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THE MASTERFUL CONSTRUCTION:

AN ANALYSIS OF LIBERAL THEORIES OF EQUALITY

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ABSTRACT

This thesis reviews the Supreme Court of Canada's (the "Court") interpretation of equality, particularly, gender equality. It is argued that liberal theories of the state have influenced and continue to influence the development of the meaning of equality. With the development of human rights and the introduction of section 15 of the Canadian Charter of Rights and Freedoms, the Court has become more informed on gender issues. However, the Court has maintained an approach to equality which is rooted in the liberal paradigm.

Liberal theories of the state allow for a variety of relationships between the individual, the community and the state. The role of the state may be simply to monitor the sanctity of the individual sphere, or it may be to support community interests and good through laws. Individual liberty may be sacrosanct or subject to the will of the community.

At varying times, the Court has adopted different structures of the state when deciding equality issues. Traditionally, the Court has employed tests, such as the similarly situated test, to investigate the occurrence of discrimination. The analysis of equality through such a test does not allow for consideration of context or external factors which may adversely affect the individual or group. It frequently results in the abstract application of principle which eschews an equality result.

Since the 1980's, the Court has given more consideration to the context of a situation when judging the equality of treatment

of an individual or group. At times, this contextual approach has appeared to move beyond the liberal paradigm. However, the liberal paradigm has not been abandoned by the Court in analyzing equality. The contextual approach of the Court is consistent with liberal theories of the state which support a state role of promoting community values.

This thesis argues that cultural characterizations of women's social, political and economic roles in society ("gender identity") affect which liberal theory of state the Court will use when determining an equality issue. For example, if the equality issue impacts on a woman's ability to conform to an accepted gender identity, such as to be a good mother, the Court will more readily adopt a concept of equality which allows state action to promote community values. If the equality issue challenges accepted gender identity, the Court will more likely adopt a traditional equality approach.

This paper begins by examining liberal theories of the state with an emphasis on conceptions of the individual and the state. Next, the paper considers how the liberal theory of the state has been applied to the legal system and the critiques of this application. Finally, a detailed description of the liberal notion of equality is provided with a discussion of how different readings of gender identity may affect the Court's approach to equality.

TABLE OF CONTENTS

THE MASTERFUL CONSTRUCTION:

An Analysis of Liberal Theories of Equality

INTRODUCTION

> "When I use a word," Humpty Dumpty said in rather a scornful tone, "it means just what I choose it to mean - neither more nor less."
> "The question is," said Alice, "whether you can make words mean different things."
> "The question is," said Humpty Dumpty, "which is to be master - that's all."[1]

Words, text and discourse do not necessarily convey only one meaning. Rather, meaning may be a question of condition. It may vary with each writer and each reader. Words that have powerful meaning for one person, may be meaningless to another.

Legal discourse is no less subject to a multiplicity of meaning. However, perhaps to a greater extent than other disciplines, there is pressure to enforce one interpretation. As Humpty Dumpty might say, this one interpretation is the master of interpretations.

This thesis will analyze the interpretation of the Supreme Court of Canada (the "Court") in defining the meaning of equality. It is generally understood that, whether due to the influence of the equality section of the Canadian Charter of Rights and Freedoms (the "Charter") or an expanded notion of human rights, the Court began to approach equality in a different manner during the 1980's.

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[1]Carroll, Through the Looking Glass (Hertfordshire: Wordsworth Edition Limited, 1992) at pg. 159.

Many felt that the Charter proposed a paradigmatic shift[2] and that the Court decisions on equality issues began to reflect this new approach. This thesis will argue that such a paradigmatic shift has not, in fact, occurred. While it seems that the Court has become more informed on gender issues, a deconstruction of equality cases suggests that the Court is approaching equality issues in roughly the same manner as it always has. In fact, the Court has maintained a steady approach to equality issues which is rooted in liberal theory and traditional understandings of "gender identity".[3]

Prior to the 1980's the Court strictly interpreted equality issues[4] by adopting the "similarly situated" test - whether similarly situated persons were being treated in a similar manner - to determine if treatment was fair or equal. As with many tests, the similarly situated test resulted in uneven and seemingly contradictory results.[5]

The Court's approach to equality issues appeared to change in the 1980's when it began to pay greater attention to the remedial

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[2]Smith, "A Paradigm for Equality Rights" in Smith et al. (eds.), Righting the Balance: Canada's New Equality Rights (Saskatoon: Canadian Human Rights Reporter Inc., 1986) at pg. 367.

[3]By this I mean cultural characterizations of women's social, political and economic roles. These characterizations represent social values and cultural ideals and are bound up in mythology.

[4]See A.G. Canada v. Lavell [1974] 2 S.C.R. 1349.

[5]Compare Lavell, supra, footnote 4, with R. v. Drybones [1970] S.C.R. 282.

nature of human rights legislation. In judgments such as Ontario Human Rights Commission et al. v. Simpson-Sears Limited,[6] the Court concluded that human rights legislation should be interpreted in a manner which gives effect to its purpose. Human rights legislation was not to be narrowly construed. It was to be understood in context, with the result reflecting the intent of the legislators.

This shift in the interpretation of human rights affected the analysis of equality. The emphasis on the purpose of the legislation as opposed to the wording of the legislation aided equality-seeking groups in advancing theories of equality with more far reaching effects than had previously been possible. It provided a framework upon which to argue, for example, that pregnancy discrimination, a form of discrimination unique to women, was sex discrimination.[7]

The changes pointed to the beginning of a generation of new thinking about equality. It seemed that the Court was abandoning the formal equality approach adopted in cases such as R. v. Lavell. In fact, some scholars argued that the Court must question the previous philosophy because of the paradigmatic shift inherent in the Charter.[8] Others suggested that we were starting down the

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[6][1985] 2 S.C.R. 536.

[7]Brooks v. Canada Safeway Ltd. [1989] 1 S.C.R. 1219.

[8]Smith, supra, footnote 2, at pp. 353-354.

road to a postliberal[9] concept of justice. Equality, it was concluded, should not longer be tied to limiting liberal notions which, among other things, pit the individual against the state.

This new thinking allowed for a renewed look at the meaning of equality. Arguments were made to the Court that suggested equality required the recognition and evaluation of historical disadvantage and its residual economic, social and political ramifications.[10] The watershed cases on the new equality provision in the Charter incorporated this understanding of disadvantage into equality theory.[11]

But, while many thought that the battle for a more substantive meaning of equality had been largely won by achieving this position, little ground has actually been gained. The new thinking of the 1980's was a window of opportunity that at any moment could close. The gains of the 1980's did not establish a new paradigm of equality theory. Instead, time has shown that, while the liberal paradigm was challenged it was not abandoned. What appeared to be a change of direction in philosophy turned out to be a shift in emphasis within the existing paradigm, the liberal paradigm.

Thus, equality law in Canada remains confined within the framework of liberal theory. While liberal philosophy may assist

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[9]Gold, "A Principled Approach to Equality Rights: A Preliminary Inquiry" (1982), 4 Supreme Court L. R. 131.

[10]See the factum of the intervenor, Women's Legal Education and Action Fund, in Andrews v. The Law Society of British Columbia.

[11]See Andrews v. Law Society of B.C. [1989] 1 S.C.R. 143 and R. v. Turpin [1989] 1 S.C.R. 1296.

equality rights in some aspects[12], liberal philosophy will limit the development of equality theory under the Charter.

This thesis provides an exploration of the paradigm of liberalism. Liberal theory may accommodate a number of equality strategies. Because liberal theory has flexibility, the Court may find results within the liberal paradigm which are quite different from the results experienced in the 1970's.

This thesis will argue that the results achieved under the Charter have been achieved within a liberal paradigm. While this is not always a poor means to an end, we must recognize the limitations and, equally, the dangers of the liberal paradigm, the greatest danger being the risk of sliding back to the pre-Charter meaning of equality. Because the liberal paradigm has flexibility there is no real deterrent to this slide. In addressing equality issues, courts may render decisions contrary to substantive equality while still remaining true to formal equality principle and precedent.[13] Liberal theory allows this scope.

It will be argued that recent decisions, like R. v. Seaboyer, which seem to depart from the tone of Andrews v. The Law Society of British Columbia, R. v. Turpin and the human rights judgments of the 1980's, in fact, are consistent with these judgments. These decisions illuminate the range of equality theory that liberalism tolerates. At the same time, the more recent cases demonstrate the

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[12]See Reference re Meaning of the Word "Persons" in Section 24 of the British North America Act, 1867 [1930] A.C. 124.

[13]See R. v. Seaboyer [1991] 2 S.C.R. 577.

return of the Court's application of the traditional and more limiting sense of equality.

But why has the Court returned to a more conservative approach to equality? What influences whether the Court will take a more "contemporary equality" approach (such as a results-oriented approach) or adopt a "conservative approach" (such as the similarly situated test approach) to equality issues? To determine this, one must deconstruct cases raising equality issues; one must look for the multiplicity of meanings that were before the Court.

The Court, like society at large, is affected by social images and stereotypes. When the issue is gender equality, the approach to equality the Court adopts is often affected by socially defined gender identities. For example, in the case of equality issues which impact on women's ability to conform to an accepted gender identity (such as to be a good mother), the Court will more readily adopt a contemporary equality approach to determine the equality issue. However, if the equality issue is one that challenges accepted gender identity, the Court will more likely adopt a conservative equality approach.

It is for this reason that the equality provision of the Charter has a limited scope. The equality provision is intertwined with liberal philosophy and as it is limited so it will limit the interpretation of equality.

The 1980's have demonstrated that there are benefits to be gained from the shift within the liberal paradigm which allows a "contemporary equality" approach. There is appreciation that

issues concerning women and disadvantaged groups are valid considerations.[14] The challenge is to determine how equality seeking groups can approach the system to maximize the likelihood of success in a "contemporary equality" framework. To keep the focus on the real issues around equality, equality-seeking groups must deconstruct equality issues before constructing an equality argument. In this manner, they may more effectively package an argument to either avoid a multiplicity of gender identity readings or to challenge the Court to question gender identity.

This paper begins by explaining the flexibility in the liberal theory of the state with an emphasis on its conception of the individual and the state. Chapter Two examines how the liberal theory of the state has been applied in the legal system and the critiques of its application. Chapter Three provides a more detailed description of the liberal notion of equality as it has been developed by the Court. This Chapter will demonstrate the shift in approach of the Court and the movement back to formal equality. Finally, Chapter Four will discussion how gender identity readings affect whether the Court adopts a "contemporary" equality approach or a formal equality approach.

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[14]See E.N. Hughes (chair), Gender Equality in the Justice System: A Report of the Law Society of British Columbia Gender Bias Committee (Vancouver, B.C.: Law Society of B.C., 1992).

CHAPTER ONE

Liberal Theories of the State

> "With the gradual disintegration of [the feudal] order and the growing importance of the individual in a society engaged in discovery, colonization, and trade ... The demand was no longer that men be kept in their appointed grooves ... Accordingly the end of law comes to be conceived as a making possible of the maximum of individual free self-assertion."[15]

This Chapter will review the work of a variety of theorists who constructed theories of the state within the liberal paradigm. Frequently, the liberal theory of the state is presumed to propose a relationship of conflict between the individual and the state. This is a misleading characterization as it artificially limits the scope of liberal theories. This Chapter demonstrates that the liberal theory of the state can encompass a richer selection of relations between the individual, community and state than, merely, one of conflict.

The demise of the feudal order and the beginning of the industrial revolution marked a change in social arrangements which required a reassessment of the civil state and particularly a reassessment of the relationship between the individual, her/his community and the governing body (the "state"). New classes emerged whose relationship with the state was not historically mapped out. Schools of thought about the nature of the state arose to describe the change and the resulting society. The most pervasive school of thought, in terms of the modern democratic

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[15]Pound, An Introduction to the Philosophy of Law (New Haven: Yale University Press, 1954) at pg. 37.

society, was liberal theory.[16] The framework of the industrial and post-industrial society owes much to the liberal theory of the state which helped to define the relationship of the individual, community and government.

An understanding of liberal theory is important in legal study for many of the principles of liberal theory form the base from which legal theory is developed. However, often legal theorists assume too narrow a view of liberal theory and ignore the full spectrum of possibilities within liberal theory. Legal theorists frequently adopt a compact picture of society, in liberal theory terms, that describes the individual as autonomous and free, the state as powerful and domineering and a relationship of tension and conflict between the two. Although this packaging may be a useful starting point for legal theory, it presents a limited view of what liberal theory can encompass and leaves the impression that liberal theory will provide one outcome.[17] While legal theorists may acknowledge the incompleteness of this definition of liberal theory,[18] the repetition of this same incomplete description lends to the view that liberal theory dictates a relationship of

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[16]This is not to suggest that other schools of thought have not influenced the modern democratic society.

[17]Green, "Un-American Liberalism: Raz's 'Morality of Freedom'" (1988), 38 U.Toronto L.J. 317, comments that "for many legal academics the caricature now defines the debate.", at pg. 317.

[18]Cassels, "Liberal Presuppositions" (1988), 38 U.Toronto L.J. 378, at pg. 379, footnote 2.

conflict between the individual and the state[19] where the individual is prior to society,[20] and tends to ignore the role community may play within the social order. Thus, the nuances and variation of liberal theory are overlooked by adopting this simplistic description.[21]

In fact, liberal theory has more flexibility than this view of liberal theory allows and the incomplete presentation of liberal theory adopted by some legal theorists may fail to define Canadian democratic society.[22]

An analysis of the writings of liberal theorists demonstrates that a relationship of conflict between the individual and the state is merely one description of the civil state in liberal theory. While, in general, liberal theorists will adopt the same basic components upon which to construct their civil state, the resulting models of the state differ. The variation between these theories may be attributed to the different emphasis each theorist placed on the basic components. A greater understanding of this

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[19]Hutchinson and Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter" (1988), 38 U.Toronto L.J. 278, at pg. 283.

[20]Green, supra, footnote 17, at pg. 317.

[21]Kymlicka, Liberalism, Community and Culture (Oxford: Clarendon Press, 1989) argues that liberalism has been misunderstood even by some well known liberal theorists.

[22]Green, supra, footnote 17, at pg. 317, comments that "there is a modern and distinctly American flavour to this combination.". Also see Justice Wilson's dissenting judgment in McKinney v. University of Guelph [1990] 3 S.C.R. 229, where she questions the characterization of the relationship between the Canadian individual and Canadian state as being a confrontational relationship.

flexibility within liberal theory aids in appreciating the development of equality theory in Canada.

i. Early Liberal Theorists

Hobbes

Thomas Hobbes was one of the first theorists to develop a theory of the civil state based on social contract, the agreement of sovereign individuals to the structure of the civil state. Hobbes hypothesized a "natural" or pre-state man who possessed absolute will and sovereignty over his being. This "natural" man divested his autonomy in the civil state to a sovereign ruler[23] for the benefit of a peaceful and ruled state.

Although Hobbes created the pre-state man who divested all autonomy to the state for the purpose of justifying the authority of the monarchy, Hobbes is an important starting point. The development of the concept of the individual with absolute will provided a basic principle for the future development of liberal democracy, government by consent, inalienable rights and a right of resistance.[24] The individual with rights separate and apart from the state or community was a new development and one which created the possibility of new relationships within the state and society.

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[23]Hobbes, Leviathan (Menston, England: The Scolar Press, 1969) at pg. 87.

[24]Coleman, Hobbes and America: Exploring the Constitutional Foundations (Toronto: University of Toronto Press, 1977) at pg. 55. See Koerner, Liberalism and Its Critics (London: Croom Helm, 1985) at pg. 34. He commented that although Macpherson felt Hobbes laid the foundation for the liberal tradition, Hobbes is not usually considered to have been a liberal.

Locke

Hobbes' natural, pre-state man with autonomy to decide his destination challenged the notion of differences between men. It proposed, however briefly, that all men entered the civil state as equals. The idea that men are not unequal by design allowed a rethinking of the relationship of the individual to his rulers. John Locke took the autonomous man of Hobbes and made the natural extension of continuing this autonomy into the civil state. Locke proposed that the autonomy of the natural man was only partially divested to the civil state. Therefore, within the civil state, the individual retained some autonomy and authority to govern certain aspects of his life.

Authority in Locke's civil state was divided into two spheres: firstly, the public or civil state sphere governed by the state with its authority originating from the autonomy individuals divested to it; and secondly, the private or individual sphere where the individual had freedom to govern. The content of this private sphere was property, being life, liberty and estates.[25]

This split of authority in Locke's theory meant the state no longer had complete authority over the individual. The state's role became that of protecting the private sphere to fend off the advance of neighbors into that private sphere. But the powerful state was also a danger to the individual sphere. While the

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[25]Locke, Treatise of Civil Government edited by Sherman, John Locke's Treatise of Civil Government and A Letter concerning Toleration (New York: Appleton-Century Company, Inc., 1937) at pg. 82.

individual must rely on the state to guard this sphere from unwarranted intrusion, the individual must also guard against unwarranted intrusion from the state. Thus, an uneasy alliance was created between the individual and the state.

While Locke emphasized the inviolability of the individual sphere, he also recognized that unrestrained activity would deny liberty to all. Liberty itself restrained some activity because individual freedom was limited by the law of nature which restricted activities causing harm to life, health, liberty and possession.[26] Therefore, the state was vested with the power to make laws and to punish for the preservation of property.[27] The state acted through the body politic whose wishes were those of the majority acting for the whole.[28] This role required the state to strike a delicate and, in all probability, impossible balance of enriching individual liberty by restricting that liberty while recognizing that state interference is an invalid interference of liberty. In resolving how this balance may be made, Locke placed the individual prior to the state as the creator of the state.

The attributes of the liberal individual only vested in certain persons. Locke did not feel that liberty, property and

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[26]Ibid., pg. 37. Individual rights are now firmly entrenched in the modern, western society. See the Canadian Charter of Rights and Freedoms, section 7; the Bill of Rights of the United States, Amendment V; and the International Covenant on Civil and Political Rights (21 U.N. GAOR Supp. 16, U.N. Doc. A/6316 at 52(1966)) Article 9.

[27]Locke, supra, footnote 25, at pg. 57.

[28]Ibid., at pg. 63.

freedom applied to all persons. Specifically, Locke excluded the application of his theory to women[29] and showed little regard to the interests of the propertyless classes. Perhaps it was for this reason that Locke was able to conclude that inequality of resources was a fair consequence because, though people were equal, some things gave certain individuals precedence over others.[30] If inequality arose in the civil state that inequality was a result of personal inadequacy. Survival, in the civil state, was a personal responsibility.

Rousseau

Not all liberal theorists reached the same conclusions as Locke regarding the relationship of the individual and the state. The comparison between Locke and Jean-Jacques Rousseau is interesting for, while they both employed similar tools to create their state, the civil state that each designed was quite different. Rousseau worked from the premise that supporting the community good created the best civil state for the individual. Thus he placed the community prior to the individual in his civil state.

Rousseau found that the social contract was reducible to one

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[29]Clark, "Women and Locke: Who owns the apples in the Garden of Eden?" in Clark and Lange (eds.), The Sexism of Social and Political Theory: Women and Reproduction from Plato to Nietzsche (Toronto: University of Toronto Press, 1979) at pg. 16. Antonia Fraser noted that Locke referred to women as the "softer sex", see The Weaker Vessel (Methuen, 1984) at pg. 4.

[30]Locke, supra, footnote 25, at pg. 35. Although Locke mentions age and virtue, sex must also be a factor as he believed in the natural inferiority of women, see Clark, supra, footnote 29.

clause of total alienation of each individual to the whole community. Unlike Hobbes' notion of complete delegation of autonomy, through this alienation Rousseau sought to establish political liberty and civil equality for the individual.[31] Rousseau felt that the alienation of each individual achieved liberty and equality because as each individual gave absolute authority to the state, conditions were equal for all. This individual, as a group, was prior to and the director of the state.

Rousseau concluded that liberty was secured when individuals are independent of each other through dependence on the collective self, the general will of the people.[32] Whereas Locke saw the state as intervening between the individual and others for the protection of the individual, Rousseau saw the general will as an umbrella for the protection of the individual. The community good subordinated the individual good because the community acted in the best interests of each by acting in the best interests of all. The state role was to support this general will.

Rousseau concluded that the concepts of liberty and equality did not conflict. Equality required, first, that power should fall short of violence and should never be exercised except by virtue of station and law. Secondly, no citizen should be rich enough to be able to buy another nor poor enough to be forced to sell

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[31]Rousseau, The Social Contract edited by Crocker, Jean-Jacques Rousseau: The Social Contract and Discourse on the Origin of Equality (New York: Washington Square Press, 1971) at pg. XV.

