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REVIEW OF CURRENT LAW AND LAW REFORM

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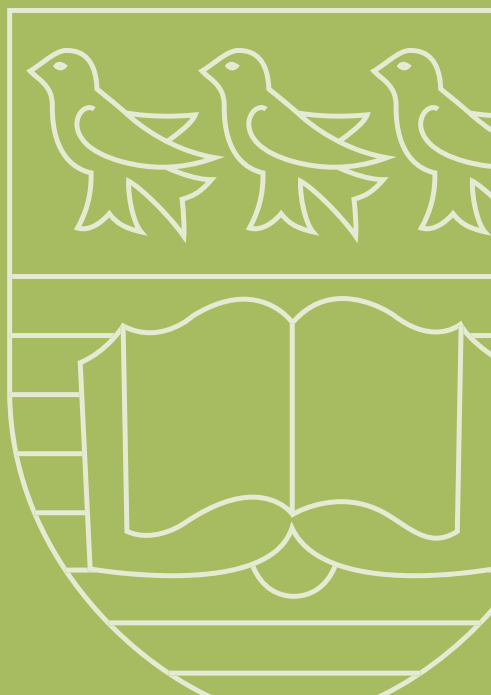

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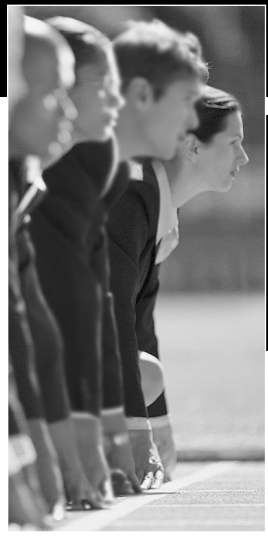

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Appeal publishes the work of law students, recent graduates, articling students and students pursuing undergraduate or graduate work in law-related disciplines. *Appeal* endeavours to publish articles that are timely, relevant and which address possibilities for Canadian law reform

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In addition, the Board would like to thank Paddy O'Reilly for her enthusiasm and hard work on the journal, and in particular, for helping us complete our call for submissions.

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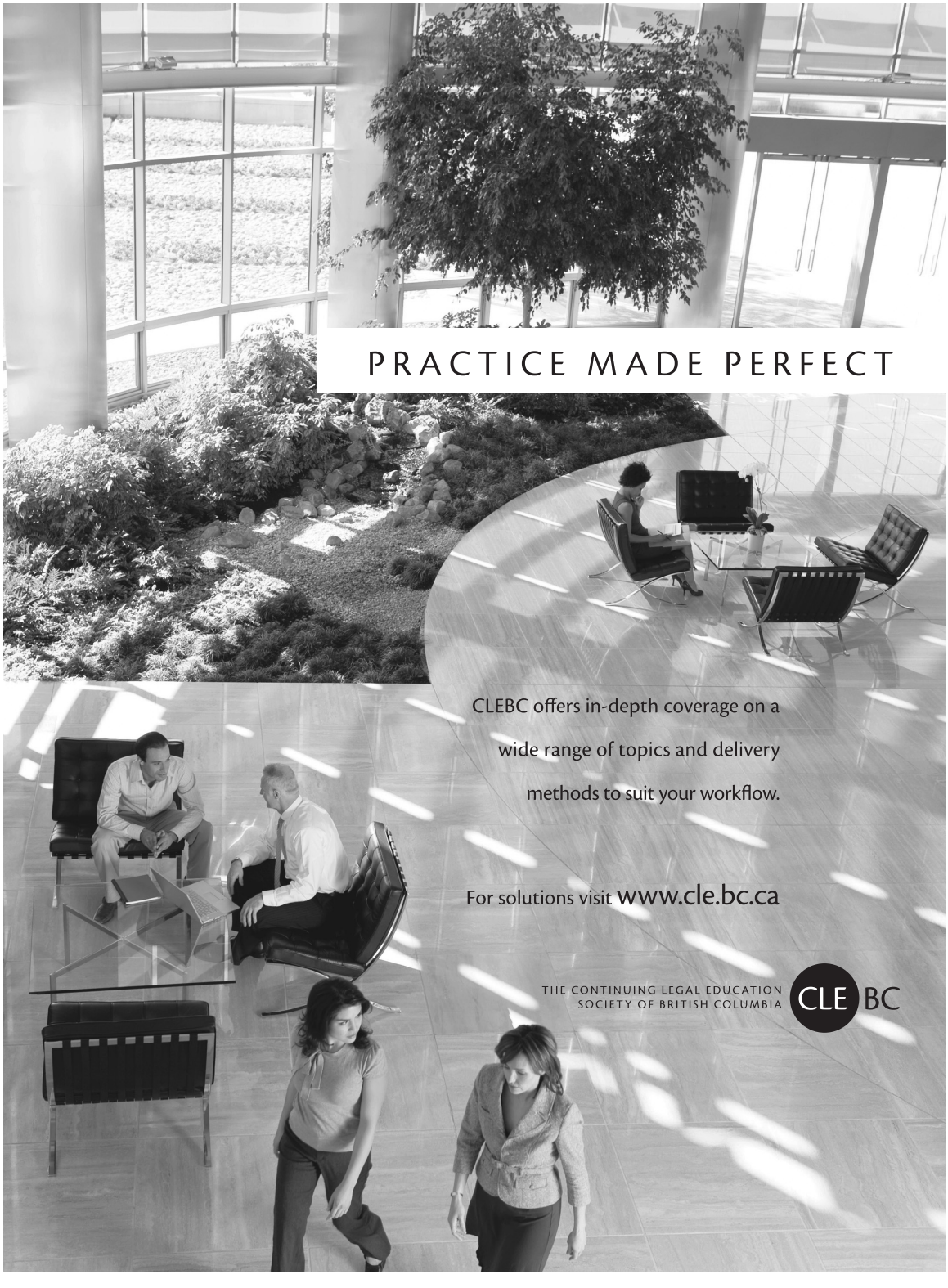
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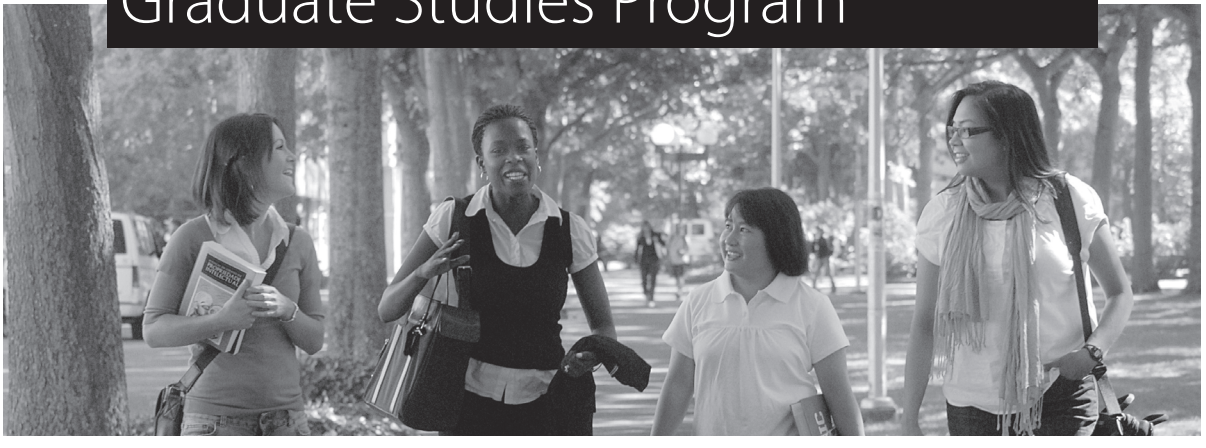

