THE PORTRAYAL OF SHARIA IN ONTARIO

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Introduction

There has been much attention given by the media to the potential use of Sharia-based arbitration to resolve family disputes in Ontario. Although this possibility has been given both positive and negative attention, a common theme pervades the discourse: Islam as "the Other."

In this paper, I provide sufficient background information for the reader to understand how Sharia-based arbitration might be used in Ontario. Then, I review several representative newspaper articles with three questions in mind. First, do the articles accurately represent Sharia? Second, do the articles accurately represent the state of the law in Ontario as it applies to arbitration in the family context? Third, what do the articles recommend as a solution to the perceived problem? By doing so, I show that the idea of Islam as a monolithic entity distinct from the West still underlies the approach of many journalists. This idea allows, or forces, these journalists to attack or defend Sharia rather than focusing on problems in domestic law. Only those writers who avoid conceiving of Islam as the Other manage to present well-reasoned criticism of the law of Ontario.

The Other

In his seminal work, *Orientalism*,[1] Edward Said discussed the Western conception of the Orient[2] as the Other. Islam, in particular, is seen as a uniform ideology that conflates politics, religion, culture, and history into a single entity. The West identifies itself, at least in part, in contrast to this idea of Islam or the Orient. The essential qualities of the Orient, "its sensuality, its tendency to despotism, its aberrant mentality, its habits of inaccuracy, its backwardness,"[3] help to define the West as rational, liberal, right-thinking, honest, and progressive.

Although much of Said's analysis is based on representations of the Orient made by late nineteenth- and early twentieth-century artists and academics, his thesis is still relevant today. In *Covering Islam*,[4] Said examined representations of Islam made in the Western media following the Iranian revolution and hostage crisis. He found that, as the "United States took over the imperial role played by France and Britain," America's representations of Islam became more like nineteenth-century European representations of Islam.[5] Since September 11th, interest in the Islamic world has been renewed yet again. Unfortunately, many journalists do not appear to have learned from the mistakes of their predecessors.

Critics of Said have portrayed him as an apologist of Islam: one who wants to replace a representation of Islam as Bad with a representation of Islam as Good. Said replied to his critics:

> Whereas what I was trying to show was that any talk about Islam was radically flawed, not only because an unwarranted assumption was being made that a large ideologically freighted generalization could cover all the rich and diverse particularity of Islamic *life* (a very different thing) but also because it would simply be repeating

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[1] *Orientalism* (New York: Vintage Books, 1978) [*Orientalism*].

[2] The choice of *Orient* to refer to the East and *West* to refer to the Occident is an interesting one: Orient and Occident sound more exotic to the English ear than the relatively plain, and older, East and West. See e.g. *The Oxford Modern English Dictionary*, or D. Harper, *Online Etymology Dictionary*, online: <http://www.etymonline.com> for etymologies.

[3] *Orientalism, supra* note 1 at 205.

[4] E. W. Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World* (New York: Pantheon Books, 1981).

[5] *Ibid.* at 26.

> the errors of Orientalism to claim that the correct view of Islam was X or Y or Z.[6]

Those who portray Islam as Good are making the same error as those who portray Islam as Bad. Both portrayals are premised on Islam being an easily identifiable ideology that is common to all followers of the religion.

Sharia

Sharia means "the path or the road leading to the water,"[7] or, more simply, "the way."[8] The word appears in only one[9] verse of the *Quran*: "Then we put thee on the [right] Way of Religion: so follow thou that [Way], and follow not the desires of those who know not."[10] Thus, its original connotation was very broad and applied to both behaviour and belief. However, Sharia has, in many circles, come to refer to law rather than theology or faith.[11]

The foundation of Sharia is the *Quran*, which contains guiding principles as well as specific rules relating to inheritance and certain crimes.[12] Although rejected by some Muslims,[13] further guidance and

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[6] E. W. Said, "Islam Through Western Eyes" *The Nation* (26 April 1980), online: *The Nation* <http://www.thenation.com/doc.mhtml?i=19800426&s=19800426said>.

[7] F. Rahman, *Islam* (London: Weidenfeld and Nicolson, 1966) at 100 [Rahman].

[8] M. S. Al-'Ashmawi, "Shari'a: The Codification of Islamic Law" in C. Kurzman, ed., *Liberal Islam* (New York: Oxford University Press, 1998) 49 at 50.

[9] *Ibid.* at 50.

[10] *The Meaning of The Holy Quran*, trans. A. Y. Ali (Beirut: Ala'alami Library, 2001) at Sura 45, Verse 18.

[11] See Rahman, *supra* note 7 at 101-109 for a brief history of the meaning of Sharia. Compare Al-'Ashmawi, *supra* note 8 at 50-51 for a discussion of how the word "Sharia" should be understood and how it is understood in Egypt. I recognize that some believe that Sharia should not be used in the narrow sense of Islamic Law. However, I have chosen to do so as it is the term used by many parties involved in the debate.

[12] Rahman, *supra* note 7 at 69.

[13] *Ibid.* at 43.

rules are given in the Hadith, a body of work that "represents the sayings and deeds of the Prophet."[14]

Varying methods of interpretation led to the development of a number of schools of law. Today, four consistently recognized legal schools of Sunni Islam[15] remain: Hanafi, Maliki, Shafi'i, and Hanbali.[16] Although the differences between the schools have largely disappeared,[17] some significant differences remain. For example, under Hanafi law, a wife may only apply for divorce when the husband is incapable of consummating the marriage. Under the other Sunni schools, a wife may pay a sum to be released from marriage.[18] There are also a number of practices common to the four schools that many Canadians would consider to be discriminatory. For instance, all four schools agree that a husband may divorce his wife at will, but give no such right to a wife.[19]

The major Shia school of law is the Ithna Ashari. Theoretically, this school leaves more room for "individual creative thinking and interpretation of the dogma and the law"[20] than do the Sunni schools. In practice, the major difference is that the Ithna Ashari school allows for temporary marriage while the Sunni schools do not.[21]

In some countries, new interpretations of Sharia are being made. For example, polygyny has been prohibited in Tunisia. Sura 4, Verse 3 of the *Quran* allows a man to marry up to four women only if he believes he can treat them justly. However, Sura 4, Verse 129 states that a

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[14] *Ibid.*

[15] There are two major branches of Islam: Sunni Islam and Shia Islam. The fundamental differences between the two sects relate to historical disputes over the possession of political leadership within the Islamic community and the religious dimension of that leadership.

[16] D. S. El Alami & D. Hinchcliffe, *Islamic Marriage and Divorce Laws of the Arab World* (London: Kluwer Law International, 1996) at 3 [El Alami].

[17] Rahman, *supra* note 7 at 83.

[18] El Alami, *supra* note 16 at 27-28.

[19] *Ibid.* at 22-28. Intervention by arbitrators or judges may allow for divorce under some schools of law without the husband's consent.

[20] Rahman, *supra* note 7 at 174.

[21] *Ibid.* at 174-175. See El Alami, *supra* note 16 at 9 for an exposition of temporary marriage, or *mut'a*.

man will never be able to deal fairly and justly between women. As a result, some argue that this prohibition is justified under Sharia.[22]

Sharia is not a single monolithic legal system. Rather, it is a term which is used in different ways by different believers. Even when it is used to refer only to law, it must be remembered that there are different schools of Sharia and different ways to interpret the materials on which Sharia is based. As with any system, there are those within each school who advocate for more liberal interpretations and those who prefer a conservative approach.

Ontario

The controversy over the use of Sharia under the law of Ontario arose most recently[23] in 2003 when the Canadian Society of Muslims proposed the establishment of a *Darul Qada*, or Muslim arbitration board.[24] The Islamic Institute of Civil Justice ("IICJ"), as it is known in English, provides mediation and arbitration services in a number of areas, including family law. The *Family Law Act* [25] allows couples to enter into domestic contracts, which include marriage contracts, cohabitation agreements, and separation agreements. Domestic contracts specify spouses' respective rights relating to property, support, children, and "any other matter in the settlement of their affairs."[26] It is open for couples to agree to submit to arbitration in a domestic contract. Any such arbitration agreement is subject to the

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[22] See J. J. Nasir, *The Status of Women Under Islamic Law and Under Modern Legislation*, 2d ed. (London: Graham & Trotman, 1994) at 26.

[23] Media attention was given to The Canadian Society of Muslims' proposal to establish arbitration boards as early as 1991. However, no such board was established before 2003. See The Canadian Society of Muslims, News Release, "The Review of the Ontario Civil Justice System" (1994), at 45-46, online: <http://muslim-canada.org/submission.pdf>.

[24] The Canadian Society of Muslims, News Release, "Darul-Qada Beginnings of Muslim Civil Justice System in Canada" (April 2003), online: <http://muslim-canada.org/news03.html>.

[25] *Family Law Act*, R.S.O. 1990, c. F.3 ss. 52-54 [*Family Law Act*].

[26] *Ibid.* ss. 52(1)(d), 53(1)(d), 54(e).

Arbitration Act,[27] which allows the parties to specify the law that the arbitrator will apply.[28]

The controversy centres around the fact that spouses can choose to have their disputes arbitrated under Sharia and have the resulting decision enforced by an Ontario court. An arbitration award is binding unless it is varied on appeal or set aside by the court.[29] As Perkins J. stated in *Duguay* v. *Thompson-Duguay*, "[t]he legislature has given the courts clear instructions to exercise the highest deference to arbitration awards and arbitration clauses generally."[30] However, Perkins J. indicated that a lower level of deference may be given to family law arbitrations. Even so, the grounds on which an arbitration award may be set aside are few. In disputes involving children, courts will be able to exercise their *parens patriae* jurisdiction to alter arbitration awards.[31] As for other subjects of dispute, the *Arbitration Act* specified that a decision may be set aside if the parties were not "treated equally and fairly."[32] In *Hercus* v. *Hercus*, Templeton J. found that this requirement of fairness may be interpreted more broadly than mere procedural fairness.[33] However, there is no case law to support the suggestion that a court would go so far as to consider whether the law that the parties had agreed to was inherently unfair.

Although some have suggested that arbitration awards would be subject to *Charter*[34] scrutiny, this is not very likely. Domestic contracts, being private agreements, are not directly subject to the *Charter* because there is no government action. Natasha Bakht has produced a paper which explained how a *Charter* challenge might

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[27] *Arbitration Act*, *1991*, S.O. 1991, c. 17 at s. 2 [*Arbitration Act*].

[28] *Iibid.* ss. 3 and 31.

[29] *Ibid.* s. 37.

[30] *Duguay* v. *Thompson-Duguay* (2000), 7 R.F.L. (5th) 301 at para. 31, [2000] O.T.C. 299, [2000] O.J. No. 1541 [*Duguay* cited to R.F.L.].

[31] *Ibid.* at para. 41.

[32] *Arbitration Act*, *supra* note 26 at s. 46(1).

[33] (2001), 103 A.C.W.S. (3d) 340 at paras. 96-99, [2001] O.J. No. 534.

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

proceed.[35] The challenge would need to be directed at the legislation which allows arbitration, rather than at an arbitration award itself.

Thus, the *Family Law Act* and the *Arbitration Act* combine to allow spouses to contract out of most of the usual family law provisions with a minimal amount of judicial oversight. Indeed, it is not surprising that the *Arbitration Act* does not provide the protections that one would expect in a family context because it was based on the Uniform Law Conference of Canada's *Uniform Arbitration Act*,[36] which was based on an international commercial arbitration model.[37]

Marion Boyd, former Attorney General of Ontario, has been appointed to review the current state of the law in Ontario.[38] Although her report was expected to be delivered in September 2004, it had not been released to the public at the time of the writing of this article. As a result, public debate has mostly been informed by the presentation of the issue in the media.

Islam the Bad

Many people assert that Islam is inherently unfair to women, and that Sharia should thus not be integrated into Ontario's family law context. Peter Worthington's column in the *Toronto Sun*, "Wake Up, McGuinty,"[39] is a typical example of this position. He claimed that

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[35] N. Bakht, "Family Arbitration Using Sharia Law: Examining Ontario's Arbitration Act and Its Impact on Women," online: <http://www.ccmw.com/ShariainCanada/NAWL-CCMW%20Sharia%20Paper.doc>.

[36] Ontario, Legislative Assembly, *Official Report of Debates (Hansard),* 35th Leg., No. L080 (5 November 1991) at 1550 (Hon Mr. Hampton).

[37] Uniform Law Conference of Canada, *Uniform Arbitration Act* (1990) at 3, online: Uniform Law Conference of Canada <http://www.ulcc.ca/en/us/arbitrat.pdf>.

[38] Ministry of the Attorney General, News Release, "Former Attorney General and Women's Issues Minister to Review Arbitrations Processes" (June 25, 2004), online: <http://www.attorneygeneral.jus.gov.on.ca/english/news/2004/20040625-arbitrationreview-nr.asp>.

[39] (August 26, 2004), online: Canoe <http://www.canoe.ca/NewsStand/Columnists/Toronto/Peter_Worthington/2004/08/26/pf-602197.html>. Dalton McGuinty is the current Premier of Ontario.

Sharia is alien to everything that Canada stands for. He pointed out that "Muslim women are vulnerable to intimation [sic], coercion, being bullied into accepting Sharia intervention." He attributed a number of practices to Sharia, including arranged marriage, male and female circumcision, the stoning of women, and the beating of disobedient wives. Worthington summarized, "[t]he essence of Islam is that it is immutable and rigid. It atrophied 1,400 years ago and cannot evolve or be re-interpreted like other religions." He concluded that Ontario should "reject Sharia law being applied to domestic disputes."

Worthington clearly sees Islam as the Other. Sharia is held to be alien to everything Canada stands for. Islam is portrayed as a fossil that cannot adapt to different political and economic circumstances. In support of his conclusion that all of Sharia is bad and unworkable in Canada, Worthington dwelled on several distasteful practices that have occurred in Islamic countries. The corollary to his conclusion is that family law in Canada is good, and that none of the problems associated with Sharia exist here.

Worthington's portrayal, of course, is a misrepresentation not only of Sharia, but also of Canadian law. Worthington's article implied that only Muslim women are subject to intimidation and bullying. However, similar concerns exist in other religious communities that use arbitration. Additionally, spousal abuse, usually targeted at women, may arise in as many as half of all divorces in Canada.[40] It is difficult to believe that abused women would be less subject to intimidation and coercion than religious women would be. The problem, then, is not limited to the Muslim community – as Worthington would have us believe – but exists within all Canadian communities. The question that should be asked is, "What can we do to mitigate the intimidation that women often face in divorce?" rather than "How can we stop Muslims from using Sharia law?" Seeing Islam as the Other blinds Worthington to broader problems that exist in Canadian family law.

[40]N. Bala, "Spousal Abuse and Children of Divorce: A Differentiated Approach" (1996) 13 Can. J. Fam. L. 215 at 215.

Islam the Good

Often, those who object to the portrayal of Islam as Bad respond with a portrayal of Islam as Good. This approach was taken by Ouahida Bendjedou in "Who's afraid of Sharia?"[41] Bendjedou presented Sharia as "a fair and equitable code that treats women and men equally and reflects important values within Muslim life." She stated that "the outcry results from a fear of the unknown, both in terms of the content of Sharia and the manner in which it is interpreted." Bendjedou believes that Muslim women can freely choose whether or not to submit to Sharia-based arbitration. Fears of unfairness can be addressed by drafting arbitration agreements that would allow appeals on the basis of conflict with public policy. She concluded that Ontario should allow Sharia tribunals to exist so that a better understanding of Sharia can be promoted.

Although Bendjedou is a Muslim woman who believes that Sharia is an equitable system, it is clear that she cannot speak for all Muslims. In her portrayal of Islam as Good, she glosses over issues that have been raised by other Muslim women. For example, the Canadian Council of Muslim Women ("CCMW") feels that Sharia has often been developed under patriarchal systems, and a conservative application of Sharia will have a negative impact on women.[42] It appears that Bendjedou is unwilling to criticize Sharia, for fear that this criticism would empower those who present Islam as Bad. In response to the view of Sharia as a monolithic and evil system, Bendjedou presentd a monolithic and good system.

Although Bendjedou presented the law of Ontario accurately, her proposed safeguards cannot realistically address the fears raised by the CCMW. It is certainly possible that arbitration agreements could be drafted so that decisions could be appealed to an Ontario court on the basis of conflict with public policy. Yet how many men or women would know that a clause such as this could, or should, be included in a domestic contract? As there is no requirement for

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[41]O. Bendjedou, "Who's Afraid of Sharia?" *The Globe & Mail* (19 August 2004) A17.

[42]Canadian Council of Muslim Women, News Release, "Tribunals Will Marginalize Canadian Muslim Women and Increase Privatization of Family Law" (24 October 2004), online: <http://www.ccmw.com/ShariainCanada/Tribunals%20Will%20Marginalize%20Canadian%20Muslim%20Women.htm>.

independent legal advice before an arbitration agreement is made, there is no guarantee that such clauses will be included. As a result, those who are least familiar with the Ontario legal system will be most likely to enter into contracts where arbitration is not subject to review. Responding to Islam as the Other causes Bendjedou to oversimplify the issue.

Islam in the West

Those who are capable of seeing Sharia as it really is – a complex combination of religion, politics, and history – are able to present realistic solutions to the problems that result from arbitration. In "How Sharia Law Could Work in Ontario,"[43] Riad Saloojee demonstrated an understanding of how Islam and Sharia operate in Canada, rather than trying to present an idealization of Islam. Although Saloojee initially answered those who present Islam as Bad in similar fashion to Bendjedou, he admitted that there are problems with allowing arbitration in the family context without stronger court oversight. Specifically, he recognized that there is no guarantee of voluntariness, and no assurance of an arbitrator's qualifications.

Saloojee recommended that four changes be made to the arbitration framework. First, both parties to an arbitration must receive independent legal advice. Second, immigrants and minority women should be educated about their rights. Third, the provincial government should cooperate with minority communities to develop a scheme for the selection and training of arbitrators. Fourth, the government should make available a registry of "sanitized" copies of arbitrators' decisions.

Saloojee's analysis was possible because he recognized that Sharia is not a monolithic system; it is neither entirely good nor entirely bad. Instead, Sharia is seen as a system that has changed in the past, and that will continue to change if necessary. Because he sees Sharia and Ontario law as systems that must interact rather than seeing the systems as Others, Saloojee is also prepared to criticize Ontario's arbitration system as a whole.