[32]Ibid., at pg. XVII.

himself.[33] Thus, the social contract provided a minimum standard. Such provision for equality would conflict with liberty in Locke's state for guaranteeing a minimum could require redistribution of resources which the state had no authority to do. Rousseau's state had authority because the individual sphere was secondary to, and more importantly, served by the state sphere which was driven by the general will.

Rousseau was also aware of the accumulating factor of property. He recognized that laws are useful to those who possess property but harmful to those who have nothing.[34] To ensure individual equality, Rousseau guaranteed the minimum by proposing a maximum of property. He concluded that a property right was a creature of the civil state and given by the civil state.[35] An individual's right to property was limited by necessity and labour.[36]

Although Rousseau's theory of the state addressed certain difficulties with the Lockean state, specifically, the seeming lack of social responsibility of the individual, it was not without its own problems. Rousseau failed to address the danger of the potential paternalistic role the state may adopt. The "general will" of the people could place arbitrary limitations on individual

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[33] Ibid., at pg. 55.

[34] MacPherson, The Life and Times of Liberal Democracy (Oxford: Oxford University Press, 1977) at pg. 17.

[35] Rousseau, supra, footnote 31, at pg. 23.

[36] Ibid., at pg. 24.

action through a lack of definition between general will serving the best interests of all and social abhorrence to conduct which has no impact on the best interests of all.

deTocqueville

During the nineteenth century, Alex deTocqueville traveled through the United States and wrote about its developing democratic state. While deTocqueville did not challenge democracy, which he felt was an unstoppable force, he concluded that it may endanger liberty.

> "Thus, the question is not how to reconstruct aristocratic society, but how to make liberty proceed out of that democratic state of society in which God has placed us."[37]

deTocqueville did not view democracy as a perfect social system, in part, because of his view that the greatest danger to freedom was an emancipated majority.[38] The unchecked majority was dangerous, deTocqueville argued, because justice was made by mankind and not the majority.[39] deTocqueville reminded us that the majority was collectively an individual. When the majority opposed the minority it was but one individual opposed to another. And, he asked, if one person with absolute power may not misuse

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[37]deTocqueville, Democracy in America edited by Heffner, Alexis deTocqueville's Democracy in America (New York: Mentor Books, 1956) at pg. 23.

[38]deTocqueville, The European Revolution edited by Lukacs, Alex deTocqueville, "The European Revolution" and Correspondence with Gobineau (New York: Doubleday Anchor Books, 1959) at pg. 20. Also see Hart, Law, Liberty and Morality (New York: Vintage Books, 1963)

[39]See Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980) and the discussion in Chapter 4.

that power why should the majority be allowed to misuse it?[40]

To guard against the unchecked majority, deTocqueville felt the ultimate authority must rest in the justice of mankind.[41] A moral justice that, in the United States, was embodied in the church. Under this system, liberty and religion were companions, with religion safeguarding morality, and morality the best security of law.[42]

deTocqueville concluded that individuality, a product of democratic origin,[43] threatened society. The equality of condition of democracy led individuals to feel detached from community as they owed nothing to others, they expected nothing from others, and their whole destiny lay in their own hands.[44] Interestingly, part of deTocqueville's answer to this selfish individualism was universal suffrage, to give each individual an equal voice in the civil state so that each citizen may feel the same necessity of union with others by knowing that he can obtain the help of others on the condition of helping them. Like Rousseau, deTocqueville concluded that participation in the process would connect the individual to the community. In this manner, the individual would perceive his personal interest was identified with

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[40]deTocqueville, supra, footnote 37, at pg. 114.

[41]Ibid., at pg. 121, quoting Madison from the Federalist, No 51.

[42]Ibid., at pg. 48.

[43]Ibid., at pg. 193.

[44]Ibid., at pg. 194.

the interests of the whole community.

deTocqueville proposed to temper the tyranny of the majority by guaranteeing the morality of justice through union with Christianity and by guaranteeing free thought and discussion through equal political participation.[45] Citizens would be perfectly free, because they were all entirely equal; and they would all be perfectly equal, because they were entirely free.[46]

Mill

The argument that morality should guide the civil state was not without its detractors.[47] John Stuart Mill also identified the tyranny of the majority as a dangerous product of democratic society but he did not argue that protection from this tyranny lay with imposing morality through law. Mill argued that the interference of society to overrule what only regards the individual must be grounded on general presumptions which may be altogether wrong. Even if right, they are as likely as not to be misapplied to individual cases.[48] Mill proposed that to minimize the interference of the state in the lives of individuals, laws regulating individual action should be limited. He concluded that

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[45]He also proposed the independence of the judiciary and a free press as important for the full airing of ideas.

[46]deTocqueville, supra, footnote 37, at pg. 189.

[47]Also its proponents, note Devlin, The Enforcement of Morals (London: Oxford University Press, 1965) and Stephens, cited in White, James Fitzjames Stephen's Liberty, Equality, Fraternity (Cambridge: Cambridge University Press, 1967).

[48]Mill, Three Essays: On Liberty, Representative Government, The Subjection of Women (London: Oxford University Press, 1975) at pg. 94.

if the state interfered with individual authority then liberty is not respected and society is not free.[49]

Mill believed that people are made human by their capacity for choice.[50] The greatest good is achieved through the realization of the life plan that individuals choose for themselves. He concluded that the capacity to determine one's path was central to this life plan. Thus, state interference with choice was legitimate only to the extent that the conduct of the individual caused harm to others.[51]

The absolute freedom of the individual as proposed by Mill has both its pros and cons. While, for example, it may provide women with the authority to make reproductive choices, it may also allow pro-life organizations to harass and picket women's clinics.[52] There is debate about the extent to which Mill actually intended his theory to be absolute. Eugene Rostow concluded that it would

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[49] Ibid., at pg. 18.

[50] Berlin, Four Essays in Liberty (Oxford: Oxford University Press, 1969) at pg. 192. Berlin notes that Mill was raised on the utilitarian notion of the greatest good for the greatest number: at pg. 175.

[51] Mill, supra, footnote 48, commented: "... that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection ... to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. ... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.", at pg. 15.

[52] "Abortion blockades legal, High Court says", Globe and Mail, January 14, 1993.

be anarchy to claim that society could tolerate the "right" of an individual to act entirely in accordance with his own ideas of right and wrong.[53] Ronald Dworkin commented that Mill was not suggesting liberty as a licence to do as one pleases.[54] Mill, he said, saw independence as a further dimension of equality. Individual independence is threatened, not simply by a political process that denies his equal voice but by political decisions that deny his equal respect.[55] Joel Feinberg noted that Mill did not intend to base the whole case of liberty on the maximization of freedom but rather on the maximization of personal and/or social utility interpreted as maximal fulfillment of desires and reduction of frustrations.[56]

The debate about the nature of Mill's proposition illustrates the concern about absolute positions in the civil state. The lack of definition of the boundaries in the liberal theory of the state has caused many theorists to seek a middle ground. This can be seen in the writings of modern theorists.

ii. Modern Liberal Theorists

Modern liberal theorists are as much mired in the conflict between the relationship of the individual, state and community as

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[53]Rostow, "The Enforcement of Morals" [1960] Cambridge L.J. 174, at pg. 175.

[54]Dworkin, Taking Rights Seriously (London: Duckworth & Co., 1977) at pg. 263.

[55]This comment must be considered in light of Dworkin's argument of equality of respect; Ibid., Chapter 12.

[56]Feinberg, The Moral Limits of the Criminal Law: Harm to Self (New York: Oxford University Press, 1986) at pg. 77.

the former day theorists were. Although their work has been important in furthering the debate around liberalism, it has not served to define a narrower scope for the liberal state.

Rawls

John Rawls concluded that the social contract was not a contract to enter a particular society but a contract whose objective was the creation of the principles of justice which individuals concerned with furthering their own interests would accept in an initial position of equality.[57] He postulated a situation of individuals unaware of their own conceptions of good or psychological propensities determining the principles of justice behind a veil of ignorance.[58] He reasoned that from this position individuals would choose two basic principles, first, equality in the assignment of basic rights and duties and, second, social and economic inequalities being just only if they result in benefits for all, particularly the least advantaged in society.[59]

While Rawls acknowledged the fictional assertion of the original contract, he proposed that our interest in its terms stemmed from our acceptance of the conditions described in the contract. Alternatively, he felt that philosophical reflection would persuade the non-believers of the justness of this

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[57]Rawls, A Theory of Justice (Oxford: Clarendon Press, 1972) at pg. 11.

[58]Ibid., at pg. 12.

[59]Ibid., at pp. 14-15. Also see pg. 60.

position.[60]

Although it may be interesting to hypothesize in this manner, Rawls' end product provided little more than an explanation of how society arrived at its current structure.[61] He failed to discuss the validity of certain of his assumptions, for example, that it is human nature to further one's own interest first and to agree to inequality in the civil state, or, that the maximization of one person's best interest necessarily entails the minimization of anothers. This is a distributive based analysis which may not be valid in such a neutral state. The conclusion of his propositions appears to allow individualism with a safety net to ensure that no one falls too far behind.

Hart

H.L.A. Hart supported Mill's arguments of liberty as a clearheaded appreciation of the danger of democratic rule - the danger of tyranny of the majority. Tyranny, Hart said, "... is the misunderstanding of democracy which still menaces individual liberty..."[62]

Hart, a Legal Positivist, believed that law is what is legislated and that this is neither inherently good nor bad.[63]

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[60]Ibid., at pg. 21.

[61]Dworkin, supra, footnote 54, at pg. 182, disagreed with this criticism of Rawls which Dworkin found to be "foolish". He concludes that Rawls' basic assumption is a right to equal respect and concern in the design of political institutions.

[62]Hart, supra, footnote 38, at pg. 79.

[63]Hart, "Positivism and the Separation of Law and Morals" (1957-58), 71 Harv. L. Rev. 593.

Hart argued that criminal punishment must be justified by some other means than morality. Hart concluded that conduct warranting criminal punishment must directly harm either individuals or their liberty or jeopardize the collective interest of members of society.[64]

Although, generally, Hart supported Mill, he modified Mill's notion of liberty by de-emphasizing the importance of individual choice because, he concluded, the modern view of humanity differed from Mill's view.[65] Hart departed from Mill's principle by proposing a role for paternalistic legislation.[66] Hart felt that paternalism is a "perfectly coherent policy" and an explanation for infringing liberty that does not abandon Mill's objection to the use of criminal law to enforce morality.[67] He concluded that

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[64]Hart, The Morality of the Criminal Law: Two Lectures (London: Oxford University Press, 1965) at pg. 32.

[65]Hart, supra, footnote 38, commented "No doubt if we no longer sympathise with [Mill's criticism of paternalism] this is due, in part, to a general decline in the belief that individuals know their own interests best....Choices may be made or consent given without adequate reflection."; "[Mill endows the normal human being] with too much of the psychology of a middle-aged man whose desires are relatively fixed, not liable to be artificially stimulated by external influences, who knows what he wants and what gives him satisfaction or happiness;...", at pg. 33.

[66] Rostow, supra, footnote 53, at pg. 174, comments that Hart's amendment of the Mill principles amends the principle beyond recognition and is an acceptance of the major premises of Lord Devlin's argument.

[67]Hart, supra, footnote 38, at pp. 31-32. Hart commented that Mill was aware of separate grounds of compulsion that were not moral compulsion. These grounds are: "because it will be better for him", "because it will make him happier" and "because in the opinion of others it would be right."; Mill, supra,

paternalistic legislation protected the individual from harm and promoted future happiness.[68] Thus, laws against euthanasia, for example, while interfering with liberty could do so for the greater good of the individual.

Hart's acceptance of paternalistic legislation abandoned, to some degree, Mill's definition of liberty. Mill argued that the ability to choose is a good independent of the wisdom of that choice.[69] Mill noted this capacity for choice included the capacity to choose incorrectly and, though others may counsel, they may not interfere with that choice.[70] Hart's acceptance of paternalistic legislation interfered with the individual right to determine questions of taste and choose a life plan.

Dworkin

Ronald Dworkin, in constructing an adjudicative theory, argued that there is an expectation of and individuals have the right to the enforcement of laws.[71] While laws may be subject to

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footnote 48, at pg. 15.

[68]Hart, supra, footnote 38, at pg. 30.

[69]See Dworkin, "Paternalism", in Wasserstrom, Morality and the Law (Belmont, Cal.: Wadsworth Publishing Company, 1971) at pg. 117.

[70]Mill, supra, footnote 48, commented "We shall reflect that he already bears, or will bear, the whole penalty of his error; if he spoils his life by mismanagement, we shall not, for that reason, desire to spoil it still further: instead of wishing to punish him, we shall rather endeavour to alleviate his punishment, by showing him how he may avoid or cure the evils his conduct tends to bring upon him.", at pg. 97.

[71]Dworkin, supra, footnote 54, at pg. 101 where he noted a chess game at which the referee must award the prize to the contestant with the most points because the participants entered

interpretation, the adjudicator's role is to uncover the conventions[72] which are the basis and philosophy for the rules.

In response to Rawl's, Dworkin concluded that a hypothetical social contract is no argument for the fairness of enforcing the terms of that contract.[73] Dworkin argued that fairness and justice are prior to the agreement. Whether one agrees to the original contract or not is not relevant in determining or justifying the fairness of the contract.[74] Consent is a factor, but Dworkin maintained, its existence does not determine the issue of fairness.[75] In this manner, Dworkin established a proposition that fairness and justice exist prior to the agreement. His theory of adjudication aimed to explain how these conventions may be uncovered and fairness, justice and equality respected.

Dworkin argued the central concept of his theory is equality.

> "Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration, and with respect, that is, as human beings who are capable of forming and acting on intelligent conceptions of how their lives should be lived. Governments must not only treat people with concern and respect, but with equal concern and respect."[76]

He proposed, not a liberty of license, but a liberal concept of

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the contest on the understanding those rules would apply.

[72] Ibid., at pg. 103.

[73] Ibid., at pg. 151.

[74] Ibid.

[75] Ibid., at pg. 152.

[76] Ibid., at pp. 272-273.

equality.[77] This entails a right to equal treatment and a right to treatment as an equal. While this sounds like an inviting notion, this equality is an abstract proposition which could fail to address systemic inequalities as, presumably, the state may treat each individual with equal concern and respect through equal participation in the civil state. This equality may suffer from the previously stated problems arising from majority rule.

Dworkin attempted to propose a theory that resolved the traditional liberty and equality conflict.[78] This theory attempted to explain and justify the support of individualism in certain cases and the support of community interests in others.

iii. Summary

Within the liberal paradigm, the basic constructs of the individual, rights, public/private and the state allow for a variety of relationships between the individual and the state. Each liberal theorist adopted the proposition of a natural man with absolute autonomy who contracted for a civil state to defend liberty. However, each theorist did not construct the same civil state. The variation in the models of the civil state reflects a different answer to the question of who or what is the best defence to liberty. Theorists like Locke and Mill concluded that the best defence to liberty lay with the individual. Thus, they emphasized freedom of the individual to act without restriction and imposed

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[77] Ibid., at pp. 262-263.

[78] Unfettered liberty results in inequality but redistribution of resources results in infringed liberty.

limits on the authority of the state. Other theorists, like Rousseau and deTocqueville, concluded that the best defence to liberty lay within the community. For Rousseau, this took the form of "general will". For deTocqueville, this took the form of religion. In either case, both theorists gave the defence of liberty to other than the individual and provided the state with a greater role to play in defending liberty. Many modern theorists, like Rawls' and Dworkin, have tried to find the balance, the medium between the two.

All approaches assume a relationship which maximizes benefits to the individual and operates for the good of the society. In practice, the application of any of these approaches does not achieve such a clear result. The line between the state, individual and community is blurred in liberal theory with the result that courts have a variety of models to follow when determining legal principle. Therefore, it is simplistic to define the liberal civil state as proposing a relationship of conflict between the individual and the state. As will be discussed below, a variety of liberal civil state models have been employed by the courts in considering equality issues.

CHAPTER TWO

Liberal Theory in Law and Its Critics

This Chapter will review how liberal theories of the state influence the approach of the judiciary to the interpretation of laws and critiques that have been made of this influence.

i. Liberal Theory in Law

> "Justice has her eyes blindfolded; only those considerations which go into the scales are weighed."[79]

The extreme positions of the liberal theory of the state, which are illustrated by the theories of Locke and Rousseau, describe the relationship between the individual and state either as one of conflicting interests or as complementary interests. These polarities have been characterized as negative and positive liberty, respectively.[80] Negative liberty, which proposes a relationship of conflict, requires that laws be minimized so as not to interfere with the autonomous individual and that individual's liberty. Positive liberty, which proposes a complementary relationship, allows the creation of laws to protect the individual as the state is perceived to act on behalf of the social good.[81]

The negative theory of liberty has prevailed in this

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[79]Lucas, "Against Equality" in Bedau (ed.), Justice and Equality (Englewood Cliffs, N.Y.: Prentice-Hall, 1971) at pg. 143.

[80]Berlin, supra, footnote 50.

[81]Ibid., at pp. 112 & 132.

century.[82] Perhaps part of the reason for the prevalence of negative liberty analysis in judicial reasoning is the practical difficulty of applying theories of adjudication, such as Dworkin's, which attempt to strike a more balanced tone between negative and positive theory. Whether one reason can be discerned or not, the negative liberty theory has resulted in an emphasis on individualism, the maximization of self potential through the minimization of the power of the state.

As the assumption is that individuals start equal with all others, individual autonomy is protected in the legal system through the neutral application of the law applied by a neutral judiciary.[83] Theoretically then, the application of the law should not advance one individual's interests before another's interests.[84] The judiciary should adjudicate rights between individuals in their voluntary transactions and not in the context

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[82]See Pound, supra, footnote 15, at pg. 40; MacKay, "Judging and Equality: For Whom Does the Charter Toll?" (1986-87), Volume 10, No. 2 Dalhousie L.J. 35, at pg. 65; Brodsky and Day, Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back? (Ottawa: Canadian Advisory Council on the Status of Women, 1989) at pg. 87, where they argue that judges are more comfortable and familiar with their negative power pursuant to section 52 of the Constitution.

[83]See MacKay, supra, footnote 82, at pg. 65; Cossman, "A Matter of Difference: Domestic Contracts and Gender Equality" (1990), 28 Osgoode Hall L.J. 303, at pg. 333; Cassels, supra, footnote 18, at pp. 379 & 380.

[84]See MacKay, supra, footnote 82, at pg. 68; Cossman, supra, footnote 83, at pg. 332; Cassels, supra, footnote 18, at pg. 380.

of some presumed good.[85] For this system to be authoritative, there must be a belief that justice through the objective application of law is both an obtainable and a sustainable goal, not to mention a laudable goal.[86]

American Jurisprudence

The influence of liberal theory in law is especially evident in early American jurisprudence on the 14th Amendment. In Coppage v. Kansas,[87] the plaintiff was charged under legislation which provided that an employer was unable to "coerce, require, demand, or influence" any person not to join or remain a member of a labour organization as a condition of securing or maintaining employment. The plaintiff contended that this legislation was in conflict with the 14th Amendment of the Constitution as depriving him of liberty or property without the due process of law.

For the majority, Justice Pitney characterized this legislation as creating an offence of prescribing conditions of employment when "... the employee [was] subject to no incapacity or disability, but, on the contrary, [was] free to exercise a voluntary choice."[88] The court noted that the employee was "... at will and a man of full age and understanding, subject to no

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[85]Dworkin suggests that the judiciary should decide cases on the basis of principle not policy. Principle is concerned with the individual and policy is concerned with the community. It is not the role of the judiciary to adjudicate individual rights based on community good: Dworkin, supra, footnote 54, at pg. 90.

[86]Objectivity in law is discussed more fully in Chapter 4.

[87](1914) 236 U.S. 1, 59 L. ed. 441.

[88]Ibid., at pg. 444.

restraint or disability..."[89]

In finding that this legislation infringed the 14th Amendment guarantee, the court noted Adair v. U.S.[90] where it was said:

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor for the person offering to sell it. ...the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract..."[91]

The court found that included in the right of private property is the right to make contracts for the acquisition of property such as contracts of personal employment. This legislation was seen to deprive employers of part of their liberty of contract and to advantage the employed through the advancement of labour organizations. Thus, the legislation was not a legitimate use of police power. This was so even though the court recognized that employees as a rule are not as financially independent as employers when contracting for employment.

> "...it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of these rights."[92]

The court adopted a traditional liberal position that inequality in fortune results from personal characteristics. Each individual has capacity to choose, negotiate and contract. If a contract operates

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[89] Ibid., at pg. 446.

[90] 208 U.S. 161.

[91] Ibid., at pg. 174.

[92] Coppage, supra, footnote 87, at pg. 447.

to the benefit of one party, such is the way of the marketplace.