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PREFACE

By Emily Lapper and Anna Johnston

The genesis and development of a student law journal is not unlike the educational journey of a law student. From those first fumbling steps into the halls of legal academia to our acceptance into the Bar, the journey of a fledgling advocate is marked with struggle, reform and, at times, triumph. In infancy, journal and student alike are slightly awestruck by the commanding presence of intellect that has walked the halls before us. After time, we learn to defy custom, to test the boundaries and challenge the wisdom of our superiors. Finally, during this slow process of maturation we begin to discover an expressive form that enables us to be useful, to fill necessary gaps or provide much needed services; we become wise, even.

Originally, *Appeal* adopted the style of a magazine, characterized by shorter articles with relatively sparse footnoting. Over the years, its aesthetic and contents have shifted to that of an academic journal, with longer articles that rely significantly more on references. It was during this transition that the journal acquired a spine, which, in conjunction with its more compact size, makes it a comfortable fit on just about any bookshelf. This adaptation was not accidental: as *Appeal* grew and developed in form, its content and purpose concurrently transitioned from being a forum for students to gain experience in legal scholarship to also being an opportunity for those voices to impact and inform the law. Along with the 'rebranding' it underwent for Volume 12 in 2007, adopting its signature green jacket and more mature style, *Appeal* confidently put itself forth as a strong player in the field of Canadian legal scholarship and has proven itself to be an important component of research libraries across the country.

Appeal is not about aiming to please. It is about respect for law, but it is also about testing the law. It is about close examination of law in all its applications, bringing innovative ideas and new modes of communicating to the growing body of Canadian legal scholarship. It is also about encouraging new voices to be heard in legal dialogue. A common perception abounds that student legal scholarship lacks sufficient experience and knowledge to provide new insights into legal issues. Not true. Students are capable of producing high-quality, provocative work that can form a part of the Canadian legal literature. Many of us enter law school with diverse and often extensive experience as professionals in other fields, lending relevance to our voices and insight into a wide range of legal issues and topics. As a vehicle to support new methodologies in and approaches to legal scholarship, *Appeal* aims to enrich the legal community by playing an active role in its development. Our articles have begun to be referenced. Our voices are being heard.

It has been a great honour and a rewarding experience to have edited this 15th Volume of *Appeal*, which contains some of the journal's strongest academic work to date. The range of legal issues discussed and perspectives drawn from in these articles are as impressive in their breadth as they are in their depth. From a deep and thoughtful examination of the

ways in which customary law infuses our appreciation, both in a cultural and a legal sense, of the environment, to a critical analysis of the British Columbia's approach to civil rights in the context of employment contracts, the authors featured in this issue provide insight and thoughtfulness that is nothing short of remarkable in a student journal. Further, the articles often reach out beyond an abstract academic realm, confronting such divisive and relevant social issues as specialized courts for veterans, violence towards prostitutes and bans against blood donated by gay men. It takes boldness to confront these issues, and sheer courage to embark upon critique of them.

Of course, any commemoration of *Appeal*'s 15th anniversary would ring hollow without an acknowledgment of the overwhelming contributions by the teachers, mentors and supervisors who have provided their assistance over the years. Individually and collectively, you have pushed the journal to higher standards. Since its inception in 1986, you have helped shape the articles that have appeared between its covers and the design of those covers themselves. Your encouragement has been invaluable and your certitude in our abilities, inspirational. *Appeal* at 15 is an embodiment of the processes and thoughts that have formed it, and we thank you for the impressions you have left.

ARTICLE

BENEVOLENT GRANDFATHERS AND SAVAGE BEASTS: COMPARATIVE CANADIAN CUSTOMARY LAW

By Elizabeth Anderson*

CITED: (2010) 15 Appeal 3-38

INTRODUCTION

This essay se1eks to explore one of the more recent and innovative understandings of customary law, one which begins by locating it as a basic element of every legal system. Law is established and evolves in societies through the lived experience of its members, and is fundamentally determined on an ongoing basis according to the norms which those actors use as a guide to their choices. This is true regardless of what measure of technical codification a given society has built onto the base that customary law provides; whether in a social setting, a sentencing circle, a legislature or a court of law, it is these fundamental beliefs and biases that structure the outcomes.

