, of course, would be the different eras in which racial equality was constitutionally entrenched in each country.

[189] Leo Driedger & Angus Reid, "Public Opinion on Visible Minorities" in Driedger & Halli, *supra* note 60, 152 at 165.

in 1995).[190] General public perception of the existence of racial discrimination rose from 55 percent in 1980 to 67 percent by 1995, but "feelings of uneasiness" among Canadians with respect to minority groups decreased from 1975 to 1995.[191] More recent surveys trace a "substantial recovery" in public perception of the impact of immigration on employment levels by 1997-1998 (i.e., a decrease in "fears that immigration was exacerbating the scarcity of employment opportunities"), as well as increased support for higher levels of immigration.[192] In the same vein, resistance to "non-white" immigration "dwindled" between 1989 and 1996.[193] However, there is considerable regional variation in these results.[194]

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[190] *Ibid.* at 170. Though data before 1980 are not available for most groups, the available data suggests that for some groups the advent of the *Charter* coincided with the reversal or halting of a trend in which figures had been dropping since 1975. The perception that "natives" had too much power dropped from 7 to 6 percent in this time, then more than doubled to 13 percent by 1985 and again to 33 percent in 1995. For Jews, the sentiment dropped markedly from 28 percent to 13 percent by 1985, after which it remained static with a slight increase to 14 percent by 1995.

[191] *Ibid.* at 167. The "feelings of uneasiness" measure relies on data from 1975 to 1995 collected at five-year intervals; this data reveals no consistent correlation with the pronouncement or coming into force of *Charter* equality provisions. While East Indians/Pakistanis and Natives experienced their largest drops in uneasiness from 1980 to 1985, blacks' greatest improvement occurred over the five years prior to 1980, and all groups represented except for East Indians/Pakistanis have experienced brief upsurges in uneasiness at various times over the course of the *Charter* era.

[192] The authors note these improvements paralleled "substantial improvements in the unemployment figures over the same period," just as the recession of the early 1990s had lead to a "marked erosion of levels policy support." Citizenship and Immigration Canada, "Executive Summary – A Detailed Regional Analysis of Perceptions of Immigration in Canada" (June 1998), online: <http://www.cic.gc.ca/english/research/papers/regional.html>.

[193] This represented a drop in the "already-small minority of respondents endorsing racist exclusionary practices." *Ibid.*

[194] *Ibid.* A later report finds that support for current immigration policy levels (i.e., the degree to which respondents feel levels are too high or too low, as opposed to support for either higher or lower levels) is negatively correlated with higher regional rates of immigration, and that this correlation is weakened somewhat by improved economic conditions. Douglas L. Palmer for Strategic Policy Planning and Research, Citizenship and Immigration Canada, "Executive Summary – Canadian Attitudes and Perceptions Regarding Immigration: Relations with Regional Per Capita Immigration and Other Contextual Factors" (August 1999), online: Citizenship and

Political representation of ethno-cultural groups and visible minorities has improved in the *Charter* period, though with some exceptions and contrary trends. In 1991, the Royal Commission on Electoral Reform reported that the number and percentage share of seats in the House of Commons had improved for both ethnic and visible minorities, though not evenly (the percentage of ethnic minorities rose from 9.4 percent in 1965 to 16.3 percent in 1988, while for visible minorities the change was from 0 percent to just 2 percent).[195] The report does not comment on the effect of the *Charter,* and the progression of numbers suggests no appreciable acceleration in the early *Charter* years through 1988. Jerome Black suggests that the situation had improved somewhat by the 1993 election, in which thirteen visible minority candidates won seats in the Commons compared to just ten in total for the previous eight elections. He notes, however, that even at this number, "visible minorities remained dramatically under-represented in Parliament" when their share of seats (4.4 percent) was compared to their share of the population (9.8 percent, according to 1991 census data).[196] As only two of those successful minority candidates were women, it has been observed that visible-minority women remain particularly under-represented.[197] Marginal numerical gains were made with the 1997 election of nineteen candidates from visible minority backgrounds, representing 6.3 percent of seats in the House, but by this point in time visible minorities comprised 11.2 percent of the total population.[198]

The impact of the *Charter* for immigrants and racial minority

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Immigration Canada <http://www.cic.gc.ca/english/research/papers/perceptions.html>.

195 Canada, Royal Commission on Electoral Reform and Party Financing, *Ethno-Cultural Groups and Visible Minorities in Canadian Politics: The Question of Access* vol. 7 (Ottawa: Royal Commission on Electoral Reform and Party Financing and Canada Communications Group – Publishing, Supply and Services Canada and Dundurn Press, 1991) at 130.

196 Jerome H. Black, "Representation in the Parliament of Canada: The Case of Ethnoracial Minorities" [Black] in Joanna Everitt & Brenda O'Neill, eds., *Citizen Politics: Research and Theory in Canadian Political Behaviour* (Don Mills: Oxford University Press, 2002) 355 at 359-60 [Everitt & O'Neill].

197 Yasmeen Abu-Laban, "Challenging the Gendered Vertical Mosaic: Immigrants, Ethnic Minorities, Gender, and Political Participation" in Everitt & O'Neill, *ibid.* 268 at 272.

198 Black, *supra,* note 196 at 361.

groups has been equivocal. Improvements in their position since adoption of the *Charter* often simply followed the trajectory of longer-running historical trends that antedated it. Moreover, evidence of such improvements is often inconclusive or contradictory. For example, racial minorities and immigrants participate in various occupations more frequently than before, but overall income disparity between them and the rest of the population appears to be increasing. Or, to cite another example, as racial discrimination wanes, more members of minority groups are finding their way to political office, but the next generation of immigrants is having a harder time getting into Canada than previous cohorts.[199]

D. Gays and Lesbians

As we have suggested, for most equality-seeking constituencies the *Charter* era has not been a period of measurable advances. Arguably, however, the *Charter* did confer important but non-quantifiable gains – in rights, dignity, respect and acceptance – on at least some groups. Gays and lesbians, who only a decade ago were acknowledged as an "analogous group" entitled to *Charter* protection,[200] may be one such group. On the other hand, their position may differ from that of the other equality-seeking groups we have identified in two respects.

First, gays and lesbians, unlike members of other groups protected by the *Charter,* are not visually obvious. Thus, those who chose to self-identify or were stereotyped almost certainly suffered overt discrimination, harassment by police and other officials, and deprivation of various rights and benefits. These are the kinds of harms whose post-*Charter* fluctuations we have attempted to chart. However, an unknown, but likely significant, proportion of gays and lesbians escaped overt victimization by remaining "invisible" both visually and statistically. We have to acknowledge, therefore, that our methodology cannot capture the total pre- or post-*Charter* experience of this or similar equality-seeking groups.

Second, accepting that gays and lesbians have indeed achieved both quantifiable and non-quantifiable gains since 1982, it is difficult

[199] See part V below.

[200] *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*]; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; and *M. v. H.*, [1999] 2 S.C.R. 3 [*M. v. H.*].

to determine whether or to what extent these gains can be attributed to the *Charter*, to Human Rights Codes and other legislative interventions,[201] or simply to reductions in homophobic attitudes that can be observed in many socially emancipated countries such as Denmark, which decriminalized homosexual relations between consenting adults in 1933, and the United Kingdom, which did so in 1967 (two years before Canada in 1969), or Belgium, Holland, and Spain, all of which gave legislative approval to same-sex marriage slightly in advance of Canada. Nor can social, political, and legal developments be easily disaggregated one from the other. High-profile *Charter* judgments may indeed embolden or even compel legislators to dismantle legal forms of discrimination – as in the case of same-sex marriages[202] – but such judgments may themselves result from changing social attitudes that allow or encourage judges to abandon old taboos and legitimate new forms of social relations. Moreover, such attitudinal changes do not necessarily occur spontaneously. They may be provoked by social activism, made poignant by literary or dramatic representations, and valorized by media exposure and discussion.

Does the *Charter*, then, matter to gays and lesbians in the sense in which we have been asking that question throughout this essay? What is the significance of the fact that they have made gains equal to or greater than those in some countries with no *Charter* equivalent or, like the United States, with different litigation outcomes? Are gays and lesbians less susceptible than other equality-seeking groups to the forces of political economy whose power we discuss in the conclusions of this essay? We do not know the answer to these

[201] Human Rights legislation in a number of Canadian jurisdictions was amended to provide protection against discrimination based on sexual orientation before the Supreme Court's decision in *Egan* (*ibid.*), which extended *Charter* protection to gays and lesbians. See *e.g.*, *An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms*, S.O. 1986, c. 64, s. 18; *Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, ss. 2-7; *An Act to Amend the Human Rights Act*, S.N.B. 1992, c. 30, ss. 1, 3-8; *An Act to Amend Chapter 214 of the Revised Statutes, 1989, the Human Rights Act*, S.N.S. 1991, c. 12, s. 5.

[202] Following a favourable response to its reference to the Supreme Court in *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75; [2004] 3 S.C.R. 698, the federal government passed *The Civil Marriage Act*, S.C. 2005, c. 33, which expands the common-law definition of "civil marriage" to include same-sex couples.

questions, but certainly view them as appropriate for further inquiry.

V. LEGAL AND DUE PROCESS RIGHTS: PROTECTION AGAINST ABUSE BY STATE OFFICIALS

Charter protections for legal rights have given rise to considerable controversy. Since such protections are most often invoked in criminal proceedings, the *Charter* is perceived to have shifted the balance towards protecting the rights of the accused and away from ensuring the effective operation of the justice system. Typically, critics of the *Charter* claim that, under its influence, conviction rates have decreased, that those who are convicted are dealt with less harshly, and that the public is exposed, as a result, to a greater risk of harm from criminal activity. These are striking claims, and one would expect them to be supported by some kind of persuasive evidence. However, not only is such evidence lacking, but some scholars maintain that during the *Charter* era the state has become neither less efficient nor more reticent about locking up society's undesirables. Michael Mandel demonstrates, for instance, that despite the enlarged procedural protections that *Oakes*[203] supposedly afforded persons accused of drug offences, convictions under the *Narcotic Control Act*[204] did not diminish during the *Charter* era. On the contrary, convictions for possession for the purposes of trafficking rose by 19 percent from 1982 to 1986, while convictions for trafficking and for possession rose by 28.9 percent and 78.3 percent respectively.[205] Moreover, the length of sentences and the rigour of probation conditions also increased steadily from the mid-1970s,[206] while prison sentences in the 1980s were the longest in Canadian history. At the institutional level, Mandel reports, the National Parole Board was invested with new powers that resulted

[203] *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.)

[204] R.S.C. 1985, c. N-1 (Repealed, 1996, c. 19, s. 94).

[205] Mandel, *supra* note 6 at 196-97. In 2002, the police-reported rate of total drug offences continued a nine-year climb, due in part to the advent of new synthetic substances but also to an increase in cannabis offences, which constituted three in four drug incidents that year. Most cannabis-related offences were for simple possession, the incidence of which had doubled since 1991. The 93,000 drug incidents reported in 2002 constituted a 3 percent increase over the previous year and marked a twenty-year high. Statistics Canada, "The Daily: Crime Statistics" (24 July 2003), online: <http://www.statscan.ca/Daily/English/030724/d030724a.htm>.

[206] Mandel, *supra* note 6 at 220.

in the proportion of the population under criminal sentence restrictions outstripping by fourfold the Depression-era figure.[207] The number of police per capita has also grown which, as Mandel notes, might itself account for much of the increase in reported crime.[208] In somewhat similar fashion, the *Askov*[209] decision (in which a section 11(a) *Charter* challenge resulted in the dismissal of 50,000 pending criminal charges) created political pressure in Ontario for spending increases of $86 million per year from 1989 to 1992, in order to build new courtrooms and appoint additional judges and Crown prosecutors.[210] During roughly the same period, far from falling because of the supposed effect of "accused-friendly" *Charter* rulings, the prison population increased by 27 percent and the probation population by 30 percent.[211]

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[207] *Ibid.* at 220-21.

[208] *Ibid.* at 221.

[209] *R. v. Askov* (1990), 59 C.C.C. (3d) 449 [*Askov*].

[210] Mandel, *supra* note 6 at 226-27.

[211] *Ibid.* at 227. According to the Canadian Centre for Justice Statistics, federal justice spending (in constant 1986 dollars), which had decreased significantly from 1983-1984 to 1985-1986 and remained at this level for several years, rose once again to its 1983-1984 level in 1991-1992, where it remained before dropping from 1993-1994 to 1994-1995. Interestingly, while Mandel attributes increased justice spending in Ontario in the early 1990s to the *Askov* fallout, increased federal spending on the justice system at the same point in time mirrored federal increases in health and social services, which followed the same brief arc described above between 1991 and 1995. Though total justice spending followed this pattern, its constituent parts did not: spending (in current dollars) on police increased steadily from 1985-1996 at around $3.3 billion to level off at $5.8 billion in 1994-1995. Court costs also climbed steadily from over $600 million in 1988-1999 to peak at under $900 million by 1992-1993 and drop gradually to just over $800 million in 1994-1995. Canadian Centre for Justice Statistics, *The Juristat Reader: A Statistical Overview of the Canadian Justice System* (Toronto: Thompson Educational Publishing, 1999) at 5-7. Following the decline in 1994-1995, total justice spending increased over the next several years, though not dramatically, from just under $10 billion in 1996-1997 to $11.1 billion by 2000-2001. The bulk of this expense continued to be related to policing, which over the same period rose from approximately $5.9 billion to $6.8 billion. The cost of courts rose from $859 million to over $1 billion, while spending on prosecutions climbed from $265 million to $335 million. The only area of justice spending in which federal expenses decreased over the five-year period was in contributions to legal aid plans, which dropped sharply from $536 million in 1996-1997 to $455 million the following year, and gradually increased over the remaining period to reach $512 million in 2000-2001. Statistics Canada, "Justice

A more recent examination by Kent Roach argues that the long-term effect of *Charter* legal rights and the resulting focus on due process has been to increase the efficiency and legitimacy of plea bargaining, which he argues is typical of a "crime-control model" of justice – the most repressive of the models in his taxonomy.[212] Roach describes the overall effect of the *Charter* as an increase in crime control; for instance, when courts invalidated warrantless searches under *Charter* as unreasonable, legislatures responded by making them legal.[213] Prison counts increased by 50 percent and other forms of punishment by 60 percent in the first ten years of the *Charter*, and imprisonment rates under the *Young Offenders Act*[214] increased despite a public perception of leniency resulting from the act.[215] He

Spending," online: Statistics Canada <http://www.statscan.ca/english/Pgdb/legal13.htm>. This drop reversed a decade-long trend that had seen legal aid spending more than triple from 1984-1985 to 1994-1995. Canadian Centre for Justice Statistics, *ibid.* at 9.

212 Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 113 [Roach, *Due Process*].

213 *Ibid.* at 313.

214 R.S.C. 1985, c. Y-1 (Repealed, 2002, c. 1, s. 199) [*Young Offenders Act*].

215 Roach, *Due Process*, *supra* note 212 at 313. A recent survey of twenty years' data suggests that the average rate of apprehended youths actually *charged* by police was 27 percent higher from 1986-1996 than in the 1980-1983 period, a jump the authors suggest was directly attributable to the introduction of the *Young Offenders Act* and a consequent "reduction in the use by police of informal means – that is, in police discretion" in dealing with young offenders. Peter J. Carrington, "Trends in Youth Crime in Canada, 1977-1996" (1999) 41 Canadian J. of Criminology 1 at 18. See also Peter J. Carrington, "Changes in Police Charging of Young Offenders in Ontario and Saskatchewan after 1984" (1998) 40 Canadian J. of Criminology 153. Comparative survey data reveals that for the period 1995 to 1998 youths were more likely to be convicted of at least one charge per case than were adults, and were more likely to receive custodial sentences. John Howard Society of Alberta, "Harsh Reality of the Young Offenders Act" (1999), online: <http://www.johnhoward.ab.ca/res-pub.htm#post> at 2. For each of these years, the majority of adults convicted received custodial sentences of less than one month, while an even greater majority of young offenders were sentenced to one-to-six months' custody. *Ibid.* at 5. This discrepancy may be accounted for in part by the fact that custodial sentences are often used by courts as a means of rescuing young offenders from homelessness or precarious home lives, but it also stems from the indeterminacy of the Act itself, which "does not provide a consistent statement of [its] intent in its Declaration of Principle. Consequently, youth court judges have had more

notes generally that the actual impact of *Askov* in terms of amnesty for criminals was smaller than reported, since in many cases several of the charges dismissed were against the same individuals[216] and that the "due process revolution" did not lead to the decriminalization of "victimless crimes."[217]

Indeed, the dynamic of the criminal justice system, even during a period of dramatic *Charter* litigation, may be largely uninfluenced by legal developments. This seems, at least, to be the working hypothesis of a 2001 report by the Canadian Centre for Justice Statistics. The report – which does not even mention the *Charter* or legal rights – instead probes for correlations between criminal statistics and environmental factors including unemployment, education, divorce rates, population density, and migration.[218] While such correlations are not easily established (as will be seen below), many statistical indicators – including crime rates, conviction rates, legal aid applications, and incarceration rates – exhibit a singular trend. The total crime rate fluctuates throughout the *Charter* era but peaks dramatically around 1991.[219] Criminal charges against youths follow the same pattern.[220] "Clearance rates" – offences resulting in the laying of charges – follow the general pattern described above, although they peak slightly earlier, with the highest number of

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freedom since the introduction of the *Young Offenders Act* to sentence youths based on a multitude of conflicting principles." *Ibid.* at 9. See also John Howard Society of Alberta, "Youth Crime in Canada: Public Perception vs. Statistical Information" (1998), online: <http://www.johnhoward.ab.ca/res-pub.htm#post>.

216 Roach, *Due Process*, *ibid.* at 92-93.

217 Soliciting, hate propaganda, pornography, gambling, drugs, and suicide stayed on the books; abortion is an exception to this, having narrowly avoided recriminalization following *Morgentaler, supra* note 140. *Ibid.* at 148-50.

218 Canadian Centre for Justice Statistics & Statistics Canada, *Graphical Overview of the Criminal Justice Indicators 2000-2001* (Ottawa: Statistics Canada, 2001) at 67-75 [CCJS & Statistics Canada]. These are presented in a series of graphs without analysis or interpretation, as are the criminal justice statistics.

219 Property crimes in particular mirror the general trend, though violent crimes instead rise steadily from 1977 through to 2001. *Ibid.* at 2. For actual number of charges against adults per year, see *ibid.* at 14. Despite the steady increase in violent crime, the homicide rate, while fluctuating greatly, ends the period lower than it began, having stood at 3/100,000 compared to just over 1.75 by 2001. *Ibid.* at 4.

220 *Ibid.* at 10-12.

charges per 100,000 occurring in 1989 (nearly 25,000). A steady decline from 1983 through 2001 in charges for crimes involving property is offset by steady increases in charges for violent and other crimes.[221] Applications for legal aid begin at around 600,000 in 1983-1984, crest to nearly 1,200,000 by 1992-1993, and drop to over 800,000 by 2000-2001. Application acceptance levels mirror this trajectory, although by the period's end successful applications as a percentage of applications appears to have dropped.[222]

On the other hand, some indicators do vary from the general pattern. Average probation counts, which peak at around 100,000 per year in 1992-1993, do not subside; they stay high through the decade, reaching their highest level at about 110,000 in 1997-1998.[223] Average counts of "actual-in" federal inmates rise steadily throughout most of the *Charter* era.[224] Interestingly, the numbers of cases heard and of cases resulting in "guilty" verdicts both dropped steadily from 1994-1995 to 2000-2001.[225] The number of admissions to provincial correctional institutions also departs from the general pattern in that it declines over the *Charter* period. However, the rate of *remand* admissions (or persons waiting trial) generally begins much lower than the sentenced rate in 1978-1979 (approximately 56,000) and increases throughout the pre-*Charter* and *Charter* periods. The end result, in which remand admissions (118,566) exceeded sentence admissions (80,928) by 2000-2001, stands in stark contrast to 1982-1983, when there were more than twice as many sentenced admissions as remanded.[226] Average counts of adults in provincial institutions show the same pattern, a growing contrast between sentenced and remanded inmates.[227] Provincial and territorial rates of sentenced and remand incarceration follow a similar trajectory to those at the federal level, in that the sentenced rate peaks in 1992-1993 and declines through to 2000-2001, while the remand rate rises consistently from 1986-1987 through to 2000-2001. This change amounts to a 37 percent increase in the proportion

221 *Ibid.* at 19.
222 *Ibid.* at 37.
223 *Ibid.* at 62.
224 *Ibid.* at 59.
225 The total number of cases dropped from 446,086 to 375,466 while the number resulting in "guilty" verdicts began at 270,874 and ended at 226,979. *Ibid.* at 22.
226 *Ibid.* at 54.
227 *Ibid.* at 56.

of total incarcerations due to remands, and a 75 percent increase in the number of remand incarcerations over the bulk of the *Charter* period. Remand admissions matched sentenced by 1996-1997 and have continued to increase as sentenced admissions have declined.[228] The duration of time spent on remand also increased steadily from 1990-1991 to 2000-2001, and the proportion of remand times exceeding three months has more than doubled.[229] Overall, environmental and demographic factors appear to offer few compelling explanations for the crime trends described above.[230] Assuming the *Charter* is indeed also irrelevant to the changes in crime statistics, the only exogenous factors remaining would seem to be shifts in the politics and administrative practice of policing.[231]

Anecdotal, rather than statistical evidence may, however, suggest a new hypothesis. In some respects the *Charter* era, far from witnessing enhanced respect for the newly entrenched "principles of fundamental justice" (section 7), has arguably coincided with a retreat from those principles. Royal commissions, public inquiries, and academic commentators, for example, have documented significant instances of police abuse.[232] Force has been heavy-

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[228] Canadian Centre for Justice Statistics, "Juristat: Custodial Remand in Canada, 1986/87 to 2000/01" (7 November 2003), online: Statistics Canada <http://www.statscan.ca> at 6-7.

[229] *Ibid.* at 12. For individual provincial and territorial remand and sentenced figures, see *ibid.* at 18-19.

[230] The unemployment rate for men, for example, does peak around 1992 to 1993 as does the crime rate; however, even higher peaks are seen in 1983 and 1997, when crime rates were comparatively much lower than in 1992-1993. Economic performance (measured here in terms of gross domestic product), often linked inversely with criminal activity, did improve from 1993 to 2001 as the crime rate dropped, though there is no dip in performance by 2001 to account for the slight upturn in crime in the same year. The divorce rate bears no correlation to crime rates *in general*, having peaked in 1987 and dropped steadily through to 1997 as the total crime rate was rising. The rate of children born to teenagers was also in decline as crime rates peaked. Population growth in urban centres increased consistently from 1992 to 2000 but did not reach its most dramatic rate until 1995, by which time crime was in decline. CCJS & Statistics Canada, *supra* note 218 at 67-74.

[231] See 51-52, above.

[232] Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution & T. A. Hickman, Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations (Halifax, N.S.: The Commission, 1989); Ontario Human Rights Commission, Paying the Price: The Human

handedly deployed to control and disrupt peaceful political demonstrations.[233] The post-9/11 security state has become

Cost of Racial Profiling – Inquiry Report (Toronto: Ontario Human Rights Commission, 2003); AFN, "Socio-Economic Exclusion," *supra* note 58; Commission on Systemic Racism in the Ontario Criminal Justice System, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen's Printer for Ontario, 1995); and Toni Williams, "Racism in Justice: The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System" in Susan C. Boyd, Dorothy E. Chunn & Robert J. Menzies, eds., (Ab)Using Power: The Canadian Experience (Halifax: Fernwood Publishing Company Limited, 2001) 200. As of 2002, The Association for the Defence of the Wrongly Convicted (AIDWYC) reported no fewer than thirty-five exonerated and pending cases of wrongful conviction. Association in Defence of the Wrongly Convicted, "The Innocence File" (2002) 2 The AIDWYC Journal 8, online: <http://www.aidwyc.org/ Journal2.pdf> at 8. Among the most common factors in cases of wrongful conviction: a "[h]igh level of community pressure on the police to apprehend a suspect," and "'tunnel vision' in the investigation." Lawrence Greenspon, "Disclosure of Evidence" (2002) 2 The AIDWYC Journal 10, online: <http://www.aidwyc.org/Journal2.pdf> at 10.

[233] See generally, W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000); Canada, Commission for Public Complaints Against the RCMP & E. N. Hughes, Commission Interim Report Following a Public Hearing into the Complaints Regarding the Events That Took Place in Connection with Demonstrations During the Asia Pacific Economic Cooperation Conference in Vancouver, B.C. in November 1997 at the UBC Campus and at the UBC and Richmond Detachments of the RCMP (Ottawa: Minister of Public Works and Government Services, 2001). Commissioner Hughes was critical of the extent to which security concerns may infringe *Charter* freedoms:

> [N]either the federal government nor the RCMP may curtail political criticism by protesters. The right to express political views lies at the very core of the freedom of expression provided for in the Charter. The fact that a visiting leader may be merely upset or angered by the expression of contrary political views and criticism by Canadians does not justify the suppression of such expression.

Quoted in Trevor C.W. Farrow, "Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time" (2003) 28 Queen's Law J. 665 at 687. As Farrow notes, despite these findings, even the most peaceful of the subsequent international meetings continued the trend of constitutionally indefensible measures:

> [V]iolation of freedom of expression is exactly what occurred at the

entrenched in legislation (though not yet subjected to *Charter* challenges),[234] and increasing police militancy has both undermined attempts at civilian control of abuse and encouraged "law and order politics" at the very moment when falling crime rates might have justified more lenient public policies.[235]

June 2002 G8 Summit in Alberta. Given the indiscriminate breadth of the Summit shutdown and the resulting total inability of protesters to gain any kind of meaningful access to the Summit meeting sites, this shutdown was likely, at least in part, an unconstitutional infringement of speech and assembly.Toronto Video Activist Collective, Tear Gas Holiday: Québec City Summit 2001, Jungli Seiko, Mari Leesmen & Malcolm Rogge, eds., (Toronto: TVAC, 2003).

234 *Anti-terrorism Act*, S.C. 2001, c. 41. Scholars have pointed to the potential of this legislation to interfere with civil rights. See Sujit Choudhry & Kent Roach, "Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability" (2003) 41 Osgoode Hall Law J. 1; Reem Bahdi, "No Exit: Racial Profiling and Canada's War against Terrorism" (2003) 41 Osgoode Hall Law J. 293; and W. Wesley Pue, "The War on Terror: Constitutional Governance in a State of Permanent Warfare?" (2003) 41 Osgoode Hall Law J. 267 [Pue]. In addition, a recent Canadian Bar Association report documented the almost-immediate use of the new legislation by law enforcement agencies to justify the criminalization of political dissent and racial profiling. See International Civil Liberties Monitoring Group (ICLMG), "In the Shadow of the Law: A Report by the International Civil Liberties Monitoring Group (ICLMG) in response to Justice Canada's 1st annual report on the application of the *Anti-Terrorism Act* (Bill C-36)" (14 May 2003), online: Canadian Bar Association <http://www.cba.org/CBA/News/PDF/Shadow.pdf>, cited in Pue, *ibid.* at n. 11 [ICLMG].