In Lochner v. New York,[93] legislation which limited the hours of the employment of bakers was challenged as an arbitrary interference with the freedom to contract guaranteed by the 14th Amendment. The court determined that this legislation was not a valid exercise of police power to protect the public health, safety, morals or general welfare. Justice Peckham, for the majority, characterized this legislation as interfering with the contract rights of both the employer and the employee. The employer was unable to allow an employee to work longer than 10 hours and an employee was unable to choose to earn extra money by working longer than 10 hours.[94] The court found the issue to be whether it was unreasonable, unnecessary or arbitrary to interfere with the right of the individual to enter into contracts in relation to labour which may seem to him appropriate or necessary for the support of himself and his family. The court noted that no argument was made that bakers, as a class, are not equal in intelligence and capacity to other men in trades or not able to assert their rights and care for themselves without the protecting arm of the state.[95]

As liberal theory proposes, the court accepted that

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[93](1905) 198 U.S. 45. The Lochner line of cases was later abandoned by the United States Supreme Court.

[94]Ibid., at pg. 53.

[95]In Holden v. Hardy (1898), 169 U.S. 366; 42 L. ed. 780, the court characterized similar legislation as a valid exercise of police power partly because the parties to a labour contract do not start from an equal bargaining position.

individuals are equal in their capacity to contract. Thus, as there was no natural inequality between the two classes, resulting inequality in the ability to strike a fair deal resulted from individual differences. Evidence of the unhealthy nature of the trade was dismissed as not showing an unusually unhealthy trade. The court expressed concern that this argument could justify state regulation of all sorts of work.

Privacy gained some measure of protection under the United States Constitution in Griswold v. Connecticut.[96] The appellants were fined under a contraception law for giving information, instruction and medical advice to married persons on contraception. The result of the judgment was a conclusion that the Constitution created zones of privacy protected from government intrusion. The court found that a government objective may not be achieved by sweeping unnecessarily broadly into an area of protected rights.[97] In his concurring opinion, Justice Douglas noted that this legislation affected a relationship which lay within the zone of privacy created by the fundamental constitutional guarantees. This law was seeking to achieve its goals by a means which had a maximum destructive impact upon the private relationship of marriage.[98]

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[96](1965) 381 U.S. 479; 14 L. ed. 2d 510.

[97]Ibid., at pg. 516.

[98]See Roe v. Wade 410 U.S. 113 (1973) where the majority of the United States Supreme Court found that, although not absolute, the right to privacy encompassed a woman's decision on whether or not to terminate a pregnancy. This demonstrates that liberal theory may provide women with certain rights. As noted

Canadian Jurisprudence

Generally, American courts have addressed the issue of the boundary of state authority more directly than Canadian courts because of the long history of adjudication on the 14th Amendment and the meaning, among other things, of property rights in this context. However, liberal theory in Canadian jurisprudence may be traced through comments about the nature of the Canadian state and the role of citizens in that state. In particular, cases considering the situation of women in the state and their role in the public sphere demonstrate an adherence to the view that natural difference may justify different treatment in the civil state. Locke, for one, concluded that certain factors[99] may justify an unequal accumulation of resources or an exclusion from the public arena. A presumed natural difference between women and men, historically, has excluded women from participating in the public sphere of the liberal state.

This may be seen in In re Mabel P. French[100] where the Supreme Court of New Brunswick was asked to consider whether women were persons within the legal profession act of the province and capable of admission to the bar in New Brunswick. All the judgments of the court found that the meaning of the word "person" in the Act did not include women. Although Justice Tuck based his

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previously, (see page 21) it may also protect the actions of those seeking to restrict those rights.

[99]See prior discussion at pg. 14.

[100]37 N.B.R. 359 (S.C.N.B., 1905).

judgment on the common law incapacity of women, he prefaced his decision with the comment

> "If I dare to express my own views I would say that I have no sympathy with the opinion that women should in all branches of life come in competition with men. Better let them attend to their own legitimate business."[101]

In his concurring judgment, Justice Barker quoted extensively from Bradwell v. State of Illinois[102]

> "... civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. ... The paramount destiny and mission of women are to fulfill the noble and benign offices of wife and mother. This is the law of the Creator."[103]

The court's denial of allowing women to enter the legal profession was premised on women's pre-state or natural character. Women, this court suggested, did not possess the capacities of a liberal individual and difference flowed naturally from God and not the law. The state was justified in limiting women's role to the private sphere of the home as her inequality rendered her unfit for public life.

The issue of whether women were persons was again raised in Reference re Meaning of the Word "Persons" in Section 24 of the

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[101] Ibid., at pp. 361-362.

[102] 16 Wall 130.

[103] In re Mabel French, supra, footnote 100, at pg. 365.

British North America Act, 1867.[104] The reference was made to determine the issue whether, pursuant to the British North America Act, women were "persons" and could be appointed as Senators. For the Court, Chief Justice Anglin took the view that at common law women were not excluded from the public forum because of their inferiority but to protect them from the vulgarities of the public forum.[105] In this manner, the common law was characterized not as imposing a burden on women but as extending a benefit. Underwritten in this comment was the paternalistic idea espoused in Re Mabel P. French that men are the protectors of women. Chief Justice Anglin concluded that, although prima facie the word "persons" would include women, for parliament to have included women in the word "persons" would have been a "striking constitutional departure". Clear language would have to be employed for the Court to conclude women were "persons" in this context.

The implication of Chief Justice Anglin's decision was that women may be "persons" when circumstances warrant such an interpretation. His comment that the supposed benefit excused women from public service, suggested a view of women as delicate.[106] As the delicacy of women may justify the common law, it must be assumed that this delicacy was a natural and not a

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[104][1928] S.C.R. 276, referred to as "The Persons Case".

[105]Ibid., at pg. 283.

[106]Olsen, "The Family and the Market: A Study of Ideology and Legal Reform" (1983), 96 Harv. L. Rev. 1497, at pp. 1499-1500, discusses the development of the "feminine ideal".

legal difference. While Chief Justice Anglin did not find this natural delicacy implied inferiority, this distinction prevented women from taking a role in the political civil sphere and relegated them to the private sphere of the home.[107]

Christie v. York Corporation[108] is an example of how notions of the public and private spheres can insulate acts which discriminate. Mr. Christie was refused service in a tavern in Toronto because he was a black person. In its defence, the respondent argued that this tavern was a private enterprise and that the plaintiff was refused service to protect its business interests.

Justice Rinfret, for the majority, found as a general principle of the law of Quebec the complete freedom of commerce subject only to considerations of good morals and public order. Without exploration of the meaning of the complete freedom of commerce, Justice Rinfret assumed it included the right to decide that black persons would not be served in the establishment. As review of the legislation applying to the tavern did not disclose a law designed to infringe the freedom to contract, Justice Rinfret concluded the action for damages must be dismissed. Although he found that freedom to contract is subject to good morals, Justice Rinfret made no attempt to explore the rationale of the respondent other than the business rationale. The question of good was left,

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[107]On appeal to the Privy Council ([1930] A.C. 124 (1929)), women were found to be included in the words "qualified person" and were eligible to be members of the Senate.

[108][1940] S.C.R. 139.

presumably, for the forces of the marketplace to dictate.[109]

Justice Davis, in dissent, did not quarrel with the principle of freedom of commerce. Instead, he characterized the matter as coming within government control through legislation regulating the sale of liquor. As the legislation specifically stated persons who may not be served and as the appellant did not fall within one of those categories, Justice Davis concluded that the respondent could not rely on the principle of freedom of commerce to deny the sale of beer to black persons. In this manner, by placing the establishment in the public sphere and within the control of the state, Justice Davis proposed redress for the plaintiff without disturbing the private law of commerce.

The above cases demonstrate how notions of liberalism and particularly negative liberty have affected the interpretation of law. In cases like Coppage and Christie, the liberal distinction between public and private spheres allowed discrimination in the private market sphere because autonomous individuals had choice in contracting. As each individual was equal, success was simply a matter of contracting wisely. To maintain the objectivity of law, the judiciary did not judge the fairness of contracts.

In the cases involving women, pre-state or natural difference which amounted to a lack of the full compliment of liberal

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[109]Posner, Economic Analysis of Law (Boston: Little Brown and Co., 1973), suggested that the marketplace will sort out inequalities and discrimination because it is economically inefficient to discriminate. Assuming that discrimination is inefficient economically, which is disputable, this ignores that behavior is not always rationale.

individual characteristics justified the exclusion of women from the public sphere. A similar understanding of women's pre-state difference was raised in Bliss v. Attorney General of Canada.[110] In this case, Justice Ritchie concluded that pregnancy discrimination was not sex discrimination because all women were not discriminated against at one time. In reaching this decision, it was noted that

> "Any inequality between the sexes in this area is not created by legislation but by nature."[111]

Thus, the discriminating distinction was placed beyond the law and originated in nature.

More recently, the Court has interpreted the Charter rights through a liberal framework. In Irwin Toy v. Quebec (Attorney General),[112] one of the issues before the Court was whether a provision in the Consumer Protection Act[113] prohibiting commercial advertising directed at persons under 13 years of age infringed freedom of expression. The majority concluded that the provision did infringe the Charter but that the breach was justifiable under section 1. The majority noted that a broad, inclusive approach to the question of freedom of expression was consistent with the views of leading theorists. The majority

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[110][1979] 1 S.C.R. 183.

[111]Ibid., at pg. 190.

[112][1989] 1 S.C.R. 927.

[113]R.S.Q. c. P-40.1, ss. 248 & 249.

judgment quoted at length from Emerson[114]

> "... the theory of freedom of expression involves more than a technique for arriving at better social judgments through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilization virtually unlimited."[115]

While the majority adopted a "broad inclusive approach", they concluded that not all expression is protected. Protected legislation must convey a message or meaning reflective of the principles underlying the freedom of expression. Meaning, it was suggested, must relate to the pursuit of truth, participation in the community or individual self-fulfillment and human flourishing.[116] This set of criteria, on the one hand, suggests an approach similar to Dworkin, in that protected speech must reflect objective principle and relate to truth. On the other hand, notions of individual self-fulfillment and human flourishing suggest Mill's notion of life plan. This mingling of the two theories is inconsistent, particularly in light of the acceptance of the above quote from Emerson which more closely fits with Mill's or Locke's view of liberty and the priority of individual concerns.

In dissent, Justice McIntyre and Justice Beetz were more hesitant to strike a balance because the limits on freedom of

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[114]Emerson, "Toward a General Theory of the 1st Amendment" (1963), 72 Yale L. J. 877.

[115]Irwin Toy, supra, footnote 112, at pg. 970.

[116]Ibid., at pg. 977.

expression proposed by the majority, though not "earth shaking",[117] represented a small abandonment of a principle "of vital importance in a free and democratic society".[118] The dissenting judges took a strong negative liberty position and argued

> "Freedom of expression, whether political, religious, artistic or commercial, should not be suppressed except in cases where urgent and compelling reasons exist and then only to the extent and for the time necessary for the protection of the community."[119]

Although both the majority and minority emphasized the importance of free speech, the varying opinions on the permeability of the individual sphere resulted in different conclusions on the extent, if at all, the principle of freedom of expression may be limited.

Recently, the structure of the Canadian state was a matter of discussion for the Court in McKinney v. University of Guelph,[120] Harrison v. University of British Columbia,[121] Stoffman v. Vancouver General Hospital,[122] and Douglas/Kwantlen Faculty Association v. Douglas College.[123] A primary issue before the

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[117] Ibid., at pg. 1008.

[118] Ibid. These comments were made in the context of the s. 1 analysis.

[119] Ibid., at pg. 1009.

[120] [1990] 3 S.C.R. 229.

[121] [1990] 3 S.C.R. 451.

[122] [1990] 3 S.C.R. 483.

[123] [1990] 3 S.C.R. 570.

Court in these cases was the application of the Charter to the institutions and their mandatory retirement policies. It was alleged that the polices infringed section 15(1) by discriminating on the basis of age.[124] These cases raised the question of where, in the context of section 32(1) of the Charter, the government begins and ends.[125] In considering the boundary set out in section 32(1), Justice LaForest noted, in McKinney,

> "To open up all private and public action to judicial review could strangle the operation of society and, as put by counsel for the universities, 'diminish the area of freedom within which individuals can act'."[126]

Framing the concern as the freedom of the individual (even the university as an individual) to liberty of action without government constraint placed the issue fully within the liberal paradigm. While the majority of the Court found that, with one exception,[127] the institutions did not fall within the meaning of government in section 32(1) of the Charter and therefore were not subject to the Charter, the judges addressed the issue of

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[124]In McKinney and Harrison, provincial human rights legislation was also challenged as infringing section 15(1) because of exemptions in the legislation allowing discrimination against persons 65 years of age or older.

[125]Section 32(1) of the Charter provides that the Charter applies to the Parliament and government of Canada and the legislature and government of each province. Thus, private activity is excluded from scrutiny under the Charter.

[126]McKinney, supra, footnote 120, at pg. 262.

[127]In Douglas College, the Court did find that the institution was an arm of the government and therefore was subject to the Charter. Referring to the reasons from McKinney, the mandatory retirement policy was found to be law in the context of section 15. The Court did not deal with the issue of whether a breach of section 15 was justified under section 1.

whether the policies infringed section 15(1). Generally, the mandatory retirement policies were found to infringe section 15(1) but were saved under section 1 of the Charter. In considering reasonableness under section 1, a number of the judgments raised the question of the extent, if at all, an individual can contract out of Charter rights - ie. whether an individual can consent to discrimination.[128]

Of the four judges who addressed the issue of consent, three felt that it may be a factor in ameliorating discrimination. Justice LaForest[129] concluded

> "It may be that the acceptance of a contractual obligation could, in some circumstances, constitute a waiver of a Charter right especially in a case like mandatory retirement, which not only imposes burdens, but benefits on employees. On the whole, though, I think such an arrangement would usually require justification as a reasonable limit under s.1. That is especially true in the case of a collective agreement, which may or may not really find favour with individual employees subject to discrimination."[130]

Although Justice LaForest did not specifically address the issue of employee consent in finding that the age discrimination was justifiable under section 1, he did comment on the contractual nature of the policy with respect to the challenged human rights legislation.[131] He noted that the legislation did not set out a government policy favouring mandatory retirement but was

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[128]Justice Sopinka, in McKinney, raised this issue in the context of section 15 prior to a determination under section 1 of the Charter.

[129]Dickson C.J. and Gonthier J. concurring.

[130]McKinney, supra, footnote 120, at pg. 277.

[131]Human Rights Code, 1981, S.O. 1981, c. 53.

permissive in allowing the private sector to contract for their work conditions. Mandatory retirement was not a condition imposed on employees but derived in part from arrangements which unions and individual employees have struggled to obtain.[132]

Justice LaForest characterized mandatory retirement as an objective of workers as a group and as individuals.

> "The present situation allows the parties concerned, the employers and the employees, the freedom to agree about an issue of central importance in their lives and activities. The freedom of employers and employees to determine conditions of the workplace for themselves through a process of bargaining is a very desirable goal in a free society."[133]

In McKinney, Justice Sopinka noted that the role of the Charter is to protect the individual against the coercive power of the state and that there must be an element of coercion before the emanations of an institution can be classified as law.[134] Justice Sopinka expressed the view that decisions for or against mandatory retirement were by democratic process. He concluded that employers and employees through the bargaining process can determine this issue for themselves.[135] If through a ruling this right was denied

> "...the Charter would be used to restrict the freedom of many in order to promote the interests of the few. While some limitation on the rights of others is inherent in recognizing the rights and freedoms of individuals the nature and extent of the limitation, in this case, would

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[132] McKinney, supra, footnote 120, at pg. 312.

[133] Ibid., at pg. 313.

[134] Ibid., at pg. 444.

[135] Ibid., at pg. 446.

be quite unwarranted."[136]

Justice Sopinka implied a distributing process, a weighing and balancing of each individual's liberty. A right, this language suggested, is absolute although a democracy may limit it to recognize other rights.

In Douglas/Kwantlen Faculty Association, Justice Sopinka further commented on the meaning of "law" within section 15(1).

> "In my opinion, [the Charter] was not intended to apply to purely consensual conduct. The Charter was intended to protect the individual from the coercive power of the state and not against the individual's own voluntary conduct in dealing with state entities."[137]

Justice Sopinka, therefore, proposed that the Charter is a shield of the individual to ward off the offensive tactics of the state.[138] This characterization of state power as coercive is a clear adoption of a Lockean theory of the state. Justice Sopinka's conclusion about the capacity and ability of the individual to contract is similar to the early American cases like Lochner. No consideration is given to the context within which this contract was made. The assumption is that consent is real and the individual has the capacity to give or enforce it. In

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[136] Ibid.

[137] Douglas College, supra, footnote 123, at pg. 617.

[138] Justice Sopinka's narrow definition of law based on coercion could significantly restrict access to section 15 of the Charter. It raises questions of the degree of consent necessary to deny the characterization of challenged rules of government entities as "law" under section 15. Further, the requirement of law to be "coercive" may pose a barrier to challenging neutral rules which have an unintentional discriminatory impact but can not be characterized as coercive.

practice, Justice Sopinka is not protecting the individual, the single person, but the individual as the majority voting block. The tyrannical nature of the voting block, its arbitrariness and other concerns raised by Mill, deTocqueville and Hart have been submerged to the public/private debate.[139] This image of the nature of the state does not serve in the final analysis to protect individual rights which, oddly enough, is its premise.

Justice Cory, in McKinney, suggested that in matters pertaining to age, contracting out of section 15 equality rights may be possible.[140] He noted that often in collective bargaining situations, members will have received careful advice on the terms of the contract. The contracts represent the opinion of the members that it is in their best interests to accept the agreement.

> "The collective agreement reflects the decision of intelligent adults, based upon sound advice, that it is in the best interest of themselves and their family to accept a higher wage settlement for the present..."[141]

The treatment of this question of contracting out of rights may be an important development in future cases. An allowance to contract out could provide the opportunity to do through a union agreement what the government can not do otherwise. An employment

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[139]Justice LaForest noted that individual employees may not consent and therefore it was important to consider the issue of reasonableness in the context of section 1: McKinney, supra, footnote 120, at pg. 277.

[140]McKinney, supra, footnote 120, at pg. 447.

[141]Ibid., at pg. 448.

agreement with an unionized labour force could require workers to be available for shift work on any day of the week save Sunday. By analogy with this case, individual employees whose religion celebrates Sabbath on a Friday or Saturday, may be found to have contracted out of their entitlement to a resting day other than Sunday. Difficult questions arise from the imposition of democratic majority rule without further analysis of the principles of the theory. What if the individual exercised her/his right to vote against the contract which the majority ultimately approved? These rules and regulations may be just as arbitrary and infringe liberty just as much as the rules and regulations government imposes on its citizens.

The danger of this form of analysis is that objective application of legal principles eschews a contextual analysis. Groups, such as women, may find themselves being treated as though they possess the full capacity and power of an individual notwithstanding historical denial of personhood and individual rights with its present day hangovers.

Further, it is questionable whether a liberal theory of the state which emphasizes individualism and the free market is a correct description of the Canadian state. In her dissenting judgment in McKinney, Justice Wilson turned a more jaundiced eye to the application of traditional negative liberal theory to Canadian society in examining the meaning of the word "government" in section 32 of the Charter.

> "I believe that the concept of government as oppressor of the people and the function of government as the

> enactment of "coercive laws" is no longer valid in Canada, if indeed it ever was."[142]

In contrast to the majority who adopted a concept of minimal state intervention, a negative liberty concept, Justice Wilson explored the historical development of the Canadian state and concluded that a regulatory government has been part of Canadian history.[143] This, she suggested, gives us a different relationship with our state. She proposed that the relationship of Canadian citizens to their government has not been a confrontational one because of the acceptance of the view that governments can aid a number of "social, political and economic problems".[144]

> "The Canadian government has thus not been regarded as a monolith of oppression but rather as having a beneficent and protective role to play."[145]

> "Canadians recognize that government has traditionally had and continues to have an important role to play in the creation and preservation of a just Canadian society."[146]

Justice Wilson adopted a broader view of the meaning of government. One, she noted,

> "that is sensitive both to the variety of roles that government has come to play in our society and to the need to ensure that in all of these roles it abides by

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[142] Ibid., at pg. 343.

[143] Ibid., at pp. 344-345.

[144] Ibid., at pg. 354.

[145] Ibid.

[146] Ibid., at pg. 356.

the constitutional norms set out in the Charter."[147]

In reviewing the question of contracting out of equality rights, Justice Wilson noted that the Court has held that some rights in the Charter may be waived but it has not addressed whether equality rights can be bargained away. Justice Wilson commented that she held "serious reservations" that they can be contracted out of,[148] though she leaves this determination for a case in which it is essential to the result.[149]

ii. Critiques of Liberalism

> "Public discussions of social injustice tend to revolve around inequalities of wealth and income, and the extent to which the state can or should mitigate the suffering of the poor."[150]

General

Many of the issues addressed by liberal theory revolve around the question of who gets what resource and who decides the distribution of that resource. The basic analysis, frequently, is distributive. There is a limited pool of resources to draw upon and the rules of how each individual draws upon them need to be established. The potential of the state to redistribute makes the state a threat to individual liberty and social justice.[151] As

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[147] Ibid., at pg. 358.

[148] Ibid., at pg. 406.

[149] Ibid., at pg. 407.

[150] Young, Justice and the Politics of Difference (Princeton: Princeton University Press, 1990) at pg. 19.

[151] Hutchinson, "Mice Under a Chair: Democracy, Courts, and The Administrative State" (1990), 40 U. Toronto L.J. 374.

was demonstrated by the cases above, the judicial system has been concerned with this potential and how it should or should not be monitored.

Liberal theory suggests that government inaction in the private sphere of the market place establishes neutrality. Critics of liberal theory argue that while the legal enforcement of property rights divorced from the individual situation may appear neutral, in practice it supports the status quo and structures the distribution of resources.[152] Thus, government inaction and action may serve the same end. As property and contract are creatures of the state and as they allocate resources, state maintenance of these institutions may be no less neutral than opposition to them.[153] Allan Hutchinson and Andrew Petter argued that private property exists only to the extent that the state is prepared to recognize and support a claim. Private property is in reality public power that has been delegated to certain individuals.[154]

In the marketplace, great value is placed on property.[155]

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[152]Cotterrell, "Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship" in Fitzpatrick and Hunt (ed.), Critical Legal Studies (Oxford: Basil Blackwell, 1987) at pg. 82; also Cohen, "Property and Sovereignty" (1927-1928), 13 Cornell L. Q. 8, at pg. 13.

[153]Hutchinson, "Talking the Good Life: From Liberal Chatter to Democratic Conversation" in Hutchinson and Green (ed.), Law and the Community: The End of Individualism (Toronto: Carswell, 1989) 151, at pg. 159.

[154]Hutchinson and Petter, supra, footnote 19, at pg. 286.

[155]MacPherson, supra, footnote 34, at pg. 21.

To the extent an individual or entity owns property, the law protects that individual. Fran Olsen noted that private property confers on its owner the "sovereign power [of] compelling service and obedience" from those who need access to the property.[156] Thus, the legal support of property rights allows those with power to maintain that power. In this manner, the law is part of the private process of redistributing resources.[157]

The state also is involved in direct distribution of resources. Charles Reich suggested that in the modern, welfare state where governments and corporations control vast amounts of property, property has lost its individuality and no longer represents the sphere of autonomy for the individual.[158] Reich argued that the expansion of the wealth of the government accompanied by a distinctive system of law, which in general terms denies the individual rights in the government largesse, has had profound consequences on individualism and independence.[159] The distribution of the government largess plays a significant role in the distribution of property and, therefore, power. Reich concluded that the control of the distribution gives the government influence in both the public and the private spheres. By distributing the government largess and attaching conditions to its

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[156]Olsen, supra, footnote 106, at pg. 1509.

[157]Hutchinson criticizes liberalism for providing no theoretical framework for resolving redistribution issues: see supra, footnote 153, at pg. 175.

[158]Reich, "The New Property" (1963-1964), 73 Yale L. J. 733.

[159]Ibid.

future distribution, the government reaches into the private sector and makes agents of the recipients.[160]

The government distribution of resources and the role of the judicial system in monitoring that distribution was at issue in Schachter v. Canada.[161] Here, the provisions of the Unemployment Insurance Act, 1971[162] provided maternity benefits to the birth mother but did not provide a comparable benefit to the birth father and paternity benefits only applied to adoptive parents. An application was brought to extend the paternity benefits to natural parents. As a section 15 violation was conceded, the Court reviewed this legislation as though section 15 was infringed and found the legislation infringed the Constitution, not by providing a benefit but by not extending the benefit to all who should receive it. Instead of reading in an extension of that benefit, the Court declared the provision invalid and suspended that declaration to allow Parliament to weigh the matter.[163] While not ruling out the possibility that, in future, reading in and extending a benefit may be an appropriate remedy, the Court

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[160]Frequently, courts characterize the distribution of property by government as a benefit instead of a right. The individual's right to such benefit is limited by the ability of the individual to meet the conditions attached to the benefit by the government: see Bliss, supra, footnote 110.

[161][1992] 2 S.C.R. 679. In this case, the appellents conceded a section 15 violation. The Court noted this procedural limitation.

[162]S.C. 1970-71-72, c. 48.

[163]After the action was started, Parliament did amend the legislation.

expressed great reluctance to extend benefits and, therefore, have a hand in the distribution of resources. As the Court concluded that this plan was a benefit which was not constitutionally mandated, the government, presumably, could have resolved the underinclusion problem by eliminating the benefit entirely.

The Court, therefore, chose to restrict its critique of the government's distribution of resources. This is defensible as the Court lacks expertise in developing policy and is not an elected body. However, this case demonstrates the difficulty that those without access to resources have in acquiring a right to them. As Reich noted, the distribution of resources may play an important role in distributing civil power. The Court's reluctance to review government distribution serves to maintain the status quo.

Feminist Critique

The critique of the notion of property and distribution is but one layer in the critique of liberal theory. A further inquiry into liberal theory and social structure finds that the public/private may be defined in a number of ways. Commonly, an economic definition is employed to define the state as the public and the market place as the private. In this context, the liberal influence on law is criticized for the fluidity of the boundaries between the state and the market. But often this critique of liberal theory assumes the validity of the split between the public and private. It questions only the neutrality of law in upholding the state's role in defining and limiting the private sphere or the function of property in allocating benefit. This critique does not

provide the whole answer to how liberal theory impacts on law and reinforces power structures. It fails to address many of the structural barriers which prevent equality.

Feminist theorists have taken the critique of liberalism one step further by challenging not only the definition of the public and private but also the assumption of capacity and will and the application of notions of individualism on those who have been historically disenfranchised. The individual with capacity and will to contract is a gendered concept. Until very recently, women were not assigned the characteristics of the liberal individual and did not possess the minimum content of the private civil sphere. Lack of capacity and will was attributed to nature and natural difference justified excluding women from participating in the civil state.[164] The private sphere for women was not the marketplace, which was occupied by the liberal individual, but the family and the home.

Carole Pateman argued that the civil contract notion of the autonomous individual who is free to contract does not include women.[165] Pateman suggested that the contract theory has two dimensions - the social contract, which is a story about freedom, and the sexual contract, which is a story about subjection.[166] The latter half of the contract theory is forgotten as attention is

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[164]See In re Mabel P. French, supra, footnote 100 and "The Person's Case", supra, footnote 104.

[165]The Sexual Contract (Cambridge: Polity Press, 1988) at pg. 2.

[166]Ibid.

directed only to the politically relevant public sphere.[167] This public sphere of civil freedom is a male attribute. Pateman argued that only men are endowed with the capacity to contract, only men have ownership of their persons, "that is to say, are 'individuals'".[168] Women are not party to the social contract that transforms natural, pre-civil freedom into civil freedom. But, notwithstanding this lack of individual ownership, women are seen to freely contract.

> "The genius of contract theorists has been to present both the original contract and actual contracts as exemplifying and securing individual freedom. On the contrary, in contract theory universal freedom is always an hypothesis, a story, a political fiction. Contract always generates political right in the form of relations of domination and subordination."[169]

Pateman described the private sphere of women as part of the civil society but separate from the civil sphere.[170] This female sphere within civil society is seen as a natural sphere while the male sphere is seen as the civil sphere.[171] The "natural" element in this theory is necessary because if women viewed their bond with men as one of contract, then the necessity

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[167] Ibid., at pg. 3.

[168] Ibid., at pg. 6 and Chapter 3. In In re Mabel French, supra, footnote 100, and "The Persons Cases", supra, footnote 104, the courts relied on the common law legal incapacity of women to deny them access to the civil sphere.

[169] Pateman, supra, footnote 165, at pg. 8.

[170] Ibid., at pg. 11.

[171] Pateman, "Feminist Critiques of the Public/Private Dichotomy", in Benn and Gaus (eds.), Public and Private in Social Life (London: Croom Helm, 1983) at pg. 282, where she notes that Benn and Gaus comment the family is paradigmatically private.

of obedience would disappear.[172]

Suzanne Silk Klein[173] argued that the liberal theorists, Hobbes and Locke, developed the theory of dominion, property, inheritance and government as though women, wives and daughters did not exist.[174]

Lorenne Clark argued that Locke had to find natural differences between the sexes to generate the patriarchal society in which he believed.[175] Clark noted that though Locke accepted natural difference between men, all men had an equal right to autonomy. In the case of women, natural differences justified an unequal right to autonomy. Locke believed the source of women's inferiority lay in their reproductive capacity.[176] Thus, the family was a natural institution based on the natural differences between the sexes. Locke used this inferiority to deny women ownership of property. In this manner, women's inferiority was insured because they were denied access to the market and a means of livelihood. Locke had to assume that women's inferiority denied capacity to own property because if women could own property that capacity would destroy the natural domination of men.[177]

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[172]See Pateman, supra, footnote 165, at pg. 40.

[173]"Individualism, Liberalism and the New Family Law" (1985), 43 U. T. Fac. L. Rev. 116.

[174]Ibid., at pg. 119.

[175]supra, footnote 29, at pg. 16.

[176]Ibid., at pg. 20.

[177]Ibid., at pg. 37.

For women, the liberal public/private sphere split has relegated them to the private within the private (the family or natural sphere) because they do not possess the attributes of an individual. Olsen noted that the family may be seen as the sanctuary of privacy where one can retreat to avoid state regulation.[178] But the state's support of a specific form of family and the roles of members of the family shape this private sphere.[179] As Judy Fudge noted, the state, both through the legislature and the judiciary, has long been involved in constituting the family.[180]

Mary McIntosh argued that the capitalist state creates a family that primarily is dependent on a male breadwinner for financial support and on female labour for maintenance of the household.[181] As well, by manipulating social security and the demands of the labour force, the state can ensure women remain financially dependent to maintain a latent reserve army of labour.

Although this century has seen a change in the legal capacity

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[178]Olsen, supra, footnote 106, at pg. 1504.

[179]McIntosh, "The state and the oppression of women" in Kuhn and Wolpe (eds.), Feminism and Materialism: Women and Modes of Production (Boston: Routledge & Kegan Paul, 1978).

[180]"The Public/Private Distinction: The Possibilities of and the Limits of the Use of Charter Litigation to Further Feminist Struggles" (1987), 25 Osgoode Hall L. J. 485, at pg. 510. Also see Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases" (1989), 3 Can. J. Women and the Law 246.

[181]McIntosh, supra, footnote 179, at pg. 264.

of women,[182] as a group, women are still financially dependent[183] and socially tied to the home. This is a phenomenon which, while not caused by the application of law, may be supported by it. For example, until recently (and in many countries still) economically debilitating conditions in the workplace, such as sexual harassment, were remediless. The legal system has inadequately addressed these circumstances because the construct of the individual with liberty and capacity masks systemic inequality in the private sphere.[184] As Catharine MacKinnon noted, in the private sphere consent is assumed.[185] This consent is abstract because those without the resources of the private sphere lack capacity to call upon the state or law to defend their private sphere.

Brenda Cossman[186] described the judicial approach in family law cases as, generally, a private choice approach which is based on the sameness principle that assumes men and women are the same and emphasizes individual responsibility and freedom of contract.

Cossman questioned the function of considering a causal relationship on an individual basis in light of the construction of

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[182]See "The Persons Case", supra, footnote 12.

[183]Abella, Equality in Employment: Royal Commission Report (1984).

[184]See Fudge, "The Public/Private Distinction", supra, footnote 180, at pg. 534.

[185]MacKinnon, "Feminism, Marxism. Method and the State: Toward Feminist Jurisprudence" (1983), 8:4 Signs 635, at pg. 656.

[186]Cossman, supra, footnote 83.

social institutions which reinforce the condition of inequality. Economic inequality is most relevant in considering the whole of the group not the individual in the group. Defining the individual as separate from the group prevents analysis of systemic inequality affecting the group. In this manner, the courts can avoid the issue of judging competing concepts of good and be facially neutral.[187]

By adopting the facially neutral position, the court accepts the patriarchal nature of the social contract and supports a concept of good inherent in that system. As MacKinnon noted, liberalism supports state intervention on behalf of women as abstract persons with abstract rights, without scrutinizing the content of these notions in gendered terms.[188] The application of the liberal individual to women avoids any consideration of the position from which women start, that of being not even in the same race as men.

In her argument against the sameness/difference theory and the inadequacies of the liberal paradigm, MacKinnon commented that the question of the inequality of women is one of the distribution of power.[189] MacKinnon pointed out that both sameness and

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[187] Ibid., at pg. 334. Cossman argues for a perspective that sees dependence, not as an either/or state, but as a continuum which recognizes that all persons are dependent in some respect: see pg. 370.

[188] MacKinnon, supra, footnote 185, at pg. 642.

[189] "Difference and Dominance: On Sex Discrimination" in MacKinnon, Feminism Unmodified: Discourses on Life and Law (Cambridge: Harvard University Press, 1987) at pp. 32-45.

difference use as a referent maleness. Women have to prove that they are the same as men to acquire equality. To the extent that women are different from men, difference justifies inequality. Difference does not lead to benefits for women because the norm of maleness proposes that difference from maleness is inferior. Therefore, in the sameness/difference theory, women have to be men to be equal. MacKinnon's solution is to step back from the same/difference theory to recognize the domination of men over women. She argued the recognition of this domination is necessary for equality.[190]

The liberal individual does not always serve women because the individual is modeled on the male norm.[191] Extending to women the capacity of individual requires that women meet standards set by men. When the law assumes that women are individuals and free to contract, it assumes that all the opportunities available to men in civil society are available to women. This assumption is made regardless of the fact that civil society is defined and dominated by men.

Marjorie Cohen argued that women for most of the history of industrialized countries have been restricted from access to all

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[190]In contrast, Miles, "Ideological Hegemony in Political Discourse: Women's Specificity and Equality" in Miles and Finn (eds.) Feminism: From Pressure to Politics (Montreal: Black Rose Books, 1989) at pg. 272, argues that feminism's progressive power lies in its ability to affirm both women's specificity and equality in a synthesis of these apparently contradictory conditions.

[191]See Cossman, supra, footnote 83, at pg. 345; Cossman also proposes other critiques of the application of the liberal individual to women. Also see Clark, supra, footnote 29.

but a handful of jobs.[192] As a result, freedom of contract cannot be seen as ever having applied to the condition of female labour.[193]

Hester Lessard noted the emphasis on the equal liberal individual is a laissez-faire approach to civil rights.[194] This approach avoids consideration of systemic inequalities and historical deprivations by focusing on the discrete transaction.

> "Widespread discrimination becomes a nonjusticiable matter of isolated, private, bargained for and "consented to" choices."[195]

Lessard characterized this equal liberal individual as a "fictive option" available to the court. This "fictive option" allows the judiciary to ignore the private experience of oppression as legally irrelevant so long as all are treated equally by the laws.[196] The question of actual choice in this circumstance also becomes legally irrelevant.

> "Reforms which achieve formal equality thus only privatize and particularize inequality, encouraging society and women themselves to blame the victim of her failures..."[197]

Like MacKinnon, Lessard argued that it is focusing on the

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[192]"The Problem of Studying "Economic Man"", in Miles and Finn (eds.), Feminism: From Pressure to Politics (Black Rose Books, Montreal, 1989) at pg. 147.

[193]Ibid., at pg. 156.

[194]Lessard, "The Idea of the 'Private': A Discussion of State Action Doctrine and Separate Sphere Ideology" (1986-1987), Vol. 10, No. 2 Dalhousie L.J. 107, at pg. 114.

[195]Ibid.

[196]Ibid., at pp. 118-119.

[197]Ibid., at pg. 132.

subordination and not the artificial boundaries of private and public that is necessary for substantive equality.

> "Only when privacy has been linked to affirmative, non-authoritarian notions of human fulfillment and dignity will the tension between substantive equality and human freedom achieve a balance that is acceptable to a diverse human community."[198]

She found judicial weight must to given to, among other things, the private experience of subordination.[199]

These arguments suggest that without the elimination of structural imbalances, there can be no change to the status quo. Although the concept of the liberal individual need not entirely be rejected, the legal system tends to impose abstract liberal theory which is blind to the realities of women's lives. This theory offers no advancement for women in society and no equality for women through law because women have not been part of the creation of the paradigm.

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[198] Ibid., at pg. 137.

[199] Ibid. Also see Sheppard, "Equality, Ideology and Oppression: Women and the Canadian Charter of Rights and Freedoms" (1986-87), 10 Dalhousie L. J. 195.

CHAPTER THREE

Equality in the Liberal Paradigm

> "...formal equality abstracts individuals out of their concrete social relations of inequality and portrays them as formal equals"[200]

This Chapter will explore the influence of liberal theory in the development of equality theory through the Canadian Bill of Rights, human rights legislation and section 15 of the Charter, the equality provision. It will be argued that the Court has, at varying times, employed different versions of the liberal state to determine equality issues. While there has been some movement in developing equality theory which challenges aspects of liberal theory, these attempts have not been firmly grounded outside liberal theory. Although the Courts' claims to have rejected the rigidity of formal equality, in practice, the consistent application of another theory of equality has not been sustained.

i. Before the Charter

Formal Equality

The Canadian Bill of Rights[201] (the "Bill") was the first federal legislation in Canada to recognize human rights, and, particularly, the right of the individual to equality before the law and the protection of the law.[202] The seminal case considering the meaning of section 1(b) of the Bill was R. v.

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[200]Bakan, "Constitutional Interpretations and Social Change: You Can't Always Get What You Want (Nor What You Need)" (1991), 70 C.B.R. 310, at pg. 315.

[201]1960 (Can.), c. 44.

[202]See section 1(b).

Drybones.[203] The case involved a challenge under section 1(b) of the Bill to a provision in the Indian Act[204] that made it an offence for Aboriginal persons to be intoxicated off the reserve. In considering the meaning of equality before the law in section 1(b), Justice Ritchie noted an interpretation of equality which provided the right of every person to whom a law extended to be treated on equal footing with every other person to whom that law extended. This interpretation, which has been attributed to Aristotle, has been summarized as

> "... things that are alike should be treated alike, while things that are unalike should be treated unalike in proportion to their unlikeness."[205]

Of this definition, which is often referred to as the similarly situated test, Justice Ritchie commented

> "the most glaring discriminatory legislation against a racial group would have to be construed as recognizing the right of each of its individual members 'to equality before the law', so long as all the other members are being discriminated against in the same way."[206]

Although Justice Ritchie did not propose an exhaustive definition of "equality before the law", he concluded

> "...I think that s.1(b) means at least that no individual or group of individuals is to be treated more harshly than another under that law, and I am therefore of the opinion that an individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence or having been made

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[203] supra, footnote 5.

[204] R.S.C. 1952, c. 149, s. 94(b).

[205] Andrews, supra, footnote 11, at pg. 166.

[206] Drybones, supra, footnote 5, at pg. 297.

subject to any penalty."[207]

The Drybones decision suggested that section 1(b) of the Bill may provide more than the right to equal treatment with those who are similarly situated. Justice Ritchie seemed to have concluded that equality before the law could entail a comparison between groups and an inquiry into whether one group was being treated more harshly than another. While Justice Ritchie rejected the application of the similarly situated test to justify an individual's rights to equal discrimination, presumably, his finding of discrimination was based on the irrelevance of race, in this case, as a grounds to categorize and group individuals.

Interestingly, in the cases that followed Drybones, the Supreme Court chose not to continue developing the notion of equality before the law along these lines. In Attorney General of Canada v. Lavell,[208] a challenge was brought against section 12(1)(b) of the Indian Act[209] which provided that Aboriginal women who married non-Aboriginal men lost their status under the Act.[210] Justice Ritchie again wrote the decision for the majority. In his judgment, he noted Dicey's interpretation of equality before the law and commented that equality before the law

"as employed in section 1(b) of the Bill of Rights is to be

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[207] Ibid., at pg. 297.

[208] supra, footnote 4.

[209] R.S.C. 1970, c. I-6.

[210] In contrast, aboriginal men who married non-aboriginal women were not denied their status and, in fact, passed on status to their non-aboriginal wives.

