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The Charter and Anglophone Legal Theory, part II

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multinationalism and poly-ethnicism,\textsuperscript{123} legal rights and moral rights;\textsuperscript{124} first- and second-class rights;\textsuperscript{125} inherent and contingent rights;\textsuperscript{126} rights to collective interests and the rights of collective agents;\textsuperscript{127} political collective rights and substantial collective rights;\textsuperscript{128} an integrity concept of rights and an agency concept of rights;\textsuperscript{129} fully voluntary groups, entry-voluntary groups, entrance-involuntary but exit-voluntary groups and fully involuntary groups;\textsuperscript{130} negative liberty and positive liberty;\textsuperscript{131} classical rights and social rights;\textsuperscript{132} rights as individualistic, exclusionary “quasi-absolute debate stopping conclusions” and rights as relational, open-ended sites of dialogue and struggle.\textsuperscript{133}

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

D. The Development of Working and Middle-Order Theories

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

\begin{footnotes}
\begin{enumerate}
\item \textit{Ibid.}
\item Trakman, \textit{supra} note 22.
\item Nedelsky, \textit{supra} note 48; Nedelsky \& Scott, \textit{supra} note 48.
\item Much the same can be said of the debate in relation to equality rights. See, for example, “Symposium on Equality” (1994) 7 Can. J. Law \& Jur. 1.
\end{enumerate}
\end{footnotes}
i) Middle-Order Theory

Twining is not as clear on this task as he is on some of the others but the suggestion is that middle theory operates in the realm between those academics who operate in the domain of high theory and those who toil in the field of legal doctrinal analysis. Here the target market seems primarily to be other legal academics and the chore is to develop "fertile hypotheses to guide research and inquiry in various areas...."135 Twining proposes that middle-order theorizing can help stimulate further scholarship, not only in "new and neglected fields of study," but also generate a "rethinking [of] old ones."136 Whereas the conduit and high theory approaches to jurisprudence have a centrifugal dynamic, middle-order theory is more centripetal, or inward looking. It is an exercise in filling the gap between high theory and the pragmatics of practical legal discourse137 and, as such, attempts to be a functional discourse.138 This form of theory does not attempt to generate substantive right answers, but rather to create coherent and intelligible frames of reference within which others — lawyers, judges or other academics — can make sense of the tasks they encounter. I will suggest three examples in the Charter context of middle-order theorizing: the debate on the legitimacy of judicial review; the question of the application of the Charter and reliance upon the public/private dichotomy; and the issue of appropriate Charter remedies.

A review of the literature indicates that the dominant jurisprudential concern of the last fifteen years has been the issue of the legitimacy of judicial review.139 An avalanche of interpretive theories have been advanced by Canadian theorists in order to provide guidance for the judiciary as to the proper approach to adopt in applying the Charter: consensualism,140 purposivism; 141 interpretivism; 142

135 “Some Jobs for Jurisprudence,” supra note 19 at 159.
136 Ibid. at 159-60.
137 “Evidence and Legal Theory,” supra note 19 at 65.
138 See, for example, Sharpe, supra note 23.
139 Despite the intense academic enthusiasm the Supreme Court remains quite disinterested. See Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 at 497 per Lamer J.
pragmatism; egalitarian liberalism; liberal legalism; postliberal pluralism; democratic communitarian proceduralism; a process theory; a co-ordinate model; substantive rationality review; institutional dialogue; democratic colloquy premised upon a weak form of parliamentary sovereignty; a grammatical approach in pursuit of self-understanding; a philosophical, contextual and justice inspired approach; a teleological interpretive discourse/practice; postmodern communitarian realism grounded in a communicative ethos; responsive asymmetricalism; philosophical realism; and "a complex partnership through institutional dialogue between supercourts and superlegislatures." These analyses often are structured around a review of the relationship between the limitations clause (section 1) and substantive Charter provisions.

The debate as to the scope of the application of the Charter may provide a second example of middle-order theorizing. Of particular importance here is the question of the public/private dichotomy. While some have argued that the

144 Talking Heads and the Supremes, supra note 22 at 250.
145 Putting the Charter to Work, supra note 22 at 10; Dyzenhaus, supra note 109.
147 Gold, supra note 75.
148 P. Monahan, supra note 22 at c. 6.
150 Slattery, supra note 71.
152 Fitzgerald, supra note 14.
155 Lyon, supra note 72.
156 Conklin, supra note 29.
157 Trakman, supra note 22 at c. 5-6.
158 Webber, supra note 22 at 244-59.
159 The Law of the Charter: General Principles, supra note 22 at 47, 83.
160 Weinrib, supra note 71 at 564-65.
161 See, for example, Talking Heads and the Supremes, supra note 22; Brudner, supra note 151; Monahan, supra note 22 at 115-17.

1997
Revue d'études constitutionnelles
Charter should only apply to state action, others have argued that it should encompass a much larger range of relationships between members of society. Still others have pointed to the incoherence and arbitrariness of these positions because of the way they rely on dichotomous thinking engendered by liberal ideology and they invoke decisions such as Dolphin Delivery as confirmation of the poverty of such analyses. Often one’s position on this debate is informed by whether one is more liberal, feminist, democratic or communitarian in one’s underlying legal philosophy.

The issue of legitimate Charter remedies provides another example of middle-order theory: assuming there is a breach of a Charter provision, what is the right response? Canadian jurists have been particularly interested in the remedy of “reading in.” Some have argued that such a strategy is legitimate not just because it is implied by section 24 but also on the basis of the argument that to allow the courts only the limited remedy of striking down a provision could result in “equality with a vengeance,” making more people worse off...