Where customary norms have been overlaid with other structures, such as courts, however, the availability of equally valuable alternative potential norms risks being concealed, arguably to a much greater degree than in a society that retains a more consensus-driven and organic legal structure. Where this overlay exists, the fundamental structure at law's core is camouflaged from view, appearing neutral, since it is written into the presuppositions with which members of that society approach the law. Furthermore, even where this danger has been recognized in the abstract, practical difficulties often arise in the process of identifying which of one's norms have been assumed to embody the only viable option.

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* Elizabeth is completing her LL.B. at the University of Victoria Faculty of Law in the spring of 2010. She has an Honours Bachelor of Arts in English from the University of British Columbia and will be articling with Bull, Housser and Tupper in Vancouver, B.C., and expects to be called to the bar in May of 2011. This paper was written as a directed research project to fulfill the paper requirement for completion of an LL.B. at University of Victoria Law. The paper was supervised by Canada Research Chair in Law and Society Jeremy Webber and was largely inspired by some of his work, most notably "The Grammar of Customary Law" (*infra* note 1). Professor Webber also generously assisted in editing the final draft for publication in Appeal. The author would like to thank him profusely for his invaluable assistance, and to acknowledge the contributions of Anna Johnston, who edited the paper, and all those who read it and provided comments on its earlier incarnations.

Cultures whose legal systems have developed based upon different normative contexts may provide comparative opportunities that both help to expose contextual assumptions and offer alternatives for the critical evaluation and improvement of the moral foundations of law and society — an evolution which is arguably essential to the continued relevance and justice of any society's legal system. Comparison may be especially useful between societies with markedly different metaphysical understandings, since the norms that rely on these constructions are likely to contrast so dramatically they will be easily recognizable.

This essay examines the specific historical and contemporary normative constructions of hunting law among the James Bay Cree of Northern Quebec, and seeks via contrast to make clear the analogously subjective nature of the understandings embodied in Canadian wildlife law and legislation. Finally, it asks how we might use this awareness of alternate legitimate outcomes to address shortcomings in Canadian wildlife law and to effect reforms that will improve the justice system in this area.

I. CUSTOMARY LAW AND NORMATIVE FRAMEWORKS

This paper is largely informed by the latest work of Jeremy Webber, "The Grammar of Customary Law."[1] Webber does not restrict himself to the traditional, narrow definition of customary law (i.e., law as practiced in Indigenous societies); rather, he adopts the inclusionary stance advocated by theorists such as Lon Fuller and Gerald Postema, in which customary law is seen to underlie and inform even the most strictly codified legal systems. John Borrows agrees that "customary law is still important in the development of common law reasoning."[2] Because one of the main ideas of customary law is that legal principles develop as a result of the interaction between order and practice that take place as participants in legal orders live out their lives, each of these orders is necessarily built upon the experience, negotiation and adoption of certain legal principles over others. Codified legislation and judicial decisions are made based on a society's distinctive norms; the norms themselves emerge from and develop through the practices of the people who live within that society.[3]

John Borrows has adopted J.H. Merryman's definition of a legal tradition: "a set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of a legal system, and about the way law is or should be made, applied, studied, perfected and taught."[4] As an aspect of a culture, a legal tradition can be distinct from the legal system of the state if the latter does not recognize the force of that particular tradition.[5] This is especially likely to occur in states that are made up of a number of historically distinct cultures, each of which has developed and in many cases continues to develop its own norms. States such as Canada, which have more than one legal tradition, are identified as legally pluralist. Bor-

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1. Jeremy Webber, "The Grammar of Customary Law" (2008) [forthcoming] [Webber, "Grammar"].
2. John Borrows, *Indigenous Legal Traditions in Canada* (Ottawa, Ont.: Law Commission of Canada, 2006) at 83 [Borrows, *Indigenous Legal Traditions*].
3. Webber, "Grammar", *supra* note 1 at 1; see also his "Legal Pluralism and Human Agency" (2006) 44 Osgoode Hall L. J. 167.
4. J.H. Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America*, 2nd ed. (Stanford, Ca.: Stanford University Press, 1985) at 1.
5. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 1. For an examination of the interrelationships between legal traditions, legal orders, and legal systems, see Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Ma: Harvard University Press, 1983).

rows helpfully observes that "[l]aws can arise whenever interpersonal interactions create expectations about proper conduct" and that the transmission of traditions, including legal traditions, is inextricably linked to a culture's "configuration of language, political structures, kinship, clan, economic systems, social relations, intellectual methodologies, morality, ideology and the physical world" in which its people live.[6]

Webber is ultimately critical of what he sees as an overemphasis on the pragmatic dimensions of customary law in Fuller and Postema's arguments: though one of law's most important express functions is undeniably the coordination of human affairs, to take this criterion as a sufficient determinant of the substantive choices made in an order's structure and operation is misleading, given the array of possible and equally workable solutions available in any given case.[7] The provisional resolution of disagreement for the purpose of preserving a functioning social system is undeniably essential,[8] but the very system of resolution that a legal order adopts necessarily relies upon built-in value judgements which are often invisible to the people who use it. These judgements are not recognized as such, but are taken for granted as foundational. The availability and feasibility of other alternatives has been lost from conscious awareness. This paper pursues the argument that the moral systems that underpin these value judgements and determined such choices in the first place must be recognized and retrieved for re-examination on a conscious level, both in order to maintain the integrity and relevance of a given legal system by ensuring its adaptability to future generations of participants and to avoid inadvertently and inappropriately imposing these normative structures on our understandings of and interactions with members of other legal orders, especially those with a traditionally disadvantaged colonial relationship to our own. One way of fostering this recognition is via comparison of the details of our own system with those of other legal orders, the members of which have chosen different values to inform their ways of living together; Indigenous systems of law, in particular, are often far enough removed from our own experience to reveal the ultimately contextual nature of many principles we take as foundational.[9] As John Borrows reminds us, "it is important to note that, like Indigenous legal traditions, Canada's broader legal traditions also rest upon unwritten cultural assumptions;"[10] he notes that the Supreme Court of Canada itself has explicitly recognized "an historical lineage stretching back through the ages, which aids in the consideration of underlying constitutional principles … [that] inform and sustain the constitutional text: they are the vital un-stated assumptions upon which the text is based" and are "not merely descriptive but are also invested with a powerful normative force, and are binding upon both courts and governments."[11]

This paper will examine some of the customary laws of the James Bay Cree — more specifically, those related to hunting and animal stewardship, and the norms that inform these laws' adoption and use; this framework will then be used to draw out and compare ele-

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6. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 7.