Although Saloojee's recommendations will probably not make for a completely satisfactory solution, they are a good starting point for

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[43]R. Saloojee, "How Sharia Law Could Work in Ontario" *Calgary Herald* (6 September 2004) A11.

debate. It is unquestionable that parties should be required to seek independent legal advice before entering an arbitration agreement. It would also be beneficial to publish decisions that have been stripped of any information that could identify the parties. Those considering arbitration could see what results could be expected, and those unfamiliar with Sharia could see how it works in practice in Canada.

However, Saloojee's second and third recommendations may be more problematic in that they would be expensive to implement. From the province's point of view, one of the advantages of arbitration is that it reduces taxpayer expense by moving disputes out of the court. If this expense is reintroduced in programs to educate immigrants and to train arbitrators, there may very well be a backlash from those who see Islam as Bad: "Why should *we* pay for *them* to apply their bad law?" Ontario will need to balance these concerns with the advantages of greater protection for those considering arbitration.

An alternative solution would be to subject arbitration awards to the same degree of scrutiny to which domestic contracts are subject. For example, the *Family Law Act* allows a provision for support in a domestic contract to be set aside if the provision results in unconscionable circumstances.[44] Likewise, a court should be able to set aside a provision of an arbitration award that was arrived at fairly but results in unconscionable circumstances. The effectiveness of this judicial protection is uncertain in light of *Hartshorne* v. *Hartshorne*,[45] in which a domestic agreement was upheld in spite of the wife's indication, at the time of signing, that she was signing the agreement unwillingly. However, there is no reason to give less protection to parties who resolve a dispute via arbitration than to parties who simply sign a contract that outlines their respective rights. The Legislature should take this opportunity to question whether adequate protection is given to all those involved in family disputes, not just those who choose to use religious-based arbitration.

Conclusion

The IICJ's proposal to provide Sharia-based arbitration has provoked significant media debate over the appropriateness of Sharia in Canada. Unfortunately, much of the debate has been uninformed and

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[44] *Family Law Act, supra* note 24 s. 33(4)(a).

[45] [2004] 1 S.C.R. 550, 2004 SCC 22.

unhelpful due to the portrayal of Islam as the Other. Only those who recognize that Sharia is not a monolithic system and is capable of change have made important contributions to the discourse.

The question that Canadians should be asking is not whether Sharia is Good or Bad. Rather, we need to examine family law in Ontario and the rest of the country to decide whose interests we want to protect and whose interests are being protected. Does family arbitration exist simply to save the government money, or are there genuine benefits to those who use it? Should the government respect the choice of individuals and allow them to resolve their disputes in the manner they choose, or should the government step in and impose solutions? How do we ensure that domestic contracts, whether they are arbitration agreements or not, are based on the true and informed consent of both parties?

There are, undoubtedly, advantages to those who participate in arbitration. It is often cheaper, less intimidating, and more private than going to court, and the arbitrator may be more sensitive to cultural and religious issues than a judge trained in the common law tradition would be. However, we should not remove family problems from the oversight of the courts simply because the parties arrive at a solution via arbitration rather than by some other method.

These issues have largely been ignored in the public debate due to the way the problem has been framed by the media. Perhaps the situation will change for the better once Marion Boyd's recommendations are released. Unfortunately, it is difficult to hold out much hope for this result.

***Addendum**: Marion Boyd's report was released in late December 2004. Since then, in the author's opinion, most newspaper articles have been more accurate in their portrayal of the situation. However, there still appears to be a greater focus on what is wrong with Sharia, rather than a focus on what is wrong with the laws of Ontario.*

CCH CANADIAN LTD. v. LAW SOCIETY OF UPPER CANADA

CASE COMMENT ON A LANDMARK COPYRIGHT CASE

Parveen Esmail

Introduction

> *Intellectual property laws exist to encourage inventors and creators to invest time and resources in the development of new works and inventions by granting them limited monopolies over their works.*[1] *This is vital in the field of intellectual property as ideas can be stolen or copied more easily than in other areas of property law.*[2] *The law of copyright is the subset of intellectual property law that is concerned with the protection of the expression of ideas.*

The Law of Copyright

Section 3(1) of the *Copyright Act*[3] states that, for the purposes of the *Act*, "copyright" includes "the sole right to produce or reproduce the work or any substantial part…in any material form whatever…" Copyright protects the expression of ideas, but the protection does

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[1] P. Jones, "Can Parties Agree to Restrict Copyright Act's Fair Dealing Rights?" (26 September 2003) 23:20 The Lawyers Weekly.

[2] *Ibid.*

[3] R.S.C. 1985, c. C-42.

not extend to the ideas themselves. The Court in *Moreau* v. *St. Vincent*, [1950] Ex. C.R. 198 at 203 stated that

> "It is…an elementary principle of copyright law that an author has no copyright in ideas but only in his expression of them…The ideas are public property, the literary work is his own. Every one may freely adopt and use the ideas but no one may copy his literary work without his consent." Copyright subsists in original works only.[4]

On March 4, 2004, the Supreme Court of Canada handed down its judgment in the case of *CCH Canadian Ltd.* v. *Law Society of Upper Canada*. This case modified the law of copyright by accepting and applying new interpretations of key copyright sections into the law of copyright. These include s. 5 ("originality"), s. 29 ("fair dealing"), and s. 27(1) ("authorization").

The decision also shifted the focus of copyright law from the pro-author approach that had dominated in the past to a balanced approach that weighs the rights of the author against those of the user. To this effect, the decision affirmed that exceptions listed in the *Act* are "user's rights" and are an integral part of the *Act*. As such, they are not subject to a restrictive interpretation but to a balanced one.

According to one commentator, the decision of the Supreme Court of Canada in the *CCH Canadian Ltd.* v. *Law Society of Upper Canada* case ranks "as one of the strongest pro-user rights decisions from any high court in the world…"[5] This paper will examine the changes to the law of copyright made by the Supreme Court of Canada in the leading case of *CCH Canadian Ltd.* v. *Law Society of Upper Canada*. It will begin by exploring the new interpretation of "originality" put forward by the Court in this case and will then examine the changes to how the "fair dealing" exception is treated in Canadian law. The Court's treatment of the Law Society of Upper Canada's allegation that the provision of self-serve photocopiers constitutes authorization by the Great Library to infringe the copyright of the Law Society in its legal materials will be considered. The paper will then assess the effects of the decision on copyright law as it stood prior to the release of the decision and

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[4] *Copyright Act,* R.S.C. 1985, c. C-42, s. 5(1).

[5] M. Geist, "Law Bytes" *Toronto Star* (22 March 2004).

will explore the implications of the ruling for law libraries across Canada in their treatment of legal materials.

The Facts

The Supreme Court of Canada heard the case on appeal from the decision of the Federal Court of Appeal on November 10, 2003. *CCH Canadian Ltd.* v. *Law Society of Upper Canada* involved an action by three publishers of legal material – CCH Canadian Ltd., Thomson Canada Ltd., and Canada Law Book Inc. – against the Law Society of Upper Canada for infringement of copyright. The Law Society of Upper Canada governs the legal profession in Ontario and operates the Great Library at Osgoode Hall in Toronto, Ontario. The Great Library offers a not-for-profit, "custom photocopying service" to members of the Law Society, the judiciary, and other authorized researchers, including law students, upon request. The photocopies of legal material are distributed to patrons in person, by mail, or by facsimile. Patrons also have access to self-service photocopiers for their photocopying needs. A copyright warning is placed above the self-service photocopiers.

The publishers claimed that the Law Society infringed copyright in its works when librarians at the Great Library photocopied and delivered reported decisions, case summaries, statutes, regulations, or limited selections of text from treatises published by the publishers to library patrons. In addition, the publishers submitted that the provision by the Great Library of several self-serve photocopiers constituted an infringement of copyright since it provided the machinery with which patrons could infringe copyright.

While the Federal Court, Trial Division held that the Law Society had infringed copyright in certain works only, the Federal Court of Appeal held that all of the works contained were original and were therefore subject to copyright protection. The Court of Appeal held that copyright protection was available for headnotes, case summaries, and topical indices in the published reasons for judgment. The Court further held that the Law Society had not established the fair dealing

defence and had authorized any copyright infringements made by library patrons using the self-service photocopiers.[6]

Originality

McLachlin C.J.C. wrote the judgment on behalf of a unanimous Supreme Court of Canada. The first question considered was whether the photocopying and delivery of legal material by Great Library staff to library patrons constituted an infringement of the publishers' copyright. The Court began by considering whether the works were "original" within the meaning of s. 5(1) of the *Copyright Act*.

Copyright subsists in *original* literary, dramatic, musical and artistic works only.[7] Originality is not defined in the *Act*.[8] Prior to the release of the Supreme Court of Canada judgment in *CCH Canadian Ltd.* v. *Law Society of Upper Canada,*[9] competing interpretations of the word "original" were found in Canadian court rulings. Some courts considered the requirement of originality to have been met as long as the work was "not copied."[10] That is, any work that was more than a mere copy of another work was considered to be original.[11] A rival interpretation held that, in order to be original, a work had to be creative.[12]

The interpretation that holds work to be original where it is more than a mere copy is clearly aimed at protecting the rights of the author. This interpretation is consistent with the position in France

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[6] C. Schmitz, "Copyright Cases Dominate Supreme Court Fall Docket" (10 October 2003) 23:22 The Lawyers Weekly.

[7] *Copyright Act*, ibid.

[8] A. Rush, "'Originality' Bar Shrinks Copyright Protection" (2 February 2001) 20:36 The Lawyers Weekly [*Rush*].

[9] 2004SCC13 [*CCH*].

[10] A. Drassinower, "A Rights-Based View of the Idea/Expression Dichotomy in Copyright Law" (2003) 16 Can. J.L. & Juris. 3-21.

[11] *CCH*, *supra* note 7.

[12] *Ibid.*

where authors' economic and moral rights receive strong protection.[13] The latter position that requires creativity to be utilized in order for originality to exist affords less protection to authors as they have a higher standard to meet in order to be eligible for copyright protection. This interpretation was imported from American jurisprudence into Canadian law in the case of *Tele-Direct (Publications) Inc.* v. *American Business Information, Inc*., [1998] 2 F.C. 22 (C.A.).

In *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, the Supreme Court of Canada chose to apply an approach that falls between the two approaches listed above. The court held that in order for a work to be original, both skill and judgment must have been employed by the author in the creation of the work. The Court defined "skill" as "the use of one's knowledge, developed aptitude, or practised ability in producing the work,"[14] while "judgment" was defined as "the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work."[15] Chief Justice McLachlin held that, in order to qualify as an original work, the exercise of skill and judgment involved in the production of the work could not be trivial or "purely mechanical."

The "skill and judgment" test affords relatively accessible protection to authors, in that a standard of creativity is not required in order to secure copyright protection. At the same time, the public has not granted limited monopolies to works that are the result of mere mechanical exercises. This middle-of-the-line position is consistent with the approach currently taken in the United Kingdom.[16]

The Court then applied the new test for originality to the facts in the case. It held that the headnotes, case summaries, and topical indices were original, as they were not copies, and were the products of the exercise of non-trivial skill and judgment by their authors. The judicial decisions themselves were not held to be original as the modifications made to the decisions by the publishers were trivial in nature. However, the reported judicial decisions, consisting of the judicial

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[13] L. E. Harris, "Editorial" (2004) *Copyright & New Media Law Newsletter* [*Harris*].

[14] *CCH,* at para 16.

[15] *Ibid.*

[16] *Ibid.*

decisions with their accompanying headnotes, were held to be original. The Court held that, despite the fact that the individual segments of the compilation may not be original, the compilation itself was original and was therefore eligible for copyright protection.

Fair Dealing

The Court also considered whether the fair dealing exception would apply to the facts of the case. Section 29 of the *Copyright Act* states that "[f]air dealing for the purpose of research or private study does not infringe copyright." Thus, while legal material may well be protected by copyright, if a copy of a protected work is made for the purpose of research or private study, the copier may be permitted to seek protection under the fair dealing exception in s. 29 of the *Copyright Act*. The Court noted that the fair dealing exception is not a mere defence but is an integral part of the *Act*. If material is reproduced for the purpose of research or private study, there is no infringement at all. Rather, such a reproduction is said to be a "user right." Furthermore, the Court held that the Law Society simply had to establish that its general dealings were fair in nature. It did not have to prove that each patron utilized the legal material provided in a way that would constitute fair dealing.

Chief Justice McLachlin pointed out that in order to qualify for this exception it must be established that the material was reproduced for the purpose of research or private study *and* that the dealing was fair. The Court affirmed the view of the Court of Appeal that "[r]esearch for the purpose of advising clients, giving opinions, arguing cases, preparing briefs and factums is nonetheless research"[17] and is therefore eligible for the fair dealing exception as long as the fairness requirement is met. This is so despite the fact that it is conducted for a commercial purpose and in pursuit of profit. The Court held that the copies provided by the Law Society were for the purpose of research and private study and therefore qualified for the exception as long as the dealing was fair.

In order to determine whether a dealing is fair, it is necessary to consider a variety of factors and the facts of the case, as fairness is a question of degree. In the past, Canadian courts had considered

[17] *Ibid. supra* note 7 at para 51.

criteria including the amount of the work lifted, the amount necessary in order for the lifter of the work to accomplish their purpose and whether the works would be in competition with one another in assessing the fairness of the dealing in question.[18] However, the Supreme Court of Canada in *CCH Canadian Ltd.* v. *Law Society of Upper Canada* affirmed a list of factors proposed by Linden J.A. of the Federal Court of Appeal[19] to help determine whether a particular dealing is fair. They are as follows: "(1) the purpose of the dealing; (2) the character of the dealing; (3) the amount of the dealing; (4) alternatives to the dealing; (5) the nature of the work; and (6) the effect of the dealing on the work."[20] While these factors are helpful to consider as analytical framework, they are not a set test for fair dealing. The factors may not arise in every case, and additional factors may be considered by the courts.

The decision expanded the scope of the fair dealing exception dramatically. Prior to the Supreme Court of Canada's decision in *CCH*, the exception was interpreted restrictively, rarely applying to entire works.[21] The Court held that the fair dealing exception, like all other exceptions in the *Copyright Act*, is a "user's right" and ought therefore not to be interpreted restrictively. Exceptions were not viewed as "user's rights" prior to the decision. In fact, the idea of "user's rights" did not exist in the landscape of Canadian copyright law at all prior to the ruling of the Supreme Court of Canada in this case.[22]

The introduction of the concept of "user's rights" is tied to another important concept in copyright law introduced by the Court in the CCH case. That is, exceptions are to be understood as integral parts of the *Copyright Act*, and where an exception is available, copyright must be taken to not have been infringed at all. Thus, if it can be established that the copying was done for the purpose of research or private study and that it was "fair," copyright will be held to not have been infringed. Furthermore, whereas exceptions are typically

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[18] D. J. Gervais, "Canadian Copyright Law Post-CCH," 18 I.P.J. 131 [Gervais].

[19] *CCH Canadian Ltd.* v. *Law Society of Upper Canada* [2002] F.C.J. No. 690.

[20] *CCH*, *supra* note 14 at para 53.

[21] *Harris*, *supra* note 13.

[22] *Ibid.*

interpreted restrictively, an exception that is understood as an integral part of the *Copyright Act* may be entitled to a broad and purposive interpretation.[23]

It is interesting to note that the factors set out by the Court to assist in the assessment of whether a dealing is fair are very similar to those utilized in the United States. The statutory fair use criteria set out in the United States include the purpose and nature of the use, the nature of the protected work, the amount and substantiality of the portion used in relation to the work as a whole, and the effect of the use on the protected work's value or potential market.[24] However, whereas in the United States the criteria are statutory and must each be considered in an analysis, the factors set out by the Supreme Court of Canada in *CCH Canadian Ltd.* v. *Law Society of Upper Canada* are non-exhaustive and need not be applied in each case.[25] In addition, while the fair dealing exception can only be used in relation to the specific purposes set out in the *Copyright Act* in Canada, the American approach has an open list of permissible purposes.[26] However, these purposes are similar to those allowed by statute in Canada and include criticism, comment, and research. As such, in affirming the list of factors suggested by the Federal Court of Appeal, the Supreme Court of Canada moved the Canadian approach to assessing fairness in dealing to an analysis similar to that employed in the United States, albeit an approach that is more flexible in regard to the list of factors to consider in fairness and more restrictive in regard to the purposes to which an exclusion may be applied.[27]

As a result of its analysis of the factors noted above, the Court held that the fair dealing exception is available to the Law Society. As such, the Law Society was not held to have infringed the publishers' copyright when it created and delivered copies of legal materials to its patrons.

The Supreme Court of Canada held that while the reported judicial decisions including the headnotes and summaries accompanying

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[23] *Gervais*, *supra* note 18.

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

[27] *Ibid.*

judicial decisions were the subject of copyright, the judicial decisions themselves were not. The compilations of material were, however, subject to copyright protection. It stands to reason that the photocopying of a judicial decision itself, without the aid of a headnote, summary, or other addition by the publisher, would not be an infringement of the publisher's copyright at all, whether the dealing was "fair" or not and regardless of the purpose of the copying.

Authorization

The Court considered whether the provision of self-service photocopiers for patrons in the Great Library constituted an authorization on the part of the Law Society to patrons to infringe the publishers' copyright. The Court held that the question of whether authorization took place is a factual one and may be inferred from lack of action in some circumstances. It stated that "a person does not authorize infringement by authorizing the mere use of equipment that could be used to infringe copyright."[28] It also affirmed the presumption that persons who authorize activities only authorize them to the extent that is in accordance with the law. The presumption may be rebutted where a sufficient degree of control, or a relationship, between the person authorizing the use of equipment and the person committing the act of photocopying is established.

The Court began by stating that no evidence had been adduced to show that the photocopiers had been used to infringe copyright. It then stated that, even if the photocopiers had been used to infringe copyright, the library lacked sufficient control over its patrons to be said to authorize any infringements, as it was not in an employer-employee or master-servant relationship with them. Furthermore, the Court held that a notice posted near the self-service photocopiers reminding patrons that the use of the photocopiers is governed by copyright law was not sufficient evidence to rebut the presumption that the Law Society only authorized photocopying to the extent that is in accordance with the law.

Based on the reasoning of the Court, law libraries are still open to liability for authorizing infringement if their own employees are involved in an infringing activity. Thus, care must be taken by law libraries across Canada to ensure that adequate safeguards are in place

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[28] *CCH*, *supra* note 14 at para 38.

to ensure that employees do not use the self-service photocopiers provided to infringe copyright as their employer law libraries may be held to have authorized their activity in this case.

Effects of the Decision

Legal Research and Licensing

The Court held that research for commercial purposes was considered to be research for the purpose of the Research or Private Study Exception in s. 29 of the *Copyright Act*. This holding allows the exception to be used by lawyers and other legal practitioners in the practice of law.