164 Supra note 81.

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

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


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

rather than making some people better off. However, others have argued that such judicial activism is of equivocal value because there can be quite negative spin-off effects.¹⁷⁰ Still others struggle to articulate some middle position that avoids excessive judicial interventionism while at the same time ensuring "progressive" outcomes.¹⁷¹

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

ii) The Formulation of Working Theory

a) Generally

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

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

A great deal of the work by Charter advocates tends to operate at the level of working theory. The projects of such scholars manifest at least four foci. First, they seek to broaden the categories of those who can qualify as potential rights holders under the Charter, for example: gays and lesbians;¹⁷⁴ students,¹⁷⁵

¹⁷⁰ Mandel, supra note 8 at 395-99.
¹⁷² "Some Jobs for Jurisprudence," supra note 19 at 159.
¹⁷³ Ibid. at 159.
foreigners,\textsuperscript{176} refugees,\textsuperscript{177} mentally disabled persons,\textsuperscript{178} convicted criminals,\textsuperscript{179} and the "unskilled, unlucky, and unorganized."\textsuperscript{180} Secondly, they seek to expand the scope of rights located in the Charter, for example, a right to food,\textsuperscript{181} welfare,\textsuperscript{182} nude dancing,\textsuperscript{183} and legal aid.\textsuperscript{184} Thirdly, rights advocates suggest reforms that would engender greater public access to the court system.\textsuperscript{185} Fourthly, they propose enhanced remedial powers for the judiciary.\textsuperscript{186}

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

\textsuperscript{177} Talking Heads and the Supremes, supra note 22 at c. 8.
\textsuperscript{178} D. Vickers & O. Endicott, "Mental Disability and Equality Rights" in Bayefsky & Eberts, supra note 23 at 381.
\textsuperscript{180} Putting the Charter to Work, supra note 22 at 10, 88.
\textsuperscript{183} J. Ross, "Nude Dancing and the Charter" (1994) 1 Rev. Const. Studies 298.
\textsuperscript{186} See, for example, Cooper-Stephenson, supra note 13.
Some gay and lesbian jurists develop similar inclusionary arguments and appear to have had juridical success in having sexual orientation included as an analogous ground under section 15. However, other gay and lesbian scholars go beyond (heterosexual) feminist scholars, for example, by problematizing the meaning and structure of “family” and “marriage,” and again appear to be having some possible success.

The exercise of developing working theories is programmatic and prescriptive. It tends to be self-conscious about its aspirations and explicit about

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

its agenda.\textsuperscript{192} To illustrate this claim I will first review debates in relation to the equality provisions and then the Aboriginal provisions of the Charter.


The equality provisions of the Charter have, perhaps, engendered some of the most polarised theoretical analyses at the level of working theory. Two sets of jurisprudential questions arise in this sphere. First, there is the debate over the meaning of equality. Second, there is the question of how do equality rights relate to other rights and liberties enshrined in the Charter. Both these questions can be most fruitfully addressed through a discussion of feminist engagements with equality.\textsuperscript{193}

“Equality” is one of those infamous “essentially contested concepts.”\textsuperscript{194} In relation to the Charter, three formulations appear to be pervasive in the literature: formal equality, equality of opportunity, and substantive equality.\textsuperscript{195} Formal equality is inspired by an aspiration for universal application. Drawing on the tradition of Aristotle, formalists posit that those who are the same should be treated alike, while those who are not the same can be treated differently. Formal equality is highly individualistic and decontextual in its analysis.\textsuperscript{196} Consequently, it focuses its attention on discriminatory practices that are direct and intentional. Equality of opportunity (or procedural equality) attempts to deal with indirect and systemic discrimination. It recognizes that not everyone is in

\begin{footnotes}
\textsuperscript{192} Eberts et al., supra note 9 at c. 7; M. Jackman, “The Protection of Welfare Rights Under the Charter” (1988) 20 Ottawa L. Rev. 257; MacKay, supra note 110.


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

\textsuperscript{196} A. Bayefsky, “Defining Equality Rights Under the Charter” in Mahoney & Martin, supra note 23 at 106; Brodsky & Day, supra note 89 at 81.
\end{footnotes}
precisely the same position, and, therefore, it considers whether people are similarly situated either socially, economically or culturally.\textsuperscript{197} If so, it advocates fair play and suggests that some advantages may be given to those who are disadvantaged so that they may be able to compete in a fair race.\textsuperscript{198} However, if they are not similarly situated they can be treated differently. Substantive equality (a.k.a. equality of condition or equality of well being) tends to dislike the race analogy mostly because it is too procedural.\textsuperscript{199} Instead, it espouses equality in the distribution of “social goods.”\textsuperscript{200} Advocates of substantive equality reject the sameness/difference comparative framework as indeterminate and ideologically loaded and they eschew a robust public/private dichotomy. Rather, they take as their starting point inequality, domination and disadvantage,\textsuperscript{201} and on this foundation emphasize context specific rather than superficially neutral modes of analysis.\textsuperscript{202} Consequently, it is argued that we should focus less on intentions and procedures and more on outcomes and effects.\textsuperscript{203} Viewed through this prism, equality must be understood in a more caring, contextual and group-sensitive way.\textsuperscript{204} In short, substantive equality favours fair shares and not just fair play.\textsuperscript{205}

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

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


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

\textsuperscript{202} Eberts et al., supra note 9 at 21.