235 Dianne Martin documents a case in which 192 files "alleging serious misconduct" against members of the Metro Toronto Police Force escaped scrutiny because the Metro Police's Internal Affairs "routinely failed to notify the Police Complaints Commissioner" when complaints were received, in a bid to "drastically limit the scope of the PCC to inquire into misconduct" via "[i]nternally developed practices and procedures, designed to ensure that the vast majority of serious allegations of misconduct would be beyond civilian review." Ray Kuszelewski & Dianne L. Martin, "The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law" (1997) 35:4 Osgoode Hall Law J. 835 at 857. An American scholar who documents the draconian punishments for criminal youth involved in the drug epidemic of the 1980s notes with respect to analogous provisions under Canadian law that a decrease in violent crime and in the drug trade in the late 1990s had largely eliminated the need for such laws: "People have reason to feel safer. At least the objective conditions for tough-on-crime, send-them-to-prison approach

We earlier suggested that we would not try to demonstrate causal relations between the adoption of the *Charter* and the developments in the areas of Canada's social and political life that it was meant to address. However, these anecdotes, along with data presented above, at least suggest the need to investigate an hypothesis: that the *Charter* era not only coincided with a toughening of attitudes, policies and behaviours in the criminal justice system, but may actually have caused them. Mandel, for one, suggests that the *Charter*-based ruling in *Askov* in the late 1980s may have triggered an increase in state expenditure on the criminal justice system, which in turn may have had the short-term effect of increasing the Ontario prison and probation population. Such changes fuel a perceived increase in crime, which in turn provides a justification for repressive crime-control strategies. Bogart's examination of capital punishment in the United States suggests a similar punitive logic at work:

> There are myriad complaints that the spreading of rights, including through the courts, has not been accompanied by a corresponding observance of responsibilities. Perhaps the criminal justice system, administered by the courts, has become the misplaced repository for an unfocused but determined insistence on such responsibility. If individuals have so many rights, then they alone are responsible for their criminal acts – and deserve to be punished, to lose their freedom.[236]

If this hypothesis can be sustained, the real-life consequences of the *Charter* would seem to have been to leave citizens more, rather than less, exposed to abuse and injustice. What an irony if indeed it should turn out that the *Charter* may have confounded both the fears of "law and order" hard-liners and the hopes of idealistic advocates of procedural due process.

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have been undermined." Wayne N. Renke, "Sensible Justice: Alternatives to Prison, by David C. Anderson," Book Review of *Sensible Justice: Alternatives to Prison* by David C. Anderson (1999) 37 Alberta Law Rev. 823 at 827. A Canadian author notes that neoconservative denunciations of the perceived "appalling" increase in violent crime as a justification for the "predictable litany of needed get tough reforms" blatantly overlook the fact that, "rather than demonstrating a troubling increase, crime rates generally have declined steadily for the past several years." Dianne L. Martin, "Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies" (1998) 36 Osgoode Hall Law J. 151.

[236] Bogart, *Consequences*, *supra* note 43 at 161.

Of course, not all infringements of citizens' legal rights occur within the criminal justice system. Other domains of state action may be sites of equally egregious violations. Indeed, it is possible to argue that while the criminal justice system deals with a relatively small "clientele," a much greater number of Canadians experience the coercive power of the state in their encounters with various public bureaucracies that determine the quality of their daily lives. Thus, the way in which people are treated by welfare officers, tax collectors, immigration officials, health departments and school boards may ultimately determine the quality of their "life, liberty and [the] security of [their] persons" – the substantive interests sought to be protected by "the principles of fundamental justice" whose application is mandated by the *Charter*.[237]

Once again, we are in no position to offer statistics or, for that matter, even anecdotal evidence. At best, we can suggest two hypotheses that may be worth investigating. The first is that worthy state projects – designed to promote *Charter* values or other progressive and humanitarian ideals – may falter or fail because they are badly conceived, designed, administered, or funded. Human rights commissions, for example, are often overwhelmed by huge caseloads, in part because their efforts have publicized the availability of recourse to "clients" who previously thought they had none.[238] In addition, like any agency with finite resources, they

[237] *Charter*, *supra* note 1, s. 7.

[238] The most comprehensive recent account of human rights commissions in Canada documents the expansion of commission caseloads over several decades, attributing growth to the continual increase in legislation protecting human rights, expansive judicial interpretations of these protections, and the increase in responsibilities entrusted to commissions over time. The authors note that the Ontario commission processed only forty-five cases in its inaugural year (1962-1963), but by the late 1970s the number exceeded 1,000 and had passed 2,500 per year by the mid-1990s. R. Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 71 [Howe & Johnson]. As of March 2003, this figure stood at 2,137. Ontario Human Rights Commission, *Annual Report 2002-2003* (Toronto: Ontario Human Rights Commission, 2003), online: <http://www.ohrc.on.ca/english/publications/index.shtml> at 6 [Howe & Johnson]. While several provincial commissions experienced fluctuations in caseload over the course of the *Charter* era, most were handling considerably more cases by 1996-1997 than in 1982-1983 (with only Manitoba handling fewer; interestingly, Québec's commission, while handling nominally more cases at the end of this period than at the beginning,

assign priorities to some initiatives over others. Since they find it difficult to turn away individual complainants, they typically focus their attention and energy on processing and prosecuting such complaints. Thus, a pattern often emerges: strategic educational programs or systemic interventions are sacrificed;[239] individual complaints grow to the point where they cannot be dealt with promptly; delays engender public and political criticism; pressures mount to clear the backlog; and the commission responds by dismissing marginal claims or diverting them to other *fora*, by pressuring complainants to accept settlements, and by avoiding complex litigation that might settle issues of principle. In the end, ironically, the human rights commission itself comes to be regarded with suspicion by its "clients" and with dismay by its natural allies in government or civil society, accused of neglecting the fundamental justice it owes to its client groups, the same groups whose equality claims are enshrined in the *Charter*. Similar disillusionment may set in with social assistance programs, public schools, and health care systems. And not without reason: such programs and agencies are statistically likely to perform below expectations, to resort to expedient but unprincipled measures, and sooner or later, therefore, to become candidates for *Charter* scrutiny and litigation.

One arena in which this pattern has manifested itself is the processing of immigrants and refugees, although in this instance *Charter* litigation features as root cause rather than inevitable result. The prospects for people attempting to immigrate to Canada may

experienced a drop from 2,002 cases in 1980-1981 to 1,409 by 1996-1997). The federal commission's caseload increased from 447 to 2,025 during this time. Early commission work focussed almost exclusively on race-related discrimination; the advent of legislated protection against sex discrimination meant that by 1995-1996 the majority of claims dealt with by Ontario's commission were gender-related (27 percent, compared to 23 percent for race-related complaints). *Ibid.* at 71-73.

[239] The workload of the Ontario Human Rights Commission provides a case in point: the number of educational initiatives initiated by the Commission stood at 1,725 in 1980-1981; by 1990-1991, it had dropped to a mere 332. While other provincial commissions may not reflect a similar decline, at their highest points, the British Columbia, Saskatchewan, and Manitoba commissions undertook nowhere near a comparable number of programs. British Columbia, for instance, began with fifty-two programs and by 1990-1991, though it had nearly quadrupled its efforts to 200, still offered less than one-eighth the number in Ontario a decade earlier. Howe & Johnson, *ibid.* at 74.

actually have worsened due to the well-intentioned decision by the Supreme Court in *Singh,*[240] which held that the *Charter* applied to all claims processed within Canada. Michael Mandel notes that the rate of successful refugee claims rose from 33 percent in 1985 – before *Singh* – to 76 percent in 1989, but then dropped to 48 percent in 1993 through a combination of "compassion fatigue" and changes to immigration policy.[241] It is easy enough to explain this ebb and flow. The government responded with measures designed to force claimants to obtain entrance visas abroad – beyond the reach of the *Charter* – where immigration officials cannot be challenged even if they make "arbitrary and capricious" choices with "no semblance of due process."[242] Meanwhile, the *Charter* presents no obstacle to government raising immigration standards, requiring higher levels of education ,and reducing its target intake for UN Convention refugees in order to accommodate a higher proportion of business

[240] *Singh v. Canada (Minister of Employment and Immigration)* [1985], 17 D.L.R. (4th) 422 (S.C.C.) [*Singh*].

[241] Mandel, *supra* note 6 at 252-53.

[242] *Ibid.* at 254. A task force of the Canadian Council for Refugees reported numerous problems and noted that "failings are institutional, endemic, structural. The problems will not go away until the system itself changes." In a 1996 survey of problems at Canada's visa posts the Council noted the difficulties in even obtaining a clear picture of Canada's refugee intake process:

> The very fact that the posts are overseas means that they cannot be subject to the close scrutiny afforded to in-Canada processes. The information is scattered around the world. Refugees, because of their vulnerability, are among those least likely to lodge complaints. Those who are accepted and resettle in Canada are on balance likely to have had better experiences than those who were rejected, whose complaints, if they have them, will probably never reach the NGOs.

This survey reported concerns that access to some posts was "severely limited," that decisions taken by immigration officials "appear to be arbitrary," and that "treatment of refugees is sometimes biased by considerations such as their colour, their wealth or their professional or educational background." Canadian Council for Refugees, "State of Refugees in Canada" online: Canadian Council for Refugees <http://www.web.net/~ccr/state.html#Introduction> [Canadian Council for Refugees, "State of Refugees in Canada"].

immigrants within its overall annual goals.[243] Moreover, recent figures suggest that even refugees who reach Canada are often denied the procedural rights supposedly guaranteed by *Singh*. A report by the Canadian Council for Refugees notes Canada's participation in a "disturbing international trend" in the increase in detention of refugees.[244] There are early indications that treatment of

[243] Mandel, *supra* note 6 at 255. Absolute numbers have fluctuated over the past two decades – the total immigration in 1982 stood at 121,330, peaked at 256,757 (in 1993), and stood at 222,411 at 2001. However, the percentage of refugee immigration dropped from 20.1 percent in 1985 to a record low of 8.3 percent in 1994, rebounding slightly by the end of the decade to rest at 12.5 percent by 2001. Canadian Council for Refugees, "Immigration to Canada, 1979-2001," online: <http://www.web.ca/~ccr/immstats.html>. Canadian refugee intake through the mid-1990s also reflected a European bias, with European refugees constituting the largest percentage of those resettled in Canada from 1993 to 1996, at rates that consistently outstripped the European share of the word's refugee population. This bias came at the expense of refugees from Africa and especially the Middle East, groups consistently under-represented in Canada's resettlement program. The Canadian Council for Refugees notes that this disproportion was due in part to the efforts to resettle refugees from the former Yugoslavia but was "also likely a result in part of the greater concentration of Canadian visa offices and staff in Europe than in other regions of the world." *Ibid.* The former explanation could possibly account for the fact that Europeans constituted 51.5 percent of refugees resettled in Canada in 1994, at a time when the United Nations assessed the European proportion of global refugee resettlement need at 40.1 percent, and possibly also the fact that in 1995 those figures were 62.5 percent and 38.5 percent, respectively; nevertheless, it fails to explain the extreme discrepancy in 1993, when Canada's resettlement was 26.3 percent European while the proportional need for European resettlement stood at just 0.28 percent. In that year, Canada resettled over 3,000 European refugees when the U.N. recognized the need for only 200 European resettlements worldwide. Canadian Council for Refugees, "Refugees Worldwide, Assessment of Global Resettlement Needs and Resettlement in Canada: Statistical Overview 1993-1996" (February 1997), online: <http://www.web.net/%7Eccr/stat1.htm#cont>.

[244] Detainees under Canadian law may be held on grounds that they present a risk of flight or a danger to the public, or because their identity is in question. The Council notes that the effect of the replacement of the 1978 *Immigration Act* with the *Immigration and Refugee Protection Act* in 2002 on detention rates is not yet ascertainable. Canadian Council for Refugees, "State of Refugees in Canada." *Supra* note 242. While the average number of days a refugee was detained in Canada fluctuated wildly and stood lower in 2000-2001 than it had in 1996-1997 (a drop from just over twenty-one days to just under twenty-one days), the total number of days detained jumped from 138,481 in 1996-1997

this sort will become increasingly common in Canada as a result of policies prompted by new anti-terrorism initiatives.[245]

The second hypothesis builds on the first. Not only is it the fate of public agencies to fall short of expectations, but that fate has been hastened and made more certain by neo-liberalism. As neo-liberal policies have reduced public revenues and expenditures, and as neo-liberal politicians have disparaged the programs on which public funds were expended (and by implication their intended beneficiaries), the behaviour of those who deliver such programs has altered. Fewer resources are available to respond to needs, fewer officials are available to adjudicate claims, fewer clients are content with either outcomes or the procedures by which they are reached, and fewer recognitions or rewards flow to civil servants who are faithful proponents of now-unpopular policies.[246] In these more

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to peak at 224,423 in 1999-2000. Most troubling of all was the steady climb in the number of persons detained from 6,401 in 1996-1997 to 9,148 in 2000-2001 – nearly a 50 percent increase over five years. Canadian Council for Refugees, "Detention Statistics" (undated), online: <http://www.web.net/~ccr/Detention Statistics.htm>.

245 ICLMG, *supra* note 234 at 9.

246 The case of human rights commissions is instructive in respect of the two hypotheses discussed in this section. As early as 1977 the Ontario commission was bemoaning a lack of sufficient funds to address the doubling of its caseload, a tripling of its community relations programs, an increase in the complexity of discrimination cases, and the resulting increased legal costs this entailed. Funding for the federal commission decreased by 8 percent in 1993 and a further 9 percent in 1997; for provincial commissions, the decline began in the 1980s and continued through the 1990s, with only Ontario, Québec, and Prince Edward Island seeing a temporary increase in the late 1980s (followed by a protracted decline over the early-to-mid-1990s). Howe & Johnson, *supra* note 238 at 76-79. Howe and Johnson explain the impact of the fiscal restraint which characterized the *Charter* era on the operations of the commissions:

> Common problems were these: inadequate commission staff due to hiring freezes or lay-offs; increased delays in responding to formal complaints; case backlogs; and difficulty carrying out new responsibilities in areas such as affirmative action, race relations, and systemic discrimination. These problems led to sluggish human rights operations and to the symbolic (rather than substantive) treatment of rights. They also lead to rising criticism by human rights advocates, minority groups, and even the officials of the underfunded commissions. These criticisms were reported periodically in the media, in the academic literature, and in Auditor General reports,

stressful conditions, we hypothesize, humane instincts are dulled, civil behaviour becomes more difficult to sustain, and systems tend to fail. By all accounts today, being a student in a school or university, a patient in a hospital, an arriving passenger under interrogation by an immigration office, or a welfare recipient seeking housing or a subsistence allowance is a more difficult, and sometimes more demeaning, experience than it used to be in the immediate pre-*Charter* years.[247] In strict *Charter* terms, perhaps, discretionary entitlements or privileges are being diminished in all these examples, not "rights." But those who experience abusive encounters with state officials and agencies are unlikely to make such subtle distinctions.

While data are not available to test either of these hypotheses, it seems highly improbable that the *Charter* has improved the quality of "fundamental justice" experienced by millions of ordinary citizens who are exposed on a daily basis to the risk of casual, personal, and systemic abuse by state bureaucracies.

VI. POLITICAL AND CULTURAL PLURALISM

One of the ambitions of the *Charter* was to reinforce and enhance

interest group briefs, and legal cases.

Ibid. at 79. Recall, also, the disappointment expressed by feminist scholars with respect to the pace of women's progress in the *Charter* period. *Supra* note 118.

[247] Here again, the example of human rights is revealing. A "report card" distributed in 1997 to stakeholders including "equality-seeking groups and advocacy organizations," "employer organizations and business groups," and "human rights officials and commissions staff" rated the commissions according to criteria including accessibility, promptness, objectivity, fair procedures, and compensation. Nearly all provincial commissions received an overall grade of "C." Those remaining – the Ontario, Manitoba, and federal commissions – all scored a "D." Survey responses from equality-seeking and advocacy groups (which sponsor individual human rights complainants, who are the commissions' clientele) yielded the following generalizations: "commission staff are highly complacent, a result of decreased morale. . . . Human rights staff are too willing to screen out 'trivial' cases, and when they do accept complaints, they too often give them inadequate attention and investigation. Human rights officers try too hard to discourage complainants from initiating complaints and, once initiated, from continuing on with them." Howe & Johnson, *ibid.* at 138-43.

the democratic character of Canadian society through the protection of both political freedoms and cultural and social expression. It is extremely difficult to provide an empirical foundation for qualitative assessments in either area. However, we will provide at least some suggestive evidence.

It at least seems clear that if greater political freedom exists in Canada following adoption of the *Charter*, fewer Canadians wish to avail themselves of it. Voter participation in federal elections – the crudest measure of the health of our political democracy – fell from 76 percent in 1979 to 61 percent in 2000,[248] and marginally again to 60.5 percent in 2004.[249] Turnout at the provincial level shows no decisive trend but certainly evidences no *Charter*-inspired frenzy to participate.[250] Increased abstention from voting seems to correlate closely with diminished confidence in or respect for politics and politicians.[251] Thus, while in 1968, only 26 percent of

[248] Centre for Research and Information on Canada, *Voter Participation in Canada: Is Canadian Democracy in Crisis?* (2001), online: <http://www.cric.ca/pdf/cahiers/cricpapers_nov2001.pdf> at 4 [CRIC, *Voter Participation*]. This study notes that turnout in other democratic countries has similarly declined; for example, participation in the United Kingdom's 2001 election was lower than in Canada's 2000 federal contest. Turnout in the United States "has not changed much over the last 30 years, but it was already very low to begin with." *Ibid.* at 6. One commentator summarizes Canada's performance as "near the bottom of the industrialized-world turnout league tables. . . . Canada has never had a peculiarly high turnout, but the gradual decline from the 1960s to the 1980s, followed by the precipitate drop in the 1990s, has taken us from the lower middle of the pack to near the very back." Richard Johnston, "Canadian Elections at the Millennium," Choices 6:6 (September 2000) at 13, cited in CRIC, *Voter Participation*, *ibid*. at 6.

[249] Linda McKay-Panos, "Right to Vote" (2004) 29:2 *Law Now* 38 at 38.

[250] A 2001 study comparing election results from the 1980-1989 period to the 1990-2001 period reveals that "turnout has declined in five provinces, risen in three provinces, and remained unchanged on two. . . . Where turnout has increased, the size of the increase has been relatively small. . . . Average turnout has not changed significantly in Ontario or Alberta, but the level of participation in those provinces (respectively, 58 percent and 53 percent at the most recent elections) nonetheless is very low." CRIC, *Voter Participation*, *supra* note 248 at 5.

[251] Interestingly, public confidence in the House of Commons has become less polarized, while confidence in political parties has become far more so. In 1979, 38 percent of respondents had a "a great deal" of confidence in the House while only 15 percent had "very little"; by 2001, these numbers stood at 24 percent and 26 percent respectively. Political parties commanded "a

Canadians believed that government leaders were "crooked," by 1997 the number had more than doubled to 55 percent.[252] In 1968, 51 percent were prepared to say that the national government cared what they thought; by 2001 that number had fallen to 27 percent.[253] In 1997, only 18 percent of university students expressed a preference to work in the federal public service, while 64.8 percent were focussed on the private sector.[254] The *Charter* has apparently failed to immunize Canadians against a growing tendency in liberal democracies to treat public processes and institutions with indifference.[255]

On the other hand, in certain respects, over the past two decades Canadian political life has become more inclusive and more

great deal" of confidence from 30 percent of respondents and "very little" from 22 percent in 1979; by 2001, these figures stood at 13 and 39 percent. *Ibid.* at 16.

252 "Canadian Public Opinion on Representative Democracy," online: Canadian Public Opinion Research Archive, Queen's University <http://www.queensu.ca/cora/trends/tables/attitudes_toward_representative_institutions.ppt> at Figure 3. Also see Centre for Research and Information on Canada, "Citizen Participation and Canadian Democracy: An Overview," online: <http://www.cric.ca/pwp_re/cric_studies/citizen_participation_and_cdn_democracy_aug_2003.ppt>. Somewhat perversely, confidence levels in politicians have rebounded somewhat since 1992 (with 48 percent of Canadians expressing "a great deal or some confidence" in political leaders in 2004, compared to 42 percent in 2002 and 19 percent in 1992), while belief in the honesty or ethics of these same leaders remains low (currently hovering at 23 percent, up 2 percent from 2002). CRIC, "Canadians More Confident," *supra* note 160.

253 CRIC, *Voter Participation*, *supra* note 248 at 15.

254 When asked their opinions specifically about the federal public service, the largest percentage of respondents either "agreed" or "strongly agreed" that it: "Has too much bureaucracy," "Is resistant to change," "Is too political," "Is too rules and process oriented," and "Is constantly downsizing." Jennifer L. Smith & Susan Snider, *Facing the Challenge: Recruiting the Next Generation of University Graduates to the Public Service* (Ottawa: Public Service Commission of Canada, 1998) at 82-84.

255 See Robert D. Putnam, Susan J. Pharr & Russell J. Dalton, "Introduction: What's Troubling the Trilateral Democracies?" in Susan J. Pharr & Robert D. Putnam, eds., *Disaffected Democracies: What's Troubling the Trilateral Democracies?* (Princeton, NJ: Princeton University Press, 2000) 3 at 13-21 [Putnam, Pharr & Dalton]. Some essays in this book provide comparative data for Canada.

representative of Canada's diversity[256] and, in that sense, more democratic. However, to put this claim in perspective, when Canada's progress can be measured against that of other countries – notably in regard to the participation of women – Canada still lags well behind relevant comparators, as noted above.[257]

In terms of changes in the concentration of political power during the *Charter* era, the picture is mixed. The federal Conservatives governed with significant majorities from 1984 to 1993, and the Liberals with similar majorities from 1993 to 2004 before slipping to a minority position in that year. Indeed, from the 1970s onward, the trend seemed to be towards greater concentration of electoral power. In 1979 and 1980, the winning parties – first the Conservatives, then the Liberals – achieved 36 percent and 44 percent of the popular vote, respectively, and held 48 percent and 52 percent of the seats in the House. However, in 1984 and 1988, the winning Conservatives received 50 percent and 43 percent of the votes and held 75 percent and 57 percent of the seats. From 1993 to 2000 (including the intervening election of 1997) the dominant Liberals remained constant at about 41 percent of the vote, while their share of seats decreased from 67 percent to 57 percent. In part, however, the apparently impregnable parliamentary majorities of the governing party resulted from the emergence of deep fault lines within the Canadian political system. Thus, whereas the Conservatives in the 1980s shared the ballot with only two other significant contenders,[258] the Liberals faced four serious opponents in each of the subsequent elections from 1993 to 2000. The fracturing of opposition support allowed the Liberals to maintain their parliamentary dominance[259] until 2004, when the Conservative Party of Canada (a merger of the Canadian Alliance and the

[256] *Ibid*. at 46-47.

[257] *Ibid*. at 36-37.

[258] The Liberals and NDP each won in a significant number of ridings. The Social Credit Party and myriad smaller parties failed to secure a single seat. Information and Documentation Branch Library of Parliament, "Electoral Results by Party: 1867 to Date" (31 August 2004), online: <http://www.parl.gc.ca/information/about/process/house/asp/PartyElect.asp?Language=E>.

[259] The Progressive Conservatives, NDP, Bloc Québecois, and Reform Party (reincarnated as the Canadian Alliance for 2000) competed in these three elections; the best showing for any one party was that of the Alliance in 2000, with 22 percent of seats. *Ibid.*

Progressive Conservatives) won sufficient votes and seats to reduce the Liberals to minority status.

At the provincial level, the evidence is likewise mixed. To mention only the largest provinces, Ontario – after forty-three years of Conservative rule – experienced four changes of government involving three different parties in six elections between 1985 and 2003, arguably a sign of a healthy democracy. British Columbia changed governments twice between 1989 and 2001, as did Québec between 1989 and 2002. However, Alberta from 1971 to the present has been governed by the same party, which has never been seriously challenged during the entire period. Overall, then, our political culture seems to have become, at different moments and in different places, both more and less robust in the years following the introduction of the *Charter* – an ambiguous conclusion that suggests that the *Charter* itself may not have figured largely in the outcome. On the other hand, at particular moments, the *Charter* itself has provoked political controversy and, to that extent, may have affected the outcome of elections. One example would be the adoption of the *Charter* itself, as part of the controversy over patriation of the Constitution, which animated the forces of Québec nationalism and arguably helped to produce the Conservative victory of 1984.[260] Another would be the controversy over gay and lesbian marriage that featured in the 2004 campaign, most notoriously when the former Conservative justice critic provoked a backlash against his party by urging invocation of the "notwithstanding clause" to roll back legislative gains made by gays and lesbians that conservatives regard as examples of the *Charter* being "used as the crutch to carry forward all of the issues that social libertarians want [*sic*]."[261]

Of course, changes in government do not necessarily produce significant changes in policy. A healthy society, it is said, is a quarrelling society. Has the *Charter* helped to make Canadian society more quarrelsome? Public opinion polls suggest that there

[260] The "betrayal" of Québec by Canada and the other provinces spurred Québec Premier René Lévesque to publicly endorse Mulroney, and it caused the Parti Québécois to shelve its separatist agenda and devote its resources and political capital to Mulroney's campaign. John F. Conway, *Debts to Pay: English Canada and Québec from the Conquest to the Referendum* (Toronto: James Lorimer & Company Publishers, 1992) at 126.

[261] Campbell Clark, Brian Laghi & Steven Chase "Leaders' Last Push for Power" *The Globe and Mail* (26 June 2004) A1.

have indeed been significant shifts in public opinion on key issues over time: on whether the health care system works, on immigration and race relations, on whether taxes are too high, and on whether Canada's relations with the United States are too friendly or antagonistic. One would hope that these shifts were the result of open debate not only within the political class but among ordinary citizens. However, the ability of ordinary citizens to reach informed opinions is very much a function of the diversity of sources of information and perspectives available to them. In this respect, pluralism has suffered a distinct setback in Canada, as a result of growing concentration of media ownership.[262] Content analyses of media reporting on important issues suggest that this concentration has indeed narrowed the spectrum of political and social views available to Canadians.[263]

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[262] One observer described the situation with respect to print media in 2002: "From the pre-World War One period, when 138 publishers ran 138 dailies, in Canada, we have reached a situation where the largest chain currently has 34% of the national readership, five media companies cover 83% of the national circulation, and the five remaining independent owners account for less than 2%." In a trend that mirrors the situation in the United States, "'[o]nly eight English markets in Canada support more than one daily newspaper, and in a couple of these, one chain owns both papers." Enn Raudsepp, "The Daily Newspaper Industry under the Microscope: Monopolies, Concentration, Conglomeration and Convergence" (June 2002) *Canadian Issues* 25 at 26 [Raudsepp]. The statistics are comparable for broadcasting, for which "[the] top five ownership groups owned 68% of all television stations in 2000, up from 28.6% in 1970. . . . [S]ingle-station ownership was far less common in 2000, with just six such entities." Canada, House of Commons, Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting* (Ottawa: Standing Committee on Canadian Heritage, 2003) at 393 (Chair: Clifford Lincoln) [Standing Committee on Canadian Heritage].