7. Webber, "Grammar", *supra* note 1 at 1.

8. At the same time, the continuing existence of multiple interpretations and perspectives on an issue within a legal system not only does not disqualify the existence of a "law" in respect of the issue, it contributes to the ultimate strength and vitality of the legal order as an ever-developing entity. See, for example, Borrows, *supra* note 2 at 15: "incongruity and differing interpretations are not signs that the community does not have law. To the contrary, multiple perspectives on a legal tradition are a sign that the tradition is vibrant and strong; it allows those with opposing viewpoints to maintain a relationship within the tradition."

9. Webber, "Grammar", *supra* note 1 at 2, 25.

10. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 15.

11. *Reference re Secession of Québec*, [1998] 2 S.C.R. 217 at para. 54.

ments that play a structurally analogous role in Euro-Canadian law and jurisprudence regarding wildlife management in Canada.

Specifically, I would argue that, much as the Cree have traditional stories that embody and explain the principles by which they govern their hunt, the text of Canadian law also reveals metaphors that point to an underlying justificatory narrative that we unconsciously consult in our determination of the 'right' way to protect, interact with, and utilize the animals which share our land. Borrows is strongly critical of the Western legal tendency to overgeneralize the differences between aboriginal and common law and thus to neglect the latter's cultural role, as well as its effects. Whereas in the Canadian legal narrative, "Aboriginal principles and traditions appear overly subjective and 'non-legal'," Borrows suggests that "a fair account of the similarities and differences between Aboriginal and common law legal systems would pay equal attention to the cultural aspects of each form of law."[12]

Webber argues that to examine any legal order solely in terms of its success in coordinating human interaction is to strip it of the essential normative components that make up the content of law which actually has meaning for its participants. Mechanisms that serve to facilitate a choice among alternative possible norms are a basic requirement of any society that is going to last long enough to deserve the name. At the same time, divorcing these mechanisms from the norms that both result from and inform them rules out the possibility of a full understanding of the context in which these processes operate, and consequently the ability to make full use of a given set of norms in the way that participants do — to anticipate the actions of others and apply the rules appropriately to each situation in reasoned ways that serve to advance one's own agendas in the ongoing maintenance and development of the norms themselves.[13] Both Webber and Postema emphasize the importance of practice or conduct as providing both the raw material for norms and the process by which they are determined; although the process is governed by reason, this reason must find expression in interaction in order to justify its continued acceptance, or to evolve in more appropriate directions.[14]

Coordination is a necessary condition of a good legal order, but it is not a sufficient one; the process by which coordination takes place and the ends to which it leads must also be taken into consideration and evaluated on the basis of merit.[15] And merit will be defined in a particular society with reference to the norms that have been explored, tested and adopted in practice, leading to a feedback loop of value refinement. Webber goes on to outline the ways in which both legislation and judicial decisions can be seen as expressions of these norms that are determined at an interpersonal level by the citizens of the order; not only the material that these institutions possess to work with, but the very procedural structure by which they act, are necessarily determined by the previously defined values of the groups over which they exert power.[16] And this power, once exercised, results in formulations that quickly become subject to the ongoing lived experience of participants, who inevitably modify their ultimate meaning through shifts in moral understanding that are brought about by this interaction of principle and process. As in his earlier papers, Web-

12. John Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto, Buffalo and London: University of Toronto Press, 2002) at 16 [Borrows, *Recovering Canada*].

13. Webber, "Grammar", *supra* note 1 at 6, 8.

14. *Ibid*. at 7; Gerald J. Postema, "Implicit Law" (1994) 13 Law & Phil. 361 at 363, 365.

15. Webber, "Grammar", *ibid*. at 8.

16. *Ibid*. at 9.

ber argues for the defining role of human agency in the ultimate direction and content of the law.[17] Furthermore, it is the substantive values of individuals, communities and cultures that drive how this agency is deployed. This realization provides the metaphor for the title of Webber's paper: he compares this sublevel of normative considerations to a grammar, one which is inevitably and inescapably being used whenever we deploy language (and, by extension, law).[18] The fact that a functioning legal system requires the determination of a common rule says nothing about what that rule will ultimately be; correspondingly, rules to address the same situation differ widely across cultures that are driven by different norms.[19] The grammar of their law is fundamentally different.

Postema identifies the existence of "conceptually sophisticated, but often transparent, deliberative framework[s]" in each society that "do not figure in the content of desires, goals, or principles of choice, but rather structure and delimit the deliberative domain in which such factors are used by agents to arrive at rationally grounded decisions" and provide the necessary common background of understanding of how the world works and the appropriate possible solutions from within which to debate the ultimate choice to be made.[20] Webber elaborates upon this concept by suggesting that this framework is inescapable, in the sense that in order to communicate or even think one must make use of one's own frameworks, because they are embedded in language itself — a language learned from one's culture and subject to its preferences. This does not mean, however, that it is not important or useful to attempt to expose the contextual nature of some of our more deeply hidden norms, and one of the best ways to do this, as mentioned, is to undertake comparisons across cultures whose members have made different choices. Indigenous legal orders, as Webber demonstrates, often do not possess the same structural need for impersonal enforcement as Western ones do, relying instead on "deliberation, diplomacy, and mediation" for consensus-building, which may eliminate the need to impose an outcome on anyone.[21] Contrary to the stereotypical perception of Indigenous legal orders as collectivist, the norms that drive the consensus-seeking process are arguably informed by a high level of respect for individual agency. Webber powerfully suggests that these models might provide inspiration for a genuinely pluralist society — one in which multiple, truly self-contained legal orders could coexist and "allow for divergent understandings, permit significant normative autonomy among sub-units, and foster cohesion through practices of negotiation and consensus-building, rather than through authoritative interpretation and imposition of a centralized order."[22]