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

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

\textsuperscript{205} The fair shares/fair play characterization was introduced by the political scientist Jill Vickers in “Majority Equality Issues of the Eighties” (1983) 1 Can. Hum. Rts. Y.B. 47. See also Jackman, supra note 182. For an argument that even the fair shares vision is
These arguments have had critical purchase in a series of recent cases. Feminists, for example, in order to avoid the Bill of Rights mentality of formal equality, have emphasized not only the affirmative action provisions of section 15(2) and the interpretive mandate of section 28, but also the expansive wording of section 15(1) and, in particular, the “before and under the law” and the “equal protection and equal benefit of the law” provisions. Such arguments were endorsed by the Supreme Court in Brooks when it explicitly overruled its decision in Bliss decided a mere ten years earlier. Moreover, in Andrews, Turpin and Butler, the Supreme Court also seems to have accepted arguments by the feminist litigational think tank, LEAF, that the most appropriate conception of equality is one that rejects formalist and similarly-situated approaches and instead adopts a conception that focuses on “disadvantage.” Such an interpretation is quite closely connected to substantive conceptions of equality, and shifts the prism of analysis from the sameness/difference paradigm to a domination/subordination paradigm.

too accommodationist and insufficiently transformative, see A. Bartholomew, “Achieving a Place in a Man’s World: Or, Feminism with No Class” (1993) 6 C.J.W.L. 465.


211 Supra note 92.


Herman argues that even this version of equality may not go far enough because there is a real danger that the recognition of gay and lesbian equality rights is premised upon an immutability (or status) argument (as opposed to a choice or conduct argument) which, in turn, is premised upon an unproblematized assumption of heterosexual normality. Herman, supra note 22 at c. 3. See also C. Stychin, “Essential Rights and

Vol. IV, No. 1
Review of Constitutional Studies
Similar feminist analyses appear to have a ripple effect on non-Charter Supreme Court decisions such as Janzen, Lavallée, and Moge. Such "victories" have encouraged other feminists to build upon these breakthroughs to argue for an enlarged sphere of influence for equality rights.

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

Perhaps the classic and most controversial example of such theorizing is to be found in relation to the pornography debate in which feminist anti-

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219 There are, however, strong indications that this feminist interpretive influence may have been short-lived. In the recent trilogy of Miron, Egan and Thibaudeau, [1995] 2 S.C.R. 418, 513, 627, a majority of the Supreme Court seem to have reconsidered the appropriateness of the "disadvantaged" approach, and through the idea of "relevancy" retreated to a similar situated, sameness of treatment or reasonableness approach to equality. For a discussion of these cases, see B. Berg, "Fumbling Towards Equality: Promise and Peril in Egan" (1995) 5 N.J.C.L. 263; D. Pothier, "M'Aider, Mayday: Section 15 of the Charter in Distress" (1996) 6 N.J.C.L. 295; R. Wintemute, "Discrimination Against Same-sex Couples: Sections 15(1) and 1 of the Charter, Egan & Nesbit v. Canada" (1995) 74 Can. Bar Rev. 682.
220 Eberts, supra note 169 at 217-18 arguing that ss. 15 & 28 have priority over ss. 25 & 35. See also de Jong, supra note 207 at 522-23 and P. Hughes, "Feminist Equality and the Charter: Conflict with Reality?" (1985) 5 Windsor Y.B. Access Just. 39.
221 Supra note 92.
pornography jurists have invoked the equality rights of sections 15 and 28 against the freedom of expression provisions of section 2(b) invoked by pornographers and liberals. Similar patterns of analysis have emerged in the sexual assault context where accused men have claimed that the rape shield provisions of the Criminal Code violate their right to a fair trial under section 11 and feminists have replied that these are trumped by sections 15 and 28. Clearly, feminists have been crucial and influential formulators of working theory.

Parallel arguments were also developed in the context of anti-hate propaganda legislation, and again the argument that s. 15 (this time in conjunction with s. 27) trumps, seems to have been persuasive in R. v. Keegstra, [1990] 3 S.C.R. 697. See, for example, K. Mahoney, “R. v. Keegstra: A Rationale for Regulating Pornography?” (1992) 37 McGill L. J. 242. However, the argument seems to have failed in R. v. Zundel (1992), 95 D.L.R. (4th) 202 (S.C.C.). See also the important intervention by R. Moon, “Drawing Lines in a Culture of Prejudice: R. v. Keegstra and the Restriction of Hate Propaganda” (1992) 26 U.B.C.L. Rev. 99.


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

Substantive equality analysis has also loomed large in feminist jurists discussions of constitutional reform. For example, Baines has argued against the Meech Lake Accord because of the dangers it posed for women’s equality rights. B. Baines, “An
However, not all feminists have been as optimistic as either liberal feminists in their accommodation to the “paradigm shift” engendered by the Charter, or radical feminist deviations with, and revolutionary reconstructions of, the Charter. For example, some feminists have queried just how flexible Charter language might be and identified just how channelling and constraining constitutional discourse can be. Others have highlighted the way in which the equality and other provisions of the Charter have been used against women thereby forcing feminist organizations into problematic and expensive defensive strategies. Hess and Seaboyer are invoked as examples of the trumping argument failing miserably. So too might Daviault. Other observers have identified the dangers inherent in the “categorization game” and have argued that the courts (and indeed feminists themselves) appear to be unable to deal with


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

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


complex and overlapping identities, for example, on the basis of race, class or sexual orientation.\textsuperscript{234}

Similar debates have been generated by feminist adaptations of section 7, the liberty principle, explicitly in the example of Wilson J.'s decision in \textit{Morgentaler},\textsuperscript{235} and how in reality such an approach may not necessarily improve women's access to abortion because it reconstitutes the public/private dichotomy\textsuperscript{236} and relies on quite problematic liberal assumptions.\textsuperscript{237}

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


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


\textsuperscript{238} Eberts, supra note 169 and de Jong, supra note 207.


\textsuperscript{240} \textit{Ibid.}

Vol. IV, No. 1
\textit{Review of Constitutional Studies}
state intervention and a "preconceived notion of gender equality," they may run the danger of paternalism in relation to First Nations women.