[263] Current levels of concentration mean that the role of daily newspapers in "establishing the public agenda and providing a forum for vigorous public debate" has "steadily diminished, and the voices that are left tend to represent an increasingly homogenous perspective on social, economic and political affairs-that of the business class." Raudsepp, *ibid.* at 26. Speaking at a recent conference on the subject, Raudsepp cited a study revealing that 75 percent of news stories in Canadian papers consisted of coverage of "canned event[s]" such as press conferences rather than reporter-originated stories. "Journalists Question Media Ownership in Canada" *The Dominion* (10 November 2003), online: The Dominion <http://dominionpaper.ca/accounts/2003/11/10/journalist.html>. The problem of concentration has attracted government's concern throughout the *Charter* era: see *e.g.*, Canada, Task Force on

Ironically, the *Charter* – far from ensuring a broader diversity of media perspectives – has been invoked to protect or reinforce growing media consolidation and growing corporate financial influence within the political process. Appellate courts have impeded or struck down attempts to apply competition laws to media companies,[264] limit campaign expenditures by well-financed single-issue lobbies,[265] regulate the dissemination of polling results

Broadcasting Policy, *et al.*, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986). A more recent government committee report summarizes its experience with this issue: "a variety of witnesses expressed concern that the concentration of media under a small number of ownership groups will pose a threat to the democratic process by reducing access to a diverse range of different views and opinions. Witnesses expressing this view would like to see restriction on the concentration of ownership to prevent the possibility of having just one voice in particular contexts." Standing Committee on Canadian Heritage, *ibid.* at 393. While media executives were quick to assure the Committee that consolidated media ownership has not reduced the diversity of opinions, leading academics were quick to disagree. Professor Marc-François Bernier argued that "[c]onvergence, or to put it another way, concentration, generally creates – and this has been borne out by several studies – a form of growing pressure to make content compatible with the businesses plans of the conglomerates." *Ibid.* at 400. Professor John Miller of Ryerson University was more emphatic:

> Are there more reporters covering the news now than there were ten years ago? I guarantee you there are not. Are their owners able to vote for you? Do they live in town or thousands of miles away? Can you talk to them on Main Street? No, you cannot. These papers are owned by six giant media companies, some with interests in television, radio, filmmaking, and the Internet. These are papers whose owners' first loyalty is not to readers but to shareholders, who view the delivery of news and information as contributing nothing to the revenue side of their ledgers, just to their overhead. *Ibid.*

The now-infamous editorial policy of the Asper family-controlled CanWest Global media company and the events leading to the dismissal of publisher Russell Mills provide eloquent support for these observers' worst fears; see *e.g.*, Katherine Macklem, "Can the Aspers Do It?" *Maclean's* 115:14 (8 April 2002) 48; and Russell Mills, "Democracy, the Media, and a Fired Publisher" (2002) 16:2 *Canadian Speeches* 8.

264 *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

265 *Libman v. Québec (Attorney General),* [1997] 3 S.C.R. 569, in which the Court struck down a third-party meeting expense limit in Québec's *Referendum Act.* The *Canada Elections Act*, S.C. 2000, c. 9 was drafted to

and advertising that might distort voting patterns,[266] and forbid commercial advertising that undercuts important public policies.[267] By contrast, on other issues much more central to the process – for example, on the question of widely discrepant constituency sizes favouring rural voters – they have refused to intervene.[268] To be fair, however, while the courts have been relatively insensitive to the power of corporations and privileged electorates to exercise undue influence over public opinion and public policy, they have been willing to create space for countervailing political forces more dependent on shoe-string resources and grassroots strategies. For example, they have prevented de-registration and de-funding of fringe political parties,[269] permitted the dissemination of political literature in airports[270] and on utility poles,[271] and protected

conform with the dicta in *Libman* by providing for higher third-party spending limits in federal elections. These limits were struck down in *Harper v. Canada (Attorney General),* [2002] A.J. No. 1542 and *Canada (Elections Canada) v. National Citizen's Coalition,* [2003] O.J. No. 3939. Leave to appeal the ruling in *Harper* was granted: *Harper v. Canada (Attorney General),* [2003] S.C.C.A. No. 76 [*Harper*]; the Supreme Court reserved judgment on 10 February 2004. Allison Dunfield, "Judgment Reserved in Gag Law Case" *The Globe and Mail* (10 February 2004), online: <http://www.globeandmail.com/servlet/story/RTGAM.20040210.wharp0210/BNStory/National/>. In a decision on 18 May 2004, the Supreme Court held that the impugned provisions of the act were constitutional.

266 *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Harper*, *ibid*. The *Charter*'s potential for interference in this regard was clearly demonstrated in the recent federal election. In *R. v. Bryan* (2003) 233 D.L.R. (4th) 745 (B.C.S.C), the *Charter*'s freedom of expression provisions were used to strike down prohibitions in the federal Election Act on the premature broadcasting of election results in electoral districts where polls have not yet closed. Elections Canada then announced that the court's decision would be applied across Canada for this election, presumably in acknowledgement that they had greatest salience in British Columbia. Elections Canada, News Release, "Chief Electoral Officer Announces Policy on Application of British Columbia Supreme Court Decision" (10 June 2004), online: <http://www.elections.ca/content.asp?section=med&document=jun1004&dir=pre&lang=e&textonly=false>.

267 *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

268 *Reference re Provincial Electoral Boundaries (Sask.),* [1991] 2 S.C.R. 158. See generally Rainer Knopff & F. L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) at c. 12.

269 *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37.

270 *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.

271 *Ramsden v. Peterborough*, [1993] 2 S.C.R 1084.

"leafleting" by social movements and trade unions as freedom of expression.[272] However, these protections have been rather tentative and somewhat peripheral to the mainstream of political developments. It remains to be seen whether they are sufficient to ensure the survival and intensification of vigorous public debate on a wide range of controversial topics.

To sum up, there clearly have been genuine debates since 1982 over many fundamental and controversial political issues – Québec secession, western alienation, free trade, the welfare state, and the *Charter* itself. However, a significant body of popular and expert opinion holds that Canada's political culture today is less vibrant, less democratic, than it was a generation ago.[273]

Political culture, however, does not exist in isolation from the

[272] *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156.

[273] Various causes have been cited for this malaise including: legalization of the politics of both the left and the right under the *Charter,* whose net effect has been a growing democratic deficit and whose "chief political beneficiary is a quasi-one-party government in Ottawa" (Reg Whitaker, "The Flight from Politics" (2002):11 *Inroads* 187; the disappearance of the three-party "hegemony" in federal politics and the resulting fragmented and regionalized party system (and electorate), which tends to "rob general elections of their capacity to act as great collective decision-making events" (R. Kenneth Carty, William Cross & Lisa Young, "Canadian Party Politics in the New Century" (2001) 35:4 J. of Canadian Studies 23 at 36); the alarming concentration of power in the office of the Prime Minister (see *e.g.*, Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); Herman Bakvis, "Prime Minister and Cabinet in Canada: An Autocracy in Need of Reform?" 35:4 J. of Canadian Studies 60); and the threat posed by growing voter cynicism and indifference (see *e.g.*, Hugh Segal, "Lack of Legitimacy Threatens Democratic Governance" (2003) 17:2 *Canadian Speeches* 7; Therese Arseneau, Robert M Campbell & A Brian Tanguay, "Reforming Canada's Political Institutions for the Twenty-First Century" (2001) 35:4 J. of Canadian Studies 5; Guy Saint-Pierre, "Public and Politicians Urged to Halt Degeneration of Democracy" (2002) 16:1 *Canadian Speeches* 21; William Cross & Lisa Young, "Party Democracy Ten Years After Charlottetown" (November 2002) *Canadian Issues* 10; and John Graham, "Reinvigorating Democracy: Dealing with September 11th through Modern Town Hall Meetings" (November 2002) *Canadian Issues* 21).

civil society in which it is bred. As we have already suggested, in some respects the changes in civil society that it was hoped that the *Charter* would engender have not materialized. The plight of Aboriginal peoples has not been much ameliorated, if at all. The project of multiculturalism, which is mentioned but not given prominence in the *Charter*, has seemingly gone off the boil. Immigrants – despite new guarantees of their legal and equality rights – seem to be having a tougher time integrating into society and the economy.

Nonetheless, by many measures, Canadian society remains quite tolerant – indeed, surprisingly so given the cultural dominance of its powerful neighbour, the United States. Surveys show repeatedly that on a number of controversial social issues, Canadian public opinion – and on many issues, Canadian law – remains far more progressive.[274] One might have expected the opposite, given that the United States has had for much longer than Canada its own well-entrenched Bill of Rights, a tradition of waging political and social controversy by means of constitutional litigation, an activist court – and until fairly recently, a liberal one – and an influential, rights-conscious legal academy. Perhaps the lesson to be learned is that constitutional Bills of Rights do not transform public attitudes and legislative performance as much as the authors of the *Charter* imagined.

VII. CONCLUSION

Acknowledging the shortcomings of our methodology and the limitations of our evidence, and acknowledging that our conclusions are necessarily qualified by the presence of exceptions and counter-examples, our evidence still shows that in many respects the *Charter* era has been a disappointment. The years since 1982 have not witnessed much progress towards equal dignity and life-chances for members of many marginalized communities, more positive encounters by ordinary citizens with the state and its agents, or the emergence of a more vibrant civic and political culture. When Canada's experience is measured against that of some European countries with no comparable document, those countries often appear to have made equal or superior progress towards realizing the

[274] Michael Adams, *Fire and Ice: The United States, Canada and the Myth of Converging Values* (Toronto: Penguin Canada, 2003).

values articulated in the *Charter*. When it is measured against that of the United States, which has a much lengthier and more intense experience with its *Charter*-equivalent – the Bill of Rights – equality, due process, and political freedoms seem in many respects to be more secure here than there.

It would be fair to propose, then, that other factors must explain recent changes in Canadian society, culture, and politics. If not the *Charter*, what then?

Political economy, above all. As our data generally suggest, if one were to establish a gradient that descends from the most affluent to the least affluent members of society, one would find at each point on that gradient not only lower living standards, but lower levels of educational attainment, health, personal safety and security, civic participation, political influence, and respect from police and other state officials. Moreover, as one descended the gradient, one would almost certainly encounter members of *Charter*-protected groups in ever-increasing numbers. Certainly disproportionate numbers of people of colour, Aboriginal peoples, women, and disabled people are to be found at the lower end of the gradient, though perhaps not immigrants, gays or lesbians. The best prospects for greater progress towards the equality values of the *Charter* would therefore be to redistribute wealth. And not just towards equality values: towards legal rights, political rights, associational rights, and perhaps language rights as well. However, most available studies suggest that throughout the *Charter* era, economic inequality in Canada has been growing rather than diminishing,[275] especially as successive governments have reduced social services and other transfer payments to the poor[276] and reconfigured the tax system so to reduce its redistributive effects.[277] If our hypothesis is correct, this

[275] See Marc Frenette, David Green & Garnett Picot, "Rising Income Inequality Amid the Economic Recovery of the 1990s: An Exploration of Three Data Sources" (Ottawa: Analytical Studies Research Division, Statistics Canada, Working Paper 219, 2004).

[276] See *e.g.*, Ann Curry-Stevens, *When Markets Fail People: Exploring the Widening Gap between Rich and Poor in Canada* (Toronto: Centre for Social Justice Foundation for Research and Education, 2001).

[277] See *e.g.*, Emmanuel Saez & Michael Veall, "The Evolution of High Incomes in Canada, 1920-2000" (Cambridge: National Bureau of Economic Research, Working Paper 9607, 2003). Saez and Veall show that from 1990 to 2000, the top 1 percent of Canadian taxpayers increased their share of all income from

might explain why the *Charter* has failed to achieve many of its ambitions.

Of course, the *Charter* was not designed to transform Canada's political economy. On the contrary, when it was adopted, its architects took considerable care neither to protect property nor to redistribute wealth.[278] An attempt in the early 1990s to complement the *Charter of Rights and Freedoms* with a so-called Social Charter might have overcome this limitation, but that attempt ultimately failed.[279] So have occasional attempts to persuade courts to read

9.3 to 13.6 percent, while the top 10 percent increased its share during the same period from 35.5 to 42.3 percent.

[278] As Patrick Monahan notes, the Supreme Court of Canada established in *Irwin Toy v. Québec,* [1989] 1 S.C.R. 927, that "economic rights are generally not protected by the *Charter*"; this interpretation relied on the fact that the *Charter*'s drafters had consciously omitted protection for property rights under s. 7 despite a proposal supporting its inclusion that was ultimately rejected by the Trudeau government. This has led to a judicial deference to governments in designing economic and social welfare policy that has immunized it from s. 15 equality challenges (as in *McKinney v. University of Guelph,* [1990] 3 S.C.R. 229 and *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497) except in cases of "compelling justification for judicial intervention" (as in *M. v. H., supra* note 200, where an Ontario law that excluded homosexuals from eligibility for benefits was struck down). Patrick Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002) at 396-97, nn. 31, 34. Further, Michael Mandel observes:

> [T]he *Charter* implicitly removes questions of economic power from the scope of judicial review by consigning them to a purely hortatory part of the constitution. Part III, entitled "Equalization and Regional Disparities," claims that Canadian governments "are committed to" the following egalitarian ideals: (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and c) providing essential public services of reasonable quality to all Canadians. But these commitments are prefaced by the disclaimer that they do not in any way alter the legislative authority or powers of any government, which ensures that no court will take the government to task for failing to live up to them.

Mandel, *supra* note 6 at 341-42.

[279] Proposed by the Ontario NDP government during the negotiations that produced the ill-fated *Charlottetown Accord*, the Social Charter was dismissed even by sympathetic commentators as unlikely to produce positive outcomes.

economic equality into the *Charter*.[280]

This is not an argument for amending the *Charter* to create a right of equal access to public goods, or to prevent poor and working

See *e.g.*, Mandel, *supra* note 6 at 109-114; Bakan & Schneiderman, *supra* note 23. Joel Bakan argues:

> [T]he very idea of a social charter or union is flawed, and that, in any of its proposed forms, it is unlikely to do what those who support it want it to do. This is because social rights, as they are articulated in social charter proposals, are too vague to guarantee anything of substance, do not touch the complicated causes of poverty and disadvantage, and their symbolic message is at best ambiguous.

Bakan, "Social Rights," *supra* note 23 at 86. Hester Lessard offers similar criticism: "[A] social charter can also be viewed as leaving the existing map of power-no power in place, and, by giving political and moral authority to that map, making us feel good about a social landscape that would recognize the most needy in our political economy without actually reworking the topography." Hester Lessard, "Creation Stories: Social Rights and Canada's Social Contract," in Bakan & Schneiderman, *supra* note 23, 101 at 102.

[280] Recent unsuccessful attempts to use the *Charter* to force governments to change their social spending priorities include: *Masse v. Ontario (Ministry of Community an Social Services)*, [1996] S.C.C.A No. 373 (Ontario has no positive duty to provide welfare assistance); *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 (Québec social assistance regime does not violate the *Charter* regulation by providing lower level of benefits for persons under thirty year of age); *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 (British Columbia has no duty to fund or provide a particular therapy for autistic children); and *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66, [2004] 3 S.C.R. 381 (Newfoundland can delay implementation of its pay equity legislation because of financial exigency). As Gwen Brodsky notes, attempts at winning economic equality through *Charter* have been frustrated by:

> (1) governments' unwillingness to undertake progressive law reforms voluntarily, (2) lack of access by poor people to the resources necessary to engage in the litigation process, (3) regressive, anti-egalitarian positions advanced in the courts by governments, and (4) judicial insensitivity to the problems of group disadvantage.

Gwen Brodsky, "Social Charter Issues" in Bakan & Schneiderman, *supra* note 23, 43 at 51-52.

class Canadians from suffering the legal, social, or political disabilities associated with economic deprivation (though ironically Prime Minister Trudeau – as an academic – had proposed precisely such provisions).[281] In the first place, there is no evidence that such constitutional provisions would accomplish very much. After all, relatively poor countries such as India and South Africa, which have constitutionalized social and economic rights, have been unable to redistribute wealth or power even with the help of an activist judiciary, while other, more affluent, countries such as the Netherlands and Sweden have become more egalitarian unaided by constitutional prescriptions. And secondly, we share the belief of other *Charter* agnostics that it may be unwise to place much faith in transformative strategies that depend primarily on judges and lawyers. Their institutional arrangements, their ideological predispositions, their intellectual formation, and their professional identification with affluent clients and powerful state interests make it unlikely that they can or will function effectively as change agents.

Political economy, then, above all, but not political economy alone: geo-political forces increasingly determine the inclination and capacity of states to make good on what their constitutions proclaim and their legislators promise.[282] Culture defines their vision of the right and the relevant; technology realigns relationships and redistributes comparative advantage; demography produces tectonic shifts in the needs, entitlements, and behaviours of key constituencies; and natural endowments and catastrophes cause the fortunes of local populations to rise and fall.

These forces, and countless others, have changed Canada considerably during the *Charter* era. But to what extent have they in turn been reinforced, retarded, redirected, or pre-empted by the *Charter*? As *Charter* agnostics, we argue that the burden of

[281] Pierre Elliott Trudeau, "Economic Rights" (1961-1962) 8 McGill Law J. 121.

[282] Robert Putnam describes a general decline in the "*capacity* of political agents to act on citizens' interests and desires," largely due to increasing globalization – he uses the term "internationalization" – which "creates a growing incongruence between the scope of territorial units and the issues raised by interdependence, reducing the output effectiveness of democratic nation-states" and has "undermined the ability of national governments to implement their chosen policies and respond to citizen demands in a satisfactory way." Putnam, Pharr & Dalton, *supra* note 255 at 25 [emphasis in original].

demonstrating its power and influence falls on those who hold that view. In our view, the available evidence suggests, at a minimum, that the *Charter* has mattered less than was hoped and expected by its authors and those who live on its avails; less than is claimed by those who fear that it has done too much or too little or the wrong things; and less than imagined by true believers of all persuasions who do not wish to have their hopes, fears, or opinions challenged by even the modest evidence we have been able to deploy.

ADVERSE EFFECT DISCRIMINATION: PROVING THE *PRIMA FACIE* CASE

Evelyn Braun*

In an era where anti-discrimination principles have gained widespread acceptance, cases of direct discrimination arise infrequently, and attention is increasingly drawn to the adverse effects of apparently neutral standards. Proof of adverse effect discrimination presents unique evidentiary challenges. The author focuses on the application of fundamental principles of adverse effect discrimination to proof of a prima facie case. This discussion is framed within an employment law context, with a particular focus on the example of adverse effect discrimination claims by part-time employees. European case law establishing that discrimination against part-time employees can amount to indirect discrimination against women is contrasted with a Canadian case. The Federal Court of Appeal decision in response to this claim by a part-time worker illustrates the need for a strong emphasis on the basic principles governing proof of a prima facie case of adverse effect discrimination. The author concludes that further guidance from Canadian courts is needed to elucidate the Canadian approach to proof of adverse effect discrimination.

À une époque où les principes anti-discriminatoires sont acceptés à grande échelle, les cas de discrimination directe n'apparaissent que peu souvent, et l'attention est alors attirée vers les effets préjudiciables des normes apparemment neutres. La preuve d'effets préjudiciables présente des défis uniques bien évidents. L'auteur se concentre sur l'application de principes fondamentaux de la discrimination par suite d'un effet préjudiciable pour prouver une cause prima facie. Cette discussion cadre dans le contexte du droit du travail avec une attention spéciale aux poursuites pour discrimination par suite d'un effet préjudiciable intentées par les employés à temps partiel. La jurisprudence européenne établissant que la discrimination contre les employés à temps partiel peut représenter de la discrimination indirecte contre les femmes fait contraste avec une cause canadienne. La décision de la Cour d'appel fédérale en réponse à ces poursuites intentées par un travailleur à temps partiel illustre le besoin important d'insister sur les principes de base régissant la preuve prima facie de la discrimination par suite d'un effet préjudiciable. L'auteur conclut que plus de direction est requise de la part des tribunaux canadiens pour élucider la démarche canadienne à l'égard de la preuve de discrimination par suite d'un effet préjudiciable.

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I. INTRODUCTION

Adverse effect discrimination[1] is a wrong cloaked in shades of grey. Those who see the world in black and white can relate more easily to direct discrimination, which arises from standards that are discriminatory on their face. Adverse effect discrimination arises from standards that are neutral on their face, apparently applying to everyone equally, but which have an adverse effect on some groups of people.[2] Because it is indirect, adverse effect discrimination must be demonstrated through proof of differential treatment. Differences in treatment may appear as a continuum. At what point on the continuum does perceived differential treatment become discrimination?

If statistics show that 80 percent of men, but only 60 percent of women consistently pass an eligibility requirement for benefit entitlement, can that requirement be challenged as having a discriminatory effect on women? What if 75 percent of men and 70 percent of women are able to meet the requirement?

If part-time employees are ineligible for sick pay that full-time employees receive, and a great majority of the part-time employees are women, is the employer discriminating against women?

These are questions that relate to proof of adverse effect discrimination. The first question focuses on proving differential

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1 For the purpose of this article, the terms "adverse effect discrimination," "adverse impact discrimination," and "indirect discrimination" are equivalent. The concept of adverse effect discrimination is central to, but not equivalent to, "systemic discrimination." Systemic discrimination has been defined in an employment context as discrimination that "results from the simple operation of established procedures of recruitment, hiring and promotion, none of which is necessarily designed to promote discrimination." *Action Travail des Femmes v. CNR*, [1987] 1 S.C.R. 1114 at 1139. Proof of systemic discrimination may involve an examination of a number of institutional practices and policies, each of which may have an adverse impact on an identified group. This article focuses on the proof of adverse impact, which contributes to a claim of systemic discrimination.

2 *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)* [1999] 3 S.C.R. 868 at para. 15 [*Grismer*].

treatment: what degree of disparity must be evident to establish adverse impact? The second explores the connection between the differential treatment and a prohibited ground of discrimination: if a group of persons experiencing differential treatment is not defined by a characteristic implicating anti-discrimination law, but many of those persons share a protected characteristic,[3] does the differential treatment constitute discrimination? Canadian equality jurisprudence does not provide ready answers to these questions, but some basic principles common to several jurisdictions offer guidance.

When equality issues are litigated under section 15(1) of the *Canadian Charter of Rights and Freedoms*, attention is focused on "whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee."[4] This issue is the third of three in the analytical framework for equality analysis set out in *Law* v. *Canada*.[5] However, in cases of adverse effect discrimination, the first two issues within this framework present their own challenges. These are the issues of:

a) establishing differential treatment; and
b) trying differential treatment to an enumerated or analogous ground of discrimination.[6]

The two questions posed above are relevant to the first two inquiries of the *Law* framework. Whether a case is brought under the

3 A "protected characteristic" is one associated with a ground of discrimination recognized in anti-discrimination law, such as race, gender or age.

4 Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*]; *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at para. 88 [*Law*].

5 *Ibid*.

6 The first two issues identified in para. 88 of *Law*, *ibid.*, are: "(A) whether a law imposes differential treatment between the claimant and others, in purpose or effect; and (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment." These two issues are closely linked, except in cases where the group experiencing differential treatment is defined by a characteristic that is not protected under anti-discrimination law. For this reason, section III of this article touches on both of these issues, while section IV focuses on the second issue alone.

Charter or under provincial or federal human rights legislation, the claimant alleging adverse effect discrimination must establish that there is differential treatment implicating a characteristic protected under an instrument of human rights law.[7] In this respect, anti-discrimination law in Canada, the United States and the European Community is based on the same broad principles. While litigation in various jurisdictions necessarily differs in response to differences in the governing legislation, this article focuses on commonalities across jurisdictions.

As equality jurisprudence evolves, a coherent and sophisticated theory of adverse effect discrimination is needed to assist claimants, lawyers, and adjudicators with the complexities associated with challenging discrimination embedded in apparently neutral standards.[8] Such a theory has its foundation in the basic principles of anti-discrimination law.

This article will focus on the application of these fundamental principles to proof of adverse effect discrimination. This discussion is framed within an employment law context, with a particular focus on the example of adverse effect discrimination claims by part-time employees. European case law establishing that discrimination against part-time employees can amount to indirect discrimination against women is contrasted with a Canadian case. The Federal Court of Appeal decision in response to this claim by a part-time worker illustrates the need for a strong emphasis on the basic principles governing proof of a *prima facie* case of adverse effect discrimination.

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7 "Instruments of human rights law" include the *Charter*; provincial, state and federal human rights legislation; and international treaties and conventions.

8 Colleen Sheppard, "Of Forest Fires and Systemic Discrimination: A Review of *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*" (2001) 46 McGill Law J. 533 at para. 17 [Sheppard].

II. DIRECT AND INDIRECT DISCRIMINATION: A UNIFIED APPROACH TO DEFENCES AND REMEDIES

Meiorin announced a unified approach to adjudicating discrimination claims under human rights legislation. The distinction between direct and indirect discrimination has been erased.[9]

In *Meiorin*,[10] the Supreme Court of Canada clarified and simplified Canadian human rights jurisprudence by introducing a unified approach to defences and remedies applied to the two classes of discrimination: direct and indirect (or adverse effect) discrimination.

Prior to *Meiorin*, defendant employers could continue to apply a neutral standard that discriminated indirectly, as long as they took steps, short of undue hardship, to accommodate individuals who were adversely affected. In contrast, a directly discriminatory standard had to be justified by the employer as a *bona fide* occupational requirement; otherwise it was struck down. Since the decision in *Meiorin*, "[e]mployers and others governed by human rights legislation are now required *in all cases* to accommodate the characteristics of affected groups within their standards, rather than maintaining discriminatory standards supplemented by accommodation for those who cannot meet them."[11]

The *Meiorin* decision is a landmark in Canadian jurisprudence. As discussed in an incisive case comment by Colleen Sheppard, this case significantly advances human rights analysis in Canada. However, as noted by that author, it is important not to misinterpret the *Meiorin* judgment as rejecting the conceptual distinction between adverse effect and direct discrimination. "Recognition of adverse effect discrimination represents a powerful and insightful

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9 *Grismer*, *supra* note 2 at para. 19.