> treated as meaning equality in the administration or application of the law by the law enforcement authorities and the ordinary courts of the land. This construction is, in my view, supported by the provisions of subsections (a) to (g) of s.2 of the Bill which clearly indicate to me that it was equality in the administration and enforcement of the law with which Parliament was concerned when it guaranteed the continued existence of 'equality before the law'."[211]

This interpretation limited the scope given to section 1(b) in the prior case of Drybones. In fact, Justice Ritchie appeared to employ the very interpretation of equality before the law which he concluded in Drybones would reduce the Bill to a mere canon of construction.[212] The decision that equality before the law provided for equality in administration or application of the law recognized (as Justice Ritchie warned against in Drybones) the right of individual members of a group to be discriminated against in the same way. As the law applied to all Aboriginal women in the same manner, no inequality in administration arose.

The judgment does not make clear why Aboriginal women form a group to themselves and, as in the Drybones case, are not part of the larger society for the purposes of this legislation. Perhaps, the difference between women and men justified the difference in treatment and warranted the simply comparison of Aboriginal women with one another.

Section 1(b) of the Bill was again raised in Queen v.

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[211] Ibid., at pg. 1366.

[212] Drybones, supra, footnote 5, at pg. 293; Tarnopolsky comments that this use of Dicey's interpretation of equality before the law become outdated even in Dicey's time: Tarnopolsky and Beaudoin, The Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1982) at pg. 410.

Burnshine.[213] In this case, the challenged legislation was a provision of the Prisons and Reformatories Act[214] providing that the courts of British Columbia could sentence a person under the age of 22, who was convicted of an offence punishable by a term of three months or more, to a term of not less than three months and for an indeterminate period of not more than two years less one day. In its decision, the Court further limited section 1(b) by finding that the Bill defined human rights that "have existed" and did not purport to define new rights and freedoms. Equality before the law had to be construed in light of the law existing in Canada in 1960.[215] Thus, this definition denied the evolution of the principle and limited the impact that social or other change could have on the meaning of equality under the Bill.

In Burnshine, the Court introduced the notion of "valid federal objective" into its interpretation of section 1(b) of the Bill. It was concluded that legislation allowing judges in British Columbia and Ontario to imprison an offender under the age of 22 to a term greater than the term provided in the Criminal Code was a valid federal objective because its purpose was to seek reform and to benefit individuals, not to treat them more harshly than others.[216]

The difficulty with this premise is that without a method to

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[213][1975] 1 S.C.R. 693.

[214]R.S.C. 1970, c. P-21.

[215]Burnshine, supra, footnote 213, at pp. 702 & 704.

[216]Ibid., at pg. 708.

contextually analyze the means to the end, the mere stating of an objective could validate the means. Assuming that it is socially desirable for the government to seek to reform only those under the age of 22, if the practical effect of the provision does not achieve the objective, the existence of this objective should not clearse the offending provision. This, of course, would not conform with negative liberty theory because the onus is on the state to justify its intrusion of individual liberty. The good will of the state would be insufficient to discharge that onus.

For women, the acceptance of unchallenged objectives has validated a history of exclusion. The Court's decision in the "Persons Case" is an example of an objective (protecting women from the vulgarities of the public forum) which validated the means and denied women rights in the public sphere.

The notion of "valid federal objective" was employed by the Court in Bliss v. Attorney General of Canada[217] to limit the extension of unemployment insurance benefits to pregnant women. In this case, Ms. Bliss, who did not qualify for maternity benefits under the Unemployment Insurance Act, 1971,[218] was denied regular unemployment benefits because of a recent pregnancy even though she was willing and able to work and met the other statutory requirements for regular unemployment benefits. In his decision for the Court, Justice Ritchie quoted the decision of Justice Pratte of the Federal Court of Appeal that

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[217] supra, footnote 110.

[218] 1970-71-72 (Can.), c. 48.

> "... the right to equality before the law could be defined as the right of an individual to be treated as well by the legislation as others who, if only relevant facts were taken into consideration, would be judged to be in the same situation."[219]

Clearly, this was an acceptance of the very test that, in Drybones, Justice Ritchie concluded would recognize the right of each individual to be discriminated against in the same way. Here, the Court concluded that the challenged provisions formed an integral part of a legislative scheme enacted for a valid federal objective which provided benefits to pregnant women.[220] As referred to previously, the Court noted that if inequality was created, it flowed from nature and not the legislation.[221]

Analysis of Formal Equality

By the time of the Bliss decision, "equality before the law" in section 1(b) of the Bill had come to mean little more than the right of individuals to be treated in the same manner as similarly situated individuals. As all pregnant women were equally disadvantaged by the legislation, equality before the law was upheld by denying them benefits available to other women and all men. The meaning of equality before the law given to section 1(b) of the Bill provided administrative equality only. The characterization of legislation as bestowing benefit, such as in Burnshine and Bliss, denied an inquiry into the disadvantage that burdened the differently situated for they had no claim on the

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[219] Ibid., at pg. 192.

[220] Ibid., at pp. 190 & 191.

[221] Ibid., at pg. 190.

administration of the law as it affected those different from them. Thus, in Bliss, the assumed relevance of difference in pregnancy allowed the Court to group the pregnant and non-pregnant into distinct groups so that inequality in treatment and outcome between women and men was not an issue.

Chapter One noted that theories of social contract suggest inequality between the dissimilar may be fair because of the inherent risk each individual accepts to be part of the civil state. Pursuant to the social contract, the rules of procedure would require those similar to each other to be treated equally. While in the abstract this may seem workable, in the real world, such an approach provides no criteria to determine similarity and dissimilarity and the judiciary must make this determination. For women attempting to categorize themselves with men, the challenge involves overcoming pre-state or natural inequality and, therefore, defining themselves as male to acquire all the attributes of the liberal individual. The Court in Bliss could be interpreted as accepting that women when not pregnant possess the attributes of the individual. It was pregnant women who could not bridge the gap to similarity and divest themselves of natural inequality.

Lynn Smith commented that the formal view of equality is empty of meaning.[222] Equality before the law allows nothing more than for the similarly situated to enter the race. No regard is paid to ability to run the race. Under this notion of equality, it is

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[222]Smith, supra, footnote 2, at pg. 367. Catharine MacKinnon argues that equality presupposes sameness: MacKinnon, supra, footnote 189, at pg. 33.

always possible to construct and justify difference and thereby stifle the opportunity for change.

The difficulty in developing, within a liberal framework, a theory of equality that allows comparison between groups in society and allows remedies for disadvantaged groups arises from the conflict between liberty and equality in a liberal democracy. As discussed previously, traditional negative liberal ideology supposes that individuals are autonomous and independent. The greater good of society is advanced by allowing each individual to maximize her or his potential without interference by the state. This liberal theory allows for inequality between individuals because, theoretically, each individual starts the race from the same position and gains advantage through personal ability.[223] Therefore, justice is blind to disadvantage arising not only from personal disability but also from socially determined disadvantage. An inquiry into that disorder becomes a slippery slope towards compensating for personal inadequacy.

The judicial focus on individualism ignores the impact of community and social relations on our person, our views and ultimately our equality with all others, both in terms of their perspective of our equality and our own. The legal system validates the status quo, whether economic or social, as normal and turns a blind eye to power distribution. Equality of the law

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[223]Locke, supra, footnote 25; Mill, supra, footnote 48.

becomes the equal application of law[224] to individuals without regard to extraneous circumstances.

Hester Lessard noted that "liberal theories of equality have been preoccupied with equal access, opportunity, and treatment rather than with inequalities in outcome and condition which are rooted in social and historical imbalances".[225]

> "A process-oriented, formal theory of equality focuses only on the even-handedness of the application of legal rules and thus treats as legally irrelevant the private experience of victims of discrimination as members of a class of victimized individuals."[226]

The cases considering equality under the Bill illustrate this point. In the construction of difference and the relevance to be attached to that difference, the concept of equality before the law as construed by the Supreme Court in the cases on the Bill failed.

Human Rights Legislation

The narrow interpretation given to equality before the law in the Bill was not carried over by the Supreme Court in its developing interpretation of the meaning of discrimination under human rights legislation. By 1982, the Court was reading human rights legislation in a broad fashion. In Insurance Corporation of British Columbia v. Heerspink,[227] Justice Lamer commented of the

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[224]See Cotterrell, supra, footnote 152, at pg. 82; Olsen, supra, footnote 106, at pg. 1502; and Bliss, supra, footnote 110, at pg. 192.

[225]Lessard, supra, footnote 194, at pg. 137.

[226]Ibid.

[227][1982] 2 S.C.R. 145.

Human Rights Code of British Columbia,[228]

> "...[the] law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others... it is intended that the Code supersede all other laws when conflict arises. ... [it] is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law."[229]

Similar comments may be found in other cases, such as the following comment by Justice McIntyre about the Ontario Human Rights Code,[230] in Ontario Human Rights Commission et al. and Simpson-Sears Limited.[231]

> "It is not, in my view a sound approach to say that according to established rules of construction no broader meaning can be given to the Code than the narrowest interpretation of the words employed. ... Legislation of this type is of a special nature, not quite constitutional but certainly more than the ordinary - and it is for the courts to seek out its purpose and give it effect."[232]

In O'Malley,[233] the appellant complained that her employer discriminated against her, contrary to the Ontario Human Rights Act, on the basis of creed.[234] In analyzing the question of

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[228]1973 (B.C.), Second session, c. 119.

[229]Heerspink, supra, footnote 227, at pg. 158.

[230]R.S.O. 1980, c. 340.

[231]supra, footnote 6. Referred to hereafter as "O'Malley".

[232]Ibid., at pp. 546-7; also see Winnipeg School Division No. 1 v. Craton [1985] 2 S.C.R. 150; Action Travail des Femmes v. Canadian National Railway Company et al. [1987] 1 S.C.R. 1114; Robichaud v. Canada (Treasury Board) [1987] 2 S.C.R. 84.

[233]supra, footnote 6.

[234]The appellant was a Seventh Day Adventist and celebrated the Sabbath from sundown Friday to sundown Saturday. It was a condition of her job as a full-time clerk that she work on two Saturdays out of three. Because of this condition, the appellant resigned from full-time employment and began to work on a part-

discrimination, Justice McIntyre concluded that, as the purpose of the human rights legislation is to be remedial, intent is not a condition of proving discrimination. Further, in a case such as this one of adverse impact, there was a duty to take reasonable steps to accommodate an adversely affected employee.[235] Therefore, Justice McIntyre allowed that the alleviation of discrimination may require treating some people differently because of their different circumstances.[236] The recognition by the Court of adverse impact was a break from the more strict application of the sameness/difference principle articulated by the similarly situated test.

This broader approach to human rights legislation influenced and was influenced by section 15(1) of the Charter, the equality provision. The approach suggested that anti-discrimination laws could secure more than just the formal principle of equality adopted in the Bill cases.

However, the extent to which equality could be developed was limited by liberal theory. While the shift in the Court's approach to equality appeared to move the theory toward a new paradigm, it was the Court's greater willingness to explore further into the

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time basis.

[235] O'Malley, supra, footnote 6, at pg. 555.

[236] In Weatherall v. Canada, No. 22633, August 12, 1993 (S.C.C.), the Court reaffirmed that equality does not necessarily require identical treatment. In this case, the different treatment between female and male inmates with regards to search procedures was held not to be sex discrimination pursuant to the Charter.

liberal paradigm that produced some equality results under the Charter.

ii. The Equality Provision

The Promise of Equality

The introduction of section 15 of the Charter offered the Court an opportunity to revisit the concept of equality. The definition of equality created for the Charter was a consequence of the narrow interpretation given to the meaning of "equality before the law" in the Bill.[237] In an effort to avoid such limitations, section 15 was expanded to include equality before the law, equality under the law, and to provide for the equal benefit and equal protection of the law. Many academics hoped that this expanded statement of equality would allow the Court to reach beyond the limitations of previous interpretations of equality before the law. Lynn Smith argued that

> "Charter equality rights may be seen as creating a new paradigm for the solution of inequality problems in Canadian law. A new paradigm means that inequality problems are to be viewed in a different way than they have been in the past..."[238]

The Charter's definition of equality was embraced enthusiastically. It was described as a post-liberal document[239] whose post-liberal equality could stretch and modify

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[237]See Kome, The Taking of Twenty-Eight: Women Challenge the Constitution (Toronto: Women's Press, 1983).

[238]Smith, supra, footnote 2, at pp. 353-354.

[239]See Gold, supra, footnote 9.

the parameters of the liberal notion of equality.[240] Smith argued that the unique Canadian view of equality, which emphasizes less individual equality of opportunity and more equality rights asserted by groups, suggests a concern for equality of result as well as treatment. This unique view, she proposed, must influence the meaning of equality rights in section 15(1).[241]

Anne Bayefsky suggested that the inclusion of the protection of affirmative action programs in section 15(2) and the addition of equal benefit in section 15(1) confirmed that part of the intention of section 15 was a result-oriented equality.[242] She commented that

> "Equal benefits will in fact require unequal distribution of resources in cases of unequal need. On this interpretation, the equal benefit of the law supports equality of results."[243]

In sum, it was believed that the inadequacies of equality before the law as it was interpreted in the Bill of Rights cases could be addressed by the four-part definition of equality in section 15(1) of the Charter.

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[240]See Sheppard, supra, footnote 199, at pg. 200. She argues that when the Supreme Court accepted that neutral rules could have a disparate impact in R. v. Big M Drug Mart Ltd. [1985] 1 S.C.R. 295, it departed from the liberal focus of equality: at pg. 203.

[241]Smith, supra, footnote 2, at pp. 358-359.

[242]Bayefsky, "Defining Equality Rights", in Bayefsky and Eberts (eds.), Equality Rights and the Canadian Charter of Rights and Freedoms (Toronto: Carswell, 1985) at pg. 21.

[243]Ibid., at pg. 24.

The Development of Equality Theory

Andrews v. Law Society of B.C.[244] was the first Supreme Court of Canada decision to interpret section 15(1) of the Charter.[245] In this case, while not following his judgment in whole, the majority of the Court adopted Justice McIntyre's interpretation of section 15(1). Justice McIntyre argued that the equality provision should be interpreted in a broad and generous manner.[246] Equality, he noted, is a comparative concept that is discerned through comparison with the condition of others in the social and political setting.[247] In this process, the main consideration must be the impact of the law on the individual or group concerned.[248]

> "In other words, the admittedly unattainable ideal should be that a law expressed to bind all should not because of irrelevant personal differences have a more burdensome or less beneficial impact on one than another."[249]

The similarly situated test was found to be deficient because it

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[244] supra, footnote 11.

[245] Mr. Andrews met all the requirements for admission to the Bar of British Columbia pursuant to the Barristers and Solicitors Act, R.S.B.C. 1979, c. 26, except that he was not a Canadian citizen. In this action, he sought a declaration that the requirement that he be a Canadian citizen before admission to the Bar infringed his equality rights under the Charter.

[246] Specifically note, Andrews, supra, footnote 11, at pg. 175.

[247] Ibid., at pg. 164.

[248] Ibid., at pg. 165.

[249] Ibid.

excluded any consideration of the nature of a law.[250] Equality, Justice McIntyre suggested, cannot be such a fixed rule or formula.[251]

Following the expanded notion of discrimination developed under human rights codes, Justice McIntyre commented that to give the Charter a purposive interpretation, the meaning of equality in section 15(1) must go further than the Bill of Rights.[252]

> "The promotion of equality entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of concern, respect and consideration. It has a large remedial component...[notes Reference re an Act to Amend the Education Act[253], where it was commented that]
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> > "... s.15(1) read as a whole constitutes a compendious expression of a positive right to equality in both the substance and the administration of the law..."[254]

In the context of his discussion of the meaning of discrimination, Justice McIntyre reviewed the definition of systemic discrimination in the Abella Report[255] and proposed a definition of discrimination under the Charter as

"...discrimination may be described as a distinction, whether

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[250]Ibid., at pg. 166.

[251]Ibid., at pg. 168.

[252]Ibid., at pg. 170.

[253](1986), 53 O.R. (2d) 513, at pg. 554.

[254]Andrews, supra, footnote 11, at pg. 171. This notion of concern, respect and consideration is similar to Dworkin's argument of equality of concern and respect: Dworkin, supra, footnote 54. Lucas suggests that equality of respect or founding equality on the right to respect because of humanness has more to do with respect than equality and says little about treatment: Lucas, supra, footnote 79, at pp. 138-151.

[255]Abella, supra, footnote 183, at pg. 2.

> intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[256]

Justice McIntyre commented that it is not enough to look at the alleged discrimination and decide whether it is an enumerated or analogous ground because every distinction will not constitute discrimination.

> "A complainant under s.15(1) must show not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory."[257]

In this case, he found that denying admission to the legal profession of non-citizens imposed a burden upon them which was without consideration to individual qualification or merit. He concluded that the discrimination in the provision of the Act was against a "discrete and insular" minority.[258]

Justice McIntyre's analysis of section 15 limited the scope of the provision by restricting it to enumerated and analogous groups. Black and Smith commented that this limit is important for if there are no barriers on access to section 15(1) the provision will

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[256] Andrews, supra, footnote 11, at pp. 174-175.

[257] Ibid., at pg. 182.

[258] Ibid., at pg. 183.

become too amorphous.[259] In clothing section 15(1), Justice McIntyre appeared to reject the similarly situated test but continued an analysis of sameness and difference to determine a right to equality. Instead of comparing the affected group to the other (ie. Aboriginal peoples to all other Canadians, as in Drybones), to succeed in invoking the equality provision, claimants must prove their membership in or similarity to an enumerated group. Equality is still a comparative process. This judgment demonstrates how difficult it is to get beyond analyzing equality based on sameness.

While Justice Wilson[260] agreed with Justice McIntyre's interpretation of section 15(1), she also provided her thoughts about its meaning.[261] She found that, in this context, non-citizens were discriminated against because the requirement in the Act placed a burden upon them. Non-citizens are an analogous category to the enumerated groups of section 15 because, relative to citizens, they lack political power. The determination of this analogy must be made in the context of "the place of the group in the entire social, political and legal fabric of our society"[262]

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[259]Black and Smith, "Notes of Cases - Constitutional Law - Charter of Rights and Freedoms, Sections 15 and 1 - Canadian Citizenship and The Right to Practice Law" (1989), 68 Can. B. Rev. 591, at pg. 592.

[260]The judgment of Chief Justice Dickson, Justice Wilson and Justice L'Heureux-Dube was written by Justice Wilson.

[261]Black and Smith, supra, footnote 259, at pg. 595, suggest that her analysis of section 15 makes it unclear the extent to which she is adopting McIntyre J.'s interpretation.

[262]Andrews, supra, footnote 11, at pg. 152.

not merely in the context of the law which is being challenged. Further, she commented that "discrete and insular" minority is not a frozen concept but "has changed and will continue to change with changing political and social circumstances."[263] Thus, the reasoning adopted in R. v. Burnshine,[264] presumably, would not apply under the Charter.

Like Justice McIntyre, Justice Wilson concluded that access to section 15(1) is limited, as:

> "... section 15 is designed to protect those groups who suffer social, political and legal disadvantage in our society, the burden resting on government to justify the type of discrimination against such groups is appropriately an onerous one."[265]

From these two judgments, it is clear that section 15(1) did not provide an unlimited guarantee of equality to all individuals and groups. Accessibility to the equality provision hinged on the ability to demonstrate both a commonality with the enumerated groups and that distinction is discrimination.[266]

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[263] Ibid.

[264] supra, footnote 213.

[265] Andrews, supra, footnote 11, at pg. 154.

[266] The necessity of demonstrating commonality with enumerated groups was confirmed in Reference Re Workers' Compensation Act, 1983 (NFLD.). [1989] 1 S.C.R. 922. The Court held that the situation of the applicants, workers and dependents, was not analogous to the grounds listed in s. 15(1) which the majority in Andrews stated was required to permit recourse to s. 15(1). In Rudolf Wolff and Co. v. Canada [1990] 1 S.C.R. 695., the Court found the group of applicants was a disparate group with the sole common interest of seeking to bring an action against the Crown. The Court found no distinction between classes of individuals enumerated in section 15(1) nor on any analogous grounds. This group was not a discrete and insular minority nor a disadvantaged group in Canadian society within the

However, Justice McIntyre's judgment gave no guidance as to how concepts of comparison, impact and enumerated and analogous grounds were to be weighed in considering discrimination. Although Justice McIntyre indicated that equality is an expansive concept and that section 15(1) provides a positive right that should be given a broad and generous interpretation, he provided no framework of analysis. Justice Wilson's judgment, on the other hand, suggested the framework is through consideration of social, political and legal factors which have defined the place of the group in society and which may result in inequality.