Webber identifies three levels of normative determination: the coordination of human interaction, the grammatical "language" structure used to express norms in a legal fashion, and the debates that utilize that grammar to negotiate the resolution of a particular situation.[23] The second and third levels operate as somewhat of a feedback loop; core elements of the solutions arrived at in the particular debates can become encoded as normative content in the level of grammar, precisely because there will always be a range of possible so-

17. *Ibid*.
18. *Ibid*. at 23.
19. *Ibid*. at 12.
20. Gerald J. Postema, "Salience Reasoning" (2008) 27 Topoi 41 at 46.
21. Webber, "Grammar", *supra* note 1 at 25.
22. *Ibid*. at 29.
23. *Ibid*. at 38.

lutions in any real-life situation.[24] In a judicial context, this is one (greatly simplified) way to think about the difference between the law and the facts; cases are decided on the facts, which in turn serve as precedents that structure the ways in which the law develops and can be deployed. This process must be ongoing and perpetual if a society's law is to remain relevant and just. To draw upon Nietzsche, pragmatic truths become absolute as we lose awareness of their original social function, [25] and the most extreme of absolute truths are the ones that have become so formative to the way in which a particular society thinks that they are no longer capable of being subject to examination on a conscious level — at least, not without a genuine commitment to maintaining awareness of the existence (if not content) of these truths so that when alternatives are encountered through the process of interaction with other societies, the limitations of one's own 'base model' become explicit.

A. Stories

An important step in the process of identifying the norms inherent in our own legal system is the realization that these elements may be articulated in ways that do not conform to the rationalistic, objective forms of reasoning which Western law tends to privilege and value. Many Indigenous peoples, when asked to describe their law, will do so in the form of a traditional story which is not immediately evident to the Western hearer as an embodiment of legal principles. Borrows notes that Indigenous laws, "commonly deriving from an oral tradition, enunciated in songs, stories and ceremonies," are often seen as custom rather than law by outsiders who fail to recognize that many of these norms and traditions had consequences which gave them more than just moral force.[26] By recognizing that our own law is described in terms that point to a series of underlying narratives, we might move one step closer to recognizing the values which drive its production.

Webber suggests we begin with the acknowledgement that "non-indigenous law too draws on metaphor, myth, and narrative."[27] The very language we use to describe and justify our laws and legal system reveals an understanding based on stories we have told ourselves as a society. These stories change, gradually or suddenly, as our values shift and are developed through the experience of living with them.[28]

Perhaps this has been phrased best by Robert Cover:

> A legal tradition … includes not only a *corpus juris*, but also a language and a mythos — narratives in which the *corpus juris* is located by those whose wills act upon it. These myths establish the paradigms for behaviour. They build relations between the normative and material universe, between constraints of reality and the demands of an ethic. These myths establish a repertoire of moves — a lexicon of normative action — that

24. *Ibid*. at 39, 40.

25. Friedrich Nietzsche, *The Will to Power: In Science, Nature, Society and Art*. (New York: Random House, 1968).

26. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 4.

27. Webber, "Grammar", *supra* note 1 at 31.

28. For a fascinating discussion of the ways in which this process might happen, see the developing literature on constitutional moments: good resources include Sujit Choudhry's edited volume, *The Migration of Constitutional Ideas* (New York: Cambridge University Press, 2006) and Mark Tushnet's "Misleading Metaphors in Comparative Constitutionalism" (2005) 3(2-3) International Journal of Constitutional Law 262-68.

> may be combined into meaningful patterns culled from meaningful patterns of the past.[29]

While Western myths used to depend largely on Christian religious narratives, they have moved toward a secular but "strongly charged aesthetic"[30] that is recognizable in such fundamental legal definitions as personhood, objecthood and which objects are susceptible to ownership and in what way. Innate ideas of what is beautiful, good, right, valuable and worth protecting find expression in the realities of legal rules that permit or regulate the cutting of trees, treatment of animals, obtainment of a marriage licence, guardianship of a child and refusal of medical life support for oneself or another, to name just a few. These convictions are what have shaped the historical development of our law and what continue to shape it even as they themselves evolve with changing economic, social and cultural realities. Myths or narratives provide a cohesive storyline by which people can apply their society's norms to a given situation. A storyline helps create familiarity with and foster effective use of the norms by providing "the relative importance of particular norms… [and] a range of examples of the norms in action, thereby furnishing models for how the norms should be applied," as well as giving "salience and a memorable quality to certain norms, which can then be retained, internalized, and sometimes made a focus of identification and allegiance."[31] These same functions are also served by common Indigenous practices surrounding narratives, such as "pre-hearing preparations, mnemonic devices, ceremonial repetition, the appointment of witnesses, dances, feasts, songs, poems, the use of testing and the use and importance of place and geographic space."[32] Colin Scott summarizes the process nicely: "As the weft of experience entwines the warp of culturally available categories, narrative is the weaver."[33]

We are often unaware of the extent of the role that norms play in our judgements. In order for a society to perpetuate itself, it must find a way to instil basic beliefs in its members. In a society with no encoded legislative framework, the role of myth, narrative and stories becomes more obvious. Indeed, much of the initial confusion of Westerners seeking to understand the customary law of Indigenous societies arose from the fact that when asked about their law, Native peoples have tended to respond by referring to things like creation stories. For Westerners accustomed to the expression of an abstract legal rule, it has often been very difficult to identify how these stories relate to a prescriptive social order, even though their own systems may actually involve similar narratives that play an analogous role.[34]

B. Metaphysics

Even if we manage to learn to read legal principles in story form, additional barriers to cross-cultural understanding remain. It is not only our values, but the very metaphysics of

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29. Robert Cover, "Nomos and Narrative" (1983) 97 Harv. L. Rev. 4 at 9.