It has been suggested that the publishers defended this case in order to ultimately require lawyers and all users of the legal material published by Canadian Ltd., Thomson Canada Ltd., and Canada Law Book Inc. to pay extra license fees for copies made of the legal materials in question.[29] If the publishers had been successful on appeal to the Supreme Court of Canada, the costs of legal services may have increased as the costs of obtaining licensing would likely have ultimately been passed on to clients and consumers of legal services. Of course, this exception from the requirement to obtain licensing only applies where all of the requirements set out in the case for the fair dealing exception are met. That is, the copying must be for an excepted purpose, and it must be fair.

Access to the Law

The Supreme Court of Canada helped to ensure equal access to the law by ruling as it did in this case.

The Great Library is located in downtown Toronto and does not allow its materials to be removed from the library. As such, if patrons had not been allowed to make copies, they may have faced the extreme inconvenience of having to travel to Toronto for the time required to complete their research rather than simply being allowed to copy and transport the materials to their place of research. This would have resulted in increased inconvenience for the clients of

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[29] Law Society of Upper Canada: Notice to the Profession. "Supreme Court of Canada Releases CCH Canadian v. Law Society of Upper Canada Copyright Decision."

counsel who do not work in Toronto, as they may have been faced with the added cost of hotel bills and other travel expenses. This lack of access to the Great Library is particularly onerous on lawyers who do not practise in law firms possessing in-house libraries and who do not have access to regional law libraries. This line of reasoning also applies in the case of self-represented litigants seeking to obtain information for use in their actions.

In addition, counsel and self-represented litigants in other parts of the country who are not able to travel to Toronto could not have accessed the resources of the Great Library at all. As a result of their proximity to the Great Library, counsel and self-represented litigants in Toronto may have received an unfair advantage with regard to access to research.

By deciding in favour of the Law Society, the Supreme Court of Canada has prevented this inequitable result. Counsel and litigants are able to make photocopies for research and private study, and legal materials may be faxed to patrons across the country.

Shift to a Balanced Approach

In the August 1990 judgment in *Bishop* v. *Stevens*,[30] Justice McLachlin (as she then was) stated as follows: "As noted by Maugham J., in *Performing Right Society, Ltd.* v. *Hammond's Bradford Brewery Co.*, [1934] 1 Ch. 121 (C.A.) at p. 127, 'the Copyright Act, 1911, was passed with a single object, namely, the benefit of authors of all kinds, whether the works were literary, dramatic or musical...'" Copyright law was interpreted as author protection legislation at that time.[31] However, in the case of *CCH Canadian Ltd.* v. *Law Society of Upper Canada*, the Court affirmed a new standard. The Court in *Théberge* v. *Galerie d'Art du Petit Champlain inc.*, [2002] 2 S.C.R. 336, stated at para. 30-31 that the *Copyright Act* is a "balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator." The Court in *CCH* accepted this position, making it the new standard in Canada. As a result, the law in Canada is now that the courts must balance the interests of the authors of works against the public interest.

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[30] 31 C.P.R. (3d) 394.

[31] *Rush supra* note 8.

The Court in *CCH* took measures in order to protect the rights of users. For example, the Court stated that "'Research' must be given a large and liberal interpretation in order to ensure that users' rights are not unduly constrained."[32] In the context of the definition of "originality," the Court stated that "[w]hen courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation."[33] These statements indicate the degree to which the Court now leans toward a balanced approach. This balanced approach will be sure to govern the way in which copyright legislation is interpreted by the Courts in the future.

Conclusion

The Supreme Court of Canada added significantly to the law of copyright in the case of *CCH Canadian Ltd.* v. *Law Society of Upper Canada*. It introduced a new test for originality: that of skill and judgment. It stated that the fair dealing exception is an integral part of the *Copyright Act* instead of a mere defence to a charge of copyright infringement. It is now a "user's right." It confirmed that research for a commercial purpose qualifies for the research and private study exception. It set out factors to consider in deciding whether a particular dealing is fair. It also entrenched the rebuttable presumption that a person who provides equipment that may be used in the infringement of copyright only authorizes the use of the equipment insofar as is consistent with the law. The decision of *CCH Canadian Ltd.* v. *Law Society of Upper Canada* clarified many areas of copyright law that were murky before the decision. More importantly, it demonstrated a shift in the focus of copyright law from author protection to a more equal balancing of interests. It set the direction of copyright law for the future and will be sure to impact heavily on the development of the law of copyright in the years to come.

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[32] *CCH, supra* note 14 at para 51.

[33] *Ibid* at para 23.

FEDERATED ANTI-POVERTY GROUPS OF B.C. v. VANCOUVER (CITY) AND WESTERN PRINT MEDIA

Raewyn Brewer

Introduction

> *Now, at nineteen, she's so brimming with goodness that she sits on a Toronto street corner […] Norah sits cross-legged with a begging bowl in her lap and asks nothing of the world. Nine-tenths of what she gathers she distributes at the end of the day to other street people. She wears a cardboard sign on her chest: a single word printed in black marker—GOODNESS.*[1]

Norah is Reta Winters' daughter. Reta is the narrator of Carol Shields' *Unless*. Shields' novel, however, is not about panhandling per se. Rather, *Unless* traces the impact Norah's situation has on her family. While Norah sits passively on the corner of Bathurst and Bloor and passersby drop money into her bowl, her mother writes "My heart is broken" on a washroom wall.[2] Norah's father surmises a traumatic event may have triggered her move to the street. Her two younger sisters sit beside her every Saturday afternoon, sandwiches and water in tow. Yet one is sleeping poorly, the other falling behind in math. Norah's behaviour does not attract a legal response. No law enforcement officer approaches Norah and asks her to move. No law enforcement officer tells Norah she could be fined. However, if

1 C. Shields, *Unless* (Toronto: Random House Canada, 2002) at 11-12.

2 *Ibid.* at 67.

Norah were transplanted to the corner of Vancouver's Granville and Robson, the story may have been different due to By-law No. 8309 ("By-law 8309" or "*Panhandling By-law*"):[3]

> **70A** (1) **"solicit"** means to, without consideration, ask for money, donations, goods or other things of value whether by spoken, written or printed word or bodily gesture, for one's self or for any other person, and solicitation has a corresponding meaning, but does not include soliciting for charity by the holder of a license for soliciting for charity under the provisions of the License by-law.
>
> **"cause an obstruction"** means
>
> (a) to sit or lie on a street in a manner which obstructs or impedes the convenient passage of any pedestrian traffic in a street, in the course of solicitation.
>
> (2) No person shall solicit in a manner which causes an obstruction.[4]

Sitting with a hand-printed sign around her neck and bowl in her lap, Norah offers no consideration for the money she receives. Nor does she have a license to solicit for charity. Thus, Norah's behaviour falls within the meaning of s. 70A(1). Furthermore, Norah sits on the street. Therefore, if she obstructs or impedes the convenient passage of *any* pedestrian traffic, she could be fined up to $2,000 for breaching

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[3] Although By-law 8309 uses the word "solicit" instead of "panhandling," Taylor J. in the British Columbia Supreme Court decision *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)* stated the By-law is also referred to as the "*Panhandling By-law*." [2002] B.C.J. No. 493 at para. 1 (QL) [*Vancouver (City)*]. Furthermore, I am adopting Taylor J.'s definition of "panhandling" for the purposes of this paper: "to beg for money in the street," at para. 2.

[4] *Ibid.* at para. 40. By-law No. 8309 s. 70A(1) also includes:

(b) to continue to solicit from or otherwise harass a pedestrian after that person has made a negative initial response to the solicitation or has otherwise indicated a refusal,

(c) to physically approach and solicit from a pedestrian as a member of a group of three or more persons,

(d) to solicit on a street within 10 m of

(i) an entrance to a bank, credit union or trust company, or

(ii) an automated teller machine, or

(e) to solicit from an occupant of a motor vehicle in a manner which obstructs or impedes the convenient passage of any vehicular traffic in a street.

s. 70A(2).[5] This troubles me deeply. Although Norah is a fictional character, her situation is not; I am wary of regulating such behaviour.[6]

My concerns about regulating panhandling are echoed by many throughout Canada. A coalition of three umbrella-like anti-poverty organizations, representing 565 member groups, challenged the validity of By-law 8309 in *Federated Anti-Poverty Groups of B.C. v. Vancouver (City) ("Vancouver (City)")*.[7] The Federated Anti-Poverty Groups of B.C., the End Legislated Poverty Society, and the National Anti-Poverty Organization joined forces to challenge the *Panhandling By-law*'s validity on five bases. First, they claimed the Vancouver Charter did not give the City the required authority to enact such a by-law.[8] Second, the petitioners asserted By-law 8309 was *ultra vires* the City of Vancouver because panhandling regulation is a "matter of criminal law under exclusive federal jurisdiction pursuant to s. 91(27) of the *Constitution Act*, 1867."[9] Their final three arguments involved the *Canadian Charter of Rights and Freedoms* ("*Charter*"). The petitioners argued the *Panhandling By-law* infringed three Charter rights:

> **2** (b) "freedom of thought, belief, opinion and expression"
>
> **7** "Everyone has the right of life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."
>
> **15** (1) "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

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5 *Ibid.* at para. 114. *The Street and Traffic By-law No. 2849* sets a maximum $2,000 fine for infringement of By-law 8309. There is no minimum fine.

6 Vancouver is not alone in regulating "panhandling." An increasing number of Canadian cities and provinces are legislating similar regimes (albeit not identical). See for example Ontario's *Safe Streets Act*, S.O. 1999, c.8, as am. by S.O. 2002, c.17, Sched. F.; British Columbia's *Safe Streets Act*, S.B.C. 2004, c.75; City of Winnipeg, By-law, No. 7700/2000, *The Obstructive Solicitation By-law* (11 December 2002); City of Calgary, By-law, No. 3M99, *Panhandling Bylaw* (8 March 1999), as am. by City of Calgary By-law, No. 6M2004.

7 *Vancouver (City), supra* note 3 at para. 6.

8 *Ibid.* at para. 81.

9 *Ibid.* at para. 102.

After Taylor J. addressed each of these five issues separately in *Vancouver (City)*, he summarized his findings at paragraph 313:

(1) The City of Vancouver had the authority to enact By-law 8309;

(2) By-law 8309 is not a criminal matter and, therefore, falls under s. 92(16) of the *Constitution Act*, 1867;

(3) By-law 8309 does not infringe ss. 2(b), 7 and 15 of the Charter.

Accordingly, Taylor J. concluded By-law 8309 was "validly enacted and is properly of force and effect."[10] As I asserted in relation to Norah's begging in *Unless*, I am uncomfortable with Vancouver's Panhandling By-law remaining in force. Moreover, I find much of Taylor J.'s reasoning in *Vancouver (City)* problematic, particularly in relation to the *Charter*.

Despite my discontent, the focus of this paper will not be a doctrinal analysis of *Vancouver (City)*. Instead, I am using *Vancouver (City)* as a case study. In the past ten years panhandling has become a hot political and social topic;[11] and a set of norms has developed around panhandling. In recent Western Canadian newspapers panhandling is regularly portrayed in articles, editorials, and letters to the editor in an unfavourable manner. A panhandler's appearance, personality, motivation level, morality, and behavioural tendencies are accounted for. Each portrayal is unique. However, I have identified what I consider to be two of the most powerful norms that animate not only many such representations, but also *Vancouver (City)*. In *Vancouver (City)* Taylor J. assessed the petitioners' and respondents' submissions in a manner that reflects these pervasive and persuasive norms: first, panhandling is likened to criminal behaviour; second, panhandling is perceived as a threat to downtown businesses. These norms, which are reflected in calls for increased panhandling regulation, are

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10 *Ibid.* at para. 313.

11 See A. Daniels, "Anti-panhandling Bylaw Splits Victoria Series: Civic Election 2002" *The Vancouver Sun* (15 November 2002) C6, online: ProQuest <http://proquest.umi.com> ("In the staid old capital ... the big issue is not capping taxes, but cap-in-hand); "City's Homeless Deserve Better," Editorial, *Toronto Star* (22 September 2003) A20, online: ProQuest <http://proquest.umi.com> (In Canada's largest city the homeless are "a local election issue. All four major candidates hoping to become mayor have plans for dealing with the homeless.").

troubling. Such assumptions fail to account for the complex social, political, cultural, and economic reasons for the unfortunate perpetuation of poverty, homelessness, and panhandling. In response I contend that we must develop a set of norms which *do* attend to panhandling's complexities. This response must occur immediately for we are living in an era where an increasing number of Canadian cities are regulating the time, place, and manner in which panhandling can occur. Finally, I conclude with one alternative norm that Canadians may wish to consider: panhandling as dialogue.

Panhandling is likened to criminal behaviour

Before addressing the five issues raised in *Vancouver (City)*, Taylor J. stated "it is necessary to set out a history of [By-law 8309's] enactment and the historical and present manner in which Vancouver manages movement."[12] He begins this historical review by succinctly summarizing where Vancouver gets its authority to enact by-laws.[13] Next, Taylor J. briefly examined the history of statutes governing panhandling.[14] It is within this latter section that certain panhandling norms first emerge, including the connection between begging and criminal activity. As Taylor J. related, "begging" was originally prohibited under the English *Vagrancy Act* of 1824, its Canadian counterpart enacted in 1869, and subsequently the *Canadian Criminal Code* of 1892.[15] For the next 80 years begging was prohibited under the *Criminal Code*. Although this offence was repealed in 1972,[16] the close nexus between begging and criminal behaviour continues to inform the panhandling discourse.

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12 *Vancouver (City)*, *supra* note 3 at para. 11.

13 *Ibid.* at paras. 12-21.

14 *Ibid.* at paras. 22-40.

15 *Ibid.* at paras. 23-24.

16 *Ibid.* at para. 27; *Criminal Code*, R. S. C. 1985, c. C-46 s. 175(1) (Currently s. 175(1) "Causing disturbance, indecent exhibition, loitering, etc." creates two summary offences which are related to the earlier provisions repealed in 1972: "Every one who" "(c) loiters in a public place and in any way obstructs persons who are there, or (d) disturbs the peace and quiet of the occupants of a dwelling-house by […] other disorderly conduct there […] is guilty of an offence punishable on summary conviction.").

One of the most striking examples of associating panhandling with criminal activity is found in the adoption of the "broken-windows syndrome" by advocates for increased panhandling regulation. The broken-windows syndrome was first developed in 1982 by George Kelling and James Q. Wilson.[17] They argued the perceived degree of social control in a certain area was related to its upkeep. More specifically, if a city street was lined with abandoned cars, piles of garbage, and buildings with "broken windows" further disorder and crime would closely follow.[18] Subsequently, Kelling and Wilson's theory was explicitly referenced and adopted by legal scholar Robert Ellickson in his 1996 article "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-space Zoning" ("Of Panhandlers").[19] Although Ellickson's views represented one particularly strong stream of anti-panhandling discourse, this influential article continues to animate understandings of panhandling. In "Of Panhandlers" Ellickson expanded Kelling and Wilson's conception of the broken-windows syndrome. He asserted this phenomenon could also be trigged by chronic begging activity: "[a] regular beggar is like an unrepaired broken window—a sign of the absence of effective social-control mechanisms in that public space."[20] Because of this perceived lack of social control, Ellickson concluded the incidence of street disorder, petty crime, and severe crime would increase whereby pedestrians would avoid that public space.

Ellickson's equation of panhandlers with broken windows and his use of the broken-windows syndrome discourse have been embraced by some Canadians, as is evident in a series of letters to the editors of major Western Canadian newspapers. Analogies have been drawn between panhandlers and trash,[21] robbers,[22] and the plague.[23]

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17 R. C. Ellickson, "Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public-space Zoning" (1996) 105 Yale L.J. 1165 (QL) [Of Panhandlers].

18 J. Waldron, "Homelessness and Community" (1982) 50 U.T.L.J. 371 at 380 (QL).

19 "Of Panhandlers," *supra* note 17.

20 *Ibid.* at 1181.

21 J. McCallum, Letter to the Editor *Calgary Herald* (28 November 2003) A20, online: ProQuest <http://proquest.umi.com>.

22 D. Doman, Letter to the Editor, *The Vancouver Sun* (13 October 2003) A7, online: ProQuest <http://proquest.umi.com>.

Furthermore, panhandlers have been held responsible for petty crimes and general lawlessness. For example, one visitor to Vancouver stated, "[i]t is a small stretch to go from panhandling to begging to pick-pocketing and, finally, to robbery and violence."[24] More recently *The Vancouver Sun* ran an article extolling the virtues of former New York Mayor Giuliani's successful and "creative" approach to crime: "the 'broken windows' method of law enforcement."[25] By "hiring more cops" and cracking down on "petty crime and degradation of public and private spaces," including panhandling, Mayor Giuliani signaled to New Yorkers that he cared about their city spaces.[26] Calls are rampant for Canadian city mayors to follow suit. And Canadian mayors are listening, if a January 2004 promise by Vancouver Mayor Larry Campbell to increase the city's police force by 200 officers in response to "rising public concern about crime, aggressive panhandling and what some Vancouver residents say is general lawlessness" is any indication.[27]

There is no reference to the broken-windows syndrome in *Vancouver (City)*. However, its underlying thesis emerges in a report Taylor J. excerpted in his judgment. The report, dated October 28, 1997, was made to the then Deputy Chief Constable of the Vancouver Police Department by Inspector Jones.[28] Among the eight categories delineated by Inspector Jones and accepted by Taylor J. are

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23 S. Sullivan, Letter to the Editor, *[Victoria] Times Colonist* (27 February 2003) A11, online: ProQuest <http://proquest.umi.com>.

24 G. Reiss, Letter to the Editor, *The Vancouver Sun* (3 September 2003) A9, online: ProQuest <http://proquest.umi.com>.

25 M. Milke, "Soft Liberal Views on Crime Ripe for Change," *The Vancouver Sun* (11 November 2003) A10, online: ProQuest <http://proquest.umi.com>.

26 *Ibid.*

27 F. Bula, "200 Police Will Be Added, Mayor Says: Larry Campbell Leads Forum on Neighbourhood Safety," *The Vancouver Sun* (12 January 2004) page number, online Canada.com News <www.canada.com>. Note, however, several British Columbian municipal leaders (such as Victoria's Mayor Alan Lowe) were *not* supportive of British Columbia's *Safe Streets Act*. British Columbia, Legislative Assembly, *Debates of the Legislative Assembly*, 26/16 (25 October 2004) at 1515 (Ms. J. Kwan).

28 Excerpts from the report can be found in *Vancouver (City)*, *supra* note 3 para. 61.

"Substance Abusers" and "Welfare Refusals."[29] Both categories included claims about panhandlers and their propensity to engage in criminal activity. According to Inspector Jones many panhandlers fall into the "Substance Abusers" category, resorting to "panning to obtain additional money for drugs".[30] Drugs in this context presumably refer not only to legal drugs, but also to illegal narcotics such as marijuana, cocaine, and heroin. The possession of these latter types of drugs is a criminal offence. Moreover this category stated that "some use … violence to obtain money,"[31] behaviour that can also be construed as criminal. In Jones's report, panhandlers falling under the "Welfare Refusals" category often hold the door open, as an apparently friendly gesture, for automated-banking machine customers. . Jones, however, claimed this "insidious tactic leaves an implied threat with every ATM customer … This amounts to thinly disguised extortion in the guise of helpfulness."[32] In addition to words like "threat" and "extortion" that have criminal connotations, Jones's report implicitly incorporates the broken-windows theory in the "Welfare Refusals" section:

> A concomitant effect is that passersby subconsciously see that the bank has passed into the hands of the panhandler and the bank is no longer in charge of its property. This subliminal message leaves a vague sense of unease and loss of security.[33]

To expand, the panhandlers' presence and criminal-like tendencies causes pedestrians to perceive that the bank lacks control over its property. In turn, they become fearful and less likely to revisit the

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[29] *Ibid.* at para. 62. The eight categories are: Street Kid Wannabees, Real Street Youth, Transients, Substance Abusers, Welfare Refusals, Frauds, Mentally Ill, and Outstanding Warrants. (Taylor J. stated "I am of the view that Inspector Jones's report, *despite expressing editorial opinions within each group*, has set out the various categories of panhandlers" [emphasis added]. Taylor J. included this disclaimer regarding Jones's editorial opinions after the categories were excerpted in full from the original report. Furthermore, Taylor J. made no specific mention about what parts of Inspector Jones's report were "editorial opinions." I think this renders Jones's chosen phrases more significant than if simply the categories were adopted and Taylor J. himself determined their content.

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

[31] *Ibid.*

[32] *Ibid.*

[33] *Ibid.*

bank (or the city street where the bank resides). Therefore this described scenario exemplifies how the broken-windows syndrome functions in panhandling discourse. This line of thinking may also have influenced the City of Vancouver when its current anti-panhandling legislation was drafted.

The precursor to By-law 8309 included more-expansive panhandling prohibitions.[34] Although the current *Panhandling By-law* adopted very little from its predecessor,[35] it did incorporate the prohibition on soliciting within ten metres of "(i) an entrance to a bank, credit union or trust company, or (ii) an automated-teller machine".[36] The National Anti-Poverty Organization ("NAPO"), one of the petitioners in *Vancouver (City)*, suggested that such provisions "assume panhandlers are more likely to be thieves than other citizens."[37] This ignores the economic reality of panhandling. People may solicit outside banks and ATMs simply because they are "wisely chosen locations for panhandling":

> From the point of view of a panhandler … these sites could be considered strategic locations where a non-panhandler has made some kind of financial transaction … and possibly has some loose change readily available upon request.[38]

Thus, by allowing cities like Vancouver to prohibit panhandling near banks and ATMs, NAPO contends two troubling conclusions may result: panhandlers are equated with thieves, and they are denied the opportunity to increase their earnings. Moreover, if the broken-windows theory underlies such ATM and banking provisions, as Inspector Jones's report in *Vancouver (City)* suggests, Jeremy Waldron presents a compelling argument as to why this is highly problematic.

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34 See *Vancouver (City)*, *supra* note 3 at para. 36 for By-law No. 7885. (For example, By-law No. 7885 prohibited all panhandling while sitting or lying on the street, and panhandling between sunset and sunrise).

35 *Ibid.*

36 *Ibid.*

37 National Anti-Poverty Organization, "Short-Changed on Human Rights: A NAPO Position Paper on Anti-panhandling By-laws" (November 1999) at 9-11. I acquired a copy of "Short-Changed" by contacting NAPO directly. NAPO, a national coalition of 396 groups across Canada, is a non-profit, non-partisan organization that conducts advocacy, education, and research on behalf of those living in poverty (*Vancouver (City)*, *supra* note 3 at para. 6).

38 NAPO, *supra* note 37 at 9.

Waldron suggested it is erroneous to engage the broken-windows discourse when analyzing panhandling for two main reasons.[39] First, regardless of whether literally broken windows indicate a sign of decay and lack of social order, human beings cannot be analogized to broken windows. If something is broken, we assume it must be fixed. Waldron argues, however, that panhandlers do not need to be fixed. Rather the underlying cause of panhandling—poverty—needs to be addressed. Waldron's view is shared by many anti-poverty activists, as evidenced in an excerpt from an article written by a panhandling outreach worker in Calgary:

> Panhandling, begging, whatever you want to call it, will always be prevalent in our city … It is unrealistic to hope to ever eliminate it unless we also eliminate poverty and homelessness. Panhandling is a symptom of poverty and should be viewed as such.[40]

A similar response was given by a Calgary Alderperson, who had worked as a social worker before joining city council, when asked to describe why he "frustrated efforts to immediately move ahead" with amendments to a panhandling bylaw.[41] According to the *Calgary Herald*, the Alderperson "defended his stance, saying the proposal represents only a cosmetic change and fails to get to the real issues."[42] Thus, by focusing on fixing the panhandling problem we shift our attention away from the underlying issues.

In addition to Waldron's belief that the broken-windows theory diverts our attention from poverty issues, Waldron maintains that the theory itself is flawed. He argues that the broken-windows discourse assumes there is a universally accepted definition of (dis)order. But, according to Waldron, this assumption is incorrect. Why? Because what constitutes (dis)order is a normative claim. Thus, how (dis)order

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39 Waldron, *supra* note 18 at 381-383 (He also uses this argument in relation to homelessness.).

40 A. Major-Hodges, "Hey Buddy, Can You Spare a Dime?," *Calgary Herald* (23 December 2003) A15, online: ProQuest <http://proquest.umi.com> [emphasis added].

41 T. Seskus, "Alderman Stalls Panhandling Law: Expected To Be Passed in Two Weeks," *Calgary Herald* (13 January 2004) page number, online: Canada.com News <www.canada.com> (The new bylaw targeted "those who continue to panhandle after a request has been declined," subjecting them to a fine of "$50 for the first offence and $100 for subsequent infractions.").

42 *Ibid.*

is defined will depend on the norms one endorses. Waldron suggested two very different sets of norms that could inform an understanding of (dis)order when thinking about panhandling. First, there are "norms of order for a complacent and self-righteous society, whose more prosperous members are trying desperately to sustain various delusions about the situation of the poor."[43] According to Waldron the United States subscribes to these norms of order. Americans have deluded themselves into thinking they live in an ordered, "just and prosperous society, a society of equal opportunity."[44] So the presence of panhandlers, "persons who live on the very margins of civilized existence," represents disorder.[45] He contrasts this with "norms of order for a society whose members are attempting in good faith to live honestly with a given mixture of great prosperity and great poverty."[46] India was given as an example of a country where these norms of order are predominant. In India "people regard street begging as a normal activity and not all as a disorder."[47] Not surprisingly, for Waldron it is essential that as North Americans we abandon our current normative understandings in favour of those embraced in India. Whether Canadians will accept panhandling as a normal activity remains to be seen. However, as an examination of both NAPO's and Waldron's writings suggest, simply likening panhandling to criminal behaviour obscures the realities of panhandling experiences: the Norah Winters of the world get lost in the shuffle.

Panhandling is constructed as a threat to downtown businesses

Taylor J.'s summary in *Vancouver (City)* of how Vancouver's panhandling by-laws originated highlighted how influential the city's business community was in promoting their enactment. Uniting many business community members in their calls for anti-panhandling legislation was a continued adherence to the second norm that animates panhandling discourse: panhandling adversely impacts

43 Waldron, *supra* note 18 at 381.

44 *Ibid.* at 380.

45 *Ibid.*

46 *Ibid.* at 381.

47 *Ibid.*

downtown businesses. The Downtown Vancouver Business Association ("Association") is one group that successfully used this argument to lobby Vancouver's City Council for policy changes.[48] Taylor J. identified their efforts, in conjunction with others, as having a direct influence on Vancouver's response to panhandlers. As he stated, the implementation of By-law 8309 and its predecessor By-law 7885 was "unquestionably" a "react[ion] to a cacophony of complaints."[49] How these complaints were constructed by the Association and others is succinctly summarized in a report authored by the City Manager for Vancouver's Council's Standing Committee on Planning and Environment (April 1998):

> [P]anhandling … has become a growing concern to residents and business communities throughout Vancouver. It creates an intimidating and unsightly atmosphere, negatively impacting on the quality of life of Vancouver's citizens while adversely affecting businesses and tourism in our City.[50]

As business and tourism are mainstays of many Canadian cities, similar claims are echoed throughout Canada. Victoria is one city where the business community is increasingly concerned with panhandling. When interviewed for a February 2003 article about panhandling, Mayor Alan Lowe asserted he had never seen the business community so angry and frustrated over an issue.[51] Even more striking is the response to a comment made at a Greater Victoria Chamber of Commerce meeting in 2003. When a business activist stated "begging," among other problems, "is killing us economically and socially," the local paper reported "the room erupted in applause."[52] *Vancouver (City)* illustrated that municipalities can legally respond by enacting panhandling regulations when faced with concerns similar to those raised in Vancouver and Victoria. However, the by-laws each city enacts must successfully balance competing interests.

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48 *Vancouver (City)*, *supra* note 3 at para. 54.

49 *Ibid.* at para. 44.

50 *Ibid.* at para. 33.

51 L. Dickson, "Reclaiming Downtown Series: The Red Zone," *[Victoria] Times Colonist* (9 February 2003) D5, online: ProQuest <http://proquest.umi.com> (The article also addresses other issues relevant to the downtown core, including prostitution and drug dealing).

52 *Ibid.*

What are these competing interests? Taylor J. identified two main groups whose interests must be accounted for when drafting panhandling regulations: panhandlers and pedestrians. Panhandlers represent "those who do not have the financial means to provide for themselves for a full and meaningful existence" whereas pedestrians represent "those who are to part with any 'spare change.'"[53] Moreover, because these two groups have opposing goals when they use city streets, Taylor J. noted "a tension has developed" between them.[54] According to s. 70A(1) of By-law 8309, panhandlers use the street to "ask for money, donations, goods or other things of value whether by spoken, written or printed word or bodily gesture."[55] On the other hand, pedestrians' goals include wanting to walk (unimpeded) down a city street. Downtown retailers and businesspersons are included in this latter group. These individuals also want to conduct their business in a way that maximizes profit levels. Although Taylor J. only identified two main interest groups, the Vancouver administrator responsible for "policies on activities conducted upon the streets and sidewalks," and referred to in *Vancouver (City)*, identified 19 such competing interest groups. These interest groups included not only pedestrians and panhandlers, but also, among others, street vendors, newspaper boxes, Canada Post delivery boxes, fire hydrants, and phone booths.[56] In balancing the interests of these diverse stakeholders, this Vancouver administrator identified the city's primary concerns as the "'maintenance of a safe passage and smooth and unobstructed pedestrian traffic flow on the City's sidewalks."[57] Taylor J. assessed By-law 8309 accordingly, concluding that it successfully met the "dominant purpose" of regulating "the safe and efficient movement of pedestrians."[58]

Rather than striking a balance of rights, anti-poverty activists argue a hierarchy of rights is created when the primary purpose of regulating city streets is defined as maintaining "the safe and efficient movement

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53 *Vancouver (City)*, *supra* note 3 at para. 43.

54 *Ibid.*

55 *Ibid.* at para. 40.

56 *Ibid.* at paras. 64-66.

57 *Ibid.* at para. 65.

58 *Ibid.* at para. 157.

of pedestrians."[59] The normative claim that panhandlers threaten the interests of downtown consumers and businesses ignores the fact that the anti-panhandling legislation "threatens the interests and rights of those who panhandle."[60] Panhandlers' rights are, ultimately, subordinated to the business community and to "those who are to part with any 'spare change.'"[61] Moreover, scholar Don Mitchell contended an "annihilation of space by law" occurs when the rights of pedestrians, business owners, and consumers are favoured in panhandling legislation.[62] According to Mitchell, legal remedies are used to "cleanse the streets … by simply erasing the spaces in which [the homeless] must live."[63] The petitioners in *Vancouver (City)* echoed Mitchell's argument when they stated By-law 8309's purpose is "to restrict and prohibit 'the intimidating and unsightly people who panhandle.'"[64] That is, the Panhandling By-law attempts to cleanse Vancouver's streets, and in turn, the spaces panhandlers can legally occupy are reduced. Such legislation, as Mitchell aptly stated, "creat[es] a world in which a whole class of people simply cannot be, entirely because they have no place to be."[65] This annihilation of space by law is particularly troubling given panhandling regulation targets panhandlers in public spaces.

Conclusion: Panhandling as Dialogue

Taylor J. asserted that "it must not be forgotten that the street plays an important role in providing a public forum for the expression of ideas and thoughts."[66] This reminder highlights that public spaces—city parks, boulevards, and street corners—oftentimes are perceived

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59 *Ibid.*

60 D. Mitchell, "The Annihilation of Space by Law: The Roots and Implications of Anti-homeless Laws in the United States" in N. Blomley, D. Delaney, and R. T. Ford, eds., *The Legal Geographies Reader* (Oxford: Blackwell Publishers, 2001) 6 at 12.

61 *Vancouver (City)*, *supra* note 3 at para. 43.

62 Mitchell, *supra* note 60 at 8 (Mitchell made this claim in relation to, what he terms, anti-homeless legislation in the United States).

63 *Ibid.* at 7.

64 *Vancouver (City)*, *supra* note 3 at para. 89.

65 Mitchell, *supra* note 60 at 8.

66 *Vancouver (City)*, *supra* note 3 at para. 158.

as places where diverse individuals can come together and exchange ideas. As a venue for dialogue, public spaces "carv[e] out a site within which free, rational discourse can occur between citizens, distanced from the particularities of the state, the economy, and the private domain."[67] For some people this characterization of public spaces is troubling. Problems arise from the belief that members of the public cannot be trusted to use their city spaces wisely: a "space that all can enter … is a space that each is tempted to abuse."[68] Similarly, in Ellickson's terms, "public spaces are classic sites for 'tragedy'" because they are open to everyone.[69] The response to these fears is the endorsement of public space regulation, including anti-panhandling legislation. A response I contend that we must be wary of.

I believe, however, there is a more constructive way to understand panhandling in public spaces. The presence of panhandlers in our cities may indeed be unnerving, yet our communities' public spaces do include panhandlers: human beings who have their own interests and needs, families, and friends. And, as centers for encouraging conversations and encounters with diverse individuals, it is precisely within our city spaces that alternative political, social, and cultural norms can emerge. We must not only encourage the emergence of such alternative norms by repealing anti-panhandling legislation, but also recognize the dangers raised by our current understandings of panhandling. Our focus should be on the underlying issues, such as poverty and homelessness. Our reaction to the Norah Winters of the streets should be one of acceptance, not marginalization.

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67 "Private Needs and Public Space: Politics, Poverty, and Anti-Panhandling By-Laws in Canadian Cities" in The Law Commission of Canada, ed., *New Perspectives on the Public-Private Divide* (Vancouver: UBC Press, 2003) 40 at 55.

68 Ellickson, *supra* note 17 at 20.

69 *Ibid.*

RECENT DEVELOPMENTS IN MARIJUANA POSSESSION LAW

Kathleen McIntosh

Introduction

> *Marijuana possession is a contentious issue. For decades the topic has been the subject of a raging national debate involving the media, politicians, lawyers, and everyday citizens. Should marijuana possession be criminal? Should it be decriminalized? Should it be legal? Is the prohibition on marijuana possession constitutional? Should ill Canadians be able to legally consume marijuana?*

Historically this debate involved significant discussion but very little action. More recently, however, there has been a flurry of activity. In less than five years, the issue has gone before several appellate courts, including the Supreme Court of Canada. Regulations were developed to allow seriously ill persons to legally possess and cultivate marijuana. Furthermore, a marijuana decriminalization bill was put before the House of Commons. These significant events, combined with a brief discussion of the history of marijuana possession, are the focus of this paper.

A Brief Historical Overview

Marijuana was first criminalized in 1923 under the *Opium and Narcotic Drug Act*.[1] The rationale for this event is not entirely certain. There was no discussion in the House of Commons. The Honourable H.S. Beland simply stated that "[t]here is a new drug in the Schedule."[2] As well, there were no cannabis-related problems at that time; opium was the drug of choice.

Interestingly, the prohibition on marijuana took place one year after *The Black Candle*[3] was published. The author of that book, Emily Murphy, was a police magistrate and judge of the Juvenile Court in Edmonton, Alberta. She devoted an entire chapter to marijuana, which she called an "extraordinary menace."[4] In that chapter she reproduced portions of a sensationalist letter from the chief of police in Los Angeles, California:

> Persons using this narcotic, smoke the dried leaves of the plant, which has the effect of driving them completely insane. The addict loses all sense of moral responsibility. Addicts to this drug, while under its influence, are immune to pain, and could be severely injured without having any realization of their condition. While in this condition they become raving maniacs and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty…[5]

Murphy further quoted the chief of police's statement that excessive consumption of marijuana "ends in the untimely death of its addict."[6] It is possible that concern about these supposed side effects of marijuana consumption influenced Parliament to take pre-emptive action.

Despite the prohibition on marijuana, enforcement was almost non-existent for several decades. The Dominion Bureau of Statistics reported that only 25 marijuana offences were recorded across

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[1] S.C. 1923, c. 22.

[2] *House of Commons Debates* 3 (23 April 1923) at 2124 (Hon. H.S. Beland).

[3] E. F. Murphy, *The Black Candle* (Toronto: Thomas Allen, 1922).

[4] *Ibid.* at 331.

[5] *Ibid.* at 332-33.

[6] *Ibid.* at 333.

Canada between 1930 and 1946.[7] However, this changed dramatically in the 1960s when marijuana was listed in the *Narcotic Control Act*.[8] Enforcement of the marijuana prohibition was fervent. In a four-year period, convictions for simple possession of marijuana rose from 431 to 8,389.[9]

The Canadian public became concerned about this mass production of "cannabis criminals." In 1968 the Liberal government responded by establishing the Le Dain Commission, formally known as the Commission of Inquiry into the Non-Medical Use of Drugs. The Commission engaged in an extensive analysis of drug use, treatment, and control and made recommendations for reform. Of particular significance was the recommendation for "the repeal of the prohibition against the simple possession of cannabis."[10]

In an effort to make this recommendation a reality, Bill S-19 was launched in the Senate in 1974. It proposed that marijuana be decriminalized and that fines be the sole penalty for possession. The bill was approved by the Senate but subsequently died on the order paper in the House of Commons.

The decades to follow were full of promises for reform, yet the only reform that came to fruition took place in 1996 with the passage of Bill C-8, the *Controlled Drugs and Substances Act* (*CDSA*).[11] This new legislation effectively changed nothing. Marijuana possession is still a criminal offence.[12] A conviction results in a criminal record and is punishable by a fine of $1,000 and six months' imprisonment.[13]

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[7] G. H. Josie, *A Report on Drug Addiction in Canada* (Ottawa: King's Printer, 1948) cited in M. Green & R. D. Miller, "Cannabis Use in Canada" in Vera Rubin, ed., *Cannabis and Culture* (The Hague: Mouton, 1975) 497 at 498.

[8] S.C. 1960-61, c. 35.

[9] Canada, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972) at 290 (Chair: G. Le Dain).

[10] *Ibid.* at 302.

[11] S.C. 1996, c. 19 [*CSDA*].

[12] *Ibid.* at s. 4(1).

[13] *Ibid.* at s. 5.

Parker and the Aftermath

Despite the longstanding controversy surrounding marijuana possession, the prohibition on marijuana possession had never been successfully challenged until *R. v. Parker*[14] ("*Parker*") In that case, the accused suffered from a severe form of epilepsy. From a very young age he was prone to experience seizures that would cause him to lose consciousness and shake violently while lying on the ground. During these seizures he vomited, lost control of his bowels, choked on his saliva, and smashed his head on the ground. Aggressive medical treatment, including a temporal lobectomy, did not improve his condition. He found that smoking marijuana helped minimize the frequency and intensity of the seizures.

The police searched Parker's home and charged him with possessing marijuana contrary to s. 4(1) of the *CDSA*. Parker argued that s. 4(1) of the *CDSA* violated his right to liberty and security of the person under s. 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*)[15] because it did not allow for the medical use of marijuana. The Ontario Court of Appeal unanimously agreed. Given that there was no way for Parker to legally obtain and possess marijuana for medical use, he was forced to choose between his health and imprisonment. This was a clear violation of s. 7 that could not be saved by s. 1 of the Charter. The Court declared the marijuana prohibition in s. 4 to be invalid, but suspended the declaration of invalidity for a period of 12 months to give Parliament an opportunity to address the constitutional defect.

As a result of this declaration of invalidity, the Governor-in-Council enacted the *Marijuana Medical Access Regulations (MMAR)*.[16] The *MMAR* came into force the day before the Parker suspension expired.[17] They provide a regulatory framework for seriously ill people to possess marijuana for therapeutic purposes. They established an application program whereby seriously ill persons could apply for permits to possess marijuana. Permit holders are also able

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[14] (2000), 146 C.C.C. (3d) 193 (Ont. C.A.) (QL) [*Parker*].

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

[16] S.O.R./2001-227.

[17] *Ibid.* at s. 73.

to grow their own marijuana (or have a designated person grow it for them) if approved for a production licence.

The validity of the *MMAR* was subsequently challenged in Hitzig v. Canada[18] ("Hitzig"). In that case, the Ontario Superior Court of Justice held that the *MMAR* violated s. 7 of the *Charter* because they did not provide seriously ill Canadians with legal access to marijuana. Individuals with possession permits or production licences were required to rely on the black market for access to marijuana and marijuana seeds. The violation could not be saved under s. 1; therefore, the *MMAR* were declared invalid. The declaration of invalidity was suspended for six months.

These events led to considerable disagreement as to the state of the law. Was marijuana possession legal or illegal? Saskatchewan[19] and Alberta[20] trial judges held that marijuana possession was illegal. Ontario[21] and Prince Edward Island[22] courts concluded that it was legal. Courts in British Columbia rendered conflicting judgments. Chief Justice Stansfield in *R. v. Nicholls*[23] ("*Nicholls*") found that marijuana possession was illegal, whereas Judge Chen in *R. v. Masse*[24] concluded that it was legal.

These differing applications of the criminal law across Canada has led to several challenges. In *R. v. Clarke*,[25] the accused claimed that it was an abuse of process to allow the federal Crown to prosecute marijuana possession charges in Nova Scotia when other provinces found that marijuana possession was not illegal. The Court agreed:

> I find that it would be oppressive and vexatious to allow the prosecution of Ms. Clarke on the charge of marijuana possession to continue, given the state of this law in the Provinces of Ontario

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[18] (2003), 171 C.C.C. (3d) 18 (Ont. S.C.J.) (QL).

[19] *R. v. Hadwen* (2003), 174 C.C.C. (3d) 420 (Sask. Prov. Ct.)(QL).

[20] *R. v. Ocoin*, [2003] A.J. No. 633 (Prov. Ct.)(QL) [*Ocoin*].

[21] *R. v. J.P.*, [2003] O.J. No. 3876 (C.A.)(QL); *R. v. Barnes*, [2003] O.J. No. 261 (Ct. J.)(QL).

[22] *R. v. Stavert*, [2003] P.E.I.J. No. 104 (S.C.(T.D.))(QL).

[23] [2003] B.C.J. No. 881 (Prov. Ct.) (QL) [*Nicholls*].

[24] [2003] B.C.J. No. 2085 (Prov Ct. (Crim. Div.)) (QL).

[25] [2003] N.S.J. No. 124 (Prov. Ct.) (QL).

> and Prince Edward Island. To do otherwise would undermine the fundamental justice of the system.[26]

Yet the Court in *Nicholls* found that there is tolerance for varied geographic applications of the criminal law where such differences occur as a function of the law. Given that Ontario judgments are not binding on other provinces, marijuana possession continued to be illegal in British Columbia. The Court also stated the following:

> There is an unfortunate degree of uncertainty at the moment regarding the status of the CDSA legislation … But for courts to interpret the law differently in different provinces does not by definition give rise to an abuse of the process of the court. [27]

Similarly, Chief Justice Caffaro in *R v.Ocoin* ("*Ocoin*") said that the Crown is permitted to prosecute possession of marijuana so long as s. 4(1) of the *CDSA* is in force in Alberta. The Court stated that to do otherwise would "create a dysfunctional juridical system in our federal system of government."[28]

In light of these conflicting provincial decisions, it is no wonder this area of the law was described as a "mess" by Chief Justice Stansfied.[29] Thankfully, a resolution was found in October 2003 when the Ontario Court of Appeal rendered its reasons in *Hitzig v. Canada*.[30] In that case, the Court reviewed the *MMAR* and found that there were two violations of s. 7 of the Charter that could not be saved by s. 1. First, some applications for marijuana possession permits required the support of two medical specialists, whereas others only required the support of one specialist. The Court held that the requirement for a second specialist was an arbitrary barrier that served no purpose.[31]

Second, permit holders who were too ill to grow their own marijuana were permitted to designate a person to produce marijuana for them. These licensed, designated producers could not be remunerated, could not provide marijuana to more than one permit holder, and could not

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[26] *Ibid.* at para. 23.

[27] *Nicholls*, *supra* note 23 at para. 76.

[28] *Ocoin*, *supra* note 20 at para. 8.

[29] *Nicholls*, *supra* note 23 at para. 2.

[30] [2003] O.J. No. 3873 (C.A.) (QL).

[31] *Ibid.* at para. 145.

combine their crops with other designated producers. These restrictions prevented the formation of legal "compassion clubs" and other efficient methods of supplying permit holders with marijuana. As a result, some permit holders were unable to legally access marijuana and were forced to rely on the black market to get their medication.[32]

These problematic provisions of the *MMAR* were declared invalid and were struck from the *MMAR*.[33] The modified *MMAR* became a constitutionally sound medical exemption to the marijuana prohibition in s. 4(1) of the *CDSA*.[34] Finally, the concern about medical access to marijuana that was raised in *Parker* more than three years earlier was rectified. The *Parker* declaration of invalidity was no longer an issue, and the prohibition on marijuana possession became Canada-wide once again.

The Supreme Court of Canada on Marijuana Possession

Two months after the *Hitzig* decision was rendered, the Supreme Court of Canada addressed the constitutionality of prohibition on marijuana possession. Two separate, yet closely related, judgments were given on December 23, 2003. The first case, *R. v. Malmo-Levine* ("*Malmo-Levine*"); *R. v. Caine*,[35] involved two incidents of marijuana possession addressed by British Columbia courts. The second, *R. v. Clay*,[36] concerned an accused convicted of marijuana possession in Ontario. The reasons in both judgments complement each other and should be read together.

Division of Powers

The accused in *Malmo-Levine* claimed that the prohibition against marijuana is outside the federal Government's criminal law power in s. 91(27) of the *Constitution Act*, 1867.[37] Both the majority and the

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[32] *Ibid.* at para. 116.

[33] *Ibid.* at para. 166.

[34] *Ibid.*

[35] [2003] S.C.J. No. 79 (QL) [*Malmo-Levine*].

[36] [2003] S.C.J. No. 80 (QL) [*Clay*].

[37] (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

minority disagreed with this argument. Marijuana is a psychoactive drug that causes the alteration of mental function. That is why people use it. Lower courts made findings that marijuana can be harmful, especially for vulnerable groups such as pregnant women, schizophrenics, and adolescents with a history of poor school performance. The protection of these vulnerable groups is a valid criminal law objective. The other two requirements for a valid criminal law (a prohibition and a penalty) are also satisfied. "The use of marijuana is therefore a proper subject matter for the exercise of the criminal law power."[38]

The Court also turned its mind to the possibility that the prohibition could be permitted under Parliament's residual power to legislate for the federal *Peace, Order, and Good Government* (*POGG*). The use of marijuana is not a national emergency, and it is a subject matter that did not exist at the time of Confederation. However, the Attorney General of Canada contended that the control of marijuana is a legislative subject matter that "goes beyond local or provincial concern and must, from its inherent nature, be the concern of the Dominion of the whole."[39] This argument was left for another day:

> Our conclusion that the present prohibition against the use of marijuana can be supported under the criminal law power makes it unnecessary to deal with the Attorney General's alternative position under the POGG power, and we leave this question open for another day.[40]

Section 7 of the *Charter*

Between the two sets of reasons, a number of s. 7 arguments were addressed by the Supreme Court. First, Malmo-Levine asserted that smoking marijuana is integral to his lifestyle and that criminalizing marijuana is an infringement of his personal liberty. He wrote the following in his factum:

It is submitted that a decision whether or not to possess and consume Cannabis (marijuana), even if it is potentially harmful to the user, is analogous to the decision by an individual as to what food to eat or

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[38] *Malmo-Levine*, *supra* note 35 at para. 78.

[39] *Ibid.* at para. 71.

[40] *Ibid.* at para. 72.

not eat and whether or not to eat fatty foods, and as such a decision of fundamental personal importance involving a choice made by the individual involving that individual's personal autonomy.[41]

The Court was not persuaded by this argument. The *Constitution Act* cannot be stretched to protect every single activity that individuals choose to define as central to their lifestyle. If this were the case, then other activities (for example, golfing, and gambling) would have to be constitutionally protected as well.

Second, Clay raised a similar s. 7 argument but put more emphasis on privacy. He asserted that marijuana smokers almost always smoke in the privacy of their own homes; therefore, it is a violation of the principles of fundamental justice to prohibit marijuana when there is no substantial harm to society. This contention was quickly dismissed by the Court:

> We do not think that the more general lifestyle argument, which we considered and rejected in *Malmo-Levine* and *Caine*, gains any strength by the appellant Clay's invocation of privacy right.[42]

Third, Caine claimed that the potential for imprisonment upon conviction for marijuana possession is a liberty violation that is not in accordance with the principles of fundamental justice. The Court agreed that the risk of imprisonment clearly engages the liberty component of s. 7. However, there is no mandatory minimum sentence upon conviction, and imprisonment is imposed for simple possession in "exceptional circumstances" only.[43] The availability of imprisonment is largely due to the fact that the prohibitive statute deals with a wide variety of narcotics, ranging from marijuana to heroin and cocaine:

> The mere fact of the availability of imprisonment in a statute dealing with a variety of prohibited drugs does not, in our view, make the criminalization of possession of a psychoactive drug like marijuana contrary to the principles of fundamental justice.[44]

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[41] Cited in *ibid.* at para. 84.

[42] *Clay*, *supra* note 36 at para. 33.

[43] *Malmo-Levine*, *supra* note 35 at para. 154.

[44] *Ibid.* at para. 4.

> Therefore, the majority held that although liberty interests are at stake, they are deprived in a manner that accords with the principles of fundamental justice.

Fourth, Clay asserted that Parliament's prohibition against marijuana is overbroad in that it catches a huge number of casual marijuana users in an effort to prevent harm to a very small percentage of chronic users. This argument also failed. The test for overbreadth as it relates to the potential infringement of fundamental justice is whether the legislative measure is "grossly disproportionate" to the state interest that the legislation seeks to protect.[45] The marijuana prohibition is not grossly disproportionate to the state interest in avoiding harm to marijuana users. Moreover, a complete prohibition is necessary. A more narrow prohibition "would not be effective because the members of at least some of the vulnerable groups and chronic users could not be identified in advance."[46]

Fifth, Malmo-Levine and Caine relied on the writings of John Stuart Mill in arguing that Parliament lacks the authority to impose criminal liability on activity that does not cause harm to others.[47] They further argued that this "harm principle" is a principle of fundamental justice under s. 7.[48] The majority of the Court disagreed. Although the avoidance of harm is an important state interest,[49] it does not meet the criteria for a principle of fundamental justice. There is no social consensus that tangible harm to others is a necessary precondition to the creation of a criminal offence.[50] Some criminal offences, such as cannibalism, incest, bestiality, and cruelty to animals, are aimed at morality. Other offences are paternalistic and are designed to "save people from themselves."[51] These laws do not offend our notions of justice. Furthermore, harm takes so many forms that the harm

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[45] *Clay*, *supra* note 36 at para. 38.

[46] *Ibid.* at para. 40.

[47] *Malmo-Levine*, *supra* note 35 at para. 103.

[48] *Ibid.* at para. 110.

[49] *Ibid.* at para. 114.

[50] *Ibid.* at paras. 115-126.

[51] *Ibid.* at para. 124.

principle is an unmanageable tool for measuring deprivation of life, liberty, and security of the person.[52]

Section 15 of the *Charter*

Finally, an equality claim was raised by Malmo-Levine. He argued that the criminalization of marijuana is a breach of s. 15 of the *Charter* because marijuana users have a "substance orientation," a personal characteristic analogous to sexual orientation. The Court held that marijuana consumption is a lifestyle choice that bears no analogy with the personal characteristics listed in s. 15. To find otherwise would "create a parody of a noble purpose."[53]

Decriminalization

In addition to addressing these arguments, the Supreme Court discussed Parliament's authority to decriminalization marijuana:

> We have concluded that it is within Parliament's jurisdiction to criminalize the possession of marijuana should it choose to continue to do so, but it is equally open to Parliament to decriminalize or otherwise soften any aspect of the marijuana laws that it no longer considers to be good public policy.[54]

This is a clear message to Parliament and Canadian citizens that decriminalization is a policy choice. Any initiatives to decriminalize marijuana possession fall squarely within Parliament's policy-making role.

The Future: Decriminalization on the Horizon?

In 2003, Jean Chretien's Liberal government announced its intention to decriminalize simple possession of marijuana. Bill C-38, *An Act to Amend the Contraventions Act* and the *Controlled Drugs and Substances Act*,[55] received first reading in the House of Commons on May 27, 2003.

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[52] *Ibid.* at paras. 127-129.

[53] *Ibid.* at para. 185.

[54] *Clay*, *supra* note 36 at para. 4.

[55] 2d Sess., 37th Parl., 2003 [Bill C-38].

The Proposed Scheme

Bill C-38, as introduced, proposed that possession of small amounts of marijuana be dealt with under the *Contraventions Act*,[56] instead of the *CDSA*. Violation tickets would be issued, and existing provincial and territorial systems would be used to process the tickets. Under this regime, marijuana possession would still be illegal, but offenders would only receive a fine and would not receive a criminal record.

Possession of 15 grams or less of marijuana would be punishable by a fine of $100 for youth and $150 for adults.[57] Larger fines would be ordered if aggravating circumstances were present. Aggravating circumstances include operating a motor vehicle, committing an indictable offence, and being in, or near, a school.[58] Under those circumstances, adults would be fined $400 and youth would be fined $250.[59].

The Federal government believes that these reforms would discourage the use of marijuana because they would allow for greater enforcement.[60] Under the *CDSA*, police officers often issue warnings for possession of small amounts of marijuana. Under the proposed scheme they could issue tickets instead. The Honourable Martin Cauchon, the Minister of Justice and Attorney General of Canada, said that the reforms would "ensure that enforcement resources are focused on where they are most needed by allowing police to enforce the law, but without the complications of going before the courts for minor offences".[61]

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[56] S.C. 1992, c. 47.

[57] Bill C-38, *supra* note 55 at cl. 5.1.

[58] *Ibid.* at cl. 5.3.

[59] *Ibid.* at cl. 5.2.

[60] Health Canada, News Release, 2003-34 "Renewal of Canada's Drug Strategy To Help Reduce the Supply and Demand for Drugs" (27 May 2003), online: Health Canada <http://www.hc-sc.gc.ca/english/media/releases/2003/2003_34.htm>.

[61] *House of Commons Debates* 106 (May 27,2003) at 6573.

Potential Advantages of Decriminalization

Some Canadians support the decriminalization of marijuana because they feel that it is one step closer to legalization. They argue that marijuana possession should be legal because consumption of marijuana is a personal choice that does not harm others. This point of view can be buttressed by John Stuart Mill's writings:

> That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.[62]

Given that marijuana use only harms the consumer, marijuana possession should not be the subject of the criminal law.

Decriminalization also avoids the problems associated with criminal convictions. Criminal convictions carry significant social stigma and can severely affect people's lives in terms of education, employment, and travel. Convictions also cause tremendous stress and personal upheaval. Violation tickets, on the other hand, do not cause the same level of anxiety and do not have life-altering implications.

Finally, decriminalization allows law enforcement officials and Crown counsel to focus their attention on more important issues. The prohibition on small amounts of marijuana demands significant resources and imposes severe strains on the criminal justice system.

Dealing with possession of marijuana by way of a violation ticket frees up tremendous enforcement and judicial resources that can be redirected elsewhere.

Potential Disadvantages of Decriminalization

On the other hand, there may be negative repercussions to decriminalization. There is concern that more people will drive while under the influence of marijuana, thereby causing more accidents, injuries, and deaths. Although driving while impaired by marijuana is an offence under s. 253(a) of the *Criminal Code*,[63] there is currently no roadside device to determine impairment. Mothers Against Drunk

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[62] J. S. Mill, *On Liberty* (New York: Norton, 1975) at 11.

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

Driving (MADD) argues that decriminalization should not take place until the police are able to deal with drivers impaired by marijuana.[64]

Moreover, significant discussion has focused on the potential impact on Canada's relationship with the United States. It is feared that America will tighten its border, making if more difficult for Canadians to travel and engage in international trade. This concern was raised by Stephen Harper during Question Period:

> American authorities have threatened to increase searches on Canadian travellers at the border. We already have duties on softwood lumber and wheat. We have bands on importations of beef. We have travel advisories because of SARS. We have an endless number of problems because of bad relations over Iraq. What assurances can the government give us that its pet project on marijuana will not jeopardize legitimate trade with the United States?[65]

Some believe that Canada's "relationship with the U.S. is too valuable to let it go up in smoke."[66]

Provincial justice ministers have also argued that there are more pressing initiatives for Parliament to consider. Dave Hancock, the Alberta Justice Minister, expressed this sentiment:

> If you only have so much time, don't use it on decriminalizing marijuana when there's a lot of other more important, pressing issues to deal with.[67]

Some of those pressing issues include implementing a national sex offender registry, legislating for automatic first-degree murder charges in child killing, increasing legal aid funding, ending expensive preliminary enquiries, and streamlining "mega-trials" that are bogging down the justice system.

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[64] MADD Canada, News Release, "An Open Letter Concerning Bill C-10 *Decriminalization of Marijuana*" (21 February 2004), online: MADD <http://www.madd.ca/english/news/pr/p040224letter.htm>.

[65] *House of Commons Debates*, 106 (27 May 2003) at 6531.

[66] "Not the Time To Push Pot Laws Too Far" [*Victoria*] *Times Colonist* (7 March 2004) D2.

[67] J. Tibbetts "Provinces Want Pot Bill Put on Backburner" [*Victoria*] *Times Colonist* (30 September 2003) A3.

The Future of Bill C-38

Bill C-38 died in November 2003 when Parliament was temporarily suspended for the swearing-in of the new Prime Minister, Paul Martin. Parliament resumed sitting, and the decriminalization proposal was reintroduced into the House of Commons as Bill C-10. Bill C-10 received first and second reading but died on the order paper in May 2004 when an election was called. Following the re-election of the Liberal government, the legislation was reintroduced again. Bill C-17 received first reading on November 1, 2004, and second reading on November 2, 2004. No further action has been taken.[68]

Conclusion

After a period of ambiguity and national confusion, appellate courts stepped in and clarified the law as it relates to marijuana possession. It is now evident that the current prohibition on marijuana possession and the current *MMAR* pass constitutional muster. Yet much uncertainty remains in light of Parliament's broad policy-making role. Will reforms be made? Will possession of small amounts of marijuana ever be decriminalized? Or will the law remain unchanged, as it has been for years?

In light of past unfulfilled promises for change, some are sceptical that current initiatives will actually come to fruition:

> …[F]ederal promises of reform are far from new. Indeed, political promises of revisions to the cannabis law have been made frequently over the past four decades, with little effect in the form of substantive law reform. Such promises should, therefore, be taken with the proverbial grain of salt until a new legal framework has actually been developed and established.[69]

Others disagree and feel that decriminalization is imminent. Although our history holds many unfulfilled promises, much has changed. We now know that Emily Murphy was wrong and that marijuana

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[68] This was last confirmed on January 18, 2005.

[69] B. Fischer, K. Ala-Leppilampi, E. Single & Amanda Robins, "Cannabis Law Reform in Canada: Is the 'Saga of Promise, Hesitation and Retreat' Coming to an End?" (2003) Can. J. Crim. & Crim. J. 266 at 282.

consumption does not lead to mania, violence, and death. We now clearly recognize the value of marijuana as a form of medicine for the seriously ill. We acknowledge the Ledain Commission's finding that marijuana possession convictions have a huge impact on the lives of youth and adults. We are more "liberal" in our views of marijuana than we were even ten years ago.[70] We are also currently living in an era of fiscal restraint where we demand that government officials make the best use of our tax dollars.[71] When taken in combination, these factors indicate that change is on the horizon.

[70] Canada, Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* (Ottawa: Communication Group, 2002) at 20 (Chair: Pierre Claude Nolin), online: Library of Parliament <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/rep-e/summary-e.pdf>.

[71] Enforcing the current marijuana possession law costs Canadians between 350 and 500 million dollars each year. *Ibid.* at 24.

THE DURESS DILEMMA:
POTENTIAL SOLUTIONS IN THE THEORY OF RIGHT

Zoë Sinel

Introduction

Duress defenses, prima facie, pose a serious dilemma for theories of punishment: an accused, committing an offense under duress, seems to be simultaneously guilty and not guilty. In an attempt to solve the dilemma surrounding the defense of duress, the Supreme Court of Canada (SCC) in R. v. Ruzic[1] *has chosen a nonviable quasi-retributivist solution while a viable one seems to be available.*

To explore this hypothesis, it will be necessary first to examine the paradox of moral culpability that inheres in duress. Since this paradox arises in the context of retributivist justifications of punishment, an in-depth analysis of these justifications will be conducted initially. The apparently harsh solution that retributivism, at first blush,

[1] [2001] 1 S.C.R. 687 (QL). [Ruzic]. A brief synopsis of the facts of Ruzic, although not in themselves relevant to my thesis, should be provided here. The accused was arrested and charged for the trafficking of drugs into Canada. Her defense was that she did so under duress. Allegedly, a third party had repeatedly threatened her mother's life in order to compel her to commit the offense.

provides for this dilemma of duress has prompted the SCC, among others, to scramble for ameliorative alternatives, which will be analyzed in the second part of this paper. Since none of these alternatives resolves the paradox, the paper will conclude with what I hope will be a more viable solution.

Retributivist Theories of Punishment: Kant & Hegel

The specific retributivist theories that I will draw on to highlight the dilemma duress are those promulgated by Kant[2] and Hegel.[3] Through the lens of their respective theories we can examine duress in its starkest and harshest light. For both, punishment is not a choice, but a duty, a duty owed to the criminal wrongdoer. This concept of obligatory punishment is not self-evident and requires further explanation.

The explanation rests on an understanding of the central tenet of their respective theories: the concept of the will. [4] [5] The will is at once universal and individualistic[6] - that is, the inherently individualistic nature of self-determination that the will embodies is shared universally as a necessary characteristic of all persons. Therefore,

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[2] I. Kant, Metaphysical Elements of Justice (1798), trans. J. Ladd (Indianapolis: Hacket, 1999). [Kant].

[3] G.W.F. Hegel, Philosophy of Right (1821), trans. T.M. Knox (Oxford: Oxford University Press, 1962). [Hegel].

[4] To avoid confusion, it is necessary here to draw attention to the two conceptions of the will articulated by Kant: the noumenal and phenomenal. The noumenal will is a universal will that exists a priori of human experience. In contrast, the phenomenal will exists in human agents and is our personal/individual deciding or volitionary force. See Kant, supra note 2 at 19.

[5] I realize that Kant and Hegel, although providing the foundations for the same theory, offer different approaches for justifying punishment. For Kant, the source of his justification lies in his formulation of the categorical imperative: "act according to a maxim that can at the same time be valid as universal law." See Kant, at 19. Hegel, on the other hand, grounded his theory in the equal and universal purposiveness or capacity of freedom that is directed towards some unconditioned end. See Hegel, at paras. 34-35.

[6] Hegel, supra note 3 at 7.

although the will is free, it is also constrained by a necessary respect for the wills of others.

The premise that men are all holders of equal rights to freedom entails a specific definition of wrong. A wrong consists in any interference or challenge to the validity of this equal freedom. In other words, a wrong can be defined as the treatment of another human being as some*thing*[7] of lesser worth. Hegel articulates a wrong as that which manifests itself as the invasion of one individual's sphere of liberty by another. The message conveyed by the wrongdoer through this invasion is that his/her right to liberty exceeds that of the person whose sphere he/she is invading.[8] As Hegel argued,

> [T]hat force or coercion is in its very conception directly self-destructive because it is an expression of the will which annuls the expression or determinate existence of a will. Hence force or coercion, taken abstractly, is wrong.[9]

Furthermore, if the wrongdoing, that is, the invasion of the sphere of liberty of another, is intentional,[10] then not only has the wrongdoer claimed too much liberty for him/herself and denied his/her victim's right to equal liberty, but his/her action also manifests as an explicit challenge to the normative order in which the right to equal liberty inheres.[11] The explicit challenge to the normative order that is now in

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[7] Emphasis is added to "thing" here to allude to Kant's second formulation of the categorical imperative in which he stated that it is always wrong to treat another human being as a means to an end rather than an end in himself. Hegel similarly emphasized this necessary respect for other persons: "Hence the imperative of right is: 'Be a person and respect others as persons.'" Ibid. at para. 36.

[8] A. Brudner, "In Defense of Retributivism" in W. Cragg, ed., Retributivism and Its Critics: Canadian Section of the International Society for Philosophy of Law and Social Philosophy (CS, IVR) (Papers of the Special Nordic Conference, held at the University of Toronto 25-27 June 1990 (Stuttgart: Steiner, 1992) at 95.

[9] Hegel, supra note 3at 92.

[10] For the purposes of this paper, I will not address the notion of unintentional wrongs since they correspond to the civil law of tort, whereas this paper's focus is on the public law of criminal offenses.

[11] To recall the distinction drawn earlier between the noumenal and phenomenal definitions of the will: a wrongful act done intentionally not only interferes with the phenomenal will of the individual, but also challenges the underlying noumenal will.

play as a result of the agent's intentional wrong mandates that punishment is not merely an appropriate "choice" but rather a duty owed to the wrongdoer.

In this logical vein, the retributivist argues that the wrongdoer "deserves" his/her punishment not because he/she is evil, but rather that because in his/her denial of the normative order, the wrongdoer authorizes his/her own punishment. In other words, by his/her very actions, the wrongdoer places him/herself outside the normative moral order, thus defeating his/her own claim to liberty. To compensate for the negation of liberty he/she intentionally inflicts, the wrongdoer must be punished with the deprivation of his/her own liberty to a degree that is proportionate to the offense. Hegel expresses this compensation through punishment as the negation of the negation.[12] Therefore, we owe the criminal a duty of punishment in order not only to compensate for the wrong, but also to reestablish the normative rightness of the entire world order. As Hegel argued,

> That coercion is in its conception self-destructive is exhibited in the world of reality by the fact that coercion is annulled by coercion; coercion is thus shown not only right under certain conditions but necessary, i.e., as a second act of coercion which is the annulment of the one that has preceded.[13]

If one takes the above quotation and reads in the word "punishment" for the second manifestation of coercion, one gets the articulation of the retributivist's principled approach to punishment. Thus, there are two criteria of a criminal offense that must be met for punishment to be justified: first, a wrong must be committed – that is, an interference with the rights of another must occur; and, second, this wrong must be committed with intention.[14]

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[12] Hegel, *supra* note 3 at 97[A].

[13] *Ibid.* at para. 93.

[14] The Canadian criminal law defines intention as one of the following three mind-states. First, it can be the intention to do 'x'. Second, it can be recklessness with respect to the consequences of doing 'x'. Third, it can be willful blindness with respect to the doing of 'x'. For the purposes of this paper, I will not conduct any further analysis of these states of *mens rea*. All that is important to keep in mind here is that intention somehow incorporates the will of the agent and in so doing makes his action properly defined as his own – that is, the action and its consequences are imputable to him *qua* agent.

What the above analysis of Hegelian and Kantian retributivist models exemplifies is the potential for harshness in cases of duress. The obligation to punish cannot, it seems, be overridden except by a correspondent right not to be punished. The two situations in which this right to not be punished are manifest are (1) if it can be established that no wrong occurred, or (2) if it can be proven that the accused did not intend the wrong. Therefore, an accused who commits and intends a wrong while under duress can not *prima facie* be deemed the holder of a right not to be punished

A First Retributivist Response

An understanding of this first response depends on the distinction between justifications and excuses.[15] Briefly, when we say that someone is justified in doing 'x', we are in effect saying that the action was not wrong, and the agent, far from being the appropriate object for blame, might be a more appropriate object for praise.[16] In the absence of a wrong action, punishment is incoherent. Therefore, in the retributivist model, justificatory defenses are essentially rights not to be punished. On the other hand, in the case of excusatory defenses, we hold the action of the accused was a wrong action; however, we "elect" not to punish because of certain exigent circumstances that existed in the context of the offense and that are particular to the accused.[17] Here, the accused has no right not to be punished, and the withholding of punishment is tantamount to mercy, not annulment of a wrongdoing. The exculpatory power of an excuse, in contrast to that of a justification, rests not in a right not to be punished but rather in a choice by the punishing force to withhold its right to punishment out of a sensitivity to the particular circumstances faced by the accused.

The distinction between justifications and excuses can also be understood in the following more fundamental way. Justifications relate to the moral culpability of the accused in that they negate it. An

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[15] The following definitions and reasoning are primarily drawn from G.P. Fletcher's essay, "The Right and the Reasonable," in Justification and Excuse: Comparative Perspectives vol. 1, (New York: Transnational Juris Publications, 1987) 68. [Fletcher].

[16] *Ibid.* at 76.

[17] *Ibid.* at 77.

accused who acts in such a way that he/she commits a wrong, but his/her commission of the wrong is deemed justifiable, can not, and is not, held morally at fault. In contrast, an excuse does not, *ab initio*, negate moral culpability. Here, we hold an accused who is excused to be morally blameworthy and responsible for his/her actions; however, we choose not to punish.

To apply this distinction to the defense of duress: an accused it seems can have his/her punishment annulled through a defense of duress only when the actions committed under duress are justified. Occasions when duress justifies are strictly limited. The duress must either be tantamount to a negation of the intent of the accused or the accused's act itself works to rectify the rights infringement. Viewed in this narrow way, the defense of duress collapses into either a defense of automatism or self-defense. Thus, the narrow circumstances in which the retributivist would seem to allow for a defense of duress create a palpable harshness. Such harshness is illustrated by the following example: a mother who kills to protect the lives of her children can not avail herself of the defense of duress. The consequence of punishing the mother in this situation is deemed unpalatable by most; therefore, several attempts to provide alternative accounts of duress have been proffered to attempt to ameliorate its apparently intrinsic harshness.

Ameliorative Alternatives

A Modified Retributivist Response: Positive Law to the Rescue?

One ameliorative alternative to the application of the defense of duress resides in an interplay between the functioning of duress as an excuse and the legislative power of the state. Here, the legislative body would pass a statute outlining an excusatory defense of duress. If an accused has a right under positive law to an excuse of duress, then the retributivist would recognize such a statutory right as sufficient to embody a correspondent right not to be punished.

At first blush, this approach seems appealing since it appears to mitigate the harshness of the duress defenses limited to the narrow justificatory role sphere, while concurrently according with retributivist principles of desert; however, upon closer examination, this alternative reveals several problems. By allowing duress to

function as an excuse, we would be in effect saying, "Yes, you are morally culpable, but we choose not to punish you on the grounds that you have satisfied the criteria of the statutory defense of duress." Since the problem with duress inheres in that we do not consider the accused necessarily morally culpable, any solution that requires this stigmatization must be looked at skeptically. Furthermore, this solution fails to provide a rationale for determining the content of such a statutory defense. I will address both of these concerns more fully in the final portion of my paper where I will return to a retributivist approach in an attempt to articulate a sound rationale for a broader justificatory defense of duress than is on the table now.

The Supreme Court of Canada's Approach

The SCC is in fact operating within the sphere outlined by the modified retributivist response – that is, Parliament has enacted a statutory excuse of duress: s. 17 of the *Criminal Code*.[18] That the SCC strikes down a good portion of this provision – specifically, the present and imminent threat requirements – and reformulates a new excuse of duress is indicative of the shortcomings of this easily manipulatable retributivist solution.

In *R* v. *Ruzic* ("*Ruzic*") the alternative adopted with respect to the defense of duress was the constitutionalization, as a principle of fundamental justice, that one cannot convict an accused who exhibited "moral involuntariness." The SCC defines "moral involuntariness" as a situation in which the accused "retains conscious control over her bodily movements … [and whose] will is overborne … by threats of another," the bottom line being that "[h]er conduct is not, in a realistic way, freely chosen."[19] According to the Court, it is contrary to the principle of fundamental justice to have someone held criminally responsible and punished for an act that they did not freely choose.

Initially, the SCC's decision seems to accord with the principled account of punishment provided by retributivism, since the retributivist would agree that an agent cannot be held criminally responsible for actions which are not products of his/her will – that

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[18] R.S.C. 1985, c. C-46, s. 17.

[19] *Ruzic*, *supra* note 1 at 44.

is, actions over which the agent has no control. However, the SCC's conception of "moral involuntariness" is not limited to actions over which the agent had on choice, but rather is so broad that it includes all actions over which the agent felt he/she had not realistic choice. By distancing itself from the clear line drawn by retributivism between choice and no choice, the SCC leaves itself open to the question of how much pressure is sufficient to create a circumstance of "no realistic choice."

The SCC's articulation of "moral involuntariness" raises fundamental questions. When is the pressure exerted by the duressor sufficient to constitute an overwhelming of another individual's will? Moreover, what kind of pressure is necessary to create this overwhelming effect? Is it limited to fear of bodily harm or death or can it extend to anger or some other emotion that (under the SCC's broad analysis of moral involuntary behavior) can be characterized as effectively overbearing an individual's will such that he/she is not making the decision he/she would reasonably make if he/she were totally free from external pressure? In his acute critique of the SCC's judgment in *Ruzic*, Stephen Coughlan succinctly stated, "[w]hat the court has done by articulating this new principle of fundamental justice is to create a new defense: irresistible impulse."[20]

The SCC renders itself vulnerable to the above "slippery-slope" brand of criticism[21] in part because of its conclusion that moral involuntariness does not necessarily entail moral blamelessness. Once it has been established that the accused committed and intended the crime, the Court finds it impossible to consider him/her morally blameless.[22] However, as Coughlan pointed out in the cases of justification the two elements of the offense are satisfied; however, we do not consider the accused to be morally blameworthy.[23] Apparently

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[20] S. G. Coughlan, "Duress, Necessity, Self-Defence and Provocation: Implications of Radical Change" (2002) 7 Canadian Criminal Law Review, 206 [Coughlan].

[21] An example of this "slippery-slope" argument in this context is embodied in the infamous "Twinkie Defense." Briefly, such an argument maintains that if one can say that one ate so many Twinkies that one's blood sugar was high to the point of irresponsibility, then the question is how many Twinkies is too many: one, ten, a hundred?

[22] *Ruzic*, *supra* note 1 at 32.

[23] *Coughlan*, *supra* note 20 at 188.

unaware of the situation to which Coughlan referred, the Court, faced with the dilemma of duress where the accused has both done and intended the crime, created a need for a separate excuse of moral involuntariness. Thus, they argued – incoherently – that although the accused was blameworthy – that is, responsible morally for his/her actions – he/she committed the offense absent a fully functioning will, and, therefore, cannot be punished since his/her actions were morally involuntary.

As result of the SCC's confusion and its subsequent overcompensation, it is now possible to acquit an accused who is morally culpable but who argues that he/she committed the crime without free moral volition. In isolation this result would not be problematic. But because moral involuntariness does not speak to proportionality, only to reasonableness, several unpalatable consequences arise. Arguing from a reasonableness criterion, we would say that a reasonable person in the "clothes" of the accused would have acted in a similar fashion. Proportionality, on the other hand, is objectively measured: the act committed under duress must be proportionate to the threat the accused was under. Without a proportionality criterion, a situation could be envisioned, after *Ruzic*, where the accused quite reasonably on the objective-subjective test viewed him/herself to be not making a truly free choice, and thus, reacted disproportionately to the perceived threat. Since he/she acted in a morally involuntary way, he/she cannot be punished as a matter of fundamental justice as now constitutionalized in s. 7 of the *Charter*.[24]

One can argue that the problems that the SCC runs into, as outlined by Coughlan, are a direct result of its "mis-definition" of the term "moral involuntariness." According to a retributivist, moral involuntariness is tantamount to automatism – that is, a situation of no choice not, as the SCC would have one believe, a situation of limited choice. A retributivist analysis of what "moral involuntariness" actually means sheds light on why the SCC runs into the problems it does; however, it still leaves us with the problem of when it is appropriate to annul punishment in cases of duress.

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[24] *Canadian Charter of Rights and Freedoms*, s. 7, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

Judicial Mercy: The Compassionate Approach

Given the narrow role of the defense of duress as supported by the retributivist theory of punishment in combination with the obfuscating take on duress as promulgated by the SCC, one must wonder how duress should fit in our legal framework. This brings us to the third ameliorative alternative: the compassionate approach. Here, acquittal does not follow because the accused has a right not to be punished, as would be the case if the defense were a justificatory one, but rather that the court chooses not to punish on the basis of humanitarianism, altruism, and/or mercy. It should be noted that this alternative is necessarily entailed by the retributivist theory if one wants to mitigate the harshness of confining the defense of duress to the justificatory sphere and if a statutory excuse of duress is absent.

It has been argued by some, notably Fletcher, that retributivism can encompass this altruism; however, I think Fletcher committed an error in his analysis of retributivism. Fletcher argued that duress can excuse because the governing body (that is, the court) can choose not to exercise its right to punish. Fletcher's mistake here is in characterizing punishment as a right and not a duty.[25] When a crime is committed, the equilibrium of the normative order shifts, and this demands a correspondent punishment to reaffirm the normative baseline; therefore, punishment is not a right that can be withheld at will or mercy, but rather a duty mandated by the concept of Right.

As stated earlier, justifications are equivalent to a right not to be punished. Justifications fit neatly into the retributivist framework outlined by the notion of the theory of right; excuses do not. An excuse, a compassionate alternative proponent would argue, might still be accommodated by the retributivist scheme. On this interpretation, the retributivist's concern for the inherent dignity and freedom of human beings is emphasized and serves as a justification for legislative and/or judicial sensitivity to particular situations of partial agency. Thus, the harshness of the retributivist regime, it is argued, can and ought to be mitigated by a sensitivity to human agency and its limitations in exigent circumstances that affect its functioning. It behooves us to be sensitive to this situation of partial agency. An accused who commits an act under partial agency should

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[25] Fletcher, *supra* note 15 at 100.

not be held as responsible for his act as one who commits an act under full agency. If we are not sensitive to this difference, the argument runs, then the unmitigated punishment of the accused acting under duress is disproportionate. Therefore, far from undercutting the retributivist doctrine's duty to punish the wrongdoer, excuses can serve to mitigate the harshness of this doctrine by paying close attention to the *ad hoc* circumstances that inhere in a situation that would make it disproportionate to punish.

Although this approach seems promising, it contains a fundamental problem. Duress acting as sentence mitigation does not really address the dilemma of duress. A mitigation in sentence includes a verdict of moral culpability – we still consider the accused to have committed a wrong. In addition, sentencing discretion is manipulatable. Whom should this power of acquittal go to? A judge, a jury, an elected body? Furthermore, what considerations ought such a body take into account when mitigating sentences? It seems obvious to say that we would prefer not to leave something as significant and nuanced as a defense of duress solely to the discretion of judges. Moreover, the situation of duress is conceptually different from most mitigating situations. If a person acting under duress refuses to succumb to the will of his/her duressor, then we do not simply consider his/her actions to be morally right, but morally saintly. We consider him/her to have acted superogatorily. It seems odd that if the accused succumbs to the threat, we hold him/her guilty, but withhold punishment; and if the accused does not succumb, we write him/her into our hagiography.

A Return to a More Nuanced Retributivism: Alan Brudner's Viable Approach

What then would be a more appropriate solution to the dilemma of duress? How can we maintain the logic of the retributivist scheme that leads to the obligation to punish without falling prey to the unpalatable results that the harshness of the retributivist doctrine leads to? I believe Professor Alan Brudner, in his paper "A Theory of Necessity,"[26] offers this very solution. His solution rests in the very theory of right, and thus it not only mitigates the harshness of the

[26] A. Brudner, "A Theory of Necessity" in Thomas Morawetz, ed. *Criminal Law* (University of Connecticut: Dermouth, 2000). [Brudner].

defense of duress, but also, by making duress a justificatory defense, retains the solidity of the retributivist principles that justify punishment.

The first step of Brudner's argument is to recognize that rights, although inherent and universal, are not absolute. Rights are universal, but they do not exist on a level playing field – that is, there is an ordering of rights. Some rights are "worth more than others" so to speak. Although he does not explicitly elaborate on this point, Brudner's theory could also prove invaluable in articulating the proper content for a statutory justificatory defense of duress.

In his scheme, it becomes possible to justify actions committed under duress by characterizing them as necessary rights infringements. If one accepts the premise that rights to personhood are rights upon which all other rights are predicated, then it follows that any threat to one's personhood could give rise to a right in the one threatened to act in such a way that one's personhood is protected, even if this means infringing on the rights of others. To maintain this solution within the rights system, however, several factors are necessary: (1) there must be a "conflict of rights," (2) the danger must be imminent, and (3) the rights must be infringed as minimally as possible or not at all if some legal recourse is available.[27] It would be prudent for the legislature to adopt these criteria in creating a statutory defense of duress, for it offers a potential way out of the dilemma of duress. By keeping the matter within the notion of rights and with the above strict limitations, Brudner allows us to avoid the "slippery-slope" of the excusatory model, but still mitigate the apparent harshness of retributive justice.

Conclusion

In sum, a look at the defense of duress through the retributivist lens provided by Hegel and Kant throws the dilemma into sharp focus. Under retributivism, the criminally culpable are owed a strict duty of punishment. On the flip side of this, the criminally not culpable are owed an equally, if not more, strict duty not to be punished. Therefore, in cases of duress, in which the accused seems to be both

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[27] Brudner, *supra* note 26 at 362-63.

culpable and not culpable at the same time, the retributivist approach seems to face an insurmountable paradox.

In this paper, I outlined several potential solutions for this paradox; none satisfied. In the first, what I referred to as "the first retributivist response," the exculpatory power of the defense of duress was limited to the justificatory sphere. Although this limitation is appropriate, logically speaking, since only justifications and not excuses provide the right not to be punished that can negate the duty to punish, it creates a harsh doctrine of duress.

In response to this harshness, several ameliorative alternatives have been offered. In one such alternative, what I have called the "modified retributivist approach," a justification of duress is created by legislating an excuse of duress. In other words, the invocation of the positive law creates a right not to be punished where one did not exist before. The flaw in this approach is that it fails to provide a rational basis for the content of such an excuse, and thus is incoherent with the retributivist principles of desert. Another alternative is manifest in the SCC's verdict in *Ruzic*. The SCC's approach also fails to solve the dilemma of duress because it allows for the possibility of too many people – including the morally culpable – to avail themselves of the defense of duress. A third alternative is embodied in what I have called the "compassionate approach." It fails for two reasons. First, like the "modified retributivist approach," it does not offer a principled account for why punishment ought to be mitigated, relying on the manipulatable discretionary power of judges. Second, it does not address the dilemma of duress since it still holds those who act under duress are guilty, thus ignoring our intuitions that speak to the contrary.

Given the failures of the above approaches, it is obvious that for an alternative to be successful it must first, remain faithful to retributivist principles, and second, resolve the dilemma of duress. Brudner's approach, which provides a justificatory foundation for the defense of duress, serves to solve the dilemma of duress. Through careful attention to the nature of rights in the retributivist framework – that is, that they are not absolute – Brudner was able to formulate a justificatory defense of duress. The benefit of justificatory defense of duress over an excusatory one is that, in the case of the former, the accused is not considered morally culpable and thus is not the proper

object of punishment, not merely because we *feel* bad about punishing him/her, but because he/she has a right not to be punished. By introducing the notion of a hierarchy of rights within the retributivist model, Brudner turned the monolithic notion of moral culpability into a more flexible one without sacrificing the strength of the retributivist model.

A BATTLE OF WORDS AT GUANTANAMO BAY

Jennifer Bond

Introduction

Over the past 35 months, a plethora of opinions have been provided on the legality of the detainees at Guantanamo Bay. Scholars, lawyers, government agencies, NGOs, and even courts have commented on the application of specific legal rules to the hundreds of individuals being held in this remote naval base in Cuba. What has not frequently been recognized, however, is that Guantanamo Bay is as much about power as it is about legal interpretation, and that this power is being created and controlled through the careful manipulation of legal discourse. This paper will explore two specific linguistic techniques being used by the U.S. government to legitimize its actions at Guantanamo Bay, and will argue that in each case legal discourse is being used as a tool to increase that government's own position of power.

"The Bush Administration has attempted to turn the forty-eight square miles of its naval base at Guantanamo Bay into territory beyond the reach of any law and outside the jurisdiction of any court. In its treatment of the detainees at Guantanamo, it has been unwilling to fully apply international humanitarian law (often called the laws of war), has flouted international human rights

> standards, and has fought hard to block judicial review by U.S. courts of the legality of its detentions."
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> --Human Rights Watch, January 2004[1]
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> "Detention of enemy combatants in wartime is not an act of punishment. It is a matter of security and military necessity. It prevents enemy combatants from continuing to fight against the U.S. and its partners in the war on terror. Releasing enemy combatants before the end of the hostilities and allowing them to rejoin the fight would only prolong the conflict…the U.S. is under no obligation to grant al-Qaida [sic] and Taliban forces POW status and did not do so."
>
> --United States Department of Defense, February 2004[2]

Background on Guantanamo Bay

Subsequent to attacks on New York and Washington in September 2001, the United States announced that it was launching a "war on terrorism". As part of this offensive, the U.S. and several allied countries invaded Afghanistan and engaged in armed combat with representatives of both the de facto government of Afghanistan, the Taliban, and Al Qaeda, the terrorist organization who claimed responsibility for the September 11th attacks.[3]

In January 2002, the U.S. began transferring individuals captured during this conflict to the Guantanamo Bay detention facility in Cuba. Suspected terrorists captured in other parts of the world were also transferred to Guantanamo Bay. Estimates indicate that between 600-800 individuals were sent to the facility between January 2002 and March 2004.[4] As of October 2004, 540 suspects from approximately 40 countries were still being held at the centre.[5]

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[1] Human Rights Watch, "United States: Guantanamo Two Years On" (9 January 2004), online: <http://hrw.org/english/docs/2004/01/09/usdom6917.htm.>

[2] United States Department of Defense, "Guantanamo Detainees Fact Sheet" (13 February 2004), online: <http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf.> [Guantanamo Detainees].

[3] G. Aldrich, "The Taliban, Al Qaeda, and the Determination of Illegal Combatants" (2002) 96 AJIL 891. [Aldrich]

[4] Estimates vary according to source. See for example: S. Murphy, ed., "Contemporary Practice of the United States Relating to International Law"

Several members of the international community, many human rights groups, and a number of legal commentators have argued that the detentions at Guantanamo Bay are not in compliance with international law. The most prevalent and persistent argument amongst these groups is that the detainees qualify as prisoners of war ("POWs") under the *Third Geneva Convention* and are therefore entitled to the protections of this agreement.[6] A more nuanced version of this argument suggests that members of the Taliban are entitled to POW treatment under the *Third Geneva Convention*, while Al Qaeda operatives are entitled only to the more general protections available under the *Fourth Geneva Convention*. [7] It is alleged that current practices at Guantanamo Bay do not meet the standards required by either the Third or *Fourth Geneva Conventions*.

The United States government has strongly resisted the suggestion that the *Third Geneva Convention* applies to Guantanamo Bay detainees. In February 2002, a White House "fact sheet" stated explicitly that "neither the Taliban nor al-Qaida [sic] detainees are entitled to POW status."[8] This position was confirmed in a more detailed document released by the U.S. Department of Defense in February of 2004 that states that "…the U.S. was under no obligation to grant al-Qaida [sic] and Taliban forces POW status and did not do so."[9] Despite these statements, the Government has maintained that the detainees are

(2004) 98 AJIL 353; Human Rights Watch World Report (2003), online: <http://www.hrw.org/wr2k3/us.html.>.

[5] P. Jackson, "Life after Guantanamo Bay," *BBC News* (4 October 2004), online: <newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/Americas/3929535.stm>.

[6] See for example: A. de Zayas, "The Status of Guantanamo Bay and the Status of the Detainees" (Douglas McK. Brown Lecture, Simon Fraser University, 28 November 2003) online: <www.law.ubc.ca/events/2003/november/McK_Brown_Lecture.html>. [de Zayas].

[7] See for example: K. Dormann, "The Legal Situation of Unlawful/Unprivileged Combatants," 85 IRRC 45 (2003) [Dormann]; Aldrich, *supra* note 3.

[8] "White House Fact Sheet: Status of Detainees at Guantanamo" (7 February 2002), online: <www.whitehouse.gov/news/releases/2002/02/print/20020207-13.html>. [White House Fact Sheet].

[9] Guantanamo Detainees *supra* note 2 at 4.

being held in a manner that is "consistent with the principles" of the *Geneva Conventions*.[10]

A number of court cases have been launched relating to the detentions at Guantanamo Bay. As a result of these claims, U.S. courts have found that detainees are entitled to challenge their detentions,[11] have the right to unmonitored, private interactions with their defense counsel,[12] have the right to be present when evidence is presented against them,[13] and are able to launch complaints through the U.S. court system.[14] The most recent legal development occurred in November 2004 when the Federal District Court for the District of Columbia found that the *Third Geneva Convention* must be applied to the detainees. The court determined that according to the rules of the Convention, detainees are assumed to be POWs until a competent tribunal determines otherwise.[15]

Law, Language, and Power

The debate surrounding Guantanamo Bay has been framed by the majority of commentators as a legal one: the central issue being discussed is what laws apply and to whom. The reality, however, is that this is not simply a question of legal interpretation. Guantanamo Bay is largely about power; and the tools being used to gain this power are primarily linguistic ones. It is therefore important to evaluate the arguments surrounding Guantanamo Bay not only for their legal merits, but also for their impact on legal discourse.

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[10] White House Fact Sheet, *supra* note 8.

[11] *Hamdi v. Rumsfeld* (28 June 2004), Supreme Court of the United States, online: <http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-6696.pdf.>.

[12] *Al Odah v. United States* (20 October 2003), United States District Court for the District of Columbia, online: <http://www.dcd.uscourts.gov/02-828a.pdf.>.

[13] *Hamdan v. Rumsfeld* (8 November 2004), United States District Court for the District of Columbia, online: <http://www.dcd.uscourts.gov/04-1519.pdf.>.[Hamdan].

[14] *Rasul v. Bush* (28 June 2004), Supreme Court of the United States, online: <http://a257.g.akamaitech.net/7/257/2422/28june20041215/www.supremecourtus.gov/opinions/03pdf/03-334.pdf.>.

[15] *Hamdan*, *supra* note 13.

The relationship between power and language is well established. Michel Foucault is one of the most recognized contributors to this area and is credited for having equated discourse with the power to shape reality.[16] Joanna Thornborrow evaluated the ways a number of theorists have expanded on Foucault's ideas, and concluded that "within social theories of power, language, or perhaps most appropriately discourse, has been seen as an important site for both constructing and maintaining power relations."[17] Kyle Felder drew on these theories in a discussion about the rhetoric surrounding September 11th. He began his piece by reminding readers that "language is a powerful tool: the most powerful tool that humans have ever devised. It does more than describe in some kind of neutral way. Rather language has the power to create realities, to shape the very way we experience events. It allows us to communicate ideas and to convince people to view reality in a particular way."[18]

The power of language is heightened when it is applied in a legal context, due in part to the control law itself exerts over society. Peter Goodrich argued that law is a discourse that should be "read in terms of control—of dominance and subordination—and of social relations portrayed and addressed to a far more general audience than that of law-breakers and wrong doers alone."[19] Gerald Burns interpreted Goodrich's work as saying that law "translates social reality into its own terms in order to control it" and that legal language is "rhetoric disguised as logic."[20] Kent Greenwalt took a slightly different approach to the relationship between power and legal discourse. He argued that power is not only protected and created through law, but that power is also a source of law: "[a] common source [of both law and cultural morality], which may be more or less conscious, is the

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[16] D. Lodge, ed. Modern Criticism and Theory (New York: Addison Wesley Longman, 1988) at 196. [Lodge].

[17] J. Thornborrow, Power Talk: Language and Interaction in Institutional Discourse (London: Pearson Education, 2002) at 7.

[18] K. Fedler, "On the Rhetoric of a 'War on Terrorism': A Lecture Presented at Ashland University on September 17, 2001," (2002) 51:4 Cross Currents 498 at 498-499.

[19] P. Goodrich, *Reading the Law: A Critical Introduction to Legal Method and Techniques* (London: Basil Blackwell, 1986) at 20, cited in G. Burns, "Law and Language: A Hermeneutics of the Legal Text" in G. Leyh, ed, *Legal Hermeneutics* (Los Angeles: University of California Press, 1992) 23 at 24. [Burns}.

[20] Burns, *supra* note 20 at 25.

interests of those who enjoy positions of dominance within the society."[21]

Language, and in particular legal discourse, can be manipulated in a large number of ways to maximize its inherent power. In the case of Guantanamo Bay, the government of the United States is using a variety of linguistic techniques to do just that. The exchange of rhetoric and legal terminology in relation to Guantanamo Bay is extensive, and it is beyond the scope of this paper to provide a detailed analysis of this discourse in its entirety.[22] Rather, I will focus on two specific terms — "war" and "enemy combatants" — to demonstrate both the means through which legal discourse is being manipulated and the ways this manipulation is translating into an increase in power for the United States.

"*War*": Manipulation of Current Terminology

Since September 2001, the United States has stated clearly and repeatedly that they are engaged in a "war against terrorism."[23] *Black's Legal Dictionary* offers the following definitions of the term "war":

1. Hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state; a period of such conflict <the Gulf War>.
2. A dispute or competition between adversaries <fare wars are common in the airline industry>.
3. A struggle to solve a pervasive problem <America's war against drugs>.[24]

It is clear that the conflict in Afghanistan, and the subsequent one in Iraq, are examples of the first type of war defined in *Black's* — they

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[21] K. Greenwalt, *Law and Objectivity* (New York: Oxford University Press, 1992) at 167. [Greenwalt].

[22] For more detailed analysis on U.S. actions in Guantanamo Bay see generally: S. Hersh, *Chain of Command: The Road from 9/11 to Abu Ghraib* (New York: Harper Collins, 2004); R. Clarke, *Against All Enemies: Inside America's War on Terrorism* (New York: Free Press, 2004); D. Rose, *Guantanamo: The War on Human Rights* (New York: HarperCollins, 2004); or M. Ratner and E. Ray, *Guantanamo: What the World Should Know* (Chelsea Green, 2004).

[23] See generally website of the United States Department of Defense: <http://www.defendamerica.mil/.>.

[24] *Black's Law Dictionary*, 8th ed., *s.v.* "war."

were "hostile conflicts by means of armed forces." What is less clear, however, is whether the ongoing "war against terrorism" is also an example of this first type of "war". I would argue that intuitively it is not. America's "war on terrorism" seems entirely analogous to the "war against drugs" contemplated in the third definition provided by *Black's:* it is "a struggle to solve a pervasive problem".

The government of the United States disagrees with the "intuitive" characterization that I, and others, have proposed and insists that the country has been in "hostile conflict" since September 11th, 2001. The reasons for this insistence are encapsulated nicely in a statement issued by the U.S. Department of Defense ("DOD") in February 2004. The DOD statement begins by drawing attention to the relationship between being in a state of war and the special laws governing armed conflict. The statement reads: "[T]he law of armed conflict governs this war [the war on terrorism] between the U.S. and al-Qaida [sic] and establishes the rules for the detention of enemy combatants."[25] It is thus made clear that the United States accepts that special laws are applicable when a country is at war.

The next sentence states that "these rules permit the U.S. to detain enemy combatants without charges or trial for the duration of hostilities."[26] This second assertion seems particularly significant for explaining U.S. insistence that they are in a continued state of "war." Here it is apparent that not only is there a leniency in the laws governing during times of war, but that the United States believes this leniency allows for detainees to be held without any procedural rights for the duration of hostilities. If this interpretation is correct, an ongoing "war on terror" will allow the Guantanamo Bay detainees to be held indefinitely without contravening international law.

The International Committee of the Red Cross ("ICRC") — custodian of the *Geneva Conventions* that codify the laws of war — has expressed concern about the way the United States is characterizing its "war on terrorism." Gabor Rona, ICRC Legal Advisor, clarified that International Humanitarian Law applies only when there is truly an "armed conflict" (the international legal term for "war"); otherwise, domestic and international criminal and human rights laws are

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[25] Guantanamo Detainees, *supra* note 2 at 1.

[26] *Ibid.*

applicable. Rona noted U.S. attempts to access the permissive International Humanitarian Laws with concern:

> The official U.S. view is that an international armed conflict is underway, spanning the world and pitting certain countries against terrorists. This conflict will end once terrorism is defeated. In the meantime, the laws of armed conflict prevail over the entire planet — meaning that within limits, killing, destruction of property and detentions are permitted, all without the restraint of judicial intervention. In this world, instead of merely arresting a suspected terrorist on the street, the U.S., if it considered him an "enemy combatant", would be within its rights to shoot him.
>
> This theory wreaks havoc with a finely tuned and time-honoured balance between the law of armed conflict, human rights and criminal laws, and thus poses grave risks and consequences for human rights and security.[27]

Kenneth Roth, Executive Director of Human Rights Watch, shares many of Rona's concerns. While Roth acknowledged that special laws are important during genuine times of war, he warned that "given the way they inherently compromise fundamental rights, they should be used sparingly. Away from a traditional battlefield, they should be used, even against a warlike enemy, as a tool of last resort — when there is no reasonable alternative, not when a functioning criminal justice system is available."[28]

The difficulty for Rona and Roth, and all others who feel that the U.S. use of International Humanitarian Law is unwarranted during its "war on terrorism," is that the terms "war" and "armed conflict" are not explicitly defined in the *Geneva Conventions* or elsewhere in international law. Rona argued that the terms are "generally understood" to involve a certain level of violence between a) armed groups within a state; b) a state and an armed group; or c) between two or more states.[29] But this "general understanding" is insufficient to constitute firmly established parameters, making it possible for the United States to manipulate the term to include its "war on terror."

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[27] G. Rona, "'War' Doesn't Justify Guantanamo" International Committee of the Red Cross, online: <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/5WVFB4.>.[Rona]

[28] K. Roth, "The Law of War in the War on Terror" Human Rights Watch, online: <www.hrw.org/english/docs/2003/12/23/usint6873_txt.htm.>.

[29] Rona, *supra* note 26 at 1.

The fact that words are subject to a variety of interpretations is not a novel concept. Ferdinand de Saussure, a Swiss linguist who is widely regarded as the father of modern linguistics, was responsible for introducing a conceptual difference between verbal signs (signifiers) and the concepts they represent (signified). [30] According to de Saussure, the signifiers (or words) must be understood to be completely arbitrary and unrelated to the concepts they describe.[31] It is as a result of this arbitrariness that words themselves can be manipulated to encapsulate a variety of conceptual realities. In the case of Guantanamo Bay, the U.S. government has manipulated the signifier, "war", to include a signified that is different from that previously considered by international law. This manipulation of existing language not only allows the United States to benefit from more permissive international laws, but also gives it a means to assert that it is operating in accordance with existing legal structures. This ability to alter discourse in order to legitimize actions is extremely dangerous and has the potential to dramatically increase the power of the United States government.

"*Enemy/Unlawful Combatants*": Introduction of New Terminology

The United States has repeatedly declared that the Guantanamo Bay detainees are "unlawful" or "enemy" combatants. This terminology is found not only in press releases, fact sheets, and other documents intended for public consumption, but also in official declarations, presidential orders, and other legal documents.[32] This consistent use of the term "enemy or unlawful combatant" suggests that the words are not mere rhetoric, but rather that they possess a particular legal meaning. The U.S. government, in its "Combatant Status Implementation Guidelines," provided a clear definition of the term:

> An "enemy combatant" for the purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida [sic] forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes

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[30] F. de Saussure, "Nature of the Linguistic Sign" in Lodge, *supra* note12 at 10.

[31] *Ibid.* at 12.

[32] See generally website of the United States Department of Defense — Press Resources: <http://www.defenselink.mil/news/>.

> any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[33]

While this definition is useful for understanding how the United States is using this term, it clearly did not provide an objective standard for determining whether individuals associated with the Taliban or Al Qaeda forces are "unlawful combatants" under broader principles of international law. Rather, this explanation *defined* the term according to membership in these groups—the term itself *presupposed* a relationship between the Taliban or Al Qaeda and being an enemy combatant, it did not provide a standard on which to *evaluate* the relationship.

Although the definition of "enemy combatants" provided by the government is very contextually specific, the United States was not the first entity to draw a distinction between legal and illegal combatants. To the contrary, the notion of illegal combatants has been found in legal literature and military manuals since the beginning of the 20th century.[34] The *Geneva Conventions* themselves also distinguish between certain types of combatants, and the protections available under the conventions vary according to the way in which a particular individual was engaged in an armed conflict.[35] Despite distinctions that have been drawn between types of combatants, however, legal discourse has only offered precise definitions of very particular categories of involvement. These have included "spies," "saboteurs," and "mercenaries."[36] The term "unlawful or enemy combatant" is not found amongst these accepted and defined categories.[37]

This has changed since Guantanamo Bay. The United States' persistent (and insistent) use of this new terminology has resulted in its necessary inclusion in legal discourse. It is now found not only

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[33] U.S. Department of Defense, "Combatant Status Review Guidelines" (29 July 2004), online: <http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.>.

[34] Dormann, *supra* note 7 at 46.

[35] See for example *Geneva Convention III [GC III]* Art. 4, 5; *Geneva Convention IV [GC IV]* Art.4, 5; Protocol I of *Geneva Conventions* [PI] Art. 45, 46.

[36] Dormann, *supra* note 7 at 52; PI Art 46, 47.

[37] See generally Dormann, *supra* note 7.

amongst documents issued by the U.S., but also in legal scholarship,[38] court judgments,[39] and documents issued by other agencies.[40] Perhaps the most persuasive indication that these terms have been appropriated into legal discourse is their inclusion in legal dictionaries. Indeed, the 2004 edition of *Parry & Grant's Encyclopaedic Dictionary of International Law* included the term "unlawful combatants." It is interesting to note that the definition provided by this dictionary not only restricts application of the term to the Guantanamo Bay situation, but also explicitly recognizes the fact that this terminology has not previously been part of legal discourse:

> **unlawful combatants:** This term, used synonymously with enemy combatants, has been applied to the al-Qaeda [sic] and Taliban prisoners taken during the conflict in Afghanistan 2001-2 and held at the US Guantanamo Bay naval based in Cuba. Such a characterization and status are not a generally recognized part of the laws of war.[41]

It would be very difficult for an entity with little or no power to unilaterally implement significant changes to legal discourse, and the success of the United States in introducing new language is an indication of its powerful position in the world. This supports Greenwalt's assertion that the interests of the powerful are a direct *source* of legal discourse.[42] As noted earlier, however, power is also a *product* of language — control of discourse leads to an increase in power.[43] As a result of the cyclical nature of power and discourse, the United States has effectively increased its current power through the introduction of new legal terms: once introduced, the discourse itself will help protect and increase the dominant structures that led to its very creation.

The introduction of the term "unlawful/enemy combatant" increases the power of the United States in two distinct ways. First, these terms

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[38] See for example Aldrich *supra* note 3; de Zayas, *supra* note 6.

[39] See most notably: *Hamdan*, *supra* note 13.

[40] These include reports by the International Committee of the Red Cross, the United Nations, and Human Rights Watch.

[41] J. Grant and C. Barker, ed., *Parry and Grant Encyclopaedic Dictionary of International Law*, 2d ed. (New York: Oceana, 2004) *s.v.* "unlawful combatants."

[42] See discussion on Greenwalt above.

[43] See generally discussion on Law, Language, and Power above.

increase the ability of the U.S. to legitimize its detentions in Guantanamo Bay through the application of a quasi-legal framework. On August 18th, 2004, the U.S. Department of Defense released a two-page report summarizing the processes available for Guantanamo detainees.[44] The first page of this document outlined three distinct tribunal processes, noted the legal purpose of each one, and linked to detailed information about the rules that have been created to guide the procedures. The second page presented much of the same information, although this time it appeared in a table format. At the bottom of this table a single footnote contains the official United States definition of the term "enemy combatant." This footnote is critical to the table and indeed to the entire process being described: the legal basis underlying detention in Guantanamo Bay is an individual's status as an "enemy combatant." Both the form of the tribunals and the substance they are meant to consider are premised on acceptance that being an "enemy combatant" is illegal and warrants ongoing detention. The ability of the United States to create this term has given it the power to structure an entire legal process around its applicability. This in turn has added an air of legal legitimacy to the detentions themselves.[45]

The second way the creation of these terms has increased U.S. power is by allowing the circumvention of existing legal structures. The government's contention that "the law of armed conflict…establishes the rules for detention of enemy combatants"[46] is false. "Enemy combatants" are a recent creation of the U.S. and as such are not contemplated by the traditional laws governing times of war. This lack of explicit reference has enabled the United States to claim that this type of enemy is not subject to many provisions of the *Geneva Conventions*, including those pertaining to POWs. If the United States were obliged to treat the Guantanamo Bay detainees as POWs, many

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[44] Department of Defense, "Guantanamo Detainee Processes," link available online at: <http://www.defenselink.mil/news/detainees.html.>

[45] I do not mean to suggest that the processes at Guantanamo Bay have been accepted as legally sound. They have in fact been subject to considerable criticism (see for example Human Rights Watch at: <hrw.org/English/docs/2004/08/16/usdom9235.htm> and "Agora: Military Commissions," 96 AJIL 320 (2002)). The very presence of these debates amongst legal commentators, however, indicates that the U.S. has succeeded in framing these processes as quasi-legal in nature.

[46] Guantanamo Detainees, *supra* note 2 at 1.

current practices would be in contravention of legally protected rights. The *Geneva Conventions* guarantee, for example, a judicial process that is equivalent to that offered to armed forces of the detaining power.[47] The Guantanamo Bay Military Commissions would not meet this requirement. Another notable protection is found in Article 17, which guarantees that POWs will not be subject to any "physical or mental torture nor to *any other form of coercion*" and that POWs who do not provide information "may not be threatened, insulted, or *exposed to unpleasant or disadvantageous treatment of any kind* [Emphasis added]."[48] Given the U.S. priority on gaining information from individuals being held at Guantanamo, it seems highly unlikely that officials are adhering to these standards when questioning detainees.

Many organizations and legal scholars have argued persuasively against the U.S. position on enemy combatants. They claimed that the detainees at Guantanamo Bay are POWs and are therefore entitled to protections under the *Third Geneva Convention*.[49] The majority of these commentators noted that Article 5 of the Convention indicated clearly that, when there is doubt about the POW status of a detainee, a "competent tribunal" must make the final determination about his/her status:

> Art. 5. The present Convention shall apply to the persons referred to in Article 4 [which details who qualifies as a POW], from the time they fall into the power of the enemy and until their final release and repatriation.
>
> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4 such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.[50]

In November 2004, an American court applied this same reasoning and concluded that the United States had an obligation under international law to apply the *Geneva Conventions* to detainees of Guantanamo Bay. Specifically, the court held that Article 5 of the *Third Geneva Convention*, requiring that detainees be treated as POWs

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[47] *GC III*, Art. 102.

[48] *GC III*, Art. 17.

[49] See for example: de Zayas, *supra* note 6; Aldrich, *supra* note 3; Human Rights Watch.

[50] *GC III*, Art. 5.

until a competent tribunal determines otherwise, applied. The court also rejected arguments that the President of the United States had the power to determine that all members of al Qaeda are "enemy combatants" and therefore are not entitled to POW protections:

> The government's legal position is that the CSRT [Combatant Status Review Tribunal] determination that [the detainee] was a member of or affiliated with al Qaeda is also determinative of [his] prisoner-of-war status, since the President has already determined that detained al Qaeda members are not prisoners-of-war under the Geneva Conventions…The President is not a "tribunal," however. The government must convene a competent tribunal (or address a competent tribunal already convened) and seek a specific determination as to [the detainee's] status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, [the detainee] has, and must be accorded, the full protection of a prisoner-of-war.[51]

This judgment created a significant challenge to the United States' position that "enemy combatants" are not subject to the Geneva Conventions, and threatened to undermine both the tribunal structures of Guantanamo Bay and the legal discourse on which these structures are based. It is clear that the collapse of this discourse will result in a significant loss of power for the United States government. It is therefore not surprising that the U.S. Department of Justice issued a statement in response to the case declaring that they "vigorously disagree with the court's decision" and will be "seeking an emergency stay of the ruling." The Department also announced an intention to appeal the decision immediately.[52]

Conclusion

Since January 2002, the government of the United States has been carefully altering legal discourse to legitimize the detention of hundreds of individuals at Guantanamo Bay. Techniques being used to accomplish this goal include the manipulation of existing terminology, including the word "war," and the introduction and definition of entirely new legal terms, including "enemy/unlawful combatants."

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[51] *Hamdan, supra* note 13 at 18-19.

[52] Department of Justice, "Statement of Mark Corallo, Director of Public Affairs, on the Hamdan Ruling" (8 November 2004), online: <www.usdoj.gov/opa/pr/2004/November/04_opa_735.htm.>.

It is interesting to examine the combined implications of these two techniques. By declaring that it is at "war," the United States is able to access the more permissive rules of International Humanitarian Law. This allows the U.S. to operate with maximum freedom and minimal judicial intervention. Even the more lenient International Humanitarian Law, however, contains some guarantees for individual human and judicial rights. The U.S. attempts to avoid its responsibility to respect these rights by creating a new category of combatant and circumventing the very legal instruments it claims to be following. This combination of linguistic techniques allows the United States to maximize its own power, while minimizing the power of others.

It is true that words are powerful and that discourse has the ability to shape realities and reinforce existing power structures. The situation in Guantanamo Bay exemplifies this dynamic. It is also true, however, that it is people who choose how to use powerful words. Karl Sornig reminded us that discourse itself is not ultimately responsible for the power it creates:

> Words can, in fact, be used as instruments of power and deception, but it is never the words themselves that should be dubbed evil and poisonous…the responsibility for any damage that might have been done by using certain means of expression still lies with the users, those who, not being able to alter true reality try — through interpretative strategies — to change its reception and recognition by their interlocutors.[53]

In the case of Guantanamo Bay, those attempting to alter perceptions of reality are doing a dangerously good job.

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[53] K. Sornig, "Some Remarks on Linguistic Strategies of Persuasion," in R. Wodak, ed., *Language, Power and Ideology: Studies in Political Discourse* (Philadelphia: John Benjamins, 1989) at 96.