By adopting the language of impact and an analytic framework of the social, political and legal factors, it appeared that the Court, in Andrews, was breaking from the limitations on equality established in the cases considering the meaning of equality before the law in the Bill.[267]

Challenging the Liberal Paradigm

This expanded understanding of equality was carried over into two human rights cases decided a few months after Andrews. Brooks v. Canada Safeway Ltd. and Janzen v. Platy Enterprises Ltd. arguably represent the pinnacle for equality theory in Canada. These decisions reached further than all cases before and after

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contemplation of section 15. Note Justice Wilson's comments in R. v. Turpin, supra, footnote 11 that a finding of discrimination will entail a search for disadvantage existing apart from and independent of the legal distinction being challenged. This case is discussed more fully below.

[267]Sheppard, supra, footnote 199, at pg. 198.

them. In Brooks v. Canada Safeway Ltd.,[268] the Supreme Court addressed the issue of whether pregnancy discrimination was sex discrimination. As previously noted, Bliss found that distinction on the basis of pregnancy was a consequence of nature and therefore was not discrimination. In Brooks, instead of simply assuming the relevance of pregnancy in distinguishing between groups, the Court considered the consequence of denying pregnant women financial benefits offered to non-pregnant persons for absence from work for valid health-related reasons.

In his judgment for the Court, Chief Justice Dickson discussed the issue of pregnancy discrimination in its social and political context. He noted that one of the purposes of anti-discrimination legislation is the removal of unfair disadvantage which has been imposed on individuals or groups in society. Here, he found that the effect of denying short and long-term benefits to pregnant women was to place one of the major costs of procreation entirely upon the group of pregnant women. Chief Justice Dickson concluded that, in this context, to find no discrimination would sanction one of the most significant ways women are disadvantaged.[269]

In dismissing the argument that this was not a matter of discrimination but simply a decision about compensation, Dickson C.J. commented

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[268] supra, footnote 7. It was argued that the employee benefit plan of Canada Safeway discriminated on the basis of sex because it denied pregnant women access to the employee benefits they would otherwise qualify for.

[269] Brooks, supra, footnote 7, at pg. 1238.

> "A further consideration militating against the application of the concept of underinclusiveness in this context, stems, in my view, from the effects of so-called "underinclusion". Underinclusion may be simply a backhanded way of permitting discrimination."[270]

Therefore, Chief Justice Dickson found it difficult to accept the conclusion from Bliss that the distinction was created by nature and not legislation. Chief Justice Dickson considered that the relevance of the difference of pregnancy in the job context, at least partially, stemmed from social determinations. Further, by finding that discrimination can include a characteristic that is unique to a group, Chief Justice Dickson accepted that equality can entail a questioning of a social or other practice which has traditionally governed the definition of similarity to a norm, specifically, a questioning of why pregnancy should define women's position in the workplace. In this case, as the benefit package adopted a standard of maleness which denied the validity of the experience of pregnancy, the denial and the consequential burden was discriminatory.

Janzen v. Platy Enterprises Ltd.[271] addressed the issue of whether sexual harassment in the workplace constituted sex discrimination.[272] Chief Justice Dickson, for the Court, noted that common to all descriptions of sexual harassment is the use of a position of power to import sexual requirements which negatively

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[270] Ibid., at pg. 1240.

[271] [1989] 1 S.C.R. 1252.

[272] In this case, female employees of a restaurant were harassed by the night cook. The employer had been notified of the harassment but took no action to stop the harassment.

alter the work conditions of employees forced to contend with sexual demands.[273] Sexual harassment, he noted, had been described as an abuse of economic and sexual power which attacks the dignity and self respect of the person as an employee and human being.[274]

The respondents argued that the treatment of the women in this workplace was a result of individual characteristics making them attractive to the harasser. This argument was based on the fact that the harasser did not harass all the women in the workplace but was selective in harassing certain women such as the complainants. Chief Justice Dickson noted that though the concept of discrimination is rooted in treating an individual as part of a group rather than treating the individual on the basis of personal characteristics, discrimination did not require uniform treatment of all members of the group.[275] The Court accepted that sexual harassment as a misuse of power affects the whole of the group though, in this case, only a small group of women were differently treated.

Like Brooks, Janzen marked an important benchmark for the concept of equality. Chief Justice Dickson noted women's lesser power to men can be perpetuated through the difference in economic power of gender groups. It may be argued that this position adopts some concept of equality which recognizes dominance and the power

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[273]Janzen, supra, footnote 271, at pg. 1281.

[274]Ibid., at pg. 1284.

[275]Ibid., at pp. 1288-89.

of dominance to perpetuate disadvantage.[276] But regardless of whether the Court ultimately went so far as to accept that argument, these cases do demonstrate a shift from a concept of equality which ignores the power of the social position of groups and toward one based on equal results. Such a shift is a step from the liberal paradigm, as the focus of the inquiry is not equality at the beginning of the race but equality of participants during the race. While equality at the beginning simply allows everyone to enter the race, equality during the race requires that each person has the resources to begin and continue. Clearly, this may entail a redistribution of resources and will entail a concept of social good which arguably positions the community prior to the individual. Thus, at a minimum, the shift moves from the concept of negative liberty towards one of positive liberty.

Equality in Context

It is within this expanding concept of equality that the Supreme Court approached the next case considering section 15(1) of the Charter, R. v. Turpin.[277] Here, the Court reviewed the issue of whether certain provisions of the Criminal Code[278] violated section 15(1) of the Charter by allowing only accused in Alberta charged with murder to elect to be tried by a judge and jury or judge alone. In the judgment of the Court, Justice Wilson found no discrimination under section 15(1). However, in the

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[276] MacKinnon, supra, footnote 189, at pg. 38.

[277] supra, footnote 11.

[278] R.S.C. 1970, c. C-34.

process of analyzing the issues, she made a number of comments regarding the interpretation of section 15(1).

Without attempting an exhaustive definition of equality before the law, Justice Wilson commented that the equality guarantee of the Charter advances the value that all persons be subject to equal demands and burdens of the law and not suffer any greater disability in the substance and application of the law than others.[279] In this case, she found she need look no further than the minimal content of equality before the law provided in Drybones to find the guarantee of equality infringed.[280] Regarding whether this inequality amounted to discrimination, Justice Wilson noted Justice McIntyre's comments in Andrews and wrote

> "In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context."[281]

She continued that, generally, a finding of discrimination will entail a search for disadvantage existing apart from and independent of the particular legal distinction being challenged.[282] In this case, the persons charged with a crime

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[279] Turpin, supra, footnote 11, at pg. 1329.

[280] Ibid.

[281] Ibid., at pg. 1331.

[282] Ibid., at pg. 1332.

could not be characterized as a discrete and insular minority.[283] The "search for the indicia of discrimination such as stereotyping, historical disadvantage or vulnerability to political or social prejudice" would be pointless in these circumstances.[284]

Justice Wilson did not simply say that this is not a disadvantaged group outside of this legal context. She also commented that finding discrimination in this case would not further the purpose of section 15(1) in "remedying or preventing discrimination against groups suffering social, political and legal disadvantage in our society."[285]

This clarification of her previous comments regarding the interpretation of section 15(1) seemed to incorporate the notions of equality raised by Chief Justice Dickson in the human rights cases of Brooks and Janzen. By placing the issue of discrimination in the context of the social, political and legal position of the group outside the particular law in question, Justice Wilson allowed a questioning of the norm itself. The validity of the norm is not a factor in the similarly situated test for, as Bill Black and Lynn Smith note, the similarly situated test is a mathematical formula which produces results only when the variables are selected. It is the selection of the variables where the real

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[283]Wilson J. noted that the notion of a "discrete and insular minority" is merely an analytical tool: Ibid., at pg. 1333.

[284]Ibid.

[285]Ibid.

decision-making occurs in this form of equality analysis.[286] So, for example, in Drybones, the chosen variable was all Canadians and, in Lavell, the chosen variable was Aboriginal women. In each case, the variable dictated the degree of success. If in Drybones, the chosen variable had been Aboriginal peoples, then the application of the similarly situated test would not have resulted in a difference and the remedy would have been denied. If Justice Wilson's social, political and legal context had been adopted in Lavell, the Court would have considered the status of Aboriginal women apart from the law begin challenged. Such an approach would have required the choice of a broader variable in reviewing the challenged distinction.

As noted above, the "social, political and legal context" analysis was first stated by Justice Wilson in Andrews where she prefaced her comments with her acceptance of Justice McIntyre's analysis of section 15(1). The treatment of her comments in Andrews and Turpin in following decisions suggests this method of analysis has been adopted by the Court. In R. v. Swain,[287] Chief Justice Lamer noted Justice McIntyre's decision in Andrews

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[286] Black & Smith, supra, footnote 259, at pg. 601, note 47.

[287] [1991] 1 S.C.R. 933. The Court considered whether a common law rule allowing the Crown to introduce evidence on the sanity of an accused regardless of whether the accused pleaded insanity infringed section 7 and/or section 15. Chief Justice Lamer found this rule did infringe section 7. To remedy this breach of section 7 the Chief Justice proposed an amendment to the common law rule that the Crown could not raise the issue of sanity until after the accused had concluded her/his defence. This amendment, he concluded, would not infringe upon the right of the accused to determine the course of her/his defence. He also reviewed the application of section 15 to this rule.

and Justice Wilson's decision in Turpin and concluded the basic framework within which section 15(1) claims are analyzed is, as follows

> "The court must first determine whether the claimant has shown that one of the four basic equality rights has been denied. ... This inquiry will focus largely on whether the law has drawn a distinction (intentionally or otherwise) between the claimant and others, based on personal characteristics. Next, the court must determine whether the denial can be said to result in "discrimination." This second inquiry will focus largely on whether the differential treatment has the effect of imposing a burden, obligation or disadvantage not imposed upon others or of withholding or limiting access to opportunities, benefits and advantages available to others. Furthermore, in determining whether the claimant's s. 15(1) rights have been infringed ,the court must consider whether the personal characteristic in question falls within the grounds enumerated in the section or within an analogous ground, so as to ensure that the claim fits within the overall purpose of s. 15 - namely, to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society."[288]

In applying this test to the facts, Chief Justice Lamer found that mentally ill people have been historically disadvantaged and that as a group they fall within the category of mentally disabled. However, he concluded that the new common law rule did not infringe any of the four equality principles and, while the discrimination gave rise to different treatment based on personal characteristics, section 15 was not invoked. The difference, Chief Justice Lamer found, arose not in the treatment between the insane and other acquittees but, if at all, under the Lieutenant Governor Warrant system.

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[288] Ibid., at pg. 992.

This analysis of the distinction placed it outside the constitutional question and, therefore, the inquiry into equality. While Chief Justice Lamer noted the social, political and legal context of the accused, he did not link that disadvantage to the end result of unequal treatment due to detention. As in Bliss, where the Court failed to recognize the connection between pregnancy and sex, the Court did not recognize a sufficient connection, a proximity, between the common law rule and the result of the detention.

While there may be limits to the Swain decision, by adopting the language of the broader analysis of Justice Wilson, the Court appeared to accept the contextual approach though its application of that approach may have been lacking.

Of note in considering the test under section 15 is the decision of Justice LaForest in McKinney.[289] Justice LaForest did not refer to Justice Wilson's analysis in either Andrews or Turpin and merely adopted Justice McIntyre's decision in Andrews. It may be that, in this case, the discriminating distinction made the social, political and legal context inquiry unnecessary. However, the judgment is not clear on this point. Justice LaForest noted an argument before the Court that section 15 required

> "... more than a mere finding of adverse distinction, but also required proof of irrational, stereotypical assumptions and prejudice, for it this were not the case, universally accepted and manifestly desirable legal distinctions would be viewed as violations of s.

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[289] supra, footnote 120.

15..."[290]

He also noted

> "It was somewhat weakly argued that a mandatory retirement policy is not based on irrelevant personal differences and stereotypical assumptions..."[291]

Justice LaForest concluded that this was irrelevant as Andrews made it clear that section 15 protects against direct and adverse impact discrimination. While these comments may be a rejection of Justice Wilson's analysis, they are probably better understood as further rejection of the requirement of intent to discriminate, particularly as the idea of irrational, stereotypical assumptions and prejudice is an overstatement of Justice Wilson's analysis.[292]

For her part, Justice Wilson commented that

> "The focus of s. 15, in my view, is clearly prejudice and stereotype."[293]

Justice Wilson noted that not every distinction on the basis of sex, age, etc. is discrimination. However, this distinction "compels one to ask the question: is there prejudice?", is the policy a "reflection of the stereotype of old age?"[294]

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[290] Ibid., at pg. 279.

[291] Ibid.

[292] In Weatherall, supra, footnote 236, Justice LaForest noted the "historical, biological and sociological differences" between men and women in reaching the decision there was no breach of the Charter. This supports the view that the Court has not rejected the contextual approach proposed by Justice Wilson.

[293] McKinney, supra, footnote 120, at pg. 392.

[294] Ibid., at pg. 393.

Other evidence of the Court's commitment to interpret equality issues in context may be found in R. v. Keegstra.[295] Chief Justice Dickson, for the majority, found a conflict between the right to freedom of expression protected under section 2(b) of the Charter and the general principle of equality. The issue was the validity of section 319(2) of the Criminal Code,[296] dealing with the prohibition on wilful promotion of hatred. Chief Justice Dickson found that section 2(b) of the Charter was infringed by the Criminal Code provision. However, he adopted the comment of Justice Wilson in Singh v. Canada[297] that the inquiry be made in light of a commitment to uphold the rights and freedoms set out in the other sections of the Charter. Chief Justice Dickson commented that a free society is one which aims at equality with respect to the enjoyment of fundamental freedoms

> "Section 15 lends further support to this observation, for the effects of entrenching a guarantee of equality in the Charter are not confined to those instances where it can be invoked by an individual against the state. In so far as it indicates our society's dedication to promoting equality, s.15 is also relevant in assessing the aims of s.319(2) of the Criminal Code under s.1."[298]

Chief Justice Dickson noted the comment made by the intervenor, Women's Legal Education and Action Fund,

> "Government sponsored hatred on group grounds would violate section 15 of the Charter. Parliament promotes equality and moves against inequality when it prohibits the wilful public

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[295] [1990] 3 S.C.R. 697.

[296] R.S.C. 1985, c. C-46.

[297] [1985] 1 S.C.R. 177, at pg. 218.

[298] Keegstra, supra, footnote 295, at pg. 755.

> promotion of group hatred on these grounds. It follows that government action against group hate, because it promotes social equality as guaranteed by the Charter, deserves special constitutional consideration under section 15."[299]

In this case, the majority concluded that the violation of section 7 was saved under section 1 of the Charter.[300]

However, in her dissenting judgment in Keegstra, Justice McLachlin[301] found the conflict was not with rights but with philosophies. She noted that the aim of section 2(b) of the Charter is to protect the individual from government censorship of expression and that section 15 is also aimed at circumventing the power of the state.[302] Justice McLachlin found it was a misapplication of Charter values to limit the scope of section 2(b) with an argument based on section 15.[303]

Justice McLachlin was correct in finding a conflict of philosophies but the real conflict lay in the determination of the meaning of section 15. Is it merely, as she suggested, a tool to advance liberal individualism or does it also incorporate notions of communitarianism and positive liberty ideals? Her judgment

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[299] Ibid., at pg. 756.

[300] In reviewing the issue of freedom of the press and the methodology of Charter application in Edmonton Journal v. Alberta (Attorney General), [1989] 2 S.C.R. 1326, Justice Wilson noted that a contextual or abstract approach may be adopted. In concluding that, in this case, the values of privacy and freedom of the press were in conflict and that one must yield to the exigencies of the other, Justice Wilson opted for a contextual analysis to balance the two: at pg. 1353.

[301] Sopinka J. concurring.

[302] Keegstra, supra, footnote 295, at pg. 833.

[303] Ibid., at pp. 833-835.

suggested that the scope of the Charter is to shield and protect the individual from government. From this, it may be interpreted that there is no positive remedy to expand government action but only a negative remedy to limit it. Perhaps this negative liberty analysis was a sign of what was to come in terms of the Court's future consideration of equality issues. Certainly, it was an indication that a negative liberty reading of section 15 was equally as possible as a positive liberty reading.

Other cases also shed light on the true extent of any philosophical change in the Court's approach to equality issues.

The Liberal Limit on Equality

R. v. Hess[304] is an interesting case for its majority decision, written by Justice Wilson, appears not to apply the equality test developed in Andrews and Turpin. In this case, the challenged provision was section 146(1) of the Criminal Code,[305] which provided that a male who has sexual intercourse with a female who is not his wife and is under the age of fourteen years, whether or not he believed that she was fourteen years or more, is guilty of an indictable offence and liable to imprisonment for life. This provision was challenged, first, as infringing the defendent's right to liberty enshrined in section 7 of the Charter, and, second, as infringing the equality provision by (a) treating male and female offenders differently and/or (b) treating male and female victims of the offence differently.

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[304] [1990] 2 S.C.R. 906.

[305] R.S.C. 1970, c. C-34. Section since repealed.

Justice Wilson concluded that section 7 of the Charter was infringed by the provision and that the provision was not saved under section 1 of the Charter. However, as Justice McLachlin, writing in dissent, had addressed the section 15 issue, Justice Wilson also turned her mind to that question. Unlike Justice McLachlin, Justice Wilson did not find that section 146(1) of the Criminal Code infringed section 15 of the Charter. In her analysis, she noted her previously developed test of searching for the indica of discrimination in the larger context. In addressing the question of whether or not this distinction is one which discriminates, she characterized the offence as relating to an act that, biologically, only men may commit. While Justice Wilson was alive to the dangers of concluding the matter on this point, she did not pursue the larger context to question the validity and relevance of this determination.

Justice Wilson's conclusion that this provision is based on a biological difference and, therefore, natural difference, seems artificially narrow. She noted that while women may seek sex with males under 14, the female does not commit the physical act defined in the Criminal Code. This begs the question regarding the nature of the offence. If the nature of the offence was child abuse, should the inadequate drawing of the legislation, its potential underinclusion, not be part of the analysis of distinction and unequal creation of burden? Justice Wilson does not sufficiently explain why an adult woman having sex with a male under 14 was so

different as to warrant different treatment[306] with the result, as in Bliss, that the mere fact of the difference and its characterization as natural, justified the difference.

Justice Wilson found that it is not the Court's role to decide whether the actions of a female merit the "same societal disapprobation as a male".[307]

> "These issues go to the heart of a society's code of sexual morality and are, in my view, properly left for resolution in Parliament."[308]

While the Court should not create new criminal offences, the proximity of the actions of a female adult to those of a male adult are hard to dismiss. This is particularly so if a contextual analysis is brought to the question of the social, political and legal disadvantage of children.

Such an inquiry could have resulted in the conclusion that the power relation between a child, whether female or male, and an adult disproportionally favours the adult. As identified in Brooks, understanding power relations aids the determination of relevance of difference. The intent and effect of the sex act of a male adult with a male child is comparable with the sex act of such adult with a female child.[309] The social, political and

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[306] Of note, the basis of the analysis is really a sameness/difference analysis.

[307] Hess, supra, footnote 304, at pg. 930.

[308] Ibid., at pp. 930-931.

[309] Justice Wilson did acknowledge the physical and psychological harm of the male child who is so abused: Ibid., at pg. 931.

legal inequality of children should have supported greater consideration of this issue under section 15(1).

If Justice Wilson had concluded that section 15(1) of the Charter was infringed and the provision was not saved under section 1, a difficult question of remedy would arise. While the section 7 issue is addressed by striking the legislation, striking the legislation to resolve a section 15 issue when the infringement is underinclusion would set a problematic precedent and create potential hardship. The result would be a situation like A.G. of Nova Scotia v. Phillips[310] where legislation providing a benefit to women was struck as it did not provide the same benefit to men. This would amount to "equality with a vengeance" that the Court in Schachter v. Canada[311] warned against, and, given Justice Wilson's prior track record on equality issues, would not accord with her view of the equality provision. Alternatively, finding discrimination and extending the legislation to include female offenders could amount to the unjustified intrusion by the state on the individual sphere. Because the judiciary is aware of the danger of this intrusion, judges have traditionally read criminal legislation in a narrow manner.

Finding section 15 not applicable, Justice Wilson was able to side step the question of the conflict of remedies and the paramountcy of Charter provisions. However, this treatment of the equality provision in the case and the reliance on natural

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[310](1980) 34 D.L.R. (4th) 633 (N.S.C.A.).

[311]supra, footnote 161.

difference will not aid the analysis of equality in the future.

While Hess may present difficult obiter to challenge in future litigation, a more serious challenge to the scope of the equality provision came in R. v. Seaboyer[312]. The Court was asked to consider the constitutionality of sections 276 and 277 of the Criminal Code,[313] which were commonly known as the "rape shield" provisions, on the basis of whether they infringed section 7 and/or 11 of the Charter. The purpose of these provisions was to provide some protection to complainants of sexual assault from fishing expeditions of defence counsel into the past sexual conduct of complainants.

Justice L'Heureux-Dubé, in writing the judgment for the dissent,[314] commented:

> "These two appeals are about relevance, myths and stereotypes in the context of sexual assaults."[315]

While finding with the majority that section 276 infringed section 11, she concluded that the provision was saved by section 1 of the Charter. Drawing upon the equality interpretation proposed by Justice Wilson in Andrews and Turpin, she noted that the constitutional questions must be "examined in their broader political, social and historical context".[316] Justice

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[312] supra, footnote 13.

[313] R.S.C. 1985, c. C-46.

[314] Justices L'Heureux-Dubé and Gonthier dissented in part.

[315] Seaboyer, supra, footnote 13, at pg. 643.

[316] Ibid., at pg. 647.

L'Heureux-Dubé found that sexual assault is not like other crimes in terms of its reported rate, prosecution rate or frequency.[317] It is subject to myths about women's sexuality. Myths, which Justice L'Heureux-Dubé felt, could affect the performance of prosecutors, police, judges and jurors.[318]

In determining the relevance of evidence, Justice L'Heureux-Dubé commented

> "...it is a decision particularly vulnerable to the application of private beliefs. Regardless of the definition used, the content of any relevant decision will be filled by the particular judge's experience, common sense and/or logic. ...there are certain areas of inquiry where experience, common sense and logic are informed by stereotype and myth."[319]

Justice L'Heureux-Dubé noted the interest of the state in protecting the integrity of the system.[320] The complainant and the community have a "legitimate interest in ensuring that trials of such matters are conducted in a fashion that does not subordinate the fact-finding process to myth and stereotype."[321]

Justice L'Heureux-Dubé introduced section 15 into her inquiry under section 1 by noting that

> "In light of the Charter commitment to equality, and the reflection of this commitment in the framework of s. 1, the objective of the impugned legislation is enhanced in so far as it seeks to ensure the equality of all

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[317] Ibid., at pp. 648-649.

[318] Ibid., at pg. 659.

[319] Ibid., at pg. 679.

[320] Ibid., at pg. 698.

[321] Ibid., at pg. 699.

individuals in Canadian society."[322]

For the majority of the Court, Justice McLachlin reviewed the issues. Sections 276 and 277 were stated to abolish the common law rules which permitted evidence of the sexual conduct of the complainant that was of little probative value. It was noted in argument that this evidence supported myths about unchaste women such as that they are likely to consent to intercourse and less worthy of belief. Justice McLachlin seemed to reject these arguments in concluding that they were "twin myths [which] are now discredited".[323] Having dispensed with these questions, Justice McLachlin turned to the argument that the legislation encouraged the reporting of rape and protected women's privacy. Justice McLachlin summed up the counter argument as the precept that the innocent must not be convicted and found this precept to be a basic concept of justice.

In finding that section 276 did infringe the rights of the accused in sections 7 and 11(d) of the Charter and was not saved by section 1 of the Charter, Justice McLachlin noted the power of judges to exclude evidence on the basis that the probative value of certain evidence is outweighed by the prejudice which may flow from it.[324] Thus, she placed great faith in her fellow judges in, first, not falling prey to myths of women's sexuality and, second, recognizing and excluding all evidence of little probative value.

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[322] Ibid., at pg. 704.

[323] Ibid., at pg. 604.

[324] Ibid., at pg. 609.

In this judgment, Justice McLachlin adopted a negative liberty approach in weighing the danger to the accused of being denied specific evidentiary tools as paramount to the social interest in equality. The implicit concern is the power of the state over the individual. The accepted and unchallenged doctrine is that 100 guilty men go free so that one innocent man is not convicted. There is no analysis of the social concern that a further 1000 guilty men will go free because women fear the system is balanced in favour of the accused and have little faith that the members of the judiciary are immune to the social values made of women's sexuality.

The argument of Justice McLachlin is very liberal in a Lockean sense because of its acceptance of the notion that the state is strong and the role of the court is to protect the individual. However, in the context of sexual assault, there are other power relations that are being acted upon. The disempowered person in this context is the complainant, and the state, in setting up these rules, was protecting those individual rights. However, in the traditional liberal sense, these protective rules of the state regulate not simply the private sphere but the private within the private being women's sexuality. The dogmatic adherence to Lockean liberal notions weakens the ability of the state to act in the interests of women and women's interests become invisible in the power struggle between the accused and the state.

Justice McLachlin commented

> "It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get

at the truth and properly determine the issues."[325]

This comment raises the important question that lies at the heart of the liberal conundrum: what is the truth and who owns it? The arguments made before the Court about the stereotypes and myths that affect the perception of the honesty and virtue of women were to illustrate the delicacy of truth. Perceptions of events are influenced by the perceiver's history, beliefs and the patterns of behavior that she/he has experienced. Liberal theories of the state suggest that there is an objective truth that can be discerned, a truth that exists external to individuals, and that an understanding of the rules of the social contract will lead us to that truth. Liberal theories suggest that understanding the rules of the social contract will allow an more accurate analysis of what is and is not acceptable disparity within the civil state. However, divorcing belief systems from perceptions of truth defeats a new understanding of equality. The acceptance that truth is objective can support positions (such as the natural "difference" of women) which justify different or unequal treatment because the presumed objectivity of the position insulates it from review. In this manner, objective truth hides systemic inequality and maintains the status quo.

In understanding the influence of the liberal theory of the state on the analysis of equality rights, the salient point is that liberal theory has flexibility to incorporate at least two views of

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[325] Ibid., at pg. 609.

the role of the state (oppressor or protector)[326] and two views of the individual (on an island of one's own or as part of a community). Trying to force liberal theory into one or the other overlooks the very nature of liberal theory, which weighs individualism and communitarianism. In the context of the legal system, these varying roles for the state and individual are employed by judges to guide the application of principles of equality. While the early section 15 cases and Brooks and Janzen indicate that the Court may challenge liberal presumptions to develop equality theory, the pull back into the liberal paradigm is strong. The result has been that the Court is inconsistent in adopting either a negative liberty approach or a positive liberty approach to equality principles. In a relatively short period of time, it has swung from formal equality to a results based, contextual approach and, in certain cases, back again.

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[326]See Chapter One

CHAPTER FOUR

Postmodern Analysis

> Gender has power because we use it as a category to explain many of our responses to others - what we expect of them, what we hope for them. It also affects what we desire for ourselves and how others view us. ... Indeed, because the explanatory force of gender can be so convincing, gender often functions as a kind of emotional and rational shortcut. Our reliance on it, as on any theory, can save us effort. But it can also induce us to avoid thinking, listening, or responding very carefully. Thus, despite the fact that we could understand our differences in other ways, and often do, our ideas about gender have a profound impact on our lives: they divide us from one another and from ourselves.[327]

This Chapter will analyze the influences, intentional or otherwise, which lead the Court to adopt either a negative or positive theory of the state. A deconstruction of social ideas of gender roles may provide one answer to the puzzle regarding the different liberal lenses through which the Court will analyze equality.

i. Objectivity/Subjectivity

In the prior chapter, it was argued that liberal theory has influenced the Court's analysis of equality issues. At times, the Court has adopted a Lockean or negative liberty analysis of equality to arrive at a determination: for example in Drybones and Seaboyer. At other times, the Court has adopted a less individualist approach and drawn upon community or group good to determine the issues: for example in Brooks and Janzen. In considering these four cases, an argument may be made that when the

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[327]Frug, Postmodern Legal Feminism (Routledge: New York and London, 1992) at pg. 54.

circumstances involve penal consequences, the Court will pay strict attention to individual rights and when the circumstances involve human right considerations, the Court will be more open to community or group interests. For example, Justice LaForest in Stoffman[328] commented in analyzing the equality issue in the context of section 1

> "As in McKinney, it is important to considering the issues raised by a case like the present to note that judicial evaluation of the state's interest will differ depending on whether the state is the 'singular antagonist' of the person whose rights have been violated, as it usually will be where the violation occurs in the context of the criminal law, or whether it is instead defending legislation or other conduct concerned with 'the reconciliation of claims of competing individuals or groups or the distribution of scarce government resources'."[329]

However, in his decision in Keegstra,[330] Chief Justice Dickson considered social interests in reviewing whether a criminal offence infringed freedom of expression. And, in the McKinney and other decisions, some members of the Court adopted Lockean notions of the state in considering human rights issues.[331] So, while there may be some truth that penal and human rights issues will be viewed through different liberal lenses, there is no guarantee that this will always be the case. The challenge for those seeking to advance equality arguments is to attempt to foresee in what circumstances the Court will opt for one or the other stream of

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[328] supra, footnote 122.

[329] Ibid., at pg. 521.

[330] Keegstra, supra, footnote 295.

[331] See the discussion in Chapter 2, at pp. 43-51

liberal theory.

Much of legal theory attempts to reconcile the conflict proposed in liberal theory between the individual and community good and to ask the question, how can the legal system respect individualism while imposing abstract rules? Theories of adjudication advance how these rules may be applied in a manner consistent with the original agreement to delegate authority. The principle of "objectivity" in adjudication is to preserve the integrity of the original agreement so that subjective determinations do not arbitrarily impede individual tendencies. Dworkin's judge Hercules[332] provides an example of an adjudicative theory which presumes the integrity of the principles and attempts to develop a structure to support and maintain this integrity by minimizing subjective interpretation and maximizing objective interpretation.

In analyzing the factors that influence adjudication, many theorists accept that, provided judges apply principle objectively, then fair, unbiased decisions will be reached. Rawls commented that

> "Being first virtues of human activities, truth and justice are uncompromising."[333]

Dworkin noted the sociological analysis of judicial decision making, an analysis which raises the question whether judges from particular economic or social backgrounds tend to make

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[332]Dworkin, supra, footnote 54, at pp. 81-94.

[333]Rawls, supra, footnote 57, at pg. 4.

determinations influenced by those backgrounds.[334] He found that though this question is interesting it throws little light on the issues that inspired the original question regarding the justification of legal principle.[335] He commented that the question should be whether this influence means only that judges differ on the nature of fundamental legal principles or whether it demonstrates that there are no such principles. Dworkin concluded this latter contention is absurd. And if the former argument is true, he concluded, judges may differ in opinion and still be right in law.[336] Dworkin's rejection of the notion that there are no principles secures those principles from the particular economic and social backgrounds of the judiciary.

In other fields of study, theorists have also challenged the absurdity of subjectivity. Dinesh D'Souza, in the "Illiberal Education", proposed the absolute nature of truth in the context of liberal teaching.[337] In writing about the "politically correct" movement in Universities, he suggested that belief in the subjectivity of truth leads to anarchy. He argued the necessity of maintaining the belief in the objectivity of liberalism, for without this belief standards become arbitrary.

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[334]Dworkin, supra, footnote 54, at pg. 5.

[335]Ibid., at pg. 6.

[336]Ibid., at pg. 6. Harris, Legal Philosophies (London: Butterworths, 1980) at pg. 175, talks of Dworkin's theory as one which does not ask judges to change their technique but to better understand what they are doing when making judgments.

[337]D'Souza, "Illiberal Education" in The Atlantic Monthly, March 1991, at pg. 51.

This fear of anarchistic tendencies in subjectivity reoccurringly surfaces in the analysis of the legal system. Owen Fiss[338] argued that belief in the subjectivity of judicial interpretation is nihilist. He recognized that subjectivity is part of the process; that to search for a "brooding omnipresence in the sky" is to create a false issue.[339] However, he did not accept that the whole of the process is subjective. Fiss found that legal interpretation is constrained by rules that derive their authority from the interpretive community that is held together by commitment to law.[340] This middle ground between subjectivity and objectivity must be adopted to save the process from nihilism which threatens the authority of authority. Authority can only be legitimate if it acts objectively not arbitrarily. The assurance of objectivity insures discernible rules governing the relationship of the ruled and ruler.

Paul Brest noted that Fiss' argument fails to question the content of the interpretive community.[341] The homogeneity of the demographic composition of this community throws light on the presumed objectivity of the interpretative community. Brest comments that

"Like most lawyers, I am a member of the same community,

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[338]Fiss, "Objectivity and Interpretation" (1982), 34 Stanford Law Review 739.

[339]Ibid., at pg. 746.

[340]Ibid., at pg. 761.

[341]Brest, "Interpretation and Interest" (1982), 34 Stanford Law Review 765.

> or at least on its immediate periphery, and I also value the rule of law. And that's what troubles me. For I wonder whether our commitment to the rule of law, as to other 'public values' is not related to our relatively fortunate status within this society. Much of our commitment to the rule of law really seems a commitment to the rule of our law."[342]

Brest argued that the line separating law and politics is not distinct. Its very location is a question of politics, not nihilism as Fiss suggested.[343]

The issue of the representative nature of our system is raised in Brest's argument of the homogeneous interpretive community. In critiquing democracy, Unger found that some individuals have captured the will of others and that the values of our society represent the interest of these individuals.[344] Writing about the Constitution of the United States, Ely argued that the heart of the American political system is rule in accordance with the consent of the majority.[345] The difficulty is protecting the minority from majority tyranny in a manner that is not a flagrant contradiction to the principle of majority rule.[346] While tyranny of the majority is a concern, Ely concluded that this is no defence to the argument of the "noninterpretivist" who concludes that the enforcement by unelected officials of an "unwritten

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[342] Ibid., at pg. 773.

[343] Ibid.

[344] Hutchinson and Monahan, "The 'Rights' Stuff: Roberto Unger and Beyond" (1984), 62 Tex. L. Rev. 1477, at pg. 1497.

[345] Ely, Democracy and Distrust: A Theory of Judicial Review (Cambridge: Harvard University Press, 1980) at pp. 6-7.

[346] Ibid., at pg. 8.

constitution" is an appropriate response in a democratic republic.[347] Thus, subjective interpretation does not aid the conflict.

While Ely acknowledged a subjective element in judicial decision making, he concluded that enforcing an "unwritten constitution" isn't a theory of adjudication because it does not tell us which values should be imposed. Ely found that the Constitution and the Warren Court's approach to judicial intervention in the democratic process provide minority rights protection, first, by insuring the political process is open to those of all viewpoints on something approaching an equal basis and, second, by correcting certain kinds of discrimination.[348] Ely interpreted this intervention as being consistent with the theme of concern with participation in the process.

> "...they ask us to focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."[349]

Participation, he assumed, will solve problems like majoritarian rule.

Traditional theories of adjudication argue that equality flows from the objective application of objective rules. But can we rely on such adjudicative theory to remove social, economic and other

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[347] Ibid.

[348] Ibid., at pg. 74.

[349] Ibid., at pg 77.

barriers to participation? Allowing groups to speak in a prescribed manner and on prescribed topics filtered through a prescribed process does not insure "the political process is open to those of all viewpoints on something approaching an equal basis". While women have made certain headway arguing within the paradigm of the male experience that women have similar or the same experience, these successes have not changed structural barriers. The successes merely reinforce that to the extent women are like men they are equal. They also set up the false premise that the norms are objective goalposts against which to measure equality.

The feminist critique of the legal system raises not merely a subjectivity in interpretation of objective principle, it addresses deeper social patterns that cut across socio-economic groups. The view that women did not possess the individual sphere, as proposed by Locke, or that women were delicate and in need of protection, as proposed by Justice Barker in In re Mabel P. French[350] were not novel suggestions. These theorists were not shedding new light on the question of the position of women in society. These premises were already understood in the civil state and were part of the general knowledge accepted in society.[351] The subjectivity, therefore, is not a question of an individual judge imposing his views at the expense of principle and causing anarchy in a carefully groomed system. The subjectivity raised by feminist theorists co-exists with this carefully developed system and

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[350] supra, footnote 100.

[351] See Fraser, supra, footnote 29.

assists its continued existence. It is the wealth of opinion and belief and presumed facts about women and their place in the state that constitute the gender identity of women, whether or not women actually fit the bill. It is the expression of desire about what women are or should be that is imposed upon women's existence and held to be true.[352] As it is couched in liberal language of individualism or objectivity, this subjectivity is hard to unearth and expose as perpetuating the inequality of women.

Many theorists, like Dworkin, are too dismissive of the influence that economic and social background may have on judicial decision making and assume the truth of the principle. While Dworkin is correct that individual judges may differ on the application of the principle, he and others fail to explain why the simple recognition of a principle makes it valid. Sandel suggested that the argument that neutrality in liberalism is a fiction misunderstands the deontological view of liberty which, at its core, does not depend on any particular value or end.[353] The bald assumption that this is possible is exactly what feminist critics challenge.

When, as Paul Brest commented, we are talking about <u>our</u> law, who is and has been included in the development of that law? Feminists dispute that the principle was developed with the consent of all individuals in society.

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[352]See Wolf, <u>The Beauty Myth</u> (Toronto: Vintage Books, 1990).

[353]Sandel, <u>Liberalism and the Limits of Justice</u> (Cambridge: Cambridge University Press, 1982) at pg. 12.

> "Modern political theorists and politicians proclaimed the impartiality and generality of the public and at the same time quite consciously found it fitting that some persons, namely, women, nonwhites, and sometimes those without property, should be excluded from participation in that public. If this is not just a mistake, it suggests that the ideal of the civil public as expressing the general interest, the impartial point of view of reason, itself results in exclusion."[354]

The search for a theory to support the "objective truth" of principle is, at best, misguided and, at worst, an excuse to justify what is. How can women who were denied liberal personhood and autonomy be assumed to consent to the structure of the state or their role in it? The objective principle has been created without the voice or input of women. A judiciary with a homogeneous economic and social background interpret those principles and policies in a manner that reflects their experience and interest which, until recently, has been consistent with the experience and interest of the group determining the principles. Thus, background is not merely interesting but crucial to understanding the process of judicial decision making.

In raising questions about the objectivity of liberal theory and how its language has served to conceal some disproportionate impacts of the legal system, a pattern emerges around how issues of equality have been treated by the Court. This pattern suggests that gender identity affected the reading of and application of the law in these cases.

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[354]Young, Justice and the Politics of Difference (Princeton: University Press, 1990) at pg. 190.

ii. Deconstructing Equality

In Drybones, the Court analyzed the question of whether or not equality before the law had been infringed by comparing the circumstances of Aboriginal persons with other Canadians. Although the Court was urged to apply the test only between Aboriginal persons, the Court recognized that the similarly situated test could be used to deny equality through the construction of similarity in a given situation. In categorizing what groups qualified for equality with each other, the Court cast the net wide and grouped together Aboriginal people and non-Aboriginal people to test the equal application of the law. This different treatment, therefore, was found to be discrimination infringing section 2(1) of the Bill. When next asked to consider section 2(1) of the Bill, the Court was faced with a seemingly similar situation in that Aboriginal women were being treated differently from Aboriginal men and could be denied status under the Indian Act because of marriage to a non-Aboriginal person. As was noted in Chapter Three, the Court began to draw back from its interpretation of equality under the law in Drybones. While specifically rejecting the "similarly situated" test in the prior case, in Lavell the Court appeared to adopt a very narrow category of similarly situated. The Court cast the net very narrowly and compared the situation of Aboriginal women to Aboriginal women, not Aboriginal women to Aboriginal men. As all Aboriginal women were treated the same there was no difference, no discrimination and there was no remedy available.

The Court provided little assistance in defining what distinguished this case from Drybones. Justice Ritchie commented:

> "The fundamental distinction between the present case and that of Drybones, however, appears to me to be that the impugned section in the latter case could not be enforced without denying equality of treatment and enforcement of the law before the ordinary courts of the land to a racial group, whereas no such inequality of treatment between Indian men and women flows as a necessary result of the application of s.12(1)(b) of the Indian Act. [355]

The Court found no inequality of treatment because in the racial group of Aboriginal people, all Aboriginal women were treated equally by the legislation.

A postmodern deconstruction of these cases requires analysis of the various "readings" which may be given to each argument. It requires consideration of the social and political circumstances which would have influenced the judges in reconciling these seemly unreconcilable cases.

In Drybones, the court was faced with an Aboriginal person who was sanctioned for being drunk off the reserve. In the liberal context, this was the classic conflict of the individual against the state. It could be read as state interference with autonomy in a situation where there is no positive purpose for the interference. The battle of the individual against the state, in the liberal context, is a public issue. Therefore, the unfairness of the treatment of the accused was evident.

Seen in this light Lavell is a very different case. The discrimination in this case was more subtle than the

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[355] Lavell, supra, footnote 4, at pg. 1372.

individual/state conflict in Drybones. More than one reading could be made of the argument in this case. While there was an "public issue" element of the group (Aboriginal women) against the powerful state (through the Indian Act), there was also a "private element", that being the role of women in the context of marriage. A socially accepted and historical pattern for women has been that women give up their identities in marriage and adopt their husband's identity. This Act merely confirmed this social structure. Coming from Western European backgrounds, this consequence would not strike the judges as unusual, or, prima facie, unfair.

The Aboriginal women in Lavell were challenging the socially accepted gender identity of women.[356] While this seems a strong characterization of the argument, we must remember that the legal personality of women as individuals with rights accruing to them as women was only just developing in the 1960's and 1970's. For example, the 1970's saw the inclusion of sex as a protected ground in human rights legislation and the development of new family law and related legislation.[357] Challenging the legal personality and entitlement of women was a much greater burden than what was challenged in Drybones. If the Court had cast the "similarly situated" net as wide in Lavell as was done in Drybones, it may have hastened developments in human rights and family law.

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[356]Although this was an imposed gender identity on the aboriginal community.

[357]See the Family Relations Act, S.B.C. 1972, c.20; and the Human Rights Code, S.B.C. 1973, c. 119.

Instead, the Court chose to narrowly construe the Bill to deny a remedy.

Bliss is also an example where the challenge was to implicit assumptions about the legal and social personality and entitlement of women. Ms. Bliss argued that, though disentitled to maternity benefits under the Unemployment Insurance Act, she was entitled to other benefits as she was capable of and available for work as required by the Act. Her disentitlement to maternity benefits arose because of the more stringent qualifying requirements placed on pregnant women. For the Court, Justice Ritchie quoted Justice Collier who sat as Umpire on the case:

> "I do not know the purpose of the legislature in injecting s. 46 into the 1971 legislation. It was suggested that, pre-1971, there was an assumption that women eight weeks before giving birth and for six weeks after, were, generally speaking, not capable of nor available for work; this, somehow, gave rise to administrative difficulties or abuses; section 46 was enacted to make it quite clear that, in the 14 week, period pregnant women and women who produced children, were, for the purpose of the statute not capable of nor available for work, and therefore not entitled to benefits. ..."[358]

Justice Ritchie concluded that the provisions in the Act constituted a complete code dealing exclusively with the entitlements of pregnant women to unemployment insurance benefits.[359] While neither expressly accepting nor rejecting the assumption about the capacity of pregnant women and new mothers, Justice Ritchie argued that the legislative scheme was a

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[358] Bliss, supra, footnote 110, at pg. 190.

[359] Ibid.

valid federal objective.

In making the argument that she was ready to work, Ms. Bliss was confronting social values of what pregnant women and new mothers want or should want and what they are capable of after birth. Ms. Bliss was proposing that, although she recently gave birth, she wished to immediately re-enter the work force. In essence, she challenged perceived norms. A reading of this argument was that she was different from the group "women" and if disadvantage resulted it was because of her unique person. This argument created a dichotomy between herself and the social identity of women.

In considering the equality issue of whether women were discriminated against, the Court could conclude that the group was not discriminated against. Therefore, pregnant persons and not women were treated differently. In fact, the Court concluded that "special benefits" were bestowed in the form of the legislative maternity plan.[360]

In arguing for a gender identity that other Canadian women did not have, the Aboriginal women in Lavell also created a dichotomy between themselves and the other, being women in general. It is in this dichotomy where there is the most flexibility for gender identity to circumscribe equality rights.

With the development of human rights legislation through the 1970's and the new approach taken to the interpretation of such legislation by the Court, as well as the introduction of the

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[360]Ibid., at pg. 188.

Charter, there was a shift in understanding in equality in the 1980's. The Court began to accept that difference did not, by necessity, justify adverse treatment. It is important to remember, however, that this analysis is still part of the similar/different dichotomy adopted prior to the 1980's and is the base for the "similarly situated" test. But, while the shift was not great, it did provide remedies that were unavailable under the strict interpretation of the "similarly situated" test. Thus, it was with a new appreciation of difference that the Court came to address equality issues in the 1980's.

Not only was the Court reading equality issues differently in the 1980's, those advancing equality arguments were approaching the topic differently. No longer was the argument that women were the same as men and should be provided the same benefits.[361] As was noted in Chapter Three, equality theorists began to challenge the construct of sameness/difference and to question why difference should deny equality. The four part definition of equality in the Charter aided this interpretation.

Without question, the greater openness of the Court to hear new equality arguments with which to clothe the equality provision of the Charter and human rights legislation was an important factor in the success of cases like Brooks and Janzen. It is interesting to note how in these cases the influence of gender identity may be

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[361]However, in the feminist movement this is not a closed issue. Some still argue the danger of acknowledging difference is greater than the gain: Faludi, Backlash: The Undeclared War Against American Women (New York: Crown, 1991).

seen to have informed the outcome of these cases.

In Brooks, the Court was asked to address the same substantive issue that it addressed in Bliss, whether pregnancy discrimination was sex discrimination. In this case, arguments were made to the Court that the capacity of women to procreate was different from any male experience and that there was no analogous situation the Court could use to compare the situation of women and men.[362]

In order to ensure that pregnant women were not subcategorized into a smaller group of the larger group of women, the argument was made that all women, whether now, later or merely by fact of womanhood, were affected. It was argued that, unlike sexual characteristics unique to men, such as the ability to grow a beard, the unique ability of women to procreate and the fulfillment of that ability was vitally socially important. In contrast to Lavell or Bliss, this characterization of the difference did not clash with social images of women or the gender identity of women. This reading of the issues presented to the Court made the equality issue easy to accept because it fit neatly with positive images of the role of women.[363]

In finding a remedy, the Court was not faced with a conflict

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[362]See the factum of the intervenor, Women's Legal Education and Action Fund, in Brooks.

[363]Also, Brooks was not a situation like Bliss where a determination of discrimination would result in a greater expense to the government. Courts are reticent to make a finding that may be construed as judicial legislation: Fudge, "The Privatization of the Costs of Social Reproduction: Some Recent Charter Cases", supra, footnote 180. For consideration of the question of expense, see Schachter, supra, footnote 161.

between the individual and the state but a conflict between legal individuals, Ms. Brooks and Canada Safeway. The Court was able to draw upon principles of community and group good to conclude that it is the intent and purpose of human rights legislation the Court must enforce. In this case, the Court upheld the principles of the state, through its human rights legislation, to support a laudable social goal.

The issue of sexual harassment in Janzen is a further example of the Court adopting a reading of the issue that supported the equality of women. In some ways, the adoption of this reading by the Court is a greater achievement than Brooks. At the Manitoba Court of Appeal, Justice Huband[364] concluded that, though not socially acceptable, harassment was a consequence of sexual attraction.

> "When a schoolboy steals kisses from a female classmate, one might well say that he is harassing her. He is troubling her; vexing her; harrying her - but he surely is not discriminating against her."[365]

Thus, Justice Huband romanticized the nature of the act to an innocent gesture of attraction from a courting school boy to the object of his affection the vexed schoolgirl.

Justice Twaddle, also of the Manitoba Court of Appeal, defused the issue as one of sexual attraction.[366] There was no group impact because attractive women were affected not women in general.

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[364](1986) 8 C.H.R.R. D/3831.

[365]Ibid., at pg. D/3834.

[366]Ibid., at pg. D/3846.

Thus, he set up the dichotomy of attractive vs. unattractive women or "seductresses" vs. other women.

Chief Justice Dickson was clear in rejecting this dichotomy in his judgment.[367] Noting the economic and other power abuses that women as a group are exposed to in situations of sexual harassment, Chief Justice Dickson was able to describe and find that this behavior constituted sexual discrimination. As in Brooks, it was accepted that, although not all women may directly confront harassment, harassment affects women as a group.

Janzen and Brooks did appear to be a move away from the liberal paradigm and an exploration of a new approach to equality. Alternatively, it may be argued that Chief Justice Dickson was adopting Dworkin's concept of equal concern and respect for each individual and accepting that the state has a role to play in ensuring that each individual receives this equality. However, assuming that these cases were an exploration of a new approach, they were not capable of sustaining a movement from the liberal paradigm.

In light of the achievements in Brooks, the decision in Seaboyer appeared, at first blush, to be inconsistent with the judicial recognition of community and group interests. However, as equality had not moved beyond the liberal paradigm, the Court's traditional negative liberty analysis in Seaboyer was consistent with its prior analysis of equality. This concept of liberty was adopted, in part, because of the available readings of gender

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[367] Janzen, supra, footnote 271, at pg. 1288.

identity and the public/private issues raised in the case. Justice McLachlin, for the majority, adopted a Lockean line of liberalism to draw out the classic individual/state conflict which defeated any consideration of equality issues. As noted in the prior chapter, women became invisible because the recognized power relationship was the public individual/state struggle. Although Justice McLachlin noted the private male/female power structure had existed, she dismissed its influence and concluded that the judiciary could be relied upon to determine when evidence was relevant and when it was not. This determination, she felt, could be made free from myths and stereotypes of women's sexuality which were no longer accepted in any event.

While the Court could have read the legislation as state support of the individual boundary - the state fulfilling its liberal role of monitoring the individual sphere - the integrity of the woman's individual boundary was ignored. What made it into the Court's definition of public individual interest was the male public individual interest. The individual in this picture was everyone. The public individual who may be arbitrarily subject to the whims of the state. The violated female individual did not make it into this picture because she did not represent everyone. She was a fractured group - those that were rightly protected by the legislation and those that weren't. The reliance on judicial discretion to exclude evidence amounted to trial by fire, the good virtuous woman would succeed and the bad seductress would fail. Thus, we all have an interest in protecting the individual from the

state because we all are that individual but there is not the same global interest in protecting the interest of the other.

In the Edmonton Journal case,[368] Justice Wilson noted the abstract and contextual approaches the Court may adopt in analyzing Charter applications. In choosing the contextual approach, Justice Wilson commented

> "One thing seems clear and that is that one should not balance one value at large and the conflicting value in its context. To do so could well be to pre-judge the issue by placing more weight on the value developed at large than is appropriated in the context of the case."[369]

It appears that Justice McLachlin's decision in Seaboyer did just this very thing. Individual rights were considered in the abstract, as external to individuals because they are valuable to all individuals, even those who were arguing against them in this context. The interests of the complainant were denied importance in relation to this larger, omnipresence truth of justice. The abstract approach set up a no win situation for women's interests.

In this method of reasoning may be found the myth of the homogenaic individual:

> "The civil public expresses the universal and impartial point of view of reason, standing opposed to and expelling desire, sentiment, and the particularity of needs and interests." [370]

The individual is sanitized and abstracted from the context.

For equality seeking groups arguing an alternate reading of

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[368] supra, footnote 300.

[369] Ibid., at pp. 1353-1354.

[370] Young, supra, footnote 354, at pg. 108.

the legislation, this case was made even more difficult because as a criminal law case the Court was keenly aware of individual rights and the danger of state encroachment on the individual sphere. When confronting traditional rights of the individual to a fair trial, there is a heavy burden on those making equality arguments to defeat unspoken or even open assumptions that create dichotomy to deny equality.

Similarly, Justice Sopinka's judgment in Norberg v. Wynrib[371] is an example of an abstracted approach. In Norberg, the appellant had an addiction to pain-killers. The respondent, a doctor, was aware of the addiction and continued to prescribe drugs on the condition that the appellant provide sexual services. While the majority of the Court dispensed with the issue on the basis of the tort of battery, Justice Sopinka rejected this conclusion. Although finding for the appellant, he did so on the basis of a breach of professional duty arising from the patient/doctor contract that the doctor treat the patient in accordance with standards of the profession.

Justice Sopinka concluded that as there was no evidence that the contractual relationship was abandoned by the parties, the remedy lay in a breach of contract.[372] The appellant's consent to the sexual contact did not change the nature of this contractual relationship and was not a consent to the breach of duty.[373]

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[371] [1992] 2 S.C.R. 226.

[372] Ibid., at pg. 314.

[373] Ibid., at pg. 315.

While Justice Sopinka found a remedy for the appellant, he did so by eliminating the context, he removed the characterization of harm occasioned on the appellant to talk about the nature of the deal as though it were a commercial contract. No analysis was given to the actual individuals and their ability to contract such a deal. The terms were merely assumed, as was capacity to contract. This analysis could equally be applied to a failed commercial deal.

> "...the ideal of impartiality generates a dichotomy between universal and particular, public and private, reason and passion. It is, moreover, an impossible ideal, because the particularities of context and affiliation cannot and should not be removed from moral reasoning. Finally, the ideal of impartiality serves ideological functions. It masks the ways in which the particular perspectives of dominant groups claim universality, and helps justify hierarchical decision making structures."[374]

Justice McLachlin, writing for herself and Justice L'Heureux-Dubé focused on the context of this issue.

> "But to look at the events which occurred over the course of the relationship between Dr. Wynrib and Ms. Norberg from the perspective of tort or contract is to view that relationship through lenses which distort more than they bring in focus."[375]

She concluded that analyzing the situation as a fiduciary relationship "encompasses the true relationship between the parties and the gravity of the wrong done by the defendent..."[376] In fiduciary relationships, one party pledges to exercise power on

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[374]Young, supra, footnote 354, at pg. 97.

[375]Norberg, supra, footnote 371, at pg. 269.

[376]Ibid.

behalf of another and to act in the best interests of the other.[377] Clearly, in this case, encouraging the continued addiction of a patient was not acting in her best interests. Using the addiction to gain benefits was not an exercise of power on behalf of another but over another. This analysis more accurately reflected the reality of this relationship.

However, there is a danger that in framing women's relation with men as one of powerless for this proposition may support a gender identity with a potential backlash. When a women fails to meet the criteria of frailty, the dichotomy between her and the group may serve to produce results which do not support the equality principle.

An example is a case from California regarding a woman who killed her battering partner.[378] This woman was reported to have fought back against the beatings. Kandel commented that

> "Many judicial opinions and press reports have emphasized certain characteristics that all battered women supposedly share [such as] low self-esteem; traditional beliefs about the home, the family, the female sex role; tremendous feelings of guilt that their marriages are failing; and the tendency to accept responsibility for the batterer's actions."[379]

The prosecutor argued that the accused's "violent" conduct in her relationship with the battering partner was inconsistent with self-defence. In an appeal of her conviction, the prosecutor further

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[377] Ibid., at pg. 272.

[378] People v. Valoree Jean Day, cited in Kandel, "Women Who Kill Their Batterers Are Getting Battered in Court" Volume IV, Number 1, 1993, Ms. Magazine, at pp. 88-89.

[379] Ibid., at pg. 88.

argued that the accused did not exhibit

> "the 'docile, submissive, humble, ingratiating, nonassertive, dependent, quiet, conforming, and selfless' traits characteristic of battered women..."[380]

Thus, in constructing equality arguments, those advancing the arguments must be careful not to add to the construct of gender identity falsely or to adopt, unintentionally, a gender identity which as easily supports equality as eschews it.

It is no easy task to identify all potential "readings" so as to promote the best "reading". But it is a challenge that, at least, must be attempted because of the consequences. When the equality argument promotes a positive gender identity, the Court will more easily characterize the state as having an expansive role in promoting and maintaining equality between its citizens. But when the equality argument or the issues are open to an interpretation that bifurcates women between the good and the bad, refuge of the Court toward liberal theory to narrow the reach of the state becomes a more likely outcome. The Court's comfort with the abstract individual leads them in that direction. The danger of defining equality within the liberal paradigm is that there are no deterrents to the slide back to the abstract individual when tough issues which challenge social understanding of groups are raised.

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[380] Ibid., at pg. 89.

CONCLUSION

The Supreme Court of Canada has brought to anti-discrimination legislation and the equality provision of the Charter an expansive view of equality which, at times, has included an analysis of equality that challenges the liberal paradigm. However, notwithstanding this achievement, the liberal paradigm has not been abandoned by the Court. Liberal theories of the state influence the interpretation and application of law and the development of equality theory in Canada.

Liberal theory provides more than one interpretation of the relationship of the individual with the state and community. In equality cases, the Court has explored more than one of these relationships and, at various times, has adopted different relationships. An understanding of why this is so will assist the construction of an equality argument. Knowledge of liberal theory will aid the development of equality litigation strategies.

Persons advancing equality arguments must be attuned to the multiplicity of interpretations available within liberal theory to describe the relation of the individual to the state to one's neighbour and to the community. In one reading, that relationship may be one of cooperation with neighbour and community aided by state regulation of the principles. In another, it may be a constant war to maintain autonomy, conduct of the individual sphere and freedom from the oppressive conduct of the state. Alternatively, the relationship may be one in the middle, a wary level of cooperation between the individual and community or state.

As well, the language of liberal theory and implicit assumptions of our society, whether they are valid or not, impact on equality results. Liberal theory posits the individual as free and autonomous with capacity and will to divest or retain. This individual possesses ability which, properly maximized, will assure her/him of all wants and needs. Failure to attain these wants and needs is a personal attribute. Each individual has all the tools at her/his disposal but use of those tools is the gift of the smart and the quick.

This liberal language overlays social presumptions about the characteristics of certain groups. Until this century, women were not considered individuals with capacity and autonomy. This lack of individual characteristics justified the exclusion of women from the civil state and relegated her to the family or natural sphere. While women have attained certain rights to participate in the civil state and to control their own destinies, this achievement has not been complete. Part of the reason for this is that the liberal individual has been transposed onto the female individual without due consideration being given to the social definition of the female individual, her gender identity.

Women's gender identity does not mesh with the full identity of the liberal individual. Myths and stereotypes about women's sexuality, capacities and abilities conflict with aspects of the liberal individual making the full application of the attributes of the liberal individual to women problematic in the legal context. The judiciary is left with the difficult position of reconciling

the conflict. Resolving this conflict was an easier accomplishment prior to the development of human rights legislation and the Charter. As was seen in Chapter Two, in early cases, such as In re Mabel P. French,[381] and the Persons' case,[382] the Court adopted the language of the pre-state and nature, to justify the exclusion of women from the public sphere. At this time, the attributes of the liberal individual had not completely vested upon women and the pre-state woman was an accepted gender identity.

Since that time women's role in society and the civil state has changed. In the legal context, women have the capacity of the liberal individual. However, women's gender identity has not kept pace with the change in women's legal identity. While women may now be seen to possess the individual sphere as men do, the myths and stereotypes that make up women's gender identity still serve to confuse the application of the liberal individual to the situation of women. This has resulted in cases such as Seaboyer where Justice McLachlin concluded that women's gender identity has matured and myths of her sexuality have been discredited. In this context, protecting the accused from the coercive behavior of the state became the priority and negative liberty principles were applied. Alternatively, in Norberg, Justice McLachlin rejected the application of tort and contract principles because they served to distort the context.

At times, the Court has advanced community good before

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[381] supra, footnote 100.

[382] supra, footnote 104.

individual good in the understanding that this best promotes equality. Arguably, Brooks and Janzen represent a challenge to the liberal paradigm because of the recognition of the gendered aspect of power relations. However, these cases may equally be seen to adopt a positive liberty theory of the state which supports the community or social good of women's involvement in the civil state. The liberal paradigm allows a flexibility to alternate the priority from individual to community interests.

In the liberal paradigm, influences on perception, such as gender identity, may be concealed particularly when individual interests are emphasized. When advancing equality arguments, one must be alive to the danger liberal theory poses to the argument. The bifurcation of the group "women" frequently results in the objective application of legal principles free from context, an "equal" application of the law which limits equality theory.

Those seeking to advance equality arguments must be aware of the panoply of readings that are possible when a court is faced with an equality issue. This is particularly so when a dichotomy in the group "women" can be read in the argument. A number of matters should be considered in structuring an equality argument, including:

1. whether the issue involves penal sanction. If a penal sanction is involved then the equality argument must be especially constructed to challenge the liberal language of individual and the negative liberty theory of the state; and

2. which is the stronger of the multiple of readings. In Brooks, a strong reading of the gender identity argument was that women as a group were being denied their ability to serve the social function of reproduction. In Seaboyer, a strong reading of the gender identity argument was that virtuous women would not be affected by a lack of rape shield legislation. Thus, a dichotomy in the group women was created by this reading. In such case, an equality argument will have a greater chance if the dichotomy is challenged and an alternate reading encompassing the whole of the group is advanced.

Equality, in the judicial system, is affected by liberal theory and equality arguments must reflect the effect of this paradigm. This is not to argue that those seeking to advance equality arguments should adopt the liberal paradigm in fashioning their equality theory. However, the liberal paradigm is a strong force in the legal system. Thought must be given to the language of liberal theory and where it may fail or support the argument. Proponents of equality arguments should be aware that, within liberal theory itself, more than one remedy may be possible as there is a spectrum of social and political relations possible.

Finally, because of the restriction the liberal paradigm imposes on equality, there is doubt that the Charter and the legal system have the capacity to provide a post-liberal remedy. The successes and failures of equality arguments demonstrate that while the liberal paradigm can expand to incorporate new equality

results, it can as quickly contract. Equality arguments under the Charter and human rights legislation will always be subject to the fluidity of liberal theories of the state. The challenge for women is to ensure that the gender identity of women, which defines women's equality within the legal system, does not artificially limit the access to remedies within this liberal system.

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