10 *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)* [1999] 3 S.C.R. 3 [*Meiorin*] [emphasis in original].

11 *Grismer*, *supra* note 2 at para. 19.

breakthrough in human rights law, and we should be careful not to jettison the concept too quickly simply because it overlaps with direct discrimination in some contexts."[12]

In their rationale for eliminating different remedies for direct and indirect discrimination, the Supreme Court of Canada recognized that a modern employer would rarely frame a requirement in directly discriminatory terms when the same effect could easily be realized by couching it in neutral language. "[T]his more subtle form of discrimination . . . is now much more prevalent than the cruder brand of openly direct discrimination."[13] Moreover, no discriminatory intention is needed whatsoever to prove discrimination. Unintentional discrimination is no less a violation of human rights law.[14] In an era where anti-discrimination principles have gained widespread acceptance, cases of direct discrimination arise less frequently, and the focus shifts to identifying the adverse effects of apparently neutral standards. Now more than ever, a coherent theory of adverse effect discrimination is essential to Canadian equality jurisprudence.

III. PROVING THE DIFFERENTIAL TREATMENT THAT CONSTITUTES ADVERSE IMPACT

A. Back to basics: *O'Malley* and *Griggs*

While a consistent approach to defences and remedies applicable to direct and indirect discrimination is a positive development, proving a *prima facie* case of indirect discrimination remains a different exercise from establishing direct discrimination. In the case of direct discrimination, the differential treatment is immediately apparent. When a rule or requirement is apparently neutral, the complainant faces an initial hurdle in proving the differential treatment. "[W]here the adverse effects of a standard or rule are in issue, data may be introduced to demonstrate the disproportionate impact caused by the rule, and this will satisfy the requirements

[12] Sheppard, *supra* note 8 at para. 15.
[13] *Meiorin*, *supra* note 10 at para. 29.
[14] *Ibid*. at para. 49.

needed to show a *prima facie* case of discrimination."[15] At the outset of an adverse impact case, "[t]he plaintiff has the burden of proof . . . , with the ultimate inquiry being whether or not a substantial adverse impact is shown by the weight of all the evidence."[16]

Given the focus in *Meiorin* on defences and remedies, less attention is paid to the preliminary issue of proving the *prima facie* case. In *Meiorin*, a female forest firefighter established that an aerobic fitness test, which was a condition of employment as a forest fighter, had a disproportionately negative effect on women as a group. The Supreme Court dealt with the burden of proof as follows:

> Ms. Meiorin has discharged the burden of establishing that, *prima facie*, the aerobic standard discriminates against her as a woman. The arbitrator held that, because of their generally lower aerobic capacity, most women are adversely affected by the high aerobic standard. While the Government's expert witness testified that most women can achieve the aerobic standard with training, the arbitrator rejected this evidence as "anecdotal" and "not supported by scientific data." This Court has not been presented with any reason to revisit this characterization. Ms. Meiorin has therefore demonstrated that the aerobic standard is *prima facie* discriminatory, and has brought herself within s. 13(1) of the Code.[17]

A casual reader could draw from this quote an inappropriate conclusion on the requirements needed to show a *prima facie* case of adverse effect discrimination. It would not be illogical to infer that, to establish discrimination, a claimant would need to show that "most" of her group were adversely affected. However, such a conclusion would be at odds with established jurisprudence. Asking whether most of a protected group is affected is the wrong question to determine whether a standard is discriminatory. The correct question is a comparative one; namely, how does the protected group fare relative to an appropriate comparator? To establish the foundation for this comparative approach, it is useful to re-examine

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15 Beatrice Vizkelety, *Proving Discrimination in Canada*, (Toronto: Carswell, 1987) at 176 [Vizkelety].

16 Schlei & Grossman, *Employment Discrimination Law*, 2d ed. (Washington, D.C.: The Bureau of National Affairs, 1983) at 1287 [Schlei and Grossman], cited in Vizkelety, *ibid*. at 87.

17 *Meiorin*, *supra* note 10 at para. 69.

the most basic principles of adverse effect discrimination, beginning with *Ontario Human Rights Commission v. Simpsons-Sears Ltd.* (*O'Malley*), and the American precedent cited there.[18]

In *O'Malley*, the Supreme Court of Canada applied the concept of adverse effect discrimination is usually said to have been introduced in the American case of *Griggs v. Duke Power Co.*:[19]

> In that case the employer required as a condition of employment or advancement in employment the production of a high school diploma or the passing of an intelligence test. The requirement applied equally to all employees but had the effect of excluding from employment a much higher proportion of black applicants than white. It was found that the requirements were not related to performance on the job, and the Supreme Court of the United States held them to be discriminatory.[20]

In *Griggs*, "most" black applicants actually were adversely affected by the employment requirement: statistics showed that only 6 percent of black applicants passed the tests in question. However, this particular fact is relegated to a footnote in the case. The issue, as noted by our own Supreme Court, was not whether most black applicants were affected, but how the proportion of black applicants passing the test compared with the proportion of white applicants passing it. On the record, it was agreed that "'whites register far better on the Company's alternative requirements' than Negroes" and that this consequence was directly traceable to race, due to inferior education received by blacks in segregated schools.[21]

The principle of comparing proportions between groups is well delineated in another leading American case, *Dothard v. Rawlinson*.[22] In this case, a female job applicant challenged a 120-pound weight requirement for employment as a prison guard in Alabama. The evidence showed that the 120-pound weight restriction would exclude 22.29 percent of women in the United

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18 [1985] 2 S.C.R. 536 [*O'Malley*].
19 401 U.S. 424 (1971) [*Griggs*].
20 *O'Malley*, *supra* note 18 at para. 16.
21 *Griggs*, *supra* note 19 at 430.
22 433 U.S. 321 (1977) [*Dothard*].

States between the ages of eighteen and seventy-nine; it would exclude 2.35 percent of the men in this age group.[23] Thus, "most" women (over 67 percent) could, in fact, meet the weight requirement. However, when the proportion of women excluded is compared with the proportion of men excluded, one can easily discern the "grossly discriminatory impact" found by the U.S. Supreme Court.[24]

B. An American approach to the degree of disparity needed to prove adverse impact

In the U.S., "[s]tatistics play a dominant role in virtually all adverse impact cases. . . . Statistical proof is the very core of evidence in adverse impact cases because relevant assessments and comparisons must be expressed in numerical terms."[25]

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[23] *Ibid.* at 329.

[24] *Ibid*. at 331. A Canadian case where discrimination was identified, but "most" members of a protected group were not adversely affected is *Roderiguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519. Although only a minority of the court addressed the equality issue, those justices who did so made the point, at para. 175, that some persons with physical disabilities are treated unequally by the impugned provision, but that the majority of persons with disabilities are not so treated.

[25] Vizkelety, *supra* note 15 at 168 (citing Schlei & Grossman, *supra* note 16 at 1331). While statistical evidence is generally central to proof of adverse impact in any jurisdiction, a recent Canadian case cautions against "over-reliance on opinion statements by experts" in the absence of first-hand evidence. The case of *Gosselin v. Quebec (A.G.)* was one of direct discrimination. [2002] 4 S.C.R. 429, 2002 SCC 84. However, in the context of determining whether the differential treatment violated the purpose of s. 15(1) by violating human dignity, a majority of the Supreme Court of Canada found that the claimant had failed to establish actual adverse effect. The trial judge had not found the statistical evidence convincing, particularly given the absence of first-hand testimony from actual class members. In dissenting reasons, Bastarache J. notes that, on the issue of evidence and burden of proof, the majority was influenced both by the lack of evidence from other individuals besides the claimant, and by the procedural fact that Ms. Gosselin's claim was authorized as a class action. Indeed, the majority characterized the requested remedy as one of ordering the government to pay almost $389 million in benefits claimed on behalf of over 75,000 unnamed class members, none of whom came forward in support of Ms. Gosselin's claim. Thus, although the Court appears to question over-reliance on statistical

To establish adverse impact, statistics may be applied to show that an observed disparity in outcome is sufficiently large that it is highly unlikely to have occurred at random, in other words, that it is statistically significant.[26] It has become a convention in the social sciences to accept as statistically significant a 0.05 probability level. At this level, the probability of the observed disparity occurring by chance is 5 percent, or one chance in twenty.[27] Many courts have cited this conventional standard with approval, but others have allowed some flexibility, acknowledging that a less stringent standard may also be acceptable.[28] The United States Supreme Court has recognized that, in relying on statistical evidence, courts are not bound by scientific tests of significance.[29]

Courts have recognized that statistical evidence is unreliable when the sample size is small. The smaller the sample size, the greater the likelihood that the disparity complained of reflects chance

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evidence, the case may be distinguishable by its unique circumstances. (See paras. 4, 46, 47, 51, 249.)

26 Barbara Lindemann & Paul Grossman, *Employment Discrimination Law*, 3d ed. (Washington, D.C.: The Bureau of National Affairs, 1997) at 89-90 [Lindemann & Grossman].

27 Similarly, an observed disparity of two or three standard deviations is considered sufficient to rule out chance. The two standard deviations test is roughly comparable to the 0.05 level of statistical significance (*ibid.* at 91, 1731).

28 *Ibid*. at 1729-30. For example, a 10 percent level of significance (one chance in ten of the disparity occurring by chance) "*might* be acceptable" in place of the more stringent 5 percent level in the context of validity of job tests. *Watkins v. Scott Paper Co*., 530 F.2d 1159, 1187 n. 40 (5th Cir.) at 1730 [emphasis in original].

29 Michael J. Zimmer *et al.*, *Cases and Materials on Employment Discrimination*, 5th ed. (New York: Aspen Law & Business, 2000) at 257 [Zimmer]: "In *Bazemore* [*v. Friday*], the Court said, 'A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of evidence.' 478 U.S. 385, 400 (1986). However, the District of Columbia Circuit, in a case decided after *Bazemore*, stated that 'statistical evidence must meet the 5% significance level . . . for it alone to establish a prima facie case under Title VII.' *Palmer v. Schulz* (*Kissinger*), 815 F.2d 84 (D.C. Cir. 1987)."

rather than discriminatory practices.[30] Conversely, when the sample size is sufficiently large, a small disparity may be statistically significant but lack practical significance. To guard against a finding of adverse impact resulting from a disparity that is statistically significant but trivial in terms of practical effect, courts often look to see whether any difference in ratios is "substantial."[31]

An important index of substantial disparity is the "four-fifths rule" promulgated by the American government's Equal Employment Opportunity Commission (EEOC). This rule applies simple arithmetic to the difficult question of how much disparity is needed to establish adverse impact. It is outlined in the Uniform Guidelines on Employee Selection Procedures.

The "four-fifths rule" provides that a selection rate for any race, sex, or ethnic group that is less than four-fifths (or 80 percent) of the rate for the group with the highest rate will generally be regarded as evidence of adverse impact, while a greater than four-fifths rate generally will not. The guideline goes on to acknowledge that smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms. Further, it endorses the use of evidence concerning the impact of the selection procedure over a longer period of time,

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30 Lindemann & Grossman, *supra* note 26, at 1734. "If the sample size is marginal, sophisticated statistical techniques can be attempted to improve the level of statistical significance. If the sample size is too small because, for example, too few applicants took the test in question during the relevant time frame, plaintiffs should contend that data from earlier periods should be introduced for purposes of allowing a reasonable opportunity to show statistical significance, at least where the same selection criteria were used during those earlier periods" (*ibid.* at 1735).

31 *Ibid*. at 94. See also *Thomas* v. *Metroflight, Inc*., 814 F.2d 1506 at 1511 n. 4 (10th Cir. 1987): "*Hazelwood* [*v. U.S.*, 433 U.S. 299 (1977)] does not say that 'statistically significant' is 'significantly discriminatory' as used in *Dothard* [*supra* note 22]. Beyond a requirement of statistical significance, the Court may require in disparate impact cases that the disparity be 'substantial' as well."

where the evidence indicates adverse impact but is based on numbers too small to be reliable.[32]

The U.S. Supreme Court has found the EEOC testing guidelines entitled to "great deference."[33] Some lower courts have accepted this approach and applied the Uniform Guidelines quite rigidly.[34] However, when applied without additional evidence of statistical significance, the four-fifths rule has been criticized for failing to take into account differences in sample size and being prone to mislead when the sample size is small. Thus, some courts have used the four-fifths rule only as a starting point when assessing adverse impact of selection devices. In particular, courts have applied different

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[32] Code of Federal Regulations, Title 29, Volume 4, Chapter XIV--Equal Employment Opportunity Commission, Part 1607--Uniform Guidelines On Employee Selection Procedures (1978), Section 1607.4. D. Adverse impact and the "four-fifths rule":

> A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex, or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact.

[33] *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975) at 433-34 (quoting *Griggs*, *supra* note 19).

[34] Lindemann & Grossman, *supra* note 26 at 130.

techniques to analyze claims of adverse impact where the sample population is small.[35]

The four-fifths rule provides a simple and convenient method of demonstrating adverse impact. The rule offers a quantitative test to answer the question of whether there is substantial adverse impact. In some cases, the four-fifths rule has been applied without reference to sophisticated statistical techniques.[36] However, evidence is most persuasive when an observed disparity has been tested for both statistical significance using social science conventions and magnitude under the four-fifths rule.

C. A European approach to the degree of disparity needed to prove adverse impact

A recent ruling from the European Court of Justice (ECJ), applied by the British House of Lords, is notable because the statistical evidence there was considered to be at the borderline of sufficiency for demonstrating adverse impact. The case of *R. v. Sec. of State for Employment, Ex Parte Seymour and Perez*[37] concerns the right of equal pay under a European Community (EC) treaty. Compensation for unfair dismissal falls within the meaning of "pay" under the EC treaty. The relevant legislation established a two-year qualifying period for compensation for unfair dismissal. The evidence showed that, in 1985, only 68.9 percent of women, versus 77.4 percent of men, qualified. Over a period of seven years, from 1985-1991, the ratio of men and women who qualified was roughly 10:9 – for every ten men who qualified, only nine women did so.[38]

The House of Lords referred the following question to the ECJ prior to ruling:

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35 *Ibid.* at 132.

36 Notably, the U.S. Supreme Court decisions in disparate impact cases have not involved the use of sophisticated statistical techniques (Zimmer, *supra* note 29 at 412).

37 [2000] 1 All E.R. 857 [*Seymour*].

38 *Ibid*. at 870-71.

> What is the Legal test for establishing whether a measure adopted by a Member State has such a degree of disparate effect as between men and women as to amount to indirect discrimination for the purposes of Article 119 of the EC Treaty unless shown to be based on objectively justified factors other than sex?[39]

The ECJ answered that a disparate effect will amount to indirect sex discrimination if the statistics indicate that a considerably smaller percentage of women than men are able to fulfil the requirement imposed by the measure.[40] They then ruled that the evidence of 68.9 percent of women versus 77.4 percent of men fulfilling the requirement in 1985 did not show a "considerably smaller percentage" of women able to fulfil the requirement. However, they indicated that discrimination could still be established if the statistical evidence revealed a persistent and relatively constant disparity over a long period of time.[41] On this basis, a majority of the House of Lords ruled that a history of seven years showing similar statistics demonstrated a persistent and relatively constant disparity, and that these figures established an adverse effect on women.[42]

D. *Prima facie* discrimination: different jurisdictions, similar approaches

In *Seymour*, the proportion of women who qualified in comparison with men was 89 percent in one year. The conclusion that this evidence alone did not establish adverse impact is consistent with the American four-fifths rule. The finding of adverse impact over a seven-year period could also be reached under the American approach, which allows for flexibility in the application of the four-

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39 *Ibid*. at 861.

40 *Ibid*. at 861-62: "[I]n order to establish whether a measure adopted by a member state has disparate effect as between men and women to such a degree as to amount to indirect discrimination . . . , the national court must verify whether the statistics available indicate that a considerably smaller percentage of women than men is able to fulfil the requirement imposed by the measure. If that is the case, there is indirect sex discrimination, unless that measure is justified by objective factors unrelated to any discrimination based on sex."

41 *Ibid*.

42 *Ibid*. at 871. The Court further held, at 875, that the measure was objectively justified, which resulted in the provision being upheld.

fifths rule, as long as differential treatment is statistically significant.[43]

In the Canadian case of *Meiorin*, the statistical disparity between men and women in pass rates for the aerobic fitness test is identified, although not analyzed. The evidence indicated that 65 percent to 70 percent of male applicants pass the test on their initial attempts, while only 35 percent of female applicants have similar success. This evidence shows a pass rate for women that is less than 55 percent that for men. Applying the four-fifths rule, this would be regarded as compelling evidence of adverse impact. Applying the European approach, there is no doubt that the statistics show a "considerably smaller percentage" of women able to fulfil the requirement.

A decision of a Canadian human rights tribunal, regarding a height requirement for employment as a pilot, uses terms similar to the American and European ones:

> Considerably more women than men were adversely affected by the Respondent's height policy. In this context, it may be said that the policy affected women "differently from" men (*semble*, *Griggs v. Duke Power Co.* . . .) The tribunal concludes therefore that the Complainants have established a *prima facie* case of discrimination based on sex.[44]

In a recent decision of the Federal Court of Canada, the four-fifths rule is cited in assessing the validity of an employment screening test, which was alleged to have an adverse effect on visible minorities. There was expert evidence in this case that the 80 percent rule has been widely accepted in the field of industrial organizational psychology in both the United States and Canada and has been used by the Canadian Public Service Commission since 1983. In this instance, the success rate of visible minorities was 83.8 percent. This was evidence that "by the standards of industrial organizational psychology in both the U.S. and Canada the adverse impact the test

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[43] *Ibid*. at 861. Sample size was not an issue in this case, since statistics covered the entire workforce.

[44] *Chapdelaine v. Air Canada* (1987), 9 C.H.R.R. D/4449; var'd 15 C.H.R.R. D/22 (CHRT T.D.).

might have on visible minorities was not at a level to challenge the validity of the test on this basis."[45]

Beatrice Vizkelety describes the statistical proof needed to prove discrimination in Canada this way:

> Statistical proof may be expected to involve the following calculations:
>
> a) the measure of the *actual treatment* of the minority;
> b) the *measure of the ideal* which serves as the point of comparison;
> c) the *summary measure* which describes the gap between the first two measures.[46]

While the precedents cited above require the gap to be "considerable," Vizkelety suggests that even if the extent of disparate effect is small, if it is shown that the rule is not necessary for the safe and efficient operation of the business, it should be set aside. She cites an American authority in support:

> Theoretically, when courts examine a particular practice, standard, or policy which has been challenged as a discrimination producing variable in the employment process, the permissible extent of the disparity should be very small. The fact that an employment practice has a relatively small impact upon the racial pattern of the work force is irrelevant if it does not arise from legitimate business necessity. Thus, the practice or policy, if unjustifiable as a business necessity, should be eradicated.[47]

In *Seymour*, the ECJ considered and rejected rival positions on the degree of disparate impact needed to establish indirect discrimination. The Equal Opportunities Commission participating in the litigation proposed a test by which "the existence of statistically significant" evidence is enough to establish disproportionate impact.[48] By selecting the "considerable" difference

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45 *Chopra v. Canada (Attorney General)*, 2005 FC 252 at para. 13.
46 *Vizkelety*, *supra* note 15 at 178 [emphasis in original].
47 *Ibid*. at 190.
48 *Seymour*, *supra* note 37 at 861.

approach, the ECJ required applicants to prove that the disparity was both significant and considerable.[49]

In Canada, as in Europe and America, statistically significant evidence that meets the four-fifths rule or the "considerable" difference test should be regarded as clear proof of adverse effect discrimination.[50] Those cases where the evidence establishes a lesser, but statistically significant, impact are ones where additional guidance is needed from Canadian courts to establish the degree of disparity needed to prove adverse effect discrimination and the factors that strengthen an adverse effect claim. For example, the persistence of the disparity over a period of time, the reliability of statistical significance based on sample size, and qualitative effects are likely factors to be considered in addition to the degree of disparity.

E. Unimpressive statistics do not preclude a successful claim

While statistics are useful in proving the *prima facie* case, they should not be applied simplistically to rule out discrimination. Statistics can only address the quantitative aspect of discrimination. In some cases where the quantitative dimension is not compelling, the qualitative aspect may prove the case.[51]

An example of the difficulties inherent in statistical proof is found in the case of *London Underground Ltd. v. Edwards (No. 2)*.[52] In this case, Susan Edwards had worked as a train operator for eight years, including four years after the birth of her child. She was able, by swapping shifts with colleagues, to work a shift pattern in which she could accommodate her domestic and childcare arrangements.

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[49] A majority of the House of Lords concluded that the persistent and constant disparity observed in respect of the entire male and female labour forces of the country could not be dismissed as insignificant or inconsiderable. *Ibid.* at 861.

[50] "Statistically significant" is conventionally defined as a 5 percent level of significance, but this relatively stringent standard is not an absolute requirement (Lindemann & Grossman, *supra* note 26 at 1729-30 n. 194).

[51] See Sheppard, *supra* note 8 at para. 26 (citing D. Pothier).

[52] [1999] I.C.R. 494 (C.A.) [*Edwards*].

In 1991, London Underground introduced a new shift work system to reduce costs and increase efficiency. The Employment Appeal Tribunal found as a fact that it was necessary for Susan to work during the day because she had sole care of her child, and accepted that she was unable to comply with the employer's requirement under the new rostering arrangement. The issue of whether a considerably smaller proportion of female operators than male operators could comply with the requirement was considered on appeal to the Court of Appeal.[53]

For the purpose of comparing the proportion of women and men employees who could comply with the new rostering system, the pool was that of all train operators employed when the new system was introduced and to whom the new arrangement applied. Of 2,023 male operators, 100 percent could comply with the employer's requirement under the new system. Twenty-one operators were female, only one of whom (Ms. Edwards) could not comply. Statistically, 95.2 percent of female operators could comply.[54] Out of context, this quantitative evidence is not compelling. However, the Court upheld the Tribunal's decision that, taking into account the number of male operators as compared to the very few female operators, and the fact that females are more likely to be single parents and caring for a child than males, it was clear that this was a requirement with which a "considerably smaller" proportion of females could comply. While the Court of Appeal did not find it appropriate to lay down a rule of thumb as to what is "considerably smaller," in this case a 5 percent difference was enough.[55]

The *Edwards* case was governed by a statutory provision requiring proof that the proportion of women who can comply with a requirement is considerably smaller than the proportion of men who can comply with it.[56] Canadian law permits a more nuanced

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53 *Ibid*. at 497-98.

54 *Ibid*. at 500-501.

55 *Ibid*. at 506-507.

56 *Ibid*. at 498. In October 2001, subsequent to the *Edwards* decision, a new, somewhat broader, statutory definition of indirect discrimination relating to employment cases was introduced in s. 1(2)(b) and s. 3(1)(b) of the *Sex Dis-*

analysis of Ms. Edward's situation based on intersecting grounds of discrimination, namely sex and family status. An alternative perspective is identified in a further discussion of *Edwards* below.

IV. GROUNDS OF DISCRIMINATION: PROVING DISCRIMINATION WHEN DIFFERENTIAL TREATMENT TARGETS A NON-PROTECTED GROUP

The adverse impact cases that seem most difficult, conceptually, are those involving differential treatment of a group that is not expressly protected by anti-discrimination provisions. One example would be differential treatment of domestic workers. This differential treatment would not directly implicate any of the prohibited grounds of discrimination in anti-discrimination law. However, once we document the gender and race composition of the group, we can identify potential problems of sex and race discrimination.[57]

A. The non-protected group of part-time employees

Examples of litigation involving differential treatment of a non-protected group are found in European precedents on the legal rights of part-time employees. [58] In the United Kingdom and Europe, as in North America, the category of "part-time employees" has not historically been protected in anti-discrimination law. However, it is

crimination Act (SDA). However, under the SDA, the claimant proceeds with either a sex discrimination claim, establishing a detriment to a considerably larger proportion of women than men, or a marital discrimination claim, establishing a detriment to a considerably larger proportion of married women than single women. To show marital discrimination, the comparison must be made between married and unmarried women, or married and unmarried men, not all married persons compared with all unmarried persons. Online: Equal Opportunities Commission Website for Legal Advisers <http://www.eoc-law.org.uk/>.

57 Sheppard, *supra* note 8 at para. 30.

58 The European law cited is drawn from the European Community or its predecessor, the European Economic Community [E.E.C.], and includes cases from the United Kingdom.

well established in European law that discrimination against part-time employees can amount to indirect discrimination against women. "[T]he fact that women continue to bear primary responsibility for childcare means that considerably more women than men work part-time. A condition which makes full time working a prerequisite for access to a range of employment related benefits, such as pensions, protection against unfair dismissal, and equal hourly pay has been held to be indirectly discriminatory."[59]

A leading precedent illustrating this principle is the *Rinner-Kuehn* case.[60] This decision held that German legislation permitting restrictions on the right of part-time workers to sick pay contravened the E.E.C. Treaty regarding equal pay for men and women, considering that a great majority of part-time workers were women. The ECJ ruled:

> [T]he E.E.C. Treaty must be interpreted as precluding national legislation which permits employers to exclude employees whose normal working hours do not exceed 10 hours a week or 45 hours a month from the continued payment of wages in the event of illness, if that measure affects a far greater number of women than men, unless the member state can show that the legislation concerned is justified by objective factors unrelated to any discrimination on grounds of sex.[61]

Another example, this one from the United Kingdom, is the case of *R. v. Secretary of State for Employment ex parte EOC*.[62] At issue in this case were conditions in British law governing the right not to be unfairly dismissed, the right to compensation for unfair dismissal, and the right to statutory redundancy pay. The legislation established the following qualifying periods for entitlement:

1. Two years of continuous employment for employees who work for sixteen hours or more per week.

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[59] Sandra Fredman, *Discrimination Law* (Oxford: Oxford University Press, 2002) at 108.

[60] *Rinner-Kuehn v. F.W.W. Spezial-Gebaudereinigung GmbH. & Co. K.G.* [1989] E.C.R. 2743 [*Rinner-Kuehn*].

[61] *Ibid*. at para. 16.

[62] [1995] 1 AC 1 (House of Lords).

2. Five years of continuous employment for employees who work between eight and sixteen hours or per week.

Employees working fewer than eight hours per week would not qualify for the rights in question.[63]

In this decision, the principle of indirect discrimination involving part-time employees is treated as self-evident; the issue is not whether there was indirect discrimination, but rather whether the government had succeeded in objectively justifying the discrimination:

> It is common ground that the great majority of employees who work for more than 16 hours a week are men, and that the great majority of those who work for less than 16 hours a week are women, so that the provisions in question result in an indirect discrimination against women.[64]

In concluding that the government had failed to establish objective justification, the House of Lords cited the *Rinner-Kuehn* precedent.

These cases involving the non-protected group of part-time employees are ones where proof of discrimination appears relatively straightforward. It is obvious that part-time employees were experiencing differential treatment. Statistics showing that the great majority of the part-time employees were women readily established that differential treatment of this non-protected group adversely affected women.

Where the differential treatment of a non-protected group is apparent, the central issue is whether group members sharing a protected characteristic (such as sex) are disproportionately impacted relative to a comparator group (such as men). In the European Community, in the context of sex discrimination, "[a]ccording to settled case law, indirect discrimination arises where a national measure, although formulated in neutral terms, works to the

[63] *Ibid*. at 23.
[64] *Ibid*. at 31.

disadvantage of far more women than men."[65] In a case of sex discrimination, proof may be as simple as showing that a significant majority of the disadvantaged non-protected group are women.[66] For example, if 67 percent of the disadvantaged group were women, the women affected would outnumber men by two-to-one; surely this would meet the criterion of far more women than men being affected.

B. The non-protected group of single parents

In the *Edwards* decision, proving that the proportion of women able to comply with the requirement was considerably smaller than the proportion of men able to comply was characterized as an evidential and statistical nightmare. A case comment indicates that it took Susan Edwards two trips to both the Industrial Tribunal and the Employment Appeal Tribunal and one to the Court of Appeal to establish that the change in shift pattern for train operators discriminated against her.[67] The approach of examining the proportion of men and women in a disadvantaged non-protected group provides an alternate perspective on adverse effect discrimination. What if the *Edwards* case were framed by focusing on the non-protected group of single parents?

The Industrial Tribunal found that, as a single parent, Ms. Edwards was "torn between the need to do her job and the need to care for her child," and the new rostering arrangements simply did not meet her needs.[68] When introducing the new shift work system, the employer had contemplated a scheme called the "Single Parent Link," which was designed to deal with precisely the kind of difficulties faced by Ms. Edwards in making child care

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65 *Gerster v. Freistaat Bayern* (1997), ECJ 2/10/97 Case C-1/95 at para. 30 [*Gerster*].

66 The composition of the comparator group is also relevant, in that women could not establish discrimination by comparing their group to another group in which women are equally predominant.

67 "Single Parents and Shift Work" (1998) July:24 Thompsons Labour and European Law Review, online: Thompsons Solicitors <http://www.thompsons.law.co.uk/ltext/l0350006.htm#06>.

68 Edwards, *supra* note 52 at 498.

arrangements. This proposal was rejected by the trade unions. The court found that this recognition by the employer of the likely adverse impact of the proposed rostering arrangements on workers who were single parents afforded support for the industrial tribunal's view that the effect of the rostering arrangements, unalleviated by such a scheme, was discriminatory in effect.[69]

The Industrial Tribunal took into account statistics showing that among single parents, ten times more women than men had the care of a child.[70] Taking the approach used in the part-time employee cases, if it is recognized that single parents are impacted adversely by a new shift work system, then the fact that far more women than men experience this adverse impact should be enough to establish *prima facie* sex discrimination.[71]

C. A Canadian approach to non-protected groups in the context of pay equity

Two of the EC cases cited above address the principle that men and women should receive equal pay for equal work. Achievement of pay equity involves considerations of gender predominance in comparable occupations or job classifications.[72] A Canadian approach to differential treatment of an occupational group can be found in legislation and cases associated with pay equity.

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69 *Ibid.* at 506.

70 *Ibid.* at 505.

71 As noted above, the *Edwards* case was governed by a statutory provision requiring proof that the proportion of women who can comply with a requirement is considerably smaller than the proportion of men who can comply with it (*ibid.* at 498). Moreover, proof that single parents as a group are adversely affected might not be straightforward. Nevertheless, this alternate perspective helps justify the determination of discrimination in the face of less than compelling evidence in the statutory approach.

72 In some jurisdictions where pay equity complaints are dealt with on an individual basis, gender predominance is not an issue. In Canada, however, achievement of pay equity involves identification of female-predominant and male-predominant jobs in the context of a defined employer, followed by job evaluation which measures skill, effort, responsibility and working conditions. See Harish C. Jain *et al.*, *Employment Equity and Affirmative Action: An International Comparison* (New York: Armonk, 2003) at 142.

When one occupational group is paid at a lower rate than another group performing work of equal value, the gender composition of the occupational groups may be examined to determine whether sex discrimination is occurring. Wage discrimination between men and women is prohibited by section 11 of the *Canadian Human Rights Act*.[73] Section 27(2) of the *Act* authorizes the Canadian Human Rights Commission to pass guidelines interpreting the provisions of the *Act*. The *Guidelines* passed under this section provide that a complainant alleging different wages must identify herself with a group predominantly of one sex, and make a comparison with a group predominantly of the other sex. The *Guidelines* then define "predominantly of one sex" as follows:

> 13. For the purpose of section 12, an occupational group is composed predominantly of one sex where the number of members of that sex constituted, for the year immediately preceding the day on which the complaint is filed, at least
>
> (a) 70 per cent of the occupational group, if the group has less than 100 members;
>
> (b) 60 per cent of the occupational group, if the group has from 100 to 500 members; and
>
> (c) 55 per cent of the occupational group, if the group has more than 500 members.[74]

Thus, the *Guidelines* suggest that when the sample is sufficiently large, evidence that 55 percent of the members of a disadvantaged non-protected group share a protected characteristic may provide a basis for establishing discrimination.

The principle of comparing female dominated work classifications with male dominated ones is not limited to cases under the *Canadian Human Rights Act*. In the recent case of *Newfoundland (Treasury Board) v. N.A.P.E.*,[75] the Supreme Court of Canada considered provincial legislation that had the effect of repudiating part of a Pay Equity Agreement between the government and major public sector unions. The impugned legislation, the

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[73] R.S.C. 1985, c. H-6.

[74] *Equal Wages Guidelines, 1986*, SOR/86-1082 [*Guidelines*].

[75] 2004 SCC 66.

Public Sector Restraint Act,[76] eliminated any liability for amounts otherwise payable to the underpaid female hospital workers in respect of the three fiscal years ending 31 March 1991. The adverse impact of the legislation fell on "female dominated work classes." In considering the issue of discrimination, the court noted that the appropriate comparator group consists of men in male-dominated classifications performing work of equal value.[77] In this case, the court found the legislation discriminatory, but justifiable as a reasonable limit under section 1 of the *Charter*.

The definition of "predominantly of one sex" found in the *Guidelines* for the *Canadian Human Rights Act* reflects an interpretation consistent with social science convention in that, the smaller the group, the larger is the percentage required to establish predominance. In contexts other than pay equity, where clear guidelines will generally be lacking, this definition may provide a reference point for establishing that a group experiencing an adverse impact is dominated by individuals sharing a protected characteristic.

V. A CASE STUDY: CAN CANADIAN PART-TIME EMPLOYEES SUPPORT A SEX DISCRIMINATION CLAIM?

Criteria such as "predominantly of one sex" or "far more women than men" may provide inadequate guidance in complex cases where the non-protected group is more diverse and intersecting grounds are relied upon. However, such criteria are valuable in assessing evidence of discrimination in some non-protected group cases. The need for continued emphasis on basic principles is evident in a recent Canadian decision on adverse impact.

In the case of *Attorney General of Canada v. Kelly Lesiuk*, a mother employed part-time as a nurse alleged that an employment insurance eligibility rule discriminates on the basis of sex, or else on

[76] S.N.L. 1992, c. P-41.1.

[77] *Ibid*. at paras. 31, 42.

basis of intersecting grounds of sex and parental status.[78] A decision in favour of Ms. Lesiuk, rendered by Mr. Justice Sulhany sitting as an Umpire under the *Employment Insurance Act*, was reversed by the Federal Court of Appeal. Leave to appeal to the Supreme Court of Canada was denied.[79]

In 1996, when substantial program changes transformed Canadian unemployment insurance (UI) into employment insurance (EI), the minimum eligibility rule changed from a standard based on weeks of employment to one based on hours of employment. Before 1996, a part-time employee and a full-time one could each qualify for UI benefits by working twenty weeks. After the changes, a full-time worker could still qualify for benefits in twenty weeks or less, by meeting the new eligibility requirement of 700 hours. However a part-time employee in Manitoba working, for example, fifteen hours a week, would need over forty-five weeks of work to qualify for benefits. With an hours-based standard, it now takes a half-time worker twice as long to qualify for EI as a full-time one.[80]

That the EI eligibility rule places part-time employees at a significant disadvantage seems self-evident.[81] The negative effect on

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78 2003 FCA 3 [*Lesiuk*, 2003].

79 *Ibid.*, rev'g *In The Matter of the EMPLOYMENT INSURANCE ACT and In The Matter of a claim by KELLY LESIUK and In The Matter of an Appeal to an Umpire by the Claimant from a Decision by the Board of Referees given on November 19, 1998 at Winnipeg, Manitoba* (2001) CUB51142 [*Lesiuk*, 2001]. Application for leave to appeal to the Supreme Court of Canada dismissed, 17 July 2003.

80 *Lesiuk*, 2001, *ibid.* at paras. 14, 15, 32.

81 In a European case that is similar in principle, the negative effect on part-time employees is treated as self-evident. In *Gerster*, *supra* note 65, civil service promotions were based on merit and length of service. For the purpose of calculating length of service, periods during which the hours worked were between half and two-thirds of normal working hours were treated as equivalent to two-thirds for the purpose of calculating length of service (at para. 10). It was common ground that these provisions treated part-time employees less favourably than full-time employees, since the former accrued length of service more slowly, and therefore gained promotion later. In Mrs. Gerster's department, and in the Bavarian civil service generally, 87 percent of the part-time employees were women. The requirement that part-time employees complete a period of service more than one-third longer than that

part-time employees' eligibility for EI was confirmed in the 1999 Employment Insurance Coverage Survey. Of full-time workers who were potentially eligible for EI benefits (in other words, had recent insurable employment and did not quit without just cause), 88 percent were actually eligible (in other words, met the minimum eligibility requirement). Of part-time workers who were potentially eligible, only 52 percent were actually eligible. Thus, the eligibility disparity between part-time and full-time workers was a striking 36 percent.[82] Stated in the language of the four-fifths rule, the eligibility rate for part-time workers is 59 percent that of full-time workers. This rate being considerably less than 80 percent, it is obvious that part-time workers are experiencing differential treatment as compared with full-time workers.

Once the differential treatment of part-time workers is established, the question becomes, "Are group members sharing a protected characteristic (sex) disproportionately impacted relative to a comparator group (men)?" The statistics show that approximately 70 percent of part-time workers in Canada are women.[83] Given that this statistic covers no small group, but rather the entire population of employees in Canada, it far exceeds the 55 percent threshold in the "predominantly of one sex" criterion discussed above. It almost certainly also meets the European criterion of "far more women than men" affected. As noted above, when the group that is adversely affected comprises twice as many women as men, it seems apparent that sex discrimination should be recognized.

So, how did this issue of adverse effect discrimination fare in the courts? In the Federal Court, the Umpire found that "the eligibility requirements demean the essential human dignity of women who predominate in the part-time labour force because they must work for longer periods than full-time workers in order to demonstrate

completed by a full-time employee in order to have the same chance of promotion was regarded as an infringement of the principle of equal treatment for men and women as regards access to employment (unless justified by objective factors unrelated to any discrimination based on sex) (at para. 41).

82 *Ibid*. at para. 39.

83 *Ibid*. at para. 56.

their work force commitment."[84] The Umpire recognized that the negative effects of the EI eligibility rule are disproportionately experienced by women, citing the following evidence: "Women represent 69.7% of part-time workers in Canada; and, among adult wage earners (age 25 to 54), women constitute an overwhelming majority (over 80%) of part-time workers."[85]

Thus, the Umpire answered in the affirmative the two questions central to establishing the *prima facie* case of adverse effect discrimination, namely:

1. Do part-time workers experience adverse effects as compared with full-time workers?
2. Are part-time workers who share a protected characteristic disproportionately impacted relative to their comparator group?

In the Canadian Federal Court of Appeal, differential treatment was recognized, but with doubts about the causal relationship between the denial of benefits and the alleged characteristics.[86] The Court characterized the difficulty as a dearth of probative statistical evidence. "The evidence shows that there is no group which is uniformly adversely affected. In addition, it shows that the new EI system has led to a net increase in eligibility and that the numbers of workers who would have qualified under the old system and failed to qualify under the new system is small."[87]

The approach to the evidence taken by the Federal Court of Appeal is problematic because issues irrelevant to proof of adverse impact are being considered. Regardless of whether the new EI system led to a net increase in eligibility as compared with the old UI system, if one group is qualifying for EI benefits with far more ease than another, differential treatment is occurring. Regarding evidence that no group is uniformly affected, the Court must have

84 *Ibid*. at para. 64.
85 *Ibid*. at para. 56.
86 *Lesiuk*, 2003, *supra* note 78 at para. 33.
87 *Ibid*. at para. 32.

been assessing whether any *protected* group is uniformly affected. (The non-protected group of part-time workers is in fact uniformly affected by having to work for longer periods than full-time workers in order to demonstrate their work force commitment and qualify for benefits.) An assessment of whether a protected group is uniformly affected is not relevant to establishing discrimination. To illustrate, in *Dothard*, it would have been unproductive to assess whether women are uniformly affected by a weight requirement which most of them could pass. To similar effect, the Supreme Court of Canada has stated, "If a finding of discrimination required that every individual in the affected group be treated identically, legislative protection against discrimination would be of little or no value. It is rare that a discriminatory action is so bluntly expressed as to treat all members of the relevant group identically."[88]

The two central questions affirmatively answered by the Umpire are not directly addressed in the Federal Court of Appeal judgment. Having found, without great conviction, that there is differential treatment, the Court goes on to rule that this does not amount to discrimination under section 15(1) of the *Charter*, and that it would, in any case, be justifiable as a reasonable limit under section 1 of the *Charter*.[89]

VI. DIGNITY CONSIDERATIONS UNDER SECTION 15(1) OF THE *CHARTER*

Ultimately, in *Lesiuk*,[90] both the Umpire and the Federal Court of Appeal concluded that there was differential treatment based on a protected characteristic. Adverse impact was proved. Under the equality provision of the *Charter*, however, proof of adverse impact does not necessarily establish discrimination, even when the differential treatment is associated with an enumerated or analogous ground of discrimination. A final step remains – to determine whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. This

88 *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252 at 1288-89.
89 *Lesiuk*, 2003, *supra* note 78 at paras. 51-52.
90 *Ibid*.

step requires a contextual determination that a challenged form of differential treatment violates the purpose of section 15(1) by violating human dignity.

In *Lesiuk*, the Federal Court of Appeal found that the claimant had not discharged her onus of establishing that her human dignity had been demeaned.[91] Thus, discrimination was not established.

Does the human dignity approach to discrimination leave part-time workers in Canada more vulnerable to discrimination than their European counterparts? Is the consideration of human dignity susceptible to an element of subjectivity or "intuition"[92] that might cause a different panel of judges to respond differently?

Whatever the answers to these questions, two points are salient. First, the necessity of proving a violation of human dignity in no way diminishes the challenge of establishing adverse impact, and the vital importance of a clear understanding of the fundamental principles of discrimination. Second, the Supreme Court has recognized the potential violation of dignity inherent in the circumstances of adverse effect discrimination. In the *Law* decision, which sets out the "human dignity" framework for section 15(1) equality analysis, the Supreme Court states:

> [I]n practice in some cases, it may well be duplicative to determine first whether differential treatment exists, and then to determine whether the purpose of s. 15(1) has been brought into play. . . . [T]his will particularly be the case where adverse effects discrimination is at issue, since the analysis of whether the claimant's difference has been effectively ignored by an impugned law will usually bring into play issues of human dignity.[93]

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91 *Lesiuk*, 2003, *supra* note 78 at para. 33.

92 *Bear v. Canada (Attorney General) (C.A.)*, 2003 FCA 40 at para. 23, per Strayer J.A.: It is apparent from reading Supreme Court jurisprudence that this "objective" or "subjective-objective" analysis, in the absence of evidence (which is usually lacking) can be confidently carried out by a court largely on the strength of the judge's intuition.

93 *Gerster*, *supra* note 4 at para. 85.

VII. CONCLUSION

The nuances of proving discrimination under the human dignity approach are undoubtedly complex. In a claim of adverse effect discrimination, however, the preliminary hurdle of proving adverse impact also presents significant challenges. Where the evidence involves selection rates or pass/fail rates, adverse impact may be established by comparing the rate for the group to which the claimant belongs with the "ideal" rate or the "highest rate" of selection. Where the selection rate for the claimant's group is less than 80 percent of the highest rate and small sample size is not at issue, the evidence of adverse impact is compelling. Smaller, but statistically significant, disparities in selection rates may also constitute adverse impact.

A second step is then needed to establish that group members sharing a protected characteristic are disproportionately impacted relative to their comparator. In the case of sex discrimination, where the group experiencing adverse impact includes far more women than men, evidence of discrimination is compelling.

These principles provide possible answers to the questions posed at the beginning of this article. Founded in precedents from several jurisdictions, these principles should be equally valid in Canadian law. However, further guidance from Canadian courts is needed to elucidate the Canadian approach to proof of adverse effect discrimination.

THE DANGER OF FIGHTING MONSTERS: ADDRESSING THE HIDDEN HARMS OF CHILD PORNOGRAPHY LAW

Robert J. Danay*

This article seeks to expose and address some of the counter-intuitive harms that are currently being wrought by the operation of both Canadian and American child pornography laws. The author explores the way in which these laws serve to perpetuate the sexualization of children in society, and examines the myth of the "salivating pedophile" upon which the law is based. The author also considers the impact of zealous efforts to suppress child pornography on rights of freedom of expression, as well as their over-shadowing effect with respect to other pressing social concerns. In light of these concerns, he proposes several recommendations for reform of the current pornography law. The author suggests that such reforms would criminalize actual harm to children rather than anachronistic notions of "moral corruption" that currently animate child pornography legislation.

Cet article cherche à présenter et régler certains des torts contre-intuitifs qui sont actuellement amenés par les lois sur la pornographie juvénile au Canada et aux États-Unis. L'auteur examine comment ces lois servent à perpétuer la sexualisation des enfants dans la société, et étude le mythe du « pédophile salivant » dont la loi s'inspire. L'auteur examine aussi l'impact de l'effort diligent fait pour supprimer la pornographie juvénile sur les droits de liberté et d'expression ainsi que leur effet d'éclipse par rapport à d'autres préoccupations sociales pressantes. Dans le contexte de ces préoccupations, il suggère plusieurs recommandations de réforme de la loi actuelle sur la pornographie. L'auteur laisse croire que ces réformes pourraient criminaliser le tort véritable aux enfants plutôt que les notions anachroniques de «corruption morale» qui animent actuellement les lois sur la pornographie.

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> "Whoever fights monsters should see to it that in the process he does not become a monster."
> -Friedrich W. Nietzsche[1]

> "Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burned women. It is the function of speech to free men from the bondage of irrational fears."
> -Justice L. Brandeis[2]

I. INTRODUCTION

It is undeniable that child sexual abuse is a topic that "evokes visceral disgust in all reasonable people."[3] Child pornography, as an element or by-product of such abuse, must evoke similar revulsion. Thus, it would seem perfectly reasonable that legislators seek to aggressively stamp out all forms of child pornography in an effort to eradicate the social blight that is child sexual abuse. According to popular reasoning, those who commit acts of child sexual abuse are not normal offenders, such as thieves, robbers, or drunk drivers. Those who commit child sexual abuse, and, by association, those who consume child pornography, are sexual *predators*. In a recent debate over new child pornography legislation in the House of Commons, Dr. Keith Martin, then a Canadian Alliance MP, argued:

> [A]nyone can make a mistake, that is part of being human. However the type of *creature* with whom we are dealing, to which this law applies, is a serial *predator* and sexual abuser of children. That puts these types of individuals in a class by themselves I would think.[4]

Given such rhetoric, there is little room left to suggest that a law aiming to protect innocent children from inhuman predatory sexual "creatures" is not also inherently worthwhile and laudable. Fol-

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1 Friedrich Nietzsche, *Beyond Good and Evil*, trans. by Walter Kaufmann (New York: Vintage Books, 1989) at 89.

2 *Whitney* v. *California*, 274 U.S. 357, 376 (1927) (Brandeis J., concurring).

3 Bruce Ryder, "The Harms of Child Pornography Law" (2003) 36 Univ. of British Columbia Law Rev. 101 at 10 [Ryder].

4 *House of Commons Debates*, 138, 51 (3 February 2003) at 3056 (Keith Martin) [emphasis added].

lowing the logic of this rhetoric leads to framing those who dare to oppose the strictest regulation of child pornography as hopelessly misguided libertarians or pedophiles, or both. Demonstrating this reasoning, Andrew Vachss, a lawyer (and crime fiction author) representing abused children, has argued: "In truth, when it comes to child pornography, any discussion of censorship is a sham, typical of the sleight of hand used by organized pedophiles as part of their ongoing attempt to raise their sexual predations to the level of civil rights."[5] I would like to suggest that this sort of inflammatory rhetoric and reasoning is based on hysterical misinformation and has masked some of the real harms that stem from our current child pornography prohibitions. I would also like to challenge the logic traditionally employed by those arguing in favour of progressively harsher penalties for increasingly trivial "pedophilic" acts. If left unchecked, the drumbeat of increased criminal sanctions in the area of child pornography law may, in addition to other notable harms, actually serve to intensify our society's current obsession with sexualized children, and thereby reinforce the very blight the law is attempting to eradicate.

In the first part of this article, I explore the way in which child pornography laws serve to perpetuate the already-rampant sexualization of children in our society. I also examine how the law is rooted in the myth of the "salivating pedophile," the origins of which can be traced back to Victorian England. In part two, I detail the degree to which pressing social concerns, particularly those involving non-sexual child abuse and neglect, are overshadowed and ignored when we place a disproportionate emphasis on the suppression of child pornography. In part three, I discuss the way in which the hysteria motivating our aggressive stance on child pornography threatens to devastate our constitutionally enshrined freedoms of expression, with demonstrably destructive effects upon fields as disparate as art, literature, journalism, and medicine. In the final part of the article, I consider the fate of child pornography law in light of its attendant harms and propose several reforms that, in concert, might serve to mitigate the damage caused by its operation

[5] "Age of Innocence" *The [London] Guardian* (17 April 1994), 14.

in practice. The focus of these recommendations is on the criminalization of actual harm to children rather than the anachronistic notions of "moral corruption" that currently animate much of the child pornography legislation.

II. CHILD PORNOGRAPHY LAW'S HARMFUL EFFECTS

A. The Perpetuation of Pernicious Discourse

The first of the undesirable effects stemming from our current child pornography legal regime is the law's contribution to the sexualization of children. In "The Perverse Law of Child Pornography," Amy Adler sets out this compelling argument:

> [T]hese laws, intended to protect children from sexual exploitation, threaten to reinforce the very problem they attack. The legal tool that we designed to liberate children from sexual abuse threatens to enslave us all, by constructing a world in which we are enthralled – anguished, enticed, bombarded – by the spectacle of the sexual child.[6]

As I will show, it is indeed patent that a criminal trial concerning child pornography involves a public display wherein the image of the child as a sexual creature is exhibited and reinforced, even though it is being condemned in the process.

Both in the United States and Canada, the process of prosecuting child pornography offences entails increasingly involved forays into a prurient realm in which the child is the central object of interest. According to Adler, child pornography cases require the courts to take on the *gaze of the pedophile* in order to root out pictures of children that harbor secret pedophilic appeal. The growth of child pornography law has opened up a whole arena for the elaborate exploration of children as sexual creatures."[7] No one would argue that the courts are intentionally endorsing the notion that children are sexual creatures, but the fact remains that "even when a child is pictured as a sexual victim rather than a sexual siren, the child is still

[6] (2001) 101 Columbia Law Rev. 209 at 210.

[7] *Ibid*. at 213 [emphasis added].

pictured as sexual."[8] As I discuss further below, the sexualization of children through criminal law proceedings is all the more disquieting when the general discursive capacity of the law, as articulated by scholars such as Carol Smart,[9] is taken into account. I will now set out some concrete examples from recent case law and legislation in order to demonstrate the existence of this phenomenon.

In the United States, the definition of "child pornography" has undergone considerable expansion in an effort to snuff out all materials that may hold some arousing appeal for pedophiles (or potential pedophiles). For example, under the federal *Child Protection Act*,[10] the use of a child in a "sexual performance" is prohibited. A "sexual performance" includes not only "intercourse, sexual bestiality, masturbation, sado-masochistic abuse" but also any "lascivious exhibition of the genitals." The various attempts at judicially defining the term "lascivious" reveal the extent to which courts have, like a deer caught in headlights, become locked into the "pedophilic gaze." For example, in *United States v. Knox* (1994), the Third Circuit Court of Appeals held that a depiction could constitute a "lascivious exhibition of the genitals" *even if a child is wearing clothes*.[11] In that case, the accused was in possession of videotapes that zoomed in on the genital areas of clothed girls. The court's analysis on this point is instructive: "in several sequences, the minor subjects, clad only in very tight leotards, panties, or bathing suits, were shown specifically spreading or extending their legs to make their genital and pubic region entirely visible to the viewer. In some of these poses, the child subject was shown dancing or gyrating in a fashion indicative of adult sexual relations."[12] By engaging in such an analysis, the Court in *Knox* required judges in future cases to carefully, explicitly and publicly scrutinize the genital and pubic regions of clothed minors in an effort to reveal the images' sexually

8 *Ibid.*

9 For example, see Carol Smart, *Feminism and the Power of Law* (London: Routledge, 1989).

10 Pub. L. No. 98-292, 98 Stat. 204 at 205 (1984) (codified and amended at 18 U.S.C. 2253 (1994)).

11 32 F.3d 733 (3rd Cir. 1994) at 744 [*Knox*].

12 Ibid. at 747.

stimulating nature. In cases such as *Knox*, courts basically put the "sexual child" on public display, while simultaneously condemning those who view children in such a manner.

In *Knox*, the court was applying a test for determining whether materials were "lascivious" that was originally set forth in *United States v. Dost* (1986).[13] This test requires a court to analyze the following six factors:

1. whether the focal point of the visual depiction is on the child's genitalia or pubic area;
2. whether the setting of the visual depiction is sexually suggestive, i.e., in a place or pose generally associated with sexual activity;
3. whether the child is depicted in an unnatural pose, or in inappropriate attire, considering the age of the child;
4. whether the child is fully or partially clothed, or nude;
5. whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and,
6. whether the visual depiction is intended or designed to elicit a sexual response in the viewer.[14]

The application of these factors, as in *Knox*, necessitates a drawn out analysis of materials that most people would not, in the past, have considered obscene or even sexual in nature. Through such analyses, police, judges, lawyers, and, ultimately, members of the public are forced to closely inspect increasingly innocuous images of children (and children generally) to determine whether the depicted children might be acting in a sexual manner. When considered in this light, it is hard to deny that courts are getting caught up in some sort of intense revulsion and fascination with sexualized children. Through cases such as *Knox* and *Dost*, American courts have allowed themselves to become unwitting cultural conduits and amplifiers of the pernicious notion that children are sexual objects.

In an effort to condemn all materials that might hold some special inciting effect upon alleged pedophiles, the judicial pedophilic gaze is extending to materials that are increasingly mundane. This trend

[13] *United States* v. *Dost*, 636 F. Supp. 828 (S.D. Cal. 1986) [*Dost*].
[14] *Ibid.* at 832.

is all the more distressing given the evidence of certain professed pedophiles who claim to *prefer* more innocent representations of children.[15] For these people, it may be the very "sexual naïvete" of the depicted children that is arousing. For example, a recent survey involving members of the North American Man Boy Love Association (NAMBLA), an organization for pedophiles, revealed that its members derived erotic stimulation through watching "children on network television, the Disney channel, and mainstream films."[16] The author of the study poignantly concluded that he "found NAMBLA's 'porn' and it was Hollywood."[17] If this is so, the judicial search for pedophilic material threatens to publicly sexualize all images of children no matter how innocuous the context.

In Canada, the prohibition against the simple possession of child pornography can be found at section 163.1 of the *Criminal Code.*[18] Under subsection (1), child pornography is defined as:

> (a) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years; [or]
>
> (b) any written material or visual representation that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act[.]

As with U.S. legislation, several elements of this section necessitate extended examinations of allegedly pornographic materials in a variety of problematic ways. Primarily, the determination of whether the materials depict the sexual organs or anal region of a person under eighteen *for a sexual purpose* requires

15 Adler, *supra* note 6 at 259.

16 See James R. Kincaid, *Erotic Innocence: The Culture of Child Molesting* (Durham, N.C.: Duke University Press, 1998) at 115 (citing Matthew Stadler) [Kincaid].

17 *Ibid.*

18 R.S.C. 1985, c. C-46 s. 163.1(1) [*Criminal Code*].

the judicial adoption of the "pedophilic gaze." In general, I would argue that the "sexual purpose" test imports a dangerously subjective element into prosecutions stemming from child pornography. As opposed to looking at the materials from some objective perspective, this test begs the court to examine impugned materials from the perspective of a pedophile in order to expose the motivation of the accused in collecting or possessing the materials in question. This exercise is patently ill-advised, as it explicitly requires courts to take on the "pedophilic gaze" when examining materials involving children.[19]

The case of *R. v. Nedelec* (2001)[20] illustrates the degree to which child pornography prosecutions under the *Criminal Code* oblige courts to publicly "expose" the sexual content of even the most innocent of childhood depictions. In *Nedelec*, the accused was charged with possession of child pornography in contravention of section 163.1 of the *Criminal Code*. The police seized from the possession of the accused, among other materials, a picture of a three- or four-year-old girl opening Christmas presents. In the picture the child was wearing a nightgown that was up around her waist. Her "genital area" was described by Shaw J. as being "prominent."[21] Shaw J. found that this picture, as with the many other pictures and

[19] It must be acknowledged that, in some respects, the very effort to draw a bright line around child pornography is itself inevitably subjective. That is, by its very nature, there is no uncontested and impartial definition of child pornography. However, this *definitional* question is distinct from the issue of whether the *judicial assessment* of child pornography will be conducted in a subjective or objective manner. An objective judicial analysis would seek to examine materials based on the obvious characteristics of the materials themselves (e.g., depictions of a child's sexual organs, or of sexual contact between adults and children, etc.). By contrast, the judicial assessment at issue in the "sexual purpose" test requires judges to interpret and predict the subjective *reason* for possession, and therefore the presumed effect of impugned materials on a pedophile. It is through this analysis that the definition of child pornography becomes perniciously subjective (in particular from the presumed point of view of a pedophile). Thus, though the definition of child pornography is itself inherently subjective, I would still argue that its judicial *assessment* ought not to be.

[20] *R.* v. *Nedelec*, [2001] B.C.J. No. 2243 (B.C.S.C.) (QL) [*Nedelec*].

[21] *Ibid.* at para. 10.

literature collected by the accused, was collected for a sexual purpose, and thus constituted child pornography. In so concluding, Shaw J. held that "[h]owever *innocently* the picture was taken, the clear and prominent depiction of the little girl's genital area is *startling*."[22] I contend that when, after careful examination of a family photo of a toddler opening up her Christmas presents, the court finds the depiction of the child's genitalia to be "startling," it is clearly locked into the pedophilic gaze. If it was truly "innocently taken," there should be nothing even remotely startling about a photograph in which a toddler's genitals happen to be exposed. By branding such materials as sexual in nature, the Court is publicly reinforcing the notion that children, even toddlers opening their Christmas presents, can reasonably be considered to be sexual objects.

The prosecution of simple possession of child pornography is unique in that it requires courts, as well as the participating police, attorneys and support staff, to repeatedly violate the very law that has been allegedly breached by the accused. As the rulings in *Knox*, *Dost*, and *Nedelec* demonstrate, prosecutions involving child pornography, by their very nature, necessitate an excruciatingly minute analysis of impugned materials in an effort to elucidate and catalogue any latent sexually charged qualities. If even "accessing" (as opposed to possessing or downloading) pornography is a crime,[23] then all prosecutions involving child pornography are tainted by repeated breaches of the law. To my knowledge, no other criminal prosecution produces this phenomenon. Courts need not engage in perjury, fraud, theft, or sexual assault in order to prosecute such offences.

If I were to confront members of the judiciary and Crown with the allegation that they had continually violated section 163.1 of the *Criminal Code* throughout the course of any given prosecution involving child pornography, they would likely argue that though

[22] *Ibid.* at para. 49 [emphasis added].

[23] It is an offence under s. 163.1(4.1) of the *Criminal Code* to merely "access" child pornography on one's computer.

this may be technically true, the examination of such materials is not harmful in the context of a court proceeding.[24] They might argue that it is the consumption of such materials by predatory sexual monsters that is pernicious. Normal, upstanding members of the judiciary, the bar, and even the general public are not at risk of sexually abusing children through exposure to morally corrupting child pornography. However, as I will now demonstrate, the distinction between the inhuman creature that is the pedophile and society at large is largely fallacious.

(i) Our Pedophilic Society and the Myth of the "Salivating Pedophile"

The notion that those whose sexual proclivities include an attraction to children are members of an insular and distinct sub-culture in society is simply false. It is clear to any rational observer that children, or adults with strikingly child-like appearances, are regularly and unabashedly displayed as sexual creatures in innumerable fora. This sexualization occurs through mass media, advertising, films, and music, and it pervades all elements of our social discourse. One need look no further than the musical craze of "boy and girl bands," and the likes of plainly sexualized children such as Britney Spears and Christina Aguilera for examples of this social trend. According to Judith Levine, author of *Harmful to Minors: The Perils of Protecting Children from Sex:*

> [W]e have arrived at a global capitalist economy that, despite all our tsk-tsking, finds sex exceedingly marketable and in which children and teens served as both sexual commodities (JonBenét Ramsey, Thai child

[24] Note that with the passage in July 2005 of Bill C-2, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 1st Sess., 38th Parl., 2004 [Bill C-2], possession of child pornography for a "legitimate purpose" relating to "the administration of justice" is expressly exculpated. This legislation, which has been passed but has not yet come into force, implicitly recognizes the odd reality that the very investigation and prosecution of child pornography possession constitutes at least a *prima facie* breach of s. 163.1 of the *Criminal Code.*

prostitutes) and consumers of sexual commodities (Barbie dolls, Britney Spears).[25]

At the same time as we bombard ourselves with popular images of sexualized children, we repeatedly and loudly decry the scourge of child sexual abuse and, by association, consumers of child pornography. Popular daytime talk shows such as Oprah Winfrey, Sally Jessy Raphael, Maury Povich, and countless others continually air special episodes exploring often-graphic accounts of child sexual abuse.[26] One particularly longstanding case of public and media fascination with (possible) child sexual abuse is that surrounding the pop singer Michael Jackson. In 2003, the documentary *Living With Michael Jackson*, detailing the singer's ongoing (and possibly sexual) relationships with young boys, was viewed, reviewed and widely discussed by worldwide audiences of unprecedented proportions.[27] The apparently inexhaustible public thirst for details about the pop singer's alleged sexual improprieties with children was further displayed by the rabid coverage surrounding Mr. Jackson's recent molestation trial.[28] The trial, which involved detailed testimony by various individuals claiming to have witnessed Jackson showering or fondling young boys, as well as testimony from children having claimed to have been molested by the singer, has been described as "a spectacle and a media circus, attracting a queasily obsessive degree of public attention."[29] It would not thus be an understatement to claim that we, as a society, have a more than keen interest in the twin subjects of sex and children. At the same time as we enthusiastically lap up a barrage of images of

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[25] (Minneapolis: University of Minnesota Press, 2002) at 4.

[26] See Kincaid, *supra* note 16 at 2.

[27] See "Mixed U.S. Reaction to Jackson Interview," online: BBC News Homepage <http://news.bbc.co.uk/1/hi/entertainment/tv_and_radio/2735315.stm>.

[28] For example, "some 2,000 journalists from more than 30 countries" attended the Santa Barbara County courthouse on 13 June 2005 to report on the rendering of the jury's verdict in the Jackson case. See Christopher Parkes, "Curtain Falls on Media Circus As Jury Finds Jackson Not Guilty" *Financial Times* (14 June 2005), online: <http://news.ft.com/cms/s/7a30e812-dc70-11d9-819f-00000e2511c8.html>.

[29] Andrew Gumbel, "Michael Jackson's Trial Is As Weird As He Is" *The Sunday Independent* (8 May 2005), online: <http://www.sundayindependent.co.za/index.php?fArticleId=2511936&fSectionId=1084&fSetId=>.

sexualized children, and any media stories relating to sex involving children, we condemn the pedophile and the viewer of child pornography in the most vitriolic of terms.[30]

The legal process of child pornography prosecution has become an integral element of a cultural fascination with sexuality and children. According to Richard Kincaid, author of *Erotic Innocence: The Culture of Child Molesting*:

> In the case of child molesting and its culturally approved narratives, we have stories that allow us a hard-core righteous prurience; it's a scapegoating exercise we have come to depend on. Through these stories of what monsters are doing to children, we find ourselves forced (permitted) to speak of just what it is that they are doing; *we take a good, long look at what they are doing*. . . . We reject this monstrous activity with such automatic indignation that the *indignation comes to seem almost like pleasure*.[31]

This judicial fascination with the graphic details of child pornography is not an academic fantasy that Kincaid has conjured up for the purposes of supporting his thesis. For example, at a recent

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[30] For an excellent Canadian example of this phenomenon, see the coverage relating to the sentencing of Michael Briere, who pleaded guilty to sexually assaulting and murdering ten-year-old Holly Jones (apparently after having downloaded child pornography). One particularly telling example is *The Globe and Mail* reporter Jan Wong's vivid description of her attempt at finding child pornography on the Internet. Wong's account of her descent into "cyber-hell" included graphic descriptions of various pornographic sites that she managed to track down:

> The photos were amateurish and badly lit. They appeared to be taken in ordinary homes, a rumpled living room, a cheaply tiled bathroom. a sunny back yard. One terrible photo showed a little girl, maybe six years old, lying on a couch, naked from the waist down. A man, completely naked, was touching her vagina with his hand. He could have been her father.
>
> I clicked on that photo. . . .

Jan Wong, "A Journey into Depraved Cyberspace" *The Globe and Mail* (19 June 2004) A8.

[31] Kincaid, *supra* note 16 at 7 [emphasis added].

sentencing hearing for an individual convicted of possessing child pornography, Giesbrecht A.C.J. described some of the impugned materials as follows:

> [A] crying toddler is shown gagging on a man's sperm. A little girl is shown being mounted by a German Shepherd. Children are shown masturbating each other. Children are shown in bondage. An adult male is seen forcing his penis into a child's mouth, and then ejaculating in her mouth. The toddler is heard crying "No, No." Another picture shows the rape of a handcuffed and hooded child. Perhaps the most poignant scene, and one that will stay in my mind forever, is the image of an adult male ejaculating into the vagina of a child. The child has a soother in her mouth.[32]

This excerpt demonstrates, in stark and disturbing terms, the way in which the vivid judicial condemnation of hard-core pornography can become virtually indistinguishable from the impugned lascivious materials themselves.

An even more recent example of judicial fascination with the graphic details of materials involving sex with children is that of the Ontario Court of Appeal in *R v. Beattie* (2005).[33] The *Beattie* case was concerned with the acquittal of an individual charged with the possession of child pornography. The materials at issue were a series of fictional stories seized from the home of the accused. These graphic stories portrayed children as willing participants in various sexual acts with adults, often the children's own parents. Based on the Supreme Court's ruling in *R. v. Sharpe* (2001),[34] the only legal issue was whether or not such stories, when viewed objectively, sent the message that "sex with children can and should be pursued."[35] The trial judge held that since there was no *explicit* advocacy of sex with children, the stories did not fall within the definition of child pornography established by the Supreme Court.[36] The Court of Appeal disagreed with the trial judge's interpretation of *Sharpe* and

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32 *R. v. Hardy*, [2002] M.J. No. 238 (Man. Prov. Ct.) (QL) at para. 6.
33 [2005] O.J. No. 1302 (C.A.) [*Beattie*].
34 [2001] 1 S.C.R. 45 [*Sharpe*].
35 *Ibid*. at para. 56.
36 *Beattie*, supra note 29 at para. 21.

held that no explicit message was required – the portrayal of children as willing participants in sexual acts with supposedly loving parents *implicitly* sent the message that sex with children ought to be pursued.[37] Note that I was able to summarize the facts, the legal issue and its resolution without having to delve into a protracted examination of the impugned stories' content. However, Laskin J., writing for the Court, found it necessary to include an entire section in his judgment in which the stories were described, graphically excerpted and categorized in meticulous detail. The Court's decision in *Beattie* thus represents yet another example of a case paradoxically condemning child pornography through its repeated and detailed exposition and exploration.

Perhaps in an effort to mask our secret prurient interest in sexualized children (and justify the public display of child sexual abuse in the courts), we (as a society) have also constructed a myth of the "salivating pedophile" – a brutal and incorrigible sexual predator of children, lurking about schoolyards, waiting to pounce. It is popularly believed that "the recidivism of pedophiles is almost 100%, if not 100%."[38] This statistic, recently quoted so confidently by an MP in the House of Commons, is grossly inaccurate. In fact, the recidivism rates of child sex offenders are among the lowest in the criminal population.[39] Studies examining thousands of sex offenders in both the United States and Canada have found that approximately 13 percent of sex offenders are rearrested, compared with 74 percent of all prisoners.[40] With treatment, the rate of recidivism is even lower.[41] The widespread public response to the sexual assault and murder of ten-year-old Holly Jones in Toronto demonstrates the extent of the Canadian public's belief in the incorrigible nature of child sexual predators. During the

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37 *Ibid.* at paras. 22-26.

38 *House of Commons Debates*, 138, 51 (3 February 2003) at 3052 (R. Harris).

39 Levine, *supra* note 25 at 26.

40 *Ibid*., citing R. Karl Hanson & M. Bussière, "Predictors of Sexual Offender Recidivism: A Meta-Analysis" (1996) 66:2 J. of Consulting and Clinical Psychology 348.

41 *Ibid*., citing E. Lotke, Sex Offenders: Does Treatment Work? (Washington, D.C.: National Centre for Institutions and Alternatives Report, 1996) at 5.

investigation of the murder, the public was shocked to learn that there were an estimated 200 known sex offenders within a three-kilometre radius of the child's home (though the police quietly admitted that these included all types of sex offenders, and "not just pedophiles").[42] Despite the fact that the man ultimately charged with the murder, thirty-five-year old software developer Michael Briere, had no criminal record,[43] a grassroots movement calling for harsher penalties for "sexual predators of children" (a proposal dubbed "Holly's Law"), steadily gained momentum following Jones' murder. In fact, a petition in support of "Holly's Law" garnered over 420,000 signatures.[44] Similarly, Jones' murder spurred renewed calls for a national sex offender registry (again, despite the fact that the child's alleged killer was not such an offender, and would not have appeared on any registry search).[45] The incessant focus on supposed sexual predators having nothing to do with the Holly Jones murder is paradigmatic of a society obsessed with children as sexual objects. It seems that many groups used Jones' murder as a well-intentioned but still misguided justification for descending further into the frenzy of fear stemming from the myth of the child sexual predator.

As the public response to Holly Jones' murder demonstrates, our society is convinced that hordes of pedophiles lurk around every corner, waiting for the opportune moment to seize upon on unsuspecting children. However, studies show that most sexual abuse of children is perpetrated by members of the child's immediate family rather than strangers.[46] In addition to false notions about rates of recidivism and colourful profiles of the lurking pedophile, numerous other hysterical misconceptions about the nature and

42 "Holly's Killer a 'Monster' Say Police," online: CBC News Homepage <http://www.cbc.ca/stories/2003/05/14/jones_invest030514>.

43 "Laying Down the Law," online: Cable Pulse 24 Homepage <http://www.pulse24.com/News/Top_Story/20030811-011/page.asp>.

44 Online: Holly's Law Homepage <http://www.hollyslaw.ca/>.

45 O. Wood, "Sex Offender Registry," online: CBC News Online Homepage <http://www.cbc.ca/news/indepth/background/sexoffender_registry.html>.

46 Levine, *supra* note 25 at 28.

severity of the threat posed to society by monstrous pedophiles abound.[47]

(ii) The Historical Roots of our Pedophilic Obsession

In *Erotic Innocence*,[48] Richard Kincaid elucidates the historical roots of the social phenomenon that I have been describing. Building on the work of Michel Foucault,[49] Kincaid traces the evolution of popular Western conceptions of sexuality and children over the past two or three centuries. Kincaid argues that the notion that children are pure, chaste and innocent was first formulated in England during the Victorian era. Historians such as Phillipe Ariès have argued that that before the seventeenth century children were essentially viewed as miniature adults, and were therefore given the freedom to fight, steal, study, have sex, travel, find homes and work, with little protection or interference from adults. [50] The idea of childhood as a state of innocence, according to Ariès, was a creation of Victorian British society in the nineteenth century. At the same time, the Victorians concocted a new ideal of the sexually desirable object. Unfortunately, the "new" child and the sexually desirable object had identical characteristics, including "softness, cuteness, docility, and passivity."[51] According to Kincaid, "[w]e've been living, not so happily, with the results of [the Victorians'] bungling ever since."[52] Thus, we *as a society*, as opposed to only that incorrigible group of monstrous pedophiles, are collectively afflicted with a neurotic combination of sexual lust for the child (or the child-like) and a belief that children are asexual innocent creatures who must be protected at all costs. Thus, the public spectacle of the sexualized

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47 *Ibid.* at 25-32; for example, Levine cites the oft-repeated misconception that equates those who abduct and kill children with pedophiles;"pedophiles abduct and murder children, and people who abduct and murder children are pedophiles" at 23.

48 Kincaid, *supra* note 16.

49 See *The History of Sexuality: An Introduction, Vol. 1*, trans. by Robert Hurley (New York: Vintage Books, 1990) [Foucault].

50 See Phillipe Ariès, *Centuries of Childhood* (New York: Vintage Books, 1962).

51 Levine, *supra* note 25 at 27.

52 Kincaid, *supra* note 16 at 52.

child, whether on television or in the courts, simultaneously beguiles and disgusts us.

As we have seen, our society's simultaneous attraction to and abhorrence of sexualized children is reflected in and amplified by the law of child pornography as it is currently formulated and prosecuted. In an effort to publicly attach the powerfully stigmatizing label of "pedophile" upon society's most hated and feared members, courts assiduously pore over even the most innocent of materials in order to publicly draw out any trace elements of (supposedly inappropriate) childhood sexuality for all to see. This process, which is, arguably, a result of the social trend described above, ensures that the image of the sexualized child remains prominently featured in the public consciousness.

The characterization of child pornography law as influencing and being influenced by prevailing social norms recognizes that the law does not operate in a vacuum. Reasoning in this manner, Adler submits that child pornography law harms society through what she terms a "disease model."[53] According to this model, child pornography law "[l]ike everything else . . . has been infected by the sexualization of children; it is symptomatic of the illness it fights. And once infected, the doctor spreads the disease to his other patients."[54] In this way, the law, through its attempt at protecting children from sexual oppression, continually reinforces the troubling notion that children are, in fact, sexually violable creatures.

In response to the "disease model," one might rightly inquire as to how it is that the perpetuation of a discourse in which children are characterized as sexual creatures serves to actually harm children. In response to this question, one should turn to the work of Michel Foucault. Foucault argues that, in general, the discourses defining and characterizing sex are part of an ongoing and dynamic process by which sexuality *itself* is shaped and reconstituted.[55] In other

[53] Adler, *supra* note 6 at 255.
[54] *Ibid.*
[55] Foucault, *supra* note 49 at 158-59.

words, "discussion [of sexuality] changes, *indeed produces*, the thing discussed." Put simply, if we constantly discuss the sexualization of children, in the courtroom or in other fora, we will manage to *actually* sexualize children, in the eyes of both children and adults. It is for this reason that "the process by which we root out child pornography is part of the reason we can never fully eliminate it; the circularity of the solution exacerbates the circularity of the problem."[56] As a result, when our legal system repeatedly reinforces, through its own discourse and legal tests, the image of the sexual child, it seems clear that more than mere words are at stake.

The general capacity of our legal system to shape everyday lives through the perpetuation of its own rhetorical discourse, as persuasively articulated by Carol Smart in *Feminism and the Power of the Law*,[57] underscores the harm that child pornography law can wreak upon society if left unchecked. Smart refers to the work of Foucault in canvassing the ways in which the law, as a discourse that claims to "speak the truth," exercises significant power in a society, such as our own, that values truth.[58] The locus of such power is the exclusion or marginalization, by the law, of competing or contradictory versions of truth. For example, through legal methods of reasoning, proof and the rules of evidence, the law consistently excludes as inadmissible those versions and sources of truth that it deems unreliable or superfluous. Smart illustrates this aspect of the law in her characterization of a solicitor's duties:

> Primarily the job of the solicitor is to translate everyday affairs into legal issues. On hearing a client's story, the solicitor sifts it through a sieve of legal knowledge and formulations. Most of the story will be chaff as far as the lawyer is concerned, no matter how significant the rejected elements are to the client. Having extracted what law defines as relevant, it is translated into a foreign language of, for example, ouster injunctions, unfair dismissals, constructive trusts. The parts of the story that are cast aside are deemed immaterial to the case and the good solicitor is the one who can effect this translation as swiftly as possible. This is the routine

[56] *Ibid*. at 264.
[57] *Supra* note 9.
[58] *Ibid*. at 9-14.

> daily practice of law in which alternative accounts of events are disqualified.[59]

Thus, through its influential claims to "speak the truth" and its related tendency to exclude alternative forms of knowledge, the law regularly shapes, and indeed defines, a panoply of popular conceptions of reality. This general discursive power of the law renders the sexualization of children through criminal child pornography proceedings a phenomenon worthy of careful consideration.

B. Distraction from "More Pressing Ills"

In addition to reinforcing the image of the sexualized child, child pornography law is harmful in that it dominates discussions of the welfare of children that ought to be far more diverse. Richard Kincaid catalogues a series of pressing concerns relating to the welfare of children in the American context (though equally applicable in Canada) that receive nowhere near as much media or judicial attention as the "national emergency"[60] of child sexual abuse and child pornography. For example, Kincaid notes the fact that the number of children living below the poverty line in the United States grew by 26 percent between 1985 and 1995, while 2,000 American children die each year from physical abuse and neglect, with 160,000 more seriously injured at the hands of abusive adults.[61] In addition, Kincaid believes that "[e]motional abuse is so widespread that we hardly bother to study it; and neglect, which accounts for the largest number by far of child abuse cases, is also almost certainly the most underreported."[62] In Canada, the rate of child poverty increased by 43 percent during the 1990s, with children representing 40 percent

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59 Carol Smart, *Law, Crime and Sexuality: Essays in Feminism* (London: Sage, 1995) at 74 [citations omitted].

60 See Ian Hacking, "The Making and Molding of Child Abuse" (1991) 17 Critical Inquiry 253 at 257.

61 Kincaid, *supra* note 16 at 160.

62 *Ibid.*

of food bank users (256,406).[63] By 2001, 1,071,000 Canadian children, or almost one child in six, lived in poverty.[64] Commenting on some of these statistics, Lise Gotell has condemned as counterproductive the treatment of legislative attacks on child pornography as a panacea for complex child welfare issues: "[d]efining child pornography as an ultimate evil induces a tunnel vision in which real threats to the welfare of children, from poverty and disintegrating social programmes to the complexities and pervasiveness of child sexual abuse, are obscured."[65] Taking Gottell's argument a step further, Kincaid bluntly concludes that "[w]e fix our eyes on sexual abuse, a comparatively minor problem, because it pleases us to talk about it."[66] If this is so, it represents a tragically ironic consequence of an effort supposedly designed with the best interests of children in mind.

Similarly, Bruce Ryder has commented on the relative paucity of attention given by Canadian legislators to the socio-economic conditions that might give rise to the production of child pornography itself:

> [T]he Canadian government's commitment to eradicating the range of socio-economic conditions identified . . . . as con-tributors to the production of child pornography is as limited as its approach to the politics of criminalizing child pornography is vigorous (vigorous at least at the symbolic level).[67]

These socio-economic factors, derived from the *Optional Protocol on the sale of children, child prostitution, and child pornography*,[68] include poverty, economic disparities, gender discrimination,

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63 Campaign 2000, "Family Security in Insecure Times: Tackling Canada's Social Deficit" (2001), online: <http://www.campaign 2000.ca/rc/01bulletin/01bull.html>.

64 *Ibid.*

65 "Inverting Image and Reality: *R. v. Sharpe* and the Moral Panic Around Child Pornography" (2001/2002) 12:1 Constitutional Forum constitutionnel 9 at 22.

66 Kincaid, *supra* note 16 at 160

67 Ryder, *supra* note 3 at 114.

68 *Optional Protocol on the sale of children, child prostitution, and child pornography*, G.A. Res. 54/263, U.N. GAOR, U.N. Doc. A/Res/54/263 (2000), 54th sess., Annex II.

dysfunctional families, and lack of education. The way in which legislators have geared child pornography and child sexual abuse laws toward stifling the desires of feared "serial predators" rather than the numerous pressing structural concerns that underlie the actual production of child pornography is just another way in which child pornography law, as it is currently constituted, distracts us from far more pressing social ills involving children.