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

c) Aboriginal Provisions

There is little within the Charter itself that relates to First Nations people. Although First Nations lobbied in the early 1980s for a constitutional declaration that their original rights under treaties and the Royal Proclamation of 1763 should be reinstated, federal and provincial procrastination thwarted such demands. In lieu, all that the First Nations were able to attain within the Charter was section 25, a saving provision which instructs judges not to interpret the Charter “so as to abrogate or derogate from any Aboriginal, treaty or other rights or freedoms that pertain to the Aboriginal peoples of Canada.” Although they are not part of the Charter, I think that sections 35 and 37 are also relevant in that they have a direct impact upon debates around the Charter. Section 35 “recognizes and affirms ... existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.” Section 37 provides for a series of First Ministers conferences on Aboriginal affairs, a process which, from the First Nations perspective, achieved very little. Finally, section 15, the generic equality provision, also applies to First Nations peoples.

Most of the scholarship on the Aboriginal provisions tends to be doctrinal. These prophylactic efforts attempt to make sense of the deeply ambiguous

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241 Ibid. at 188.
242 For an attempt to mediate these two apparently contradictory positions by focusing on s. 35(4) see D. Greschner, “Aboriginal Women, the Constitution and Criminal Justice” (1992) U.B.C. L. Rev. (Special Ed.) 338.
243 Francophone feminists have expressed a similar argument in the context of the relationship between the distinct society clause of the Meech Lake Accord and the Charter when many Anglo feminists feared that their equality rights were in danger. M. Turpel, “The Charlottetown Discord and Aboriginal Peoples’ Struggle for Fundamental Political Change” in K. McRoberts & P. Monahan, The Charlottetown Accord, the Referendum and the Future of Canada (Toronto: University of Toronto Press, 1993) at 117.
244 Sanders suggests that s. 27 might also have some indirect influence. D. Sanders, “Article 27 and the Aboriginal People’s of Canada” in Multiculturalism and the Charter, supra note 23 at 155.
sections so as to enhance potential rights claims by the First Nations.\(^\text{245}\) Surprisingly, section 25 has generated very little jurisprudential analysis.\(^\text{246}\) However section 35 has encouraged several scholars to articulate some broader working theory of its effect: that it entrenches a constitutional trust;\(^\text{247}\) that it signifies a constitutional commitment of honour;\(^\text{248}\) that it operates as a distinct and special Charter for Aboriginal peoples;\(^\text{249}\) or more radically still, that it is a constitutional acknowledgement of an already existing, continuing and inherent (as opposed to contingent) right of self determination/government.\(^\text{250}\) These readings, in turn, have led some authors to argue that there is a constitutional mandate to recognize and promote culturally-specific Aboriginal criminal justice systems.\(^\text{251}\)

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


\(246\) But see Pentney, *ibid*.


\(248\) Lyon, *supra* note 72 at 101.

\(249\) Lyon, *supra* note 38 at 243, 246.


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

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

This exclusion caused concern among some Aboriginal women who argued (contrary to Turpel’s position) that they required the protection of the equality provisions of the *Charter* against potential sexual discrimination within the Aboriginal community. Recently, it has been suggested that one way to resolve this apparent jurisprudential impasse would be to develop parallel Aboriginal

258 Webber, *supra* note 22 at 170-72.
259 *Supra* note 66. For Turpel’s reply see *supra* note 243 at 132-35.
Charters of Rights reflecting First Nations' worldviews. The lack of specificity of such proposals at this point in time makes it difficult to determine if the incommensurability problem can be resolved.

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

E. The Synthesizing Function

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

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

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

262 “Some Jobs for Jurisprudence,” supra note 19 at 160.
263 Bakan, supra note 4; Talking Heads and the Supremes, supra note 22 at 244.
264 Weiler, supra note 84.
265 Etherington, supra note 4.
266 Herman, supra note 4.
F. The Ideological Function

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

The concept of “ideology” is, of course, indeterminate. Generally, however, it can be understood as a prism through which one comes to terms with the relationship between ideas and reality. More precisely, and factoring in the crucial variable of power, there is a helpful insight to be called from Thompson’s proposition that “[t]o study ideology ... is to study the ways in which meaning (or signification) serves to sustain relations of domination.” In other words, the concept of ideology enables us to think about the way in which our modes of thought (re)present and filter material practices and experiences to us. Ideology takes seriously the relationship between knowledge and power not just in the sense that to have knowledge is to have power, but more in the sense that power relations constitute the nature, quality, categories and parameters of the knowledge that is available. This is particularly important for jurisprudence (and in particular Charter jurisprudence) because legal theory is not only passive and disinterested reflection on the nature and function of law; rather, it is, as the Australian jurist Valerie Kerruish argues, a proactive meaning disseminating practice, a cultural product. Thus, in this section I want to suggest that those who have proclaimed “the end of ideology” have been premature, at least in the context of Anglophone Canadian legal theory.

268 See also DeCoste, supra note 4, Lahey, supra note 222.
270 Kerruish, supra note 2 at 196.
Ideologies can operate in a variety of ways. In its crudest form, ideology is associated with ideas of a conspiracy thesis through which the dominant elites maintain their power, not only by direct force but also by the process of inculcating in the oppressed classes a false consciousness. Few Charter scholars support such a conspiracy thesis. A more cautious version suggests that such are the formative contexts of judges that they almost inevitably identify with and legitimize the perspectives of the elite of Canadian society. Charter decisions, particularly in the realm of labour law, have provided a great deal of data to support such analyses.

The debate over whether property/economic rights can or should be included as Charter rights is a good example of where the competing ideologies surface. While some argue in favour of such rights because property is in essence a natural right, liberty's "siamese twin," others concur because it may provide minimum opportunities and rights for the dispossessed. Others are opposed to locating such rights in the Charter either because it smacks of illegitimate judicial activism, or because of the dangers of further enhancing corporate power in Canada. Similar ideological divisions are manifest in the debates over constitutionally protecting commercial expression under section 2(b).
Similarly, it could be suggested that the debates on the legitimacy and effectiveness of the section 33 override provision (the technical legal questions of its relationship to section 1 and whether a court can review a legislature’s invocation of the section procedurally or substantively) necessitates an articulation of competing conceptions of democracy. Moreover, it brings into particularly sharp relief the differences between those whose primary fidelity is to a deontological and individualistic worldview and those who subscribe to a more communitarian and majoritarian worldview.

A more subtle theory still of ideology, argues in favour of false necessity analysis, that is, that ideology functions best by portraying certain beliefs as natural, inevitable, self-evident and therefore unchallengeable. Such necessitarianism is, in Bourdieu’s terms, “doxa,” a belief structure that so closely dovetails with common sense that it seems absurd to even question it. Alternative ideas, practices or modes of social interaction are simply unimaginable and inconceivable. Examples might be the assumption that individual rights are by definition a good thing, the presupposition that the individual is the foundational unit of social analysis or the belief that constitutional decision making is principled rather than political.

“Heterodoxy” occurs when someone challenges the self-evidence of such truisms as to the virtue of individual rights. Heterodox jurists, as we have seen, advance several arguments against Charter ideology and discourse. “Orthodoxy” is a response to heterodoxy’s challenge to doxa, the articulation of justifications for that which had formerly been taken for granted. Schwartz’s rejection of Aboriginal rights claims is a good example of such orthodoxy as are Smith’s


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


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

285 B. Schwartz, supra note 111.

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

287 Schwartz, supra note 111.

1997
Revue d'études constitutionnelles
Richard F. Devlin

pragmatism in defense of feminist struggles with the equality provisions,288 Dyzenhaus' egalitarian liberalism,289 and Slattery's transcendent but practical defence of judicial decision making.290

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

Gramsci's thoughts on “traditional” and “organic” intellectuals might also have some purchase in an analysis of the ideological context of Charter scholarship.295 Traditionally, intellectuals have tended to be contemplative thinkers, scholars in the idealist tradition who seek a truth uncontaminated by politics, experience, identity or other partisan variables. The goal is the pursuit of objectivity, neutrality, and impartiality. Organic intellectuals, by contrast, deny the possibility of ever achieving such a “view from nowhere” to advocate the contrary argument that theory and experience are mutually constitutive. As members of oppressed social classes, they emphasize the pervasiveness of perspectivism and, as self-conscious representatives of their social group, they strive to articulate the world view or vision that captures the standpoint or

288 L. Smith, “Have the Equality Rights Made Any Difference?” in Bryden, supra note 23 at 60.
289 Dyzenhaus, supra note 109.
294 See, for example, L. Weinrib et al., “Legal Analysis of the Draft Legal Text of October 12, 1992” (unpublished manuscript).
location that they represent. Organic intellectuals criticise the purism of the traditionalists as theoreticist and, therefore, complicitous in the perpetuation of oppressive social relations. Instead, organic intellectuals advocate a transformativist conception of theory: that the only legitimate purpose of theory is to help advance progressive political practice.\textsuperscript{296} Examples of such organic jurists might include advocates of lesbian and gay rights,\textsuperscript{297} First Nations spokespersons,\textsuperscript{298} people of colour,\textsuperscript{299} disability rights activists,\textsuperscript{300} or feminist practitioners.\textsuperscript{301} It is more difficult to identify organic intellectuals on the basis of their class, because by the time one reaches the heady plateau of jurisprudence, one has more than likely become a member of the middle class and therefore is distanced from the working class community.\textsuperscript{302}

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

V. EVALUATIVE COMMENTS

My aim in this paper has not been to distribute bouquets and brickbats to individual scholars. Consequently, in this section, in my attempt to analyze the relationship between the Charter and legal theory, I will: a) identify and discuss what are some of the more positive patterns that have emerged in Charter

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


\textsuperscript{298} Borrows, \textit{supra} note 250; Johnston, \textit{supra} note 112; Turpel, \textit{supra} note 66.

\textsuperscript{299} Iyer, \textit{supra} note 234.


\textsuperscript{301} Eberts et al., \textit{supra} note 9 at 3-4; Eberts, \textit{supra} note 188; Lahey, \textit{supra} note 222; Mahoney, \textit{supra} note 188.

\textsuperscript{302} But see Fudge and Glasbeek's spirited defence of class analysis in the face of identity jurisprudence, \textit{supra} note 39 and Mandel, \textit{supra} note 8 whose work is heavily influenced by a class analysis.
jurisprudence; and b) briefly highlight some problems that may be worth further consideration.

A. Positive Patterns

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

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

304 See, for example, Dickson C.J., supra note 1.
305 Supra note 81.
Closely related to this, there seems to be a sense that theory is not significant for theory’s own sake, but that it is important because of its utility in advancing one’s normative viewpoint. More specifically, the literature seems to suggest that the vast majority of Canadian jurists tend to fall between the liberal and the left end of the political continuum. Thus, debates have tended to involve those who, very roughly, might be called the liberal egalitarian democrats and the radical progressives.

However, two further points may be worth noting here. First, unlike political science or philosophy, within legal circles, few jurists adopt an explicitly right-wing orientation. Law and economics discourse, while influential in other aspects of Canadian jurisprudential life, has only had a marginal influence on Charter theory. The National Citizens Coalition and REAL Women, for example, appear to be without a jurisprudential spokesperson (so far).

Second, although I have suggested that the debate has tended to revolve around disputes between liberal egalitarians and radical progressives this should

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

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

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But see R. Martin, “Bill C-49: A Victory for Interest Group Politics” (1993) 42 U.N.B.L.J. 357 and Martin & Hawkins, supra note 35. Although I do not subscribe to the currently popular view that left-right distinctions are passé, there are times when there appears to be a certain commonality between some on the legal left and those on the political right, particularly with regard to criticisms of the antidemocratic nature of judicial review. See, for example, Bogart, supra note 22 at 148-49 who is not only ambivalent about distinctions between “socialism and toryism,” but who also invokes the American papal apologist Mary Ann Glendon in his partial critique of the Morgentaler decision. See also Mandel, supra note 8 at 73.
not be mistaken for a claim that the latter group espouse a uniform position. Rather there have been fractionalizations over time. While there are some holdouts who insist that the Charter is incapable of being hijacked for progressive ends, there are now strong signs of left revisionism which advocates a more nuanced position which may allow for Charter mobilization, depending upon the issues.

Two examples might illustrate this fractionalization among progressives. Some on the left have argued in favour of a Social Charter as a defence mechanism against the rightward shift in Canadian politics, whereas others have argued that such a strategy is simply symbolic soft law that pretends to advance real human needs while in fact achieving nothing concrete. Similarly, within the feminist movement there have been pointed disagreements over, for example, tax deductions on the basis of gender and race, pornography, prostitution, the most appropriate vision of equality and, indeed, the appropriateness of litigational politics at all. Similarly, there have been lesbian

313 Mandel, supra note 8 at 3, 47, 457-61.
314 See, for example, Fudge, supra note 99 at 497-98; Herman, supra note 22 and Hutchinson, supra note 22 who seems to have made significant alterations in his stance. Originally, Hutchinson appeared to be totally opposed to Charter based arguments. See A. Hutchinson & A. Petter, “Private Rights/Public Wrongs: The Liberal Lie of the Charter” (1988) 38 U.T.L.J. 278 at 279. Now, in the light of Andrews and Morgentaler, he appears to have adopted a position of “mindful moderation” and “strategic skepticism” [supra note 22 at 41, 158, 175, 177] and to have hunkered down for a long war of position. The problem with such revisionism is that while it manifests the virtues of contextualism and specificity, it provides little real pragmatic guidance. See, more generally, R. Devlin, “Some Recent Developments in Canadian Constitutional Theory with Particular Reference to Beatty and Hutchinson” (1996) 22 Queen’s L. J. 81. See also Fudge, supra note 93 for a similar critique.
315 See generally, Bakan & Schneiderman, supra note 23; Mandel, supra note 8 at 109-15, 123.
319 Bartholomew, supra note 205.
 critiques of both (heterosexual) feminist jurisprudence and (gay dominated) sexual orientation jurisprudence.\textsuperscript{320}

At least three interpretations can be advanced as to the significance of this pluralization of progressive voices. First, it might be suggested that many progressive jurists have adopted a position of Derridean undecidability thereby relinquishing grand theories in favour of more localized and context sensitive politico-juridical strategizing.\textsuperscript{321} Alternatively, one might conjecture that the Charter debates illustrate yet another failure to consolidate solidarity among progressives,\textsuperscript{322} and that radical jurists have been overwhelmed by a discursive regime that is undesirable, but unavoidable.\textsuperscript{323} As a consequence, it could be argued that while the left are all over the map in terms of what to do about the Charter, conservative and corporate forces have (apparently without a great deal of jurisprudential reinforcement or direction) seized the opportunity created by the Charter and effectively pursued a regressive politico-juridical agenda. Third, and less pessimistically, one could interpret debates among progressive jurists not on the basis of their impact on social and judicial policymaking, but focus more upon the quality of the debates themselves. Viewed in this light, there is no doubt that progressive legal theory is blossoming in Canada and that there is an openness and spirit of engagement that is heartening.\textsuperscript{324}

To me this fractionalization suggests a certain irony. Debates within contemporary literary criticism in the last decade or so have tended to suggest that we must confront the death of the author thesis, that is, that authorial intent is of quite limited significance and that what is crucial is the reader's

\textsuperscript{320} For discussions see, for example, Eaton, supra note 39; D. Herman, “A Jurisprudence of One’s Own? Ruthann Robson’s Lesbian Legal Theory” (1994) 7 C.J.W.L. 509; Majury, supra note 190.

\textsuperscript{321} Herman is probably the clearest example of this position supra note 22 at 8, supra note 4 at 603 but so too is Fudge who, despite her differences with Herman, admits that the Charter may mean very different things to unions and feminists, supra note 93. Such a view would challenge DeCoste’s argument that in spite of strong differences between many progressives, “there are two, and only two, positions possible with respect to the relationship between law and life — a liberationist/transformative position, and a non-liberationist/reformative position.” DeCoste, supra note 4 at 946. See, for example, Hutchinson’s excessively harsh critique of Conklin, supra note 22 at 75-84 or the debate between Fudge and Glasbeek, supra note 39 and Herman, supra note 39.

\textsuperscript{322} Fudge, supra note 99 at 458; Fudge & Glasbeek, supra note 39; Hutchinson, supra note 22 at xiii, 147, 174.