30. Webber, "Grammar", *supra* note 1 at 32.

31. *Ibid*. at 33.

32. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 12.

33. Colin Scott, "Spirit and Practical Knowledge in the Person of the Bear among Wemindji Cree Hunters" (2006) 71(1) *Ethnos* 51 at 51 [Scott, "Spirit and Practical Knowledge"].

34. John Borrows acknowledges and seeks to address these difficulties in understanding by expressly drawing analogies between the Canadian common law system of case law governed by precedent and the customary law of traditional Indigenous societies, specifically that of the Anishnabek of Ontario. He attempts to illustrate the parallels between the systems by retelling several traditional Anishnabek stories in a case-law style that will be more familiar to those who have been trained in the common law. See Borrows, *Recovering Canada*, *supra* note 12.

how people perceive realities, such as the passage of time or the independent existence of spirits, that are implicated in how we structure our interactions and affairs. Anishinabek legal conceptions of property ownership, for example, are substantively different than those of Western legal traditions; for the former, land can be held for sustenance purposes, but this does not imply that the owner can do whatever he or she chooses with the 'property'. Rather, the land is literally understood as a mother to the Anishinabek people.[35] Thus, the very rocks themselves are recognized as having legal rights, which implies personhood: "Their active nature means rocks have an agency of their own which must be respected when Anishinabek people use them. It would be inappropriate to use rocks without their permission because the action would oppress their liberty."[36] This understanding goes beyond an Aboriginal tendency to acknowledge the role of narratives and even beyond differences in the stories of law themselves, to a basic difference in belief about the way the world works. Colin Scott has noted how root metaphors become implicit in descriptions of experience, so that we become blind to our own metaphysical paradigms even as we retain awareness of those of other societies.[37]

The potential for misunderstanding is compounded if each culture has somewhat different perceptions of space, time, historical truth, and causality. Borrows provides examples: early Christians explained human settlement of the Earth as emerging from Mesopotamia, where they believed the Garden of Eden was located, whereas the Ojibway thought of humankind's source as Michilimackinac Island in the Great Lakes; also, "[t]emporally speaking, Christianity, Islam and Judaism have tended to view time as being linear, progressing, and 'marching on' … [while o]ther cultures such as the Maya, Ainu or Cree have thought of time as being cyclical and repetitive."[38] Methods of understanding Indigenous cultures that impose categorical identifications which do not correspond to realities as envisioned and expressed by those cultures themselves are doomed to inadequacy. Irving Hallowell explains that since Western thinking categorically identifies "persons" as synonymous with humans,

> The same identification is implicit in the conceptualization and investigation of social organization by anthropologists. Yet this obviously involves a radical abstraction if, from the standpoint of the people being studied, the concept of "person" is not, in fact, synonymous with human being but transcends it … [I]f, in the world view of a people, "persons" as a class include entities other than human beings, then our objective approach is not adequate for presenting an accurate description of "the way a man, in a particular society, sees himself in relation to all else." A different perspective is required for this purpose. It may be argued, in fact, that a thoroughgoing "objective" approach to the study of cultures cannot be achieved solely by projecting upon those cultures categorical abstractions derived from Western thought. For, in a broad sense, the latter are a reflection of *our* cultural subjectivity. A higher order of objectivity may be

35. Borrows, *Recovering Canada*, *supra* note 12 at 39.

36. *Ibid*. at 38.

37. Colin Scott, "Science for the West, Myth for the Rest? The Case of James Bay Cree Knowledge Construction" in Laura Nader, ed., *Naked Science: Anthropological Inquiry Into Boundaries, Power and Knowledge* (New York: Routledge, 1996) 69 [Scott, "Science for the West"].

38. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 115 and n. 356.

> sought by adopting a perspective which includes an analysis of the outlook of the people themselves as a complementary procedure.[39]

Furthermore, it may be that it is this Indigenous metaphysical notion of the "relatedness" of all that exists that fuels the impulse to adjust to both human and non-human aspects of nature, an impulse which "underpins Native American ethical thought and axiology."[40]

The fundamentally different base metaphysics of Indigenous societies can provide a rich opportunity for the recognition and evaluation of our own deepest beliefs;[41] yet, when approaching with such a different mindset, it is difficult as a Westerner to claim to have arrived at a reasonably certain understanding of this alternative system of norms without risking a colonial arrogance that may recognize the differences between the two systems and yet still in many ways misconstrues the ultimate framework of the unfamiliar society. Another society may have made a different normative choice in an area where we took for granted our own as the only possible conclusion; it is not enough, however, to end our exploration here and assume that though the end result was different, the two societies must have arrived at their respective determinations in a similar way. And it is a matter of some debate whether a true understanding of another society's metaphysics can ever really be achieved by an outsider; it may be that the conscious ongoing maintenance of an awareness of fundamentally significant differences which we cannot ever really grasp is the best we can do in terms of respecting another society's understandings. Continuing to build upon previous understandings of other legal orders is key, of course, but at the same time we must resist the temptation to think we have arrived at a full understanding, or that, given the ever-evolving nature of law and custom within all societies, we ever can.