C. Infringement of Freedom of Expression

In addition to contributing to the ongoing sexualization of children and distracting us from more pressing concerns, child pornography laws seriously threaten the integrity of fundamental and constitutionally enshrined freedoms of expression. Through our collective zeal to clamp down upon and eliminate child pornography, legislatures and courts (both in Canada and the United States) have engaged in a steady expansion of the definition of child pornography as well as a reduction in the availability of defences to child pornography related charges. The ramifications of this trend on the right to free expression, which, according to the Supreme Court of Canada, "permeates all truly democratic societies and institutions,"[69] are profound and alarming.

With respect to the expansion of the definition of child pornography, I have already detailed the degree to which this phenomenon has taken place both in Canada, through the "sexual purpose" test, and the United States, through the "lascivious exhibition" standard. The following are some startling American examples of just how far this trend has gone: Blockbuster Video was charged with a violation of obscenity and child pornography statutes for renting out the Academy Award winning film *The Tin Drum*, based on a novel by Günter Grass;[70] numerous family members, including a sixty-five-year-old grandmother and respected

[69] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1336.

[70] *Oklahoma ex rel.* Macy *v. Blockbuster Videos Inc*., 27 Media L. Rep. 1248 (W.D. Okla. 1998).

photographer,[71] have been charged with making and possessing child pornography for taking pictures of children in the family in allegedly inappropriate ways;[72] professors[73] and reporters[74] attempting to do research on the phenomenon of child pornography have been charged and convicted. From this brief survey it is clear that the current expansion of the definition of child pornography in the United States has potentially stifling effects on the freedom of expression of artists, academics, the media, and members of the general public alike.

To understand fully this unsettling trend in the American context, it must be noted that in *New York v. Ferber* (1982),[75] the first U.S. Supreme Court decision treating the relationship between child pornography law and freedom of speech, the Court held that child pornography is obscene, and thus not expression protected by the First Amendment. Thus, without constitutional protection,[76] the laws regulating child pornography have been allowed to trench upon expressive freedoms almost completely unchecked, with the constant calls for tougher regulation showing no signs of abating. It is for this reason that Adler has argued that child pornography is the "new crucible of the First Amendment," replacing political dissent as the area in which "popular pressure on courts and legislatures exerts

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71 Kate Coscarelli & Jeffery C. Mays, "Photos of Undressed Kids Get Grandmother Arrested" *Newark Star-Ledger* (5 February 2000) 1.

72 Adler, *supra* note 6 at 241.

73 See Vern Bullough, "History of Adult Human Sexual Behaviour with Children and Adolescents in Western Societies" in J. Feierman, ed., *Pedophilia: Biosocial Dimensions* (New York: Springer-Verlag, 1990) 69 at 82-85.

74 In *United States v. Matthews*, 11 F. Supp. 2d. 656 (D. Md. 1998), aff'd 209 F. 3d 338 (4th Cir. 2000) [*Matthews*], a National Public Radio reporter was found guilty of possession of child pornography in the context of legitimate research. The Court held that even "well-intended uses" of child pornography are prohibited.

75 458 U.S. 747 (1982) [*Ferber*].

76 This trend may have begun to reverse itself, with the recent U.S. Supreme Court case of *Ashcroft v. The Free Speech Coalition* 122 S Ct. 1389 (2002) [*Ashcroft*]. In this case the Court found the *Child Pornography Protection Act* (*CPPA*) to be unconstitutional to the extent that it attempted to criminalize the possession of materials in which adults merely *appeared to be minors*. The Court held that such a provision did in fact violate the First Amendment.

itself most ferociously" and where "the greatest encroachments on free expression" have become accepted and commonplace.[77]

In Canada, the trend towards stricter regulation and application of child pornography laws has also been notable. The *Criminal Code* prohibition against simple possession of child pornography (section 163.1) was originally enacted in 1993. Since that time, there have been several dubious prosecutions, similar to those in the United States, under the *Criminal Code* scheme. For example, in 1993, Canadian artist Eli Langer was charged after a show in which he displayed some paintings portraying sexual relations involving what *appeared to be* young males under the age of eighteen. Though Langer was ultimately exonerated after the trial judge found artistic merit in the painter's work,[78] the Ontario government used a forfeiture application to seize the paintings as child pornography, with the intention of destroying them.[79]

Another example of the disconcerting application of *Criminal Code* child pornography provisions occurred in February 2000, when a father of two children was arrested for making child pornography after a technician at a photo lab processed a roll of family snapshots that included pictures of the accused father's four-year-old son "goofing around" without his pyjama pants. Though the charges were ultimately dropped, the process exacted a heavy toll on the accused. His original bail conditions included a requirement that he leave the family home. Subsequent to the laying of the charges, the Children's Aid Society demanded a custody hearing and parenting courses for the man and his wife. The accused, a recent immigrant, spent his entire savings on legal costs.[80]

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77 Amy Adler, "Inverting the First Amendment" (2001) 149 Univ. of Pennsylvania Law Rev. 921 at 921-22.

78 *Ontario (Attorney General)* v. *Langer* (1995), 123 D.L.R. (4th) 289 (Ont. Gen. Div.).

79 See M. O'Malley & O. Wood, "The Supreme Court and Child Porn: Saving Children or Thought Control?" online: CBC News <http://www.cbc.ca/news/indepth/background/sharpe_pornography.html>.

80 "The Supreme Court and Child Porn," online: CBC News <www.cbc.ca/news/background/childporn/>.

The constitutionality of section 163.1 of the *Criminal Code* was called into question in *R. v. Sharpe* (2001),[81] which was heard before the Supreme Court of Canada. In *Sharpe*, the police seized writings composed by the accused, including a collection of violent stories entitled "Sam Paloc's Boyabuse – Flogging, Fun and Fortitude: A Collection of Kiddiekink Classics."[82] In addition, the police seized a collection of books, manuscripts, stories and photographs that the Crown alleged to be child pornography. The Supreme Court, in a judgment written by McLachlin C.J.C., held that section 163.1 of the *Criminal Code* violated freedom of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*.[83] However, subject to two "read-in" limitations on the definition of child pornography, the violation of freedom of expression stemming from the impugned section was found to represent a reasonable limit in a free and democratic society under section 1 of the *Charter*.[84] The majority of the Court held that, if left intact, the definition of child pornography in section 163.1 would have struck an inappropriate balance between the protection of children from sexual abuse and protection of freedom of expression. Thus, McLachlin C.J.C. held that the definition of "child pornography" should be read as though it contained an exception for: (1) any written material or visual representation created by the accused alone, and held by the accused alone, exclusively for his or her own personal use; and, (2) any visual recording, created by or depicting the accused, provided it does not depict unlawful sexual activity and is held by the accused exclusively for private use.[85]

In *Sharpe*, the Supreme Court attempted to interpret and define the constitutional boundaries of the various elements of the criminal child pornography possession provisions. In doing so, the Court was

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81 *Sharpe, supra* note 34.

82 *Ibid.* at 62.

83 *Ibid.* at 72-73; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

84 *Ibid.* at 118-19.

85 *Ibid.*

attempting to *limit* the operation of the provisions, an approach that can be contrasted with the aggressive expansionism employed by many American courts.[86] For example, the majority in *Sharpe* attempted to elucidate the requirement under section 163.1(1)(a)(ii) that materials have, as a "dominant characteristic," the depiction of a sexual organ or anal region "for a sexual purpose." McLachlin C.J.C. held that "[f]amily photos of naked children, viewed objectively, generally do not."[87] The placing of such photography in "an album of sexual photos and adding a sexual caption could change its meaning,"[88] however. In attempting to prevent the arrest of parents and other family members for taking innocent photographs, the Court held that "[a]bsent evidence indicating a dominant prurient purpose, a photo of a child in the bath will not be caught."[89] Thus, it would seem that despite upholding the extremely dubious "sexual purpose" test unaltered, the Court was attempting to restrict cautiously, rather than enlarge, the definition of "child pornography" to protect the right to free expression.

With respect to advocating or counselling sexual activity with a person under the age of eighteen years under section 163.1(1)(b), the Court held that "the prohibition is against material that, viewed objectively, sends the message that sex with children can and should be pursued."[90] McLachlin C.J.C. made sure that literary works "aimed at description and exploration of various aspects of life that *incidentally* touch on illegal acts with children"[91] were exempt from the operation of the section. Literature such as Nabokov's *Lolita* and Plato's *Symposium* were offered by the Court as examples of such materials that did not "advocate or counsel" sexual activity with children. In Sharpe's trial following the Supreme Court ruling, Shaw J. found that Sharpe's "Kiddiekink" stories were morally repugnant, but concluded that they did not counsel the reader to engage in such

86 See for example *Knox*, *supra* note 11, or *Dost*, *supra* note 13.
87 *Sharpe*, *supra* note 34 at 82.
88 *Ibid.*
89 *Ibid.*
90 *Ibid.* at 83.
91 *Ibid.* [emphasis added].

proscribed acts.[92] Thus, Sharpe was found not guilty with respect to his composition, possession and distribution of the fictional "Kiddiekink" written materials.[93]

The majority of the Supreme Court in *Sharpe* also tried to limit the operation of section 163.1 by upholding the defences available under the section at that time. When *Sharpe* was decided, the available defences under section 163.1 included educational, scientific, or medical purposes, the nebulous "public good" defence, and, most controversially, the defence of "artistic merit." McLachlin C.J.C. held that the defence of artistic merit "must be construed broadly"[94] so that "a person who produces art *of any kind* is protected, however crude or immature the result of the effort in the eyes of the objective beholder."[95] The defences of educational, medical or scientific purpose as well as the defence of public good were also upheld and construed broadly by the Court.

The general reaction to the Supreme Court ruling was mixed. Child advocates were pleased that section 163.1 was not struck down in its entirety as it had been by the trial court and the B.C. Court of Appeal. However, there was some concern over the two exceptions that were read-in by the Court. Some argued that they created a "loophole for pedophiles."[96] REAL Women of Canada, an intervener in the case, argued that "[i]n their attempt to strike a balance, the Supreme Court justices have overreached. They naively trust that

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92 *R.* v. *Sharpe* (2002), 91 C.R.R. (2d) 235 (B.C.S.C.) at para. 37 [*Sharpe* B.C.S.C.].

93 *Ibid.* Shaw J. further held that if he was incorrect about whether the written materials counselled the reader to commit a child sexual offence, the material in question had "artistic merit" at paras. 66-68. This conclusion was based on the evidence of several expert witnesses, all of whom testified that a much more violent and offensive text by the Marquis de Sade had "artistic merit." Furthermore, the materials had "artistic merit" because they used literary devices common to literature.

94 *Sharpe*, *supra* note 34 at 86.

95 *Ibid.* at 87 [emphasis added].

96 "The Child Pornography Decision: Where Do We Go from Here?" citing Mark Hecht, online: Focus on the Family Homepage <http://www.fotf.ca/family facts/analysis/010901.html>.

child pornography created by a pedophile will remain for private use. . . . They obviously live in a world far removed from the realities of life."[97] However, these criticisms were mild when compared to the maelstrom that followed Mr. Sharpe's acquittal on charges relating to his "Kiddiekink" stories. Shaw J.'s finding that such writings had "artistic merit" as defined by the *Criminal Code* and interpreted by the Supreme Court of Canada was the main flash point.[98] Critics feared that the ruling would:

> "[s]erve to encourage pedophiles to continue to write and distribute material that encourages the exploitation of children. In this latter regard, it is important to note that once this material – no matter how squalid and disgusting – is found to be "artistic," there will be no restrictions on its distribution.[99]

Spurred on by such concerns, the federal government introduced Bill C-2[100] into Parliament in 2004.

Bill C-2, which was passed by Parliament in July of 2005 (though had not yet come into force as of this writing), stands to reverse the ruling of the Supreme Court of Canada in *Sharpe* in several notable ways. First, the definition of child pornography would be extended to the possession of "any written material the dominant characteristic of which is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence."[101] That is, if and when Bill C-2 comes into force, even where an individual composes materials for her own personal use (in a diary, for example), without any intention of distribution, possession of such materials would violate the new section 163.1.

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97 *Ibid*., citing REAL Women of Canada.

98 See M. Hume, "Sharpe's Porn Has 'Merit': Court" *National Post* (27 March 2002) A1; J. Armstrong, "B.C. Court Finds Artistic Merit in Sharpe's Child-Sex Stories" *Globe and Mail* (27 March, 2002) A1.

99 E. Schuster, "'Artistic Merit' Trumps Child Protection: B.C. Judge Protects Child Pornography in Some Circumstances," citing Gwen Landolt of REAL Women Canada, online: The Interim Homepage <http://www.lifesite.net/interim/2002/may/02artisticmerit.html>.

100 Bill C-2, *supra* note 24.

101 *Ibid*. s. 7(2).

This prohibition functionally criminalizes unpopular or unpalatable thoughts, and represents a troublesome development.[102] In this regard, the words of U.S. Supreme Court Justice Oliver Wendell Holmes are apposite: "If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate."[103] The enactment of this measure would also explicitly override one of the two read-in exceptions to the law, despite the Supreme Court's holding to the effect that the criminalization of personal writings trench "heavily on freedom of expression while adding little to the protection the law provides children."

A second aspect of Bill C-2 that merits comment is the reformulation of the defences available to exculpate the *prima facie* commission of child pornography offences. In particular, under the new section 163.1(6):

> (6) No person shall be convicted of an offence under this section if the act that is alleged to constitute the offence
>
> > (a) has a legitimate purpose related to the administration of justice or to science, medicine, education or art; and
> >
> > (b) does not pose an undue risk of harm to persons under the age of eighteen years.[104]

Though the language of this defence is marginally less disconcerting than previous incarnations proposed in Parliament,[105]

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[102] *Sharpe*, *supra* note 34 at 109.

[103] *United States v. Schwimmer*, 279 US 644 (1929) at 654-55 (cited with approval by McLachlin J. in *R. v. Zundel*, [1992] 2 S.C.R. 731 at 753).

[104] Bill C-2, *supra* note 24.

[105] For example, Bill C-20, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, 2nd Session, 37th Parliament, first reading December 5, 2002 [Bill C-20], would have eliminated the defences of artistic merit, educational, medical, or scientific purpose and left only the vague defence of public good as the only exculpatory avenue once the possession of child pornography under s. 163.1

there are still several notable deficiencies with the current version. First, I would argue that the awkward phrase regarding a "*legitimate* purpose related to . . . (emphasis added)" actually has no independent objective meaning for the courts to apply. Indeed, the term "legitimate" has been defined as, *inter alia*, "being in compliance with the law."[106] As a result, the new section 163.1(6) is tainted by a circularity that unwisely delegates to the courts the uncomfortable task of defining "legitimacy," without any reference to any independent yardstick. Such a task is daunting indeed, given the diversity and breadth of the contexts at issue.[107] This approach is likely to result in an *ad hoc* and unprincipled approach, leaving citizens in the dark as to the permissible scope of those activities that somehow happen to touch upon "child pornography," as it is currently (i.e., broadly) defined. Such uncertainty may indeed cause individuals involved in the enumerated pursuits to steer clear of any activity that might not fall into the nebulous definition of

was proven. Moreover, in order to ensure that no scientist, psychiatrist, journalist, or professor could ever legitimately study child pornography directly, the Bill stipulated (at s. 7(2)) that "the motives of an accused are irrelevant" with respect to the possession or viewing of proscribed materials.

[106] See *Webster's Ninth New Collegiate Dictionary*, under "legitimate."

[107] Should Bill C-2 actually come into force and courts are indeed called upon to define legitimacy in the context of child pornography defences, I would recommend that legitimacy be assumed in all activities falling into the areas enumerated by s. 163.1 (*i.e.*, administration of justice, science, medicine, education, and art), save where actual physical or psychological harm to children can be reasonably assumed or proven. Such an interpretation would minimize the extent to which courts are called upon to engage in inappropriate policy-making and would provide what is perhaps the only rational yardstick by which "legitimacy" could be defined. Any act that results in actual harm to actual children, no matter what the forum, is indefensible and ought to be criminalized. Defining legitimacy in accordance with actual harm to children would also provide a modicum of certainty to those engaged in activities in the enumerated areas.

I emphasize that even if courts were to follow my recommended interpretation of legitimacy, such a state of affairs would still be grossly inadequate. This is so as even if legitimacy is attributed to all those activities in the enumerated areas that do not involve physical or psychological harm to actual children, there are likely to be serious problems with *proving* that a given activity is *not* going to somehow cause harm to children. Also, I would argue that the scope of the enumerated areas is itself too narrow and ought to be expanded. Both of these issues are discussed in greater detail below.

"legitimate." Such caution would be more than understandable given the grave stigma associated with a criminal conviction involving child pornography. Such a "chill" on otherwise laudable and socially valuable endeavours renders the defence ill-advised, at best. The uncertain scope of the available defences may also render the provisions constitutionally void for vagueness.[108]

A second and related deficiency with the new "legitimate purpose" defence is its rather narrow scope of application. There are a number of apparently legitimate and constitutionally protected activities that are excluded from the list of approved areas. One glaring example is the area of journalism. Indeed, *Globe and Mail* reporter Jan Wong, in her rather graphic description of her trip into child pornography "cyberhell," taken for the benefit of readers following the Holly Jones murder case,[109] would appear to have criminally "accessed" child pornography in contravention of section 163.1 in pursuit of an activity that did not have a "legitimate purpose." Such a result would be similar to that which currently exists in the United States, where, as noted above, journalists have been held criminally liable for conducting legitimate research on child pornography.[110]

Though Wong's "investigation" and subsequent report may have been gratuitous and sensationalist, it ought to have been protected under the *Charter*, section 2(b) of which expressly protects "freedom

[108] See, for example, *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1152 *per* Lamer J. (as he then was): "It is essential in a free and democratic society that citizens are able, as far as possible, to foresee the consequences of their conduct in order that persons be given fair notice of what to avoid, and that the discretion of those entrusted with law enforcement is limited by clear and explicit legislative standards." See also *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606; *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139; *R. v. Zundel*, (1987), 58 O.R. (2d) 129 (C.A.); *Luscher v. Deputy Minister, Revenue Canada, Customs and Excise*, [1985] 1 F.C. 85 (C.A.), at 89-90; and D. Stuart, "The Canadian Void for Vagueness Doctrine Arrives with No Teeth" (1990), 77 C.R. (3d) 101.

[109] *Supra* note 30.

[110] See, *e.g.*, *Matthews*, *supra* note 74.

of the press." In this regard, the recent dictum of Lord Birkenhead, of the UK House of Lords is apt:

> Without freedom of expression by the media, freedom of expression would be a hollow concept. The interests of a democratic society in ensuring a free press weighs heavily in the balance in deciding whether any curtailment of this freedom bears a reasonable relationship to the purpose of the curtailment. In this regard it should be kept in mind that one of the contemporary functions of the media is investigative journalism. This activity, as much as the traditional activities of reporting and commenting, is part of the vital role of the press and the media generally.[111]

Similarly, the European Court of Human Rights has emphasized, as a matter of human rights law, the importance of diligently protecting freedom of the press:

> [F]reedom of expression constitutes one of the essential foundations of a democratic society and that the safeguards to be afforded to the press are of particular importance. Whilst the press must not overstep the bounds set, inter alia, in the interest of "the protection of the reputation or rights of others," it is nevertheless incumbent on it to impart information and ideas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog."[112]

The right of the public to receive the information gathered by the press is also protected in Canada, pursuant to section 2(b) of the *Charter*.[113] Given the extent of widespread misinformation at play in the case of child pornography and pedophilia in general (discussed above), it is important that the press be able to investigate and report

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[111] *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 (H.L.), cited with approval in *Goddard v. Day* [2000] A.J. No. 1558 (Q.B.).

[112] *Jersild v. Denmark* (1994), 298 Eur. Ct. H.R. (Ser. A) 23 at para. 31. See also *Observer and Guardian v. the United* (1991), 216 Eur. Ct. H.R. (Ser. A) 20 at paras. 29-30.

[113] The Constitution protects the right to receive expressive material as much as it does the right to create it. *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120 at para. 41; and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1339-40. Section 2(b) "protects listeners as well as speakers." *Ford v. Québec (Attorney General)*, [1988] 2 S.C.R. 712 at 767.

to the public on the *actual* character, incidence, and effects of such phenomena. As a result, the failure of the "legitimate purpose" defence to include a reference to journalism represents another notable shortcoming.

Finally, the new defences in section 163.1 of the *Criminal Code* ought to be criticized given that any individual charged with a child pornography offence must prove, in order to exculpate herself, that her impugned conduct "does not pose an undue risk of harm to persons under the age of eighteen years." This requirement is both remarkably vague and impossible to actually meet. With regard to vagueness, the requirement immediately begs a number of questions. What sorts of harms are at issue? Physical harm? Psychological, attitudinal or perhaps moral harm? How is the "risk" of harm to be calculated? It seems unlikely that any objectively verifiable data could be proffered to compute the risk of harm to children posed by many acts involving child pornography.[114] Even if such a calculation were possible, how much risk of harm must be present in order to be considered "undue"? Again, the courts are left in the unenviable position of answering these problematic policy questions, the determination of which is a task far more suited to the legislature.[115]

All of the above indicates that the passage of Bill C-2 is but another unfortunate chapter in the ongoing saga that has been Parliament's well-intentioned but rather inept attempt at eradicating child pornography from the Canadian landscape. Regardless of its underlying intentions, it is clear that Parliament's vision has become

[114] For example, it seems an impossible task to determine, with any semblance of exactitude, the risk posed to minors by the act of "accessing" images of child pornography on one's computer. The risk in this case would appear to be that the viewer will be morally or psychologically corrupted into either (a) actually molesting children or (b) seeking to view even *more* child pornography, which would create a indefinable demand for a product that involved harm to children in its production. It would seem that neither possibility can be quantified with any degree of certainty. This question is discussed in greater detail below.

[115] See, generally, *Newfoundland (Treasury Board) v. N.A.P.E.*, [2004] 3 S.C.R. 381 at para. 83; and *South Westman Regional Health Authority Inc. v. Souris (Town)*, (2002), 163 Man. R. (2d) 294 (C.A.) at paras. 25-26.

clouded by the contemporary cultural sandstorm surrounding children and sexuality. As a result, its legislation threatens to grossly curtail a number of vital social activities (including scientific research into the phenomena of child pornography and pedophilia) as well as fundamental freedoms of expression.

The importance of freedom of expression as a general matter was eloquently articulated by McLachlin C.J.C. in *Sharpe*:

> Among the most fundamental rights possessed by Canadians is freedom of expression. It makes possible our liberty, our creativity and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that the best route to truth, individual flourishing and peaceful coexistence in a heterogeneous society in which people hold divergent and conflicting beliefs lies in the free flow of ideas and images. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.[116]

If our constitutionally enshrined freedoms of expression are to have any real meaning, then a true balance must be sought between such freedoms and the *actual* protection of children. In the next section of the paper, I explore several ways in which this might be accomplished.

III. MITIGATING THE HARMS OF CHILD PORNOGRAPHY LAW

In "The Harms of Child Pornography Law,"[117] Ryder identifies, and attempts to rectify, what he terms the "incoherence" of Canadian child pornography law. Ryder argues that the current scheme is incoherent to the extent that it uniformly regulates three fundamentally different forms of expression.[118] These three forms of expression are images that involved harm in their production, materials that can be labelled as hate propaganda and "harmless"

[116] *Sharpe*, *supra* note 34 at 70.
[117] Ryder, *supra* note 3 at 104.
[118] *Ibid.* at 109.

sexual representations. Professor Ryder persuasively argues that these vastly disparate forms of expression demand disparate legal responses. As a result, he properly recommends that criminal laws dealing with child pornography be revamped with a view to proscribing only those materials that involved actual harm to children in their production, or that advocate the harming of children.

In addition to rationalizing the applicable *Criminal Code* provisions and reasonably protecting freedoms of expression, Ryder's recommendations would, in my view, have the salutary effect of addressing some of the concerns raised by Adler and Kincaid. In effect, these proposals may serve to mitigate the degree to which the prosecution of child pornography offences serves to perpetuate the sexual objectification of children. In addition, by reducing the emphasis placed by the law on the prosecution of child pornography in all its *theoretical* forms, it is possible that more attention may be given to other, often-ignored child welfare issues. As I discuss Ryder's recommendations, I will point out some of the ways in which the harms I have detailed would be mitigated.

A. Materials Involving Harm in Production

The first form of expressive materials under the current ambit of section 163.1 considered by Ryder are materials that demonstrably harmed children in their production. The restriction on such materials is at the heart of Canadian child pornography laws. In the 1984 *Report of the Committee on Sexual Offences Against Children and Youth* (the "*Badgley Report*"),[119] the committee found that "in reference to child pornography, it is the circumstances of its production, namely, the sexual exploitation of young persons, which is a fundamental basis for proscription."[120] Similarly, in *Sharpe*, the Supreme Court found the prevention of harm to actual children to be

[119] Committee on Sexual Offences Against Children and Youth, *Sexual Offences Against Children: Badgley Report*, vol. 1 (Ottawa: Supply and Services Canada, 1984) at 99-103.

[120] *Ibid.* at 101.

the purpose underlying the *Criminal Code* child pornography provisions.[121] Treating the prohibitions against counselling/ advocating and the possession of harmless sexual representations under the same section as materials involving harm to children is confusing and irrational. The availability of the defence of artistic merit (or, should Bill C-2 come into force, the defence of a "legitimate purpose") in cases where the expression in question involved proven harm to children in its production is most problematic. Ryder rightfully characterizes this element of the current scheme as "a blinding stupidity" and an "abominable feature of the current law."[122] Another consequence of grouping these disparate forms of expression together is that the producers and consumers of materials that did not involve any harm to children in their production are falsely branded as "child pornographers," "sex offenders," and "pedophiles."

Ryder recommends that the prohibition against the possession of materials that involved harm in their production remain in place.[123] This recommendation is prudent, subject to some strict parameters on the definition of "harm." One of the major difficulties with child pornography law elucidated by Adler is the way in which courts are required to inspect impugned materials, especially visual images, for hidden sexual content. In my estimation, prosecutions targeting materials that caused true abuse in their production entail the least possible degree of "pedophilic gazing."[124] Generally speaking, no subjective and detailed exploration of impugned materials is needed in the case of representations depicting actual sexual abuse, such as forced intercourse with a child. The sexual and, more importantly,

[121] *Sharpe*, *supra* note 34 at 73.

[122] Ryder, *supra* note 3 at 114.

[123] *Ibid.*

[124] Admittedly, even in cases where courts are not required to uncover hidden sexual content in otherwise non-sexual representations of children (such as cases where the sexual acts involving children are explicit), the perpetuation of the notion that children are sexual objects is promulgated. However, the restriction of the definition of child pornography to such cases would represent a justifiable measure, as the incidental sexualization of children through the court proceedings would be in a justifiable effort to reduce serious harm to actual children.

abusive content of such representations is patent from any reasonable perspective. By contrast, materials depicting minors who are engaged in acts that are not patently abusive, such as children opening Christmas presents or taking baths, involve a high degree of judicial inspection from the vantage point of the pedophile. Adler notes that "once we accept that prohibited depictions of 'sexual conduct' by children can include not only explicit sex acts, but also the more subjective notion of 'lascivious exhibitions,'"[125] we put in motion the sexualization of children through the taking on of the pedophilic gaze. Thus, I would recommend that the criminal definition of child pornography be limited to materials wherein children are engaged in "explicit sex acts." Any broader definition of "harm" could open the floodgates to the prohibition of over-inclusive categories of expression.

Though the nebulous "lascivious exhibition" standard is not in place in Canada, as I have shown, the "sexual purpose" test (from section 163.1(1)(a)(ii) of the *Criminal Code*) requires a similarly dubious examination of materials from the perspective of a pedophile. Under the current regime, "innocently taken" family photographs incidentally displaying the genitalia of children can be characterized by courts as having a seedy "sexual purpose."[126] Asking whether particular photographs or videos of children's genitalia or anal regions were taken or collected for a sexual purpose strays too far from the pressing issue of harm and becomes involved in the prurient and destructive realm of judicial pedophilic gazing. For this reason, the sexual purpose test must be abandoned.

The abandonment of the sexual purpose test, and a focus on actual harm to actual children, would be accomplished through the elimination of section 163.1(1)(a)(ii)[127] in its entirety. If this were done, the only visual materials that would be proscribed under section 163.1(1)(a) would be those portraying "a person who is or is

[125] Adler, *supra* note 6 at 261.

[126] See *Nedelec*, *supra* note 20.

[127] The subsection prohibits the possession of materials "the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years."

depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity."[128] In order to keep the focus of the law on harm to actual children, this pared-down definition of child pornography should be amended to cover only depictions of persons who are underage, not those who are merely depicted as being underage.

B. The Hateful Advocacy of Harmful Acts

With respect to the prohibition against disseminating materials that counsel or advocate the commission of sexual crimes against minors, Ryder recommends that it be removed from the operation of the child pornography provisions and absorbed into the existing criminal hate speech regime (under section 319 of the *Criminal Code*).[129] Section 319 of the *Criminal Code* states that "every one who, by communicating statements in any public place, incites hatred against any identifiable group where such incitement is likely to lead to a breach of the peace" is guilty of an offence. Children can clearly be characterized as an identifiable group under this section. The adoption of this measure would have several salutary effects. First, it would move the law's emphasis away from sexuality and youth and towards the true target of the prohibition: "the hateful advocacy of harmful acts."[130] In this regard, this reform would have the valuable effect of decreasing the degree to which courts are forced (or tempted) to employ discourse that unnecessarily sexualizes children. If Ryder's recommendation were adopted, judicial attention would be focused not on hidden prurient qualities inherent in particular impugned materials, but on the express advocacy of harm, sexual or otherwise, to children. This reform would remind the courts that the true purpose underlying all child pornography laws is the prevention of actual harm to actual children, and not the detailed analysis of all materials that might hazily "send the message that sex with children can and should be pursued."[131] In

[128] *Criminal Code*, *supra* note 18.
[129] Ryder, *supra* note 3 at 115.
[130] *Ibid.* at 116.
[131] *Sharpe*, *supra* note 34 at 83-84.

my estimation, for all the reasons set forth by Adler, Kincaid, and others, this reminder is sorely needed.

C. "Harmless" Representations

The final category of expressive materials caught by the current child pornography prohibition is material involving no harm in its production. These materials include imaginary visual representations (paintings, cartoons, sculptures and the like). In addition, the possession of written materials describing unlawful sexual relations involving children also falls into the category of "harmless" expressive representations, the production and possession of which should not be prohibited under the *Criminal Code*.[132]

In *Sharpe*, the Court held that the possession of child pornography, in general, is harmful because "(1) child pornography promotes cognitive distortions; (2) it fuels fantasies that incite offenders; (3) prohibiting its possession assists law enforcement efforts to reduce the production, distribution and use that result in direct harm to children; (4) it is used for grooming and seducing victims; and (5) some child pornography is produced using real children."[133] The encouragement of "cognitive distortion" and the fuelling of dangerous fantasies are the only two elements from this list that would apply to impugned materials that neither involve harm in production nor constitute hate speech. McLachlin C.J.C. explains the difficult and questionable concept of "cognitive distortion" as follows: "child pornography may change possessors' attitudes in ways that makes them more likely to sexually abuse children. People may come to see sexual relations with children as normal and even beneficial. *Moral inhibitions* may be weakened. People who would not otherwise abuse children may consequently do so."[134] It should be noted that the trial judge in *Sharpe* rejected both the causation of cognitive distortions and the fuelling of dangerous fantasies as appropriate bases for banning child

[132] Ryder, *supra* note 3 at 124-25.
[133] *Sharpe*, *supra* note 34 at 96-97.
[134] *Ibid*. [emphasis added].

pornography. He did so due to the complete absence of evidence that might substantiate the existence of such phenomena. However, the majority of the Supreme Court in *Sharpe* held that Parliament was not required to offer scientific proof of the benefits of banning child pornography. Rather, in order to justify the prohibition, it need only demonstrate a "reasoned apprehension of harm." Applying this test,[135] the majority in *Sharpe* approved of both the cognitive distortion and fantasy fuelling justifications for banning the possession of child pornography.[136]

The Court's position in this regard has been properly met with significant criticism. For example, Robert Martin argues that "[i]t is disturbing that the majority did not require concrete evidence to support any of these hypotheses. The trial judge was less confident of his own omniscience and demanded proof of the actual harm caused by child pornography."[137] Both the cognitive distortion and fantasy fuelling justifications represent anachronistic notions of "moral corruption." The moral corruption argument has its roots in obscenity law dating back to the mid-nineteenth century.[138] Ryder properly rejects the adoption of this sort of reasoning into child pornography law, arguing that:

> the evidence simply does not support the 'causal hypothesis' that underpins the moral corruption style of argument. Its enduring appeal probably lies, not in its rationality, but in its promise of simple solutions to disturbing and complex social problems.[139]

Similarly, in *Ashcroft*, the U.S. Supreme Court rejected the notion that materials not involving direct harm to children could be proscribed without violating the First Amendment. Justice Kennedy held that "while the Government asserts that the images can lead to actual instances of child abuse, *the causal link is contingent and indirect*. The harm does not necessarily flow from the speech, but

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[135] *Ibid*. at para. 85.

[136] *Ibid*. at paras. 88-89.

[137] "Case Comment: *R.* v. *Sharpe*" (2001) 39 Alberta Law Rev. 585 at 588.

[138] (1868), 3 L.R. Q.B. 360 at 371.

[139] Ryder, *supra* note 3 at 121.

depends upon some unquantified potential for subsequent criminal acts."[140] The majority of the Court in *Ashcroft* also held:

> [T]he Government has shown no more than a remote connection between speech that might encourage thoughts or impulses and any resulting child abuse. Without significantly stronger, more direct connection, the Government may not prohibit speech on the ground that it may encourage pedophiles to engage in illegal conduct.[141]

Ultimately, the restriction on expression that does not involve harm to children in its production is (among the currently prohibited forms of child pornography) the most injurious to freedom of speech, and as with all child pornography prohibitions, it inherently entails a degree of harmful sexualization of children. At the same time, as we have seen, the evidence supporting the restriction is tenuous at best.

In this section I have recommended, subject to certain caveats, that Ryder's parsing of child pornography law into three distinct categories be adopted as a measure both to protect fundamental freedoms of expression and to lessen the degree to which courts are required to take on the pernicious "pedophilic gaze." More specifically, I propose that, subject to a narrow reading of the term "harm," the production and possession of materials involving harm in their production continue to be prohibited and subject to serious sanction. Materials advocating the sexual abuse of children should not be treated under the child pornography provisions of the *Criminal Code*, but should be transplanted into the criminal hate propaganda regime. Finally, materials that do not involve any harm to children in their creation should be removed altogether from the operation of the *Criminal Code* child pornography provisions.

IV. CONCLUSION

As long as criminal courts continue to prosecute individuals for possessing child pornography, at least some of the harms to society detailed by Adler and Kincaid stemming from such prosecutions will

[140] *Ashcroft, supra* note 67 at 1402 [citation omitted] [emphasis added].
[141] *Ibid.* at 1403.

continue to operate. However, through the recommendations I have set forth, I have sought to minimize the extent of those harms as much as possible. With regard to possession offences, I make these proposals based on the assumption that the benefits of criminalizing the possession of child pornography at all outweigh its associated costs. The most reasonable rationale underlying the criminalization of the possession of child pornography is that consumers of such materials create a demand for a product that involves harm to actual children.[142] There is no way to be certain with any degree of scientific exactitude if the benefits stemming from this indirect attack on the prevention of sexual abuse of children outweigh the intangible harm of publicly sexualizing children through criminal court proceedings. However, I would recommend against the complete abolition of the child pornography prohibitions based on the mere suspicion that the harms stemming from its prosecution outweigh the harms to children that could be averted through the maintenance of the prohibition.

I believe that the most prudent course of action is to recognize the degree to which the judicial process further drenches our society in its rhetoric of sexualized children, and to minimize the degree to which it continues to do so. Furthermore, it must be recognized that we are a society whose ferocious and unrelenting condemnation of child sexual abuse and child pornography is simultaneously reasonable and hysterical. We must be vigilant to curtail the degree to which our hysteria is amplified through the law, making victims of our children and our fundamental freedoms. It is only through this strict vigilance that our child pornography laws (and our children) will survive what may indeed be the legal "crucible" of our time.

[142] Ryder, *supra* note 3 at 109.

REVIEW OF *IDEOLOGY AND COMMUNITY IN THE FIRST WAVE OF CRITICAL LEGAL STUDIES*

Mark Tushnet*

Ideology and Community in the First Wave of Critical Legal Studies by Richard W. Bauman (Toronto: University of Toronto Press, 2002), pp.257

Having been asked to review Richard Bauman's useful book, I recalled a scene in Woody Allen's *Annie Hall*. Allen's character Alvy Singer is standing on line at a movie, overhearing a pompous bore trying to impress his date by describing Marshall McLuhan's work. Allen/Singer tells the camera – and the man – that he doesn't understand McLuhan, and to prove it drags McLuhan on screen to resolve the question. Professor Bauman writes of the "first wave" of critical legal studies, by which he means the work produced in thedecade after 1975.[1] I produced some of that work, and I imagine

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[1] Bauman at 6. This limitation has, I think, some unfortunate effects. (1) Professor Bauman's approach produces some criticisms of early critical legal studies that invite the response that it is unfair to expect people to do everything all at once. See, *e.g.*: "Insufficient attention was paid by early radical critics to the issue of how legal ideology, assuming it is formed within the circle of legal experts, spreads throughout society" (*ibid*. at 75). The question, I would think, is whether those working in the critical tradition ever got around to paying attention to that issue. My judgment is that they, or we, did, in a number of historical studies. Professor Bauman's philosophical interests may have led him to evaluate those studies in a way that induced him to overlook the ways in which those studies were directed at the issue he identifies. (2) Similarly, Professor Bauman's summary list of his concerns about the programmatic implications of the works he examines includes at least some items that participants in the critical legal studies project attempted to address in later work. See *ibid*. at 155:

> [a] the indeterminate outlines of the critical legal use of community as a normative concept; [b] the question of whether the radical critics ignore elements of communal value already present in conventional legal practice and theory; [c] doubts about whether the civic republican ideal can be retrieved; [d] the scope for meaningful political debate in the

that I am supposed to play McLuhan in this essay, using my authority as one of Professor Bauman's subjects to assess whether his evaluation is correct.

I'm not sure I can do that. As I have observed elsewhere, once you write something, it is loosed upon the world and takes on the meaning(s) that its readers give it, whatever your own intentions or understandings were.[2] Professor Bauman takes critical legal studies to have been concerned with producing a critique of liberalism as articulated by systematic philosophers and political theorists.[3] His work consists in part of fair-minded summaries of leading works in critical legal studies understood in that way, and those interested in a reasonably accessible presentation of the main lines of critical legal studies arguments will find Professor Bauman's presentations quite useful.[4] This is particularly noteworthy because Professor Bauman is plainly unsympathetic to what he takes to be critical legal studies' main arguments.[5] Even here, though, Professor Bauman presents equally fair criticisms of the inadequacies of critical legal studies'

> projected post-liberal community; and, finally, [e] the question of who are to be the designated agents of the transformation, and the way in which the answer to this question reflects upon the current institutional role of radical critics of the law.

Of these, I believe that [b] was a more substantial component of early critical legal studies work than Professor Bauman does, and that subsequent scholarship attempted to address [c]. (3) On the most general level, Professor Bauman's self-imposed time-frame precludes him from treating later developments in critical legal studies as elaborations or explications of earlier presentations. *See* note 7 *infra* (noting a similar issue in connection with the early and later work of John Rawls).

2 Mark Tushnet, *The Death of an Author, By Himself* (1994) 70 Chicago-Kent Law Rev. 111. My observation in that brief essay was not, of course, original with me.

3 That approach pervades the book. One early indication (at 6) is Bauman's statement that he uses "the techniques of analytic philosophy" in his inquiry.

4 A note on style, though: Professor Bauman would have benefited from an editor or copy-editor who told him to break his (frequent) page-long paragraphs into smaller chunks.

5 But see Bauman at 176 (describing the book as "an essay in sympathetic understanding and grounded critique"). "Sympathetic understanding," of course, is not inconsistent with lack of sympathy for what is understood.

criticisms, such as they were,[6] of liberalism understood as Professor Bauman says critical legal studies understood it.

Professor Bauman is not alone in seeing critical legal studies in this way. And, as it happens, I agree in the main with what he has to say about the failings of critical legal studies – again, understood in this way – as a critique of liberalism as a systematic political philosophy.[7] It's just that, as I see it, critical legal studies was not put on offer as that kind of critique, even if it was taken up as such a critique by admirers and critics.

My focus here will therefore not be on what Professor Bauman says about critical legal studies as he understands it, but on presenting an alternative understanding of what critical legal studies was about. In brief, it was not a critique of liberalism as presented by systematic political philosophers, but was rather a critique of the way philosophical liberalism had actually worked its way into the ordinary understandings of those who defined the central concerns of the U.S. legal academy in the 1970s. One way of putting the point is that critical legal studies was not about legal philosophy but was about legal thought, where the latter term refers to the way legal academics informally conceptualize their daily work.[8] Another way

6 I note a problem with determining the verb tense one should use in discussing critical legal studies. I believe that legal academics continue to do work that should be described as critical legal studies, in the sense that its intellectual lineage is traceable to the work Bauman discusses and its concerns are those that animated that work. I would prefer to refer to critical legal studies in the present tense, but defer to Bauman's choice of focus on work written before roughly 1985 and so will generally use the past tense.

7 I would note, though, that Professor Bauman probably should have devoted a bit more space to explaining why the late John Rawls – of *Political Liberalism* (New York: Columbia University Press, 1993), published in 1993, after the works Professor Bauman discusses were written – is simply an explication of the early John Rawls of *A Theory of Justice* (Oxford: Clarendon Press, 1972). Although I believe that the "explication" view of *Political Liberalism* is correct, critical legal scholars were not the only ones to think – mistakenly, according to Rawls – that *A Theory of Justice* was indeed metaphysical, not political.

8 I draw the distinction between legal philosophy and legal thought from my reflections on Brian Leiter's highly critical review of Neil Duxbury's book entitled *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995). Brian Leiter, "Is There an 'American' Jurisprudence?" (1997) 17

of putting it is to suggest that Professor Bauman's approach to critical legal studies misses the real import of the closing passage of Roberto Unger's book on the critical legal studies movement, with its reference to priests who had lost their faith but kept their jobs.[9] Critical legal studies was primarily about the U.S. legal academy, not about liberalism as a political philosophy – except insofar as the latter had some loose connections to the former.

Legal academics made those connections in both private and public law. Private law scholarship had absorbed the lessons of American Legal Realism and argued, in every area one entered, that scholars, judges, and legislators could determine what legal rule should apply by a careful analysis of the competing public policies implicated in the situation to which the rule would apply.[10] Yet, it was clear that, again in every area, the best resolution of conflicts or tensions among the relevant policies was quite unclear. At the time critical legal studies got its start, U.S. legal academics had few systematic approaches to resolving those conflicts.[11]

Legal academics in the United States did *present* resolutions, but to proponents of critical legal studies it was apparent that the recommendations rested almost entirely on the personal authority of those offering the resolutions. Our teachers presented themselves as

Oxford J. of Legal Studies 367.

9 Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Cambridge, MA: Harvard University Press, 1986) at 199 [Unger].

10 Here *public policy* includes the value given to allowing individual actors to determine for themselves what course they pursue.

11 Law and economics soon emerged as a systematic effort to resolve these conflicts, and critical legal studies devoted a fair amount of attention to demonstrating the inability of law and economics to do so. Some of the critical legal studies work on law and economics was published before 1985. See, *e.g.*, Duncan Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Maryland Law Rev. 563; Duncan Kennedy, "Cost-Benefit Analysis of Entitlement Problems: A Critique" (1981) 33 Stanford Law Rev. 387. Given his largely philosophical interests, Professor Bauman understandably says little about that work. The inability of law-and-economics to resolve conflicts among competing public policies has become increasingly apparent as law-and-economics has passed into a third generation of scholars whose economic models incorporate more and more complexity and produce fewer and fewer specific recommendations for the rules to be chosen.

respected members of the American Law Institute, for example, whose personal endorsement of solutions should carry a great deal of weight. Undoubtedly, some reactions within critical legal studies to these men – which is who (or what) they were, with only one or two exceptions – arose from personal distaste at the pomposity and self-absorption that accompanied the recommendations.[12] But, there was a deeper point: Recommendations for policy choice that rested on personal authority were, it seemed, quite inconsistent with the aspirations of *law*.[13]

Professor Bauman observes correctly that some critical legal studies' presentations of this point moved to an inappropriately high conceptual level. The tensions among competing public policies were called *contradictions*, which they were not in any logical sense.[14] And, as Professor Bauman says, sometimes the critical legal studies' presentations "adopt[ed] a standard of coherence that is inappropriate to legal reasoning."[15] Yet, it seems to me, Professor Bauman's response is incomplete. For him, competing lines of legal authority are reconciled through "a rationally defensible exercise of practical deliberation."[16] Works on practical deliberation and *phronesis* in recent legal literature have not dispelled my sense that the "rational defense" of such processes continues to rest uncomfortably on the personal authority of the deliberator.[17]

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[12] The rest of Unger's statement about priests captured this feeling (at least when the work was delivered as a speech at a critical legal studies conference): "[W]e . . . found the mind's opportunity in the heart's revenge" (Unger, *supra* note 10 at 119).

[13] I recall some discussions, which I do not think reached the level of detailed published treatments, of the way in which Max Weber analyzed the role of *honoratiores* in Roman law, and it seems to me now that we perceived some tension between that role and the aspirations of modern law. (I would not put too much weight on this recollection, however.)

[14] See Bauman at 62 (explaining why so-called contradictions are better described as "conflicting or competing values").

[15] *Ibid*. at 9.

[16] *Ibid.*

[17] Here Professor Bauman's self-imposed limitation on the period his work covers leads him to discuss the critical legal studies approach to adjudication without dealing in detail with Duncan Kennedy's presentation of his mature views in *Critique of Adjudication: Fin de Siècle* (Cambridge, MA: Harvard University Press, 1997). It would be particularly useful to see how Professor Bauman would compare his own account of "practical reasoning" in contract

Here, then, there was a connection between critical legal studies and liberalism, but it was more affinity than critique. As we saw things, liberalism meant, at its most modest, that conflicts of principle were to be resolved by reason rather than authority. Our teachers purported to believe that private law doctrine was consistent with liberalism, but their performances manifested a belief that conflicts of principle within private law could be resolved only by (their) authority. This aspect of critical legal studies did not repudiate or criticize liberalism, but rather tried to hold contemporary private law scholarship to the requirements of a liberalism with the most minimal content.[18]

U.S. legal academics relied on another technique to deal with conflicts of principle: institutional analysis of the allocation of decision-making capacities of the sort associated with the Legal Process school. This was also the technique used to deal with problems in public law.[19] The technique's general form was to shift from matters over which there was substantive disagreement to procedures. One thing was immediately obvious to us (and to the more sophisticated advocates of Legal Process ideas, although not to less sophisticated ones). Suppose you adopted a procedure that *predictably* would lead to a particular resolution of the substantive disagreement. Those whose substantive positions would be rejected would have no reason to go along with the procedure. And, the point could be generalized across substantive disagreements: Consider your views on the entire range of matters about which there is disagreement, and evaluate the procedures being proposed to see whether you end up with more results you favor under those procedures or under some alternative procedures.

At this point, the Legal Process arguments could go down two

law (at 119-21) with Kennedy's detailed phenomenology of judging. Professor Bauman devotes one paragraph (at 175) to Kennedy's later work, asserting that it does not "represent a striking new departure for critical legal studies."

[18] It might not even be necessary to characterize the aspiration to base law on reason as a (specifically) liberal proposition, although I take it that such an aspiration is built into liberalism.

[19] Professor Bauman's index does not contain any references to Henry Hart or Albert Sacks, the authors of the canonical Legal Process work, and I do not recall reading in the book any passing references, which might not have elicited a direct citation, to Legal Process work.

paths. They might deny that outcomes were predictable. This, though, seemed implausible in the social setting of the United States in the 1970s. Further, it was in some tension with the usual reaction to the critical legal studies claim that legal results could not readily be predicted from an examination of the relevant legal materials alone. That reaction was that outcomes were indeed predictable. Yet, that predictability obviously re-raised the question of how moving from substance to procedures could avoid conflicts over substantive disagreements. In addition, it was never established that predictability arose from the legal materials rather than, for example, from the personal characteristics of legal decision-makers. That, in turn, raised rule-of-law questions: Predictability might well result from the injection of personal authority into the decision-making process.

Alternatively, and more commonly, the Legal Process response was to look for principles of allocation to alternative procedures that rested on essentially technocratic criteria, picking up on the Progressive-era commitment to the use of administrative agencies staffed by technical experts. Decision-makers who were "good at" making one sort of decision would be given the power to make such decisions, while those who were good at making other types of decisions would get the power to make *those* decisions. Yet, to critical legal studies, this simply reproduced the problem of substantive disagreements, masking them only slightly behind the implicit criteria for determining who was good at making what kinds of decisions.[20] And, it was never made clear why *lawyers* were particularly well-suited to applying those criteria, even though the Legal Process school necessarily gave lawyers that job.

I go through all this as a prelude to describing how the critique of a certain sort of liberalism entered into critical legal studies. When those who developed critical legal studies made the points I've just made, the immediate responses tended to invoke an extremely crude,

[20] This point cannot be divorced from the fact that critical legal studies took shape during the period of the Vietnam War, which many radical critics attributed to the misplaced confidence of government decision-makers in their own ability to make technically correct decisions. The self-understanding of those who made a mess of the War was captured in the (intentionally ironically critical) title of a best-selling book on the War, David Halberstam, *The Best and the Brightest* (New York: Penguin Books, 1973).

quasi-philosophical liberalism whose predicates were what Professor Bauman calls "the subjectivity of values [and] radical individual autonomy."[21] That is, the response was, "Well, what else can you do when there's no objective standard for assessing the correctness of the preferences people actually have, which themselves vary wildly?" Put another way, not critical legal studies but rather our adversaries first invoked the principles of a crude liberalism. I suppose we could have replied by pointing out how defective these responses were as a philosophical matter, but my sense is that we knew that such a reply would not have functioned as an effective refutation in our context.[22] Instead, we developed critiques of radical individual autonomy and the subjectivity of value, which we presented as a critique of liberalism – but not, I emphasize, a critique of liberalism-as-it-could-be-defended-by-its-best-proponents, but rather a critique of the everyday liberalism of the U.S. legal academy.[23] With critical legal studies understood in that way, Professor Bauman's criticisms of what critical legal studies had to say about liberalism turns out to be more an endorsement of critical legal studies than a criticism of it.[24]

Dotted throughout Professor Bauman's work are comments on the possibility that critical legal studies' arguments were as much "question[s] of rhetoric or persuasion" as they were analytic propositions.[25] Near the conclusion, Professor Bauman argues that,

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21 Bauman at 7.

22 I cannot fully reproduce the sources of that feeling, but my sense (today) is that we knew that such a reply would have pulled us on to our adversaries' ground after we had already succeeded in shifting the discussion to *our* ground.

23 One way to understand our strategy is this: What we wrote seemed to take on, say, John Stuart Mill, but actually our targets were the acolytes of Henry Hart and Albert Sacks, who had assimilated a weak or distorted version of Millian liberalism. When we criticized "Millian liberalism," what we really were criticizing was "the liberalism of the contemporary legal academy, which has some modest affinities to Millian liberalism." (I say that our targets were Hart and Sacks's acolytes because the Hart and Sacks materials were themselves much more subtle than the versions their acolytes offered us.)

24 Professor Bauman's discussion of Kennedy's analysis of "attitudes" and "basic orientations" (at 17) suggests some awareness on Professor Bauman's part that critical legal studies was not as concerned it is might seem with systematic, worked-out philosophy.

25 See, *e.g.*, *ibid.* at 36.

considered as rhetoric, critical legal studies either was not effective as rhetoric, or could have been more effective. At the beginning of his final chapter, he is particularly concerned that critical legal studies did not adequately defend the proposition that existing arrangements should be replaced by inadequately specified alternatives, for "[t]o be persuaded of the need for a new set of arrangements and values . . . , we need to know precisely what they are."[26] Professor Bauman provides a good summary of the critical legal studies arguments *against* "blueprintism,"[27] and he may underestimate the extent to which advocates of critical legal studies did indeed offer the relevant prescriptions.[28] In the end, though, whether the rhetoric of critical legal studies carried the day is basically an empirical question. The fact that a book published in 2002 remains engaged with the issues we raised suggests that critical legal studies may have been more effective than Professor Bauman seems to think.

[26] *Ibid*. at 126. See also *ibid*. at 171: "Readers of the radical literature should be given the opportunity to compare the principles espoused by critical legal studies with the actual forms of social and political life to which those principles are supposed to lead. Where what is at stake involves how we teach, how we practice, and how we explain, turnabout on these issues is only fair play."

[27] *Ibid*. at 132-33.

[28] The underestimation may result from a failure to appreciate the extent to which critical legal studies was an internally diverse group. There was no "line" to which people who advocated critical legal studies had to adhere on pain of expulsion, which may make Professor Bauman's call for precision in prescriptions inappropriate.