\textsuperscript{323} See, for example, Bakan & Schneiderman, supra note 23 or Petersen’s reply to Majury, supra note 190.
A reflection on the relationship between the Charter and its jurisprudential interlocutors dovetails with this thesis. As many scholars have suggested, the Charter was designed primarily by the federal government as part of a unifying and nation-building strategy, to enhance the collective psyche of a Canadian identity that would counteract the centrifugal forces disaggregating the country, most particularly provincialism and regionalism. However, as this review of the literature has indicated, at least in the realm of jurisprudence, the effect seems to have been the opposite. While it would be somewhat linear to suggest that the Charter has caused jurisprudential polarisation, it is probably accurate to suggest that Charter discourse has provided a forum for dissensus, an opportunity for divergences, the ramifications of which are more immediately apparent than, for example, the differences around federalism might suggest. Moreover, the dissensus is not superficial. It has necessitated careful reconsideration of our assumptions about the nature of the state and it has called into question fundamental visions of what a good society should strive to be, with very different conceptions of rights, liberty, freedom, and equality and the balances that need to be drawn between them. Indeed, as the arguments advanced by Turpel indicate, the problems may not just be those of divergence, but of an incommensurability of legal cultures in which the Charter is reunderstood as cultural, political, constitutional and juridical colonialism. Not quite what Trudeau had in mind, eh?

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


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

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

Turpel, supra note 66.

P. Trudeau, “The Values of a Just Society” in Trudeau, P. & T. Axworthy, eds., Towards a Just Society: The Trudeau Years (Toronto: Viking, 1990) 357 at 363 and Axworthy, “Colliding Visions: The Debate Over The Charter of Rights and Freedoms 1980-81” in Weiler & Elliott, supra note 4 at 13. The general public appears to be a great deal more cohesive than legal theorists in their assessment of the Charter. In a poll taken in 1992, Angus Reid found that the vast majority of Canadians supported the Charter and believed that their rights had increased in the course of the previous decade. See Angus Reid, “A Decade with the Canadian Charter of Rights and Freedoms” (11 April, 1992). Some may be tempted to read this as indicative of just how
This fragmentation of the jurisprudential conversation has come about, I would suggest, because the nature of political discourse in Canada has undergone transition in the last two decades. Since Confederation, traditionally the primary focus of political concern has been the federalist dilemma: how to allocate power between provinces and the central government. Other political controversies have been filtered through the federalist paradigm. But in the last twenty years, there has been an increasing awareness of how other political debates are autonomous from and have dynamics independent of those of federalism, though at times they may intersect with the federalist dilemma. These political orientations are not so much about geographical or territorial jockeying, but rather are connected to the emergence in western societies of what are called the “new social movements” with an increasing emphasis on identity politics, that is, a politics that is particularly related to issues of (dis)ability, gender, class, sexual orientation and/or race. The Charter has been targeted as a terrain of ideological discourse where identity jurisprudences can be articulated, pursued, contested, challenged, legitimized and devalued resulting in judicial decisions that are sometimes unpredictable. And it is this lack of predictability that will ensure a continued jurisprudential engagement because, like it or not, Charter discourse has taken on a life of its own. Social actors can no longer choose to ignore it, because unless you are prepared to argue even as a strategy of resistance, others will use it against you.

However, none of this is to claim that many of these developments could not have taken place absent the Charter. There is excellent legal theory being far removed Canada’s legal theorists are removed from the larger populace.


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

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

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

1997
Revue d'études constitutionnelles
generated by theorists who have not been entranced by the Charter. While at an earlier time, I have been too hasty in suggesting that the Charter has caused a "sea-change" for Canadian legal theory, I still believe that there is a connection, though not causal. The Charter, I believe, has provided a forum in which jurisprudence can demonstrate its importance. Whereas other areas of law — contracts, property or torts — clearly have a significant impact on our social ordering, the broader perception of these is that they are esoteric and that, correlative, theory about such esotericism can only be esotericism squared. The Charter, on the other hand, tends to be more publicly accessible and engenders greater symbolic significance; therefore, when theory is invoked to help shed light, it is seen have some further legitimacy.

A good example may be found in relation to Langille's analysis of judicial interpretation of the Charter. To bolster his analysis he invoked Wittgenstein. This, in turn, led other theorists to question his use of Wittgenstein or to invoke countervailing theorists, which in turn triggered further Wittgensteinian-inspired rejoinders from Langille and others. So while there is no logical reason why Wittgenstein could not have been the subject of legal theory by Canadian jurists, the opportunity was grounded in Charter-inspired concerns.

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

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

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

Another question which sometimes arises is whether there is anything distinctive about Canadian jurisprudence. On occasion, some scholars have suggested that either in general\(^\text{345}\) or with specific regard to the Charter\(^\text{346}\) there is something particular about Canadian legal theory and constitutional practice. As the preceding overview might suggest, debates on the issues of individualism and communitarianism, judicial absolutism and democratic politics, gender, race, class, and sexual orientation, the interpretive turn, etc. also pervade American

\(^{341}\) Macdonald, supra note 112; Green, supra note 127.
\(^{342}\) Herman, supra note 22 at 66, 69.
\(^{343}\) Conklin, supra note 29 at 8, 217.
\(^{345}\) See, for example, A. Linden, “Introduction” in Bayefsky, supra note 43 at 1; Monahan, supra note 22 at 4; Slattery, supra note 247.
\(^{346}\) Bayefsky, supra note 43 at 148-50; Slattery, supra note 71.

1997
Revue d'études constitutionnelles
legal theory. Indeed, many Canadian scholars, explicitly and implicitly, often rely on the insights of leading American theorists. But there remain some important differences. As might be obvious, in my opinion the voice of progressive scholars is quite strong in Canada whereas in the United States — despite the emergence of feminism, critical legal studies and critical race theory — the primary axis of debate remains right vs. liberal rather than liberal vs. left. Second, whereas privacy and liberty have been the lodestars for much American jurisprudence, it would appear that equality discourse has been given a particular spin by Canadian legal theorists. Third, although every democracy faces the difficult jurisprudential debate about the legitimacy of judicial review, it has a particular focus and accent in Canada, given that it is the only jurisdiction in the world to have a section 33 override provision.

Finally, on the theme of positive patterns, I want briefly to address the issue of the tone of contemporary jurisprudential debate. Traditionally, debates within legal theory have tended to be quite polite and when disagreements arose they were often stated indirectly. However, with the advent of the Charter the traditional decorum of debates has, on occasion, given way to heated engagement. While not deteriorating into mutual ad hominems, frequently contemporary disputes are articulated with a pointedness that until now has been somewhat unusual.347 David Beatty, in particular, seems to have attracted particular attention.348 In my opinion such a shift in tone is not something that we should be too concerned about. All it indicates is that the issues at stake matter; that jurisprudence is not solely the abstract pursuit of pure knowledge (although some may aspire to that) but also is a practice which can have direct and practical consequences both materially and ideologically.349


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

B. Potential Problems

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

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

Moreover, within the Charter itself, there appears to be a somewhat uneven jurisprudential division of labour. For example, while freedom of expression, freedom of association and the equality provisions seem to have generated a great deal of attention, the legal rights provisions (with the exception of those that deal with issues of gender\textsuperscript{353}) appear to be under theorized\textsuperscript{354} even though they have been the subject of the most extensive judicial attention in the Charter

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


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

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

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

1997
Revue d'études constitutionnelles
regime. Similarly, the pressing and extremely vital issue of Charter remedies has gained only a relatively small amount of jurisprudential analysis.\textsuperscript{355}

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

Finally, as pointed out previously, Canadian jurisprudence has been attracted to the interpretive, the idea that what binds us together legally and politically is an implied commitment to ongoing debate, conversation and dialogue. This is obviously an attractive metaphor in that it assumes a basic substratum of commonality that makes social, political, and legal interaction plausible and intelligible. However, one problem with this metaphor is that its abstraction allows it to be invoked by jurists of very different stripes. While it is true that not all Canadian jurists buy into the metaphor — Mandel for example wants us (who?) back on the streets\textsuperscript{358} and others warn us that conversational metaphors can reinforce oppression\textsuperscript{359} or obscure situational inequalities\textsuperscript{360} — my sense is that too many Canadian jurists fetishize the metaphor of dialogue. In a sense, it is almost as if they conceive of politico-legal practice as a near perfect


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


\textsuperscript{358} Mandel, supra note 8 at 454.

\textsuperscript{359} Nedelsky & Scott, supra note 48 at 69.

\textsuperscript{360} Hutchinson, supra note 22 at 189.
The Charter and Anglophone Legal Theory

jurisprudence seminar. While many recognize problems with the metaphor, to my mind most underestimate just how deep our differences might be.

For example, the assumption seems to be that the differences are essentially substantive and that with sufficient communicative goodwill it is possible to eventually get to yes. However, there are several problems here. First, and obviously, politics and power are driven as much by bad faith as by good faith and this inevitable reality cannot be glossed over. Second, even assuming that parties to a politico-juridical dialogue were to operate in good faith, there is the question of what language they are to communicate in. The assumptions here appear to be twofold: language is equally available to all, and that language is basically transparent and neutral. But again, not everyone has equal access to language, either qualitatively or quantitatively, thus there is the danger of the "dictatorship of the articulate." Moreover, a language is not just a medium, it also captures and refracts specific cultural norms and practices that are not always translatable. No where in the Anglophone scholarship reviewed have I encountered a jurist even considering whether the dialogue should be in a language other than English. This is not just a political or moral problem, which would be serious enough; it is also epistemological. Third, advocates of dialogism concur that the conversation should remain continually open, but again there are at least two problems here: a) do most citizens really have that much time available?; b) at some point some decisions have to be made, even relatively temporary ones, and so some mechanisms for closure are inevitable, or else some players may continue to discuss simply to avoid ever getting to a resolution. In short, when we unpack it the premise underlying the dialogic model is that of liberal contractualism, a regime of haggling, a world of offering

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

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


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

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

1997

Revue d'études constitutionnelles
and counter-offering, of giving and taking. But this is a deeply optimistic vision for, as Carol Pateman has pointed out, contract rather than being the apotheosis of freedom and choice might well be a highly refined form of subordination.\textsuperscript{367}

VI. CONCLUSION

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

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

Moreover, as this essay suggests, there is no longer much consensus on what might constitute the core of jurisprudential analysis. Rather, with the mushrooming of legal theoretical work, there has been increasing disensus and a corresponding emergence of what might be most usefully described as jurisprudential pluralism. In other words, it is probably not helpful to think of jurisprudence as a static paradigm, but rather as terrain of struggle in which several incommensurable paradigms are in play, a constellation of incongruent and dynamic discourses.\textsuperscript{369} If this is accurate then it seems to me to be unhelpful to conceive of legal theory in an instrumentalist sense, as the source of determinative right answers, as Dickson C.J. seemed to have hoped.\textsuperscript{370} Jurisprudence is not oracular. What theory can do, however, is to help us identify and rethink some of the assumptions we take for granted. Moreover, it can reveal to us the contingency of such assumptions and thereby facilitate the recognition of the plurality of perspectives that can be brought to bear on law. While the

\textsuperscript{368} Supra note 4 at 321. See also Gold in Weiler & Elliot, supra note 4 at 95.
\textsuperscript{370} Supra note 1.
Charter cannot be said to have caused this fractionalization in Canadian legal theory. Charter based claims and Charter discourse has been an important discursive terrain for the articulation of this dissensus.\textsuperscript{371} In short, the Charter is both fractured and fracturing. And so I would conclude by suggesting that rather than promoting order and coherence, contemporary Charter-inspired legal theory refracts the messiness of the problematic that is called Canada.

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