Natalie Oman provides a vivid example of such a disconnect in basic frameworks of understanding in a case where both parties failed to recognize the existence of an alternate interpretation of the same events. In 1872, the Gitxsan village of Kitsegulka on the west coast of BC was accidently burned down by white miners.[42] In response, the Gitxsan blocked the minors' trade goods from passing on the Skeena River, a major trade route. Negotiations ensued with BC's Lieutenant-Governor; historical records indicate that the Gitxsan understood the meeting as analogous to one of their own feasts — gatherings traditionally used, among other purposes, to resolve intratribal legal disagreements — with the requisite feast elements of an explanation of the offence told by way of story in order to contextualize it, the sharing of oral histories, the receipt of gifts from the miners to signify responsibility for wrongdoing and recognition of Gitxsan jurisdiction, a signed agreement to confirm mutual respect for each other's sphere of authority, and a celebration of the successful consensus. The colonists, on the other hand, understood the process as a meeting at which grievances were recited, the bizarre Gitxsan insistence on singing and storytelling was humoured, a token sum was paid to end the blockade, a statement was signed to this effect and a symbolic show of force was made to discourage future interference with colonial activities.

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39. A. Irving Hallowell, "Ojibwa Ontology, Behavior and World View" in Stanley Diamond, ed., *Culture in History: Essays in Honor of Paul Radin* (New York: Columbia University Press, 1960), 19 at 21.

40. Robert Bunge, *An American Urphilosophie: An American Philosophy BP (Before Pragmatism)* (Maryland: University Press of America, 1984) at 94, emphasis in original.

41. Webber, "Grammar", *supra* note 1 at 37.

42. Natalie Oman, "Paths to Intercultural Understanding: Feasting, Shared Horizons and Unforced Consensus" in Catherine Bell & David Kahane, eds. *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press, 2004) at 70-71.

The effect of divergent background understandings becomes even more insidious when one considers that in cases of power imbalance, such as the one described above, the unconscious imposition of the more powerful group's standards of value and worldview inherently limits the number of available solutions to a problem.[43] "[T]he standards of value of the more powerful party generally define the reality that is admitted as imaginable."[44] The disadvantage that this reality poses to the marginalized group is generally immediately apparent, but often the negative consequences to the dominant order are also substantial, if more subtle, as discussed later in this paper.

Iris Marion Young goes so far as to deny the possibility of putting oneself in another's place with any sort of accuracy or moral respect, given the extent of differences in perspective across cultures.[45] If true, however, this inability gives rise to problems when one considers the implications of moral judgements — the types of decisions that both result from and lead to the further development of our cultural system of norms. Some theorists, Young among them, have suggested that we refrain from making these judgements, but at least some types of judgements are inevitable if one is to function in a social world. Even an awareness that our judgements are informed by cultural and personal experience cannot lessen the force of judgement itself. Fundamentally, there can be no neutral position; as much as the range of possible beliefs available to others are dictated by their culture, so too are our own choices constrained by our circumstances. Thomas Morawetz points out that this inevitable situatedness effectively rules out the possibility of subjecting one's own certainty to the same kind of critical evaluation that can be made of the convictions of others: "what could I use to check my picture of the world and my practices as a whole but my picture of the world and my practices?"[46] Webber makes a similar point, noting that there are likely to be strengths and weaknesses in any society's normative framework, but that our ability to compare our own on an equal footing with that of others is constrained by the fact that "we can only discuss these comparisons in language. We can never get outside language. We can do our best to translate across languages, but whatever we say is inevitably afflicted by the limitations — and the strengths, and the normative overtones — of the tools we use to say it."[47]

These restrictions do not mean, however, that we should abandon all efforts at understanding. Charles Taylor has attempted to develop a methodology by which intercultural understanding might be or become attainable with his concept of "sharing horizons," in which certain similar metaphysical and moral (and by extension, legal) ideas between two cultures, however few they might be to begin with, can serve as a platform from which to gradually develop accurate understandings of more radical foreign beliefs through dialogue with these others.[48] As Oman points out, "[t]he dialogical process that gives rise to a meta-language of negotiation in this situation provides the participants with the opportunity to discover a broader horizon against which their home conceptual systems can be

43. Oman, *ibid*. at 72.

44. Oman, *ibid*. at 86. Borrows argues that "[a] Eurocentric approach to legal interpretation must not be allowed to undermine Indigenous legal traditions", *Indigenous Legal Traditions*, *supra* note 2 at 114.

45. Iris Marion Young, "Asymmetrical Reciprocity: On Moral Respect, Wonder and Enlarged Thought" (1997) 3(4) Constellations 354.

46. Thomas Morawetz, *Wittgenstein and Knowledge* (Amherst, MA: University of Massachusetts Press, 1978) at 134.

47. Webber, "Grammar", *supra* note 1 at 42.

48. Charles Taylor, "Understanding and Ethnocentricity" in *Philosophy and the Human Sciences*, vol. 2 of *Philosophical Papers* (Cambridge, UK: Cambridge University Press, 1985).

more revealingly located in relation to the conceptual systems of others."[49] Webber would seem to agree with the possibility of this type of gradual-assembly model: "[t]here are areas of overlap in experience, analogies among our attempts to make sense, which can serve as starting points for mutual understanding."[50]

By retaining a conscious awareness of the existence of alternative possibilities, then, we can best position ourselves so as to be able to take advantage of opportunities that arise for us to build another level of understanding onto our conception of a different culture and its law. For Oman, acknowledging "alternative *legitimate* (whether comprehensible or not) standards of value — and the world-views they underpin … [allows] the possibility of outcomes that challenge the assumptions and expectations of both parties."[51] And as Webber reminds us, even if these values and their underlying metaphysics never become comprehensible, our necessary inability to evaluate them impartially makes it inappropriate to impose our own.[52]

Lest one think that this incremental process could someday lead to a complete fusion of understanding between two cultures, however, Oman reminds us that "any understanding that is reached is necessarily transitory, since it is an understanding of finite aspects of a living culture that is heterogeneous, contested and changing."[53] Even as one culture develops and improves its understanding of another's laws, that law is evolving to remain relevant to current circumstances.

Many theorists, then, seem to advocate the examination and recognition of modes of law in other cultures as a means to foster a conscious awareness of our own legal norms, especially those rendered invisible by unrecognized narrative and assumed universal metaphysics. The question then becomes how to proceed from this recognition in the inevitable process of substantive moral evaluation in a way that maintains the enlightenment gained via this hard-won awareness of alternative possibilities. There are two issues here — the search for a genuine understanding of another culture's law, and the possibilities for the ways we come to understand it to serve in the ongoing development of our own system. The latter process draws on the lives of those in other legal systems to provide a broader base of material.

Clearly, it is important to develop and maintain an awareness of the normative and metaphysical differences that underpin alternative systems of law so as to avoid operating from a position of misunderstanding, or worse, one which mischaracterizes what these differences actually mean when seen through an alternate worldview, thereby marginalizing a disadvantaged culture. It should be noted that there is also a significant and perhaps deadly disadvantage to the dominant culture in this mischaracterization. In *Recovering Canada*, Borrows argues for the need to incorporate First Nations legal principles into the law of the state, not only for the benefit of Indigenous people, but because their laws include knowledge that would greatly benefit and improve the dominant legal system. Essentially, he ar-

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49. Oman, *supra* note 42 at 82.

50. Webber, "Grammar", *supra* note 1 at 42.

51. Oman, *supra* note 42 at 86 [emphasis in original].

52. Webber, "Grammar", *supra* note 1 at 42. A detailed discussion of the arguments surrounding the possibility of objective moral improvement through cross-cultural comparison of narratively arranged norms, see Satya P. Mohanty, *Literary Theory and the Claims of History: Postmodernism, Objectivity, Multicultural Politics* (Ithaca: Cornell University Press, 1997).

53. Oman, *supra* note 42 at 74.

gues that First Nations systems of law can and will continue to exist independently of their recognition by Canadian courts, but that "Canadian law cannot be truly independent until it more fully receives non-colonial sources of law."[54] Even more fundamentally, "Law can become unjust and irrelevant if it is not continually reviewed and revised,"[55] and one of the best ways for a legal tradition to ensure that it continually strives not just for maintenance but a higher level of moral worth — by its own standards and those of other cultures — is to draw upon those other cultures in order to gain awareness of the broadest possible range of understandings and corresponding options for solutions to a problem. A universal moral standard, much like a comprehensive understanding of another culture's normative framework, is likely an unattainable moving target, but again, this is no excuse for abandoning the effort at self-improvement.

II. JAMES BAY CREE LAW

A. Narrative/Metaphysical Differences

One of the major areas of Indigenous law that has and will likely continue to provide insights into the development of a corresponding common law concern is the natural environment. This section of the paper will explore those insights by examining the laws of the James Bay Cree that deal with the hunting and management of wildlife, taking special note of the moral and metaphysical assumptions that ground these directives.

In order to examine these legal principles with any degree of accuracy, it is important to remain aware of the problems of alternate metaphysics. Even once we succeed in accepting that another culture uses a different set of narratives and their corresponding metaphors, it is easy to forget that these metaphors are often just as effective in describing an external reality, as evinced by the empirical results of management efforts based on these alternative constructions. Colin Scott argues that once we disassociate these results from our own implicit metaphors, which we have come to exclusively identify as "scientific," it becomes apparent that Cree management techniques based on constructions that we would regard as mystical or nonliteral are, empirically speaking, just as effective.[56] Scott identifies the Western tendency to think that any correspondence between scientifically defined management success and "mystical" paradigms is merely fortuitous;[57] however, Native cosmologies have developed in the ways that they have precisely because they have proven a useful standard in practice for the management goals of the people who employ them, and are subject, like Western science, to modification and adjustment where they prove to be inaccurate (the norm-practice feedback effect described above). The next parts of the essay describe some of the specific accepted goose and bear hunting practices of the James Bay Cree and attempt to identify the norms that have influenced their adoption.[58]

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54. Borrows, *Recovering Canada*, *supra* note 12 at 13.

55. Borrows, *Indigenous Legal Traditions*, *supra* note 2 at 14.

56. Scott, "Science for the West", *supra* note 37.

57. *Ibid*. at 71.

58. Beaver are also a major Cree resource, but their harvesting patterns have been complicated by the economic pressures of the fur trade, in ways that are beyond the scope of this essay to discuss. The hunting territory debate is addressed well in Charles A. Bishop & Toby Morantz, eds., "Who Owns the Beaver?: Northern Algonquian Land Tenure Reconsidered" (1986) 28 (special issue) Anthropologica 1.

B. Relations with Game Animals

The Cree discussed in this essay, the James Bay Cree, are a specific group who inhabit an area to the east and southeast of James Bay and southeast of Hudson Bay. They can be further divided into modern community-based settlements: Waskaganish, Eastmain, Wemindji, Chisasibi, Whapmagoostui, Nemaska, Waswanipi, Oujé-Bougoumou, and Mistissini. Historically, these communities were comprised of two broadly different social formations. One was the small winter hunting group, made up of a few families — in Mistassini "two to five commensal units, which are generally nuclear families"[59] — which generally travelled great distances to access scarce and widely scattered resources and operated largely in isolation. The other was the summer gathering of the larger band, an exercise which facilitated band social interaction and allowed for the effective hunting of seasonally available animal resources such as geese, which migrate across the territory twice a year in the spring and fall.

Among the Cree, animals are said to communicate with humans, if one is willing to read their signals. Trends in animal populations are understood as intentional communications to the hunters.[60] Ronald Niezen notes the existence of Indigenous linguistic constructions that emphasize that animals ultimately control the hunt, and that success therefore depends upon respectful modes of action.[61] When an animal becomes scarce or can no longer be successfully hunted in any particular area, its absence is read as an expression of that animal's unwillingness to be caught — an attitude which may be to the result of displeasure with the hunters' over-harvesting of that area and concomitant failure to allow the animals a respectful amount of space: "Cree hunters' discrimination of population trends is expressed in terms of the animal's readiness to give itself. To take too much when the animal is signalling a growing avoidance of or anger towards hunters is to undