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### The Charter and Anglophone Legal Theory, part I

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# THE CHARTER AND ANGLOPHONE LEGAL THEORY

Richard F. Devlin\*

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

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

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\* Associate Professor, Dalhousie Law School, Visiting Professor, McGill Law School (1995-1996). This paper originally was commissioned as part of the Centre for Constitutional Studies' project on the impact of the Charter. The papers in that research project have since been collected in *Charting the Consequences: The Impact of the Charter on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997) edited by D. Schneiderman and K. Sutherland. Due to a number of circumstances (mostly because of delay), this paper does not appear in the collection, but is being published separately. Special thanks to Alexandra Dobrowolsky, Hélène Lajeunesse, Kevin Peterson, Dianne Pothier, and an anonymous reviewer for their assistance in helping me complete this essay. The review is current to December 1995.

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Constitutional litigation ought not to be seen as a barren exercise of statutory interpretation .... The legal community must assist the courts by working to develop a theoretical framework of constitutional principles.

Brian Dickson C.J.<sup>1</sup>

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

V. Kerruish<sup>2</sup>

## I. ON METHOD — JURISPRUDENTOLOGY

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

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

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<sup>1</sup> “An Address to the Mid-Winter Meeting of the Canadian Bar Association” Edmonton (2 February 1985) 13-19.

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

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

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

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

## II. ON THE PARAMETERS OF LEGAL THEORY

In this section, I want to make a few preliminary comments about the nature, scope, and methods of legal theory. However, it is to be noted that what follows

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

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

should not be conceived of as an attempt to provide a single comprehensive definition of legal theory for such closure, even if it were possible, would be undesirable in that it would attempt to impose parameters on a practice that is always in the process of becoming.

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

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

Moreover, it is important not to confuse abstraction with decontextualism, that is, the process whereby one attempts to isolate phenomena from their (in)formative environment in order to attain a clearer, or at least less

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

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

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

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

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

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

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

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

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

society? How does law fulfill those functions? How important is law in a society? Which perspectives, overtly or covertly, inform legal institutions, rules or procedures?

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

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

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

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

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

<sup>13</sup> (Toronto: Carswell, 1990).

<sup>14</sup> (Toronto: Carswell, 1994).

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

<sup>16</sup> (Toronto: Carswell, 1988).

<sup>17</sup> 3rd ed. (Toronto: Carswell, 1989).

Finally, it should be acknowledged at the outset that in order to render the project manageable, there are at least three limitations that significantly circumscribe the scope and ambitions of this essay. First, there is no attempt to provide a comparative or longitudinal analysis of the development of Canadian constitutional theory.<sup>18</sup> Second, the focus is primarily on legal academics who write in relation to the *Charter* and, therefore, I have tended to marginalize the important contributions of scholars from other disciplines. Third, and most problematically, due to my own inability to read French, I have concentrated on anglophone scholars.

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

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

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

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

of high theory; the development of theories of the middle order and working theories; and a synthesizing function.<sup>21</sup> To these I will add a sixth task for jurisprudence: an ideological function.

### III. A QUANTITATIVE ANALYSIS

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

<sup>21</sup> See "Some Jobs for Jurisprudence," *supra* note 19 at 160; also see "Evidence and Legal Theory," *supra* note 19 at 64.

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

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

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

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

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

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Press, 1994); C.I.A.J., *The Canadian Charter of Rights and Freedoms* (Cowansville: Yvon Blais, 1983); Canadian Human Rights Foundation, ed., *Multiculturalism and the Charter: A Legal Perspective* (Toronto: Carswell, 1987); K. Mahoney & S. Martin, eds., *Equality and Judicial Neutrality* (Toronto: Carswell, 1987); D. Schneiderman, ed., *Freedom of Expression and the Charter* (Calgary: Thompson, 1991); R. Sharpe, ed., *Charter Litigation* (Toronto: Butterworths 1987); L. Smith, et al., *Righting the Balance: Canada's New Equality Rights* (Saskatoon: C.H.R.R., 1986); K. Swinton, ed., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988); W. Tarnopolsky & G. Beaudoin, *The Canadian Charter of Rights and Freedoms: A Commentary* (Toronto: Carswell, 1982); Weiler & Elliot, *supra* note 4.

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

<sup>25</sup> See, for example, Canadian Journal of Law and Jurisprudence.

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

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

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

hospitable to *Charter* issues, have been quite wide ranging in their jurisprudential coverage. Moreover, the *Charter* seems to have had little impact on the scholarship of some of Canada's most established jurists, for example, Professors Weinrib and Trebilcock.

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

#### IV. A QUALITATIVE ANALYSIS

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

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

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

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

## A. Constructing Intellectual History

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

## B. Conduit Function

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

In terms of the assimilationist approach, Twining argues that the role of the jurist is to “venture forth ... [and] bring back the ideas, techniques, and insights of [another] discipline and to integrate or assimilate them into the intellectual milieu of the law.”<sup>37</sup> It is to be noted that such an approach seems to be premised

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<sup>32</sup> “Evidence and Legal Theory,” *supra* note 19 at 64.

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

<sup>34</sup> R. Penner, “Introduction: The Dickson Legacy, The Legacy of a Judicial Humanist” (1991) 20 *Man. L. J.* 263.

<sup>35</sup> *The Democratic Intellect* (1992) 15 *Dalhousie L. J.*; see also R.E. Hawkins & R. Martin, “Democracy, Judging and Bertha Wilson” (1996) 41 *McGill L. J.* 1.

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

<sup>37</sup> “Some Jobs for Jurisprudence,” *supra* note 19 at 157.

upon strong assumptions as to the nature and parameters of law. In that sense it tends to presume that law itself is unproblematic. Moreover, it constructs jurisprudence as an active subject and other intellectual genres as passive objects, waiting to be press-ganged into the service of legal theory. Such an assumption has resulted in the familiar paradigm of “law and ...” approaches, with corresponding charges of intellectual imperialism (and naïveté).

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

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

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

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

<sup>39</sup> For a particularly clear example, see the excellent debate between Fudge and Glasbeek and Herman. [ J. Fudge & H. Glasbeek, “The Politics of Rights: A Politics with Little Class” (1992) 1 Soc. & L. Stud. 45; D. Herman, “Beyond the Rights Debate” (1993) 2 Soc. & L. Stud. 25]. See also L. Clark, “Liberalism and the Living-Tree: Women, Equality, and the *Charter*” (1990) 28 Alta. L. Rev. 384; M. Eaton, “Lesbians, Gays and the Struggle for Equality Rights: Reversing the Progressive Hypothesis” (1994) 17 Dalhousie L. J. 130; D. Fraser, “And Now for Something Completely Different: Judging Interpretation and the Canadian Charter of Rights and Freedoms” (1987) 7 Windsor Y.B. Access Just. 66; D. Greschner, “Abortion and Democracy for Women: A Critique of *Tremblay v. Daigle*” (1990) 35 McGill L. J. 633; Mandel, *supra* note 8

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

Also of considerable significance is the turn, sometimes implicit but often explicit, to literary criticism. Many scholars, who emanate from diverse and often quite contradictory ideological positions, seem to be inspired by their inquiries into the different approaches to literary criticism. However, despite these differences, there appears to be widespread consensus that the way to proceed in a *Charter*-ized regime is through a colloquy,<sup>43</sup> democratic dialogue,<sup>44</sup> a postmodern democratic dialogue,<sup>45</sup> a distinctively Canadian conversation,<sup>46</sup> communicative discourse,<sup>47</sup> constitutional dialogue of democratic accountability,<sup>48</sup> a conversation of justification,<sup>49</sup> a conversation about rights and roles.<sup>50</sup> Sections 1 and 33 are often invoked as exemplars of this dialogic vision. I will

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at 83, 222; Trakman, *supra* note 22; N. Sargent, “Rethinking the Law and Social Transformation Debate: Beyond the Correspondence Metaphor” (1991) 3 J. Human Just. 1; C. Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 Can. J. Law & Jur. 49; B. Weber, “A Disenchanted *Charter*? The Common Law Tradition and the Charter of Rights and Freedoms” (1988) 3 Can. J. Law & Soc. 195.

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

<sup>41</sup> *Supra* note 30.

<sup>42</sup> *Supra* note 29.

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

<sup>44</sup> Hutchinson, *supra* note 22.

<sup>45</sup> C. Stychin, “A Postmodern Constitutionalism: Equality Rights, Identity Politics, and the Canadian National Imagination” (1994) 17 Dalhousie L. J. 61.

<sup>46</sup> Webber, *supra* note 22 at 192.

<sup>47</sup> Trakman, *supra* note 22 at c. 1.

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

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

<sup>50</sup> M. Gold, “Of Rights and Roles: The Supreme Court and the *Charter*” (1989) 23 U.B.C.L. Rev. 507.

have more to say about this apparent faith in dialogism later in the essay, but at this point I simply want to highlight that almost everyone seems to be doing it.

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

### C. The Construction of High Theory

#### i) High Theory Defined

For Twining, "high theory" is essentially "philosophical," it addresses "fundamental issues," which might include:<sup>52</sup>

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

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

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

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

<sup>52</sup> "Some Jobs for Jurisprudence," *supra* note 19 at 158.

political messiness of law in action.<sup>53</sup> Thus, it is suggested that high theory (or philosophy) is a method of jurisprudence but, unlike legal theory, it is not coterminous with jurisprudence.<sup>54</sup>

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

## ii) The Post-Rationalist Turn

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

Perhaps the grandest assault on this rational instrumentalist conception of law comes from J.C. Smith and his argument that our legal order may, in fact, be driven by a neurotic patriarchal psyche, a juridical unconscious that is motored by an irrational fear of the other.<sup>59</sup> Smith, however, has little to say about the *Charter*, although in passing he does appear to suggest that women

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

<sup>54</sup> *Evidence and Legal Theory*, *supra* note 19 at 62.

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

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

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

<sup>58</sup> Gibson, *supra* note 22 at 1.

<sup>59</sup> Smith, *supra* note 30.

judges can interpret it in a “different voice” that is more open to diverse needs of a postmodern society such as Canada.<sup>60</sup>

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

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

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

By unpacking such presuppositions Conklin aspires to make legal decision-makers subject to the demands of what he, in contrast to instrumental reason, calls “critical reason.”<sup>63</sup> Critical reason insists that one must develop the talent of self-reflexivity, that one must resist juridical closure and that one must make explicit one’s prejudgments, be they ontological, political or moral. Furthermore, Conklin argues that the *Charter*, because of the centrality of the manifestly contestable concepts of freedom, democracy, liberty, and equality, necessarily “entertains” and “fosters” such recourse to social, political and moral theory.<sup>64</sup>

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<sup>60</sup> J.C. Smith, “Psychoanalytic Jurisprudence and the Limits of Traditional Legal Theory” in Devlin, *supra* note 4 at 223.

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

<sup>62</sup> *Ibid.* at 218.

<sup>63</sup> *Ibid.* at 248-52.

<sup>64</sup> *Ibid.* at 236-65.

In other words, legal decision-makers must justify their reasons and, therefore, be held accountable for the enforcement of their preferred image of the constitution. In this way, Conklin argues, the nexus between (legal) knowledge and power is rendered transparent and, thereby, more contestable.<sup>65</sup>

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

### iii) The Rights Debate

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

The dominant intellectual paradigm in Canadian jurisprudence presumes that rights, like law, are both natural and unequivocally desirable. Drawing on the spectre of an unfettered majoritarianism advocates of an entrenched *Charter* argue that the more rights we have the better.<sup>68</sup> In particular, pride of place is

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

<sup>66</sup> M.E. Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” in Devlin, *supra* note 4 at 503.

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

<sup>68</sup> See, for example, T. Axworthy, “Colliding Visions: The Debate Over the Charter of Rights and Freedoms 1980-81” in Weiler & Elliot, *supra* note 4 at 13; T. Axworthy, “Liberalism and Equality” in Mahoney & Martin, *supra* note 23 at 43; Bayefsky & Eberts, *supra* note 23; N. Lyon, *supra* note 38; J. MacPherson, “Litigating Equality Rights” in Smith, *supra* note 23, 231 at 232; J. Whyte, “Fundamental Justice: The

given to the right to individual liberty.<sup>69</sup> Viewed from this perspective, the juridical history of Canada is one of inexorable (if slow) improvement as we have moved from a shaky common law regime of inchoate rights, to the statutory recognition of rights, to the constitutional entrenchment of rights.<sup>70</sup> Jurists who subscribe to such a perspective envision the *Charter* as a normative and institutional structure designed to encourage both the courts and the legislators to maximize human rights<sup>71</sup> and social justice.<sup>72</sup> However, if there is conflict between the legislatures and the courts, most rights advocates tend to argue that the courts should have the last word not only because they are likely to be the strongest guardians of minority interests,<sup>73</sup> but also because the *Charter* itself provides objective and determinative right answers.<sup>74</sup> Importantly, many rights theorists emphasize that the judicial enforcement of rights is grounded in principle, not policy, politics or power.<sup>75</sup> The call is for “judicial statesmanship”<sup>76</sup> and constitutional fidelity.<sup>77</sup>

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Scope and Application of Section 7 of the *Charter*” (1983) 13 Man. L. J. 455.

<sup>69</sup> *Putting the Charter to Work*, *supra* note 22 at c. 6.

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

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

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

<sup>73</sup> Slattery, *supra* note 71; Whyte, *supra* note 68.

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

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

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

<sup>77</sup> Lyon, *supra* note 72 at 99.

Others, however, are unimpressed and advance several arguments against the ideology and practice of the *Charter*-ization of rights.<sup>78</sup> First, critics argue that judicial review is undemocratic because judges are unelected and, therefore, unaccountable.<sup>79</sup> Moreover, they are said to be unreflective of the class, race, gender, (dis)abilities, sexual orientations or political preferences of Canadian society-at-large.<sup>80</sup> Particular attention has been focused on the hostility of the courts to rights claims by unions as manifested in *Dolphin Delivery*<sup>81</sup> and the right to secondary picket, the *Labour Trilogy*<sup>82</sup> as to whether the freedom to associate includes a right to strike, and the *BCGEU*<sup>83</sup> case in which the right to picket, though recognized as a form of expression under section 2(b) could be justifiably restricted under section 1.<sup>84</sup> Inversely, the courts are identified as having a pro-business tendency in, for example, their somewhat formalistic and legalistic recognition of corporations as persons and the correlative entitlement to a panoply of *Charter* rights.<sup>85</sup>

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

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

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

<sup>80</sup> Bakan, *supra* note 4.

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

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

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

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

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

Second, and closely related, is the argument that a public preoccupation with a *Charter* and rights arguments tends to subordinate and colonize other forms of political debate and mobilization. Such a dynamic prioritizes litigation rather than participation,<sup>86</sup> and reconstructs “citizens” as “petitioners.” This is compounded by the danger that litigational politics tends to catapult lawyers into the position of a political vanguard, a vanguard that is disconnected from broader social causes.<sup>88</sup>

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

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

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L. J. 309.

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

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

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

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

<sup>90</sup> *Lavigne v. OPSEU*, [1991] 2 S.C.R. 211.

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

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

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

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

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

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

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

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

<sup>96</sup> *R. v. Oakes*, [1986] 1 S.C.R. 103.

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

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

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

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

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

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

any concrete social impact and, indeed, may even operate as a form of deradicalization through partial incorporation.<sup>103</sup>

Finally, at least one critic worries that *Charter*-ized rights can encourage a unidimensional and stultifying nationalism.<sup>104</sup>

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

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

<sup>104</sup> Webber, *supra* note 86 at 230-31.

<sup>105</sup> B. Cossman, “Dancing in the Dark” (1990) 10 *Windsor Y.B. Access Just.* 223.

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

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

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

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

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

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

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

Specifically, section 15 (the equality provisions), sections 16-23 (language rights), section 25 (aboriginal rights), section 27 (multiculturalism) and section 28 (women's rights) have been hotly contested *Charter* provisions. So too have been proposals for a Social Charter. While some argue that group rights are nonsensical because a group is indeterminate,<sup>111</sup> others point to the needs of native,<sup>112</sup> multicultural,<sup>113</sup> and minority language<sup>114</sup> communities to argue that collective rights are both defensible and that they fulfill an important constitutional function. Problematized by cases such as *Société des Acadiens*,<sup>115</sup> *Ford v. Quebec (A.-G.)*<sup>116</sup> and *Sparrow*,<sup>117</sup> as well as the draft legal text of the Charlottetown Accord, many legal philosophers provide us with a steady, and sometimes sustaining, diet of conceptual distinctions that operate at various levels of description and abstraction: individualism and communitarianism,<sup>118</sup> liberalism and communitarianism;<sup>119</sup> history-based groupism and liberal individualism;<sup>120</sup> hostile liberalism, moderately sceptical liberalism and sympathetic liberalism;<sup>121</sup> duality and multiculturalism;<sup>122</sup> multiculturalism,

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- <sup>111</sup> B. Schwartz, "Individuals, Groups and Canadian Statecraft" in Devlin, *supra* note 4 at 39.
- <sup>112</sup> D. Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" (1989) 2 Can. J. Law & Jur. 19; M. McDonald, "Should Communities Have Rights? Reflections on Liberal Individualism" (1991) 4 Can. J. Law & Jur. 217; W. Pentney, "The Rights of the Aboriginal Peoples of Canada and the Constitution Act 1982: Part 1 — The Interpretive Prism of Section 25" (1988) 22 U.B.C. L. Rev. 21, "Part 2 — Section 35: The Substantive Guarantee" (1988) 22 U.B.C. L. Rev. 207.
- <sup>113</sup> J. Magnet, "Multiculturalism and Collective Rights: Approaches to Section 27" in Beaudoin & Ratushney, *supra* note 17 at 739.
- <sup>114</sup> M. Bastarache, ed., *Language Rights in Canada* (Montreal: Yvon Blais, 1987); D. Réaume, "Language Rights, Remedies, and the Rule of Law" (1988) 1 Can. J. Law & Jur. 35, and "Individuals, Groups, and Rights to Public Goods" (1988) 38 U.T.L.J. 1; L. Green & D. Réaume, "Education and Linguistic Security in the Charter" (1989) 34 McGill L. J. 777.
- <sup>115</sup> (1986), 27 D.L.R. (4th) 406 (S.C.C.).
- <sup>116</sup> [1988] 2 S.C.R. 712.
- <sup>117</sup> (1990), 56 C.C.C. (3d) 263 (S.C.C.).
- <sup>118</sup> MacDonald, *supra* note 112; Monahan, *supra* note 22 at 111-113.
- <sup>119</sup> E. Mendes, "Two Solitudes, Freedom of Expression and Collective Linguistic Rights in Canada: A Case Study of the *Ford* Decision" (1991) 1 N.J.C.L. 283.
- <sup>120</sup> Schwartz, *supra* note 111.
- <sup>121</sup> MacDonald, *supra* note 112.
- <sup>122</sup> J. Magnet, "The *Charter's* Official Languages Provisions: The Implications of Entrenched Bilingualism" (1982) 4 Sup. Ct. L. Rev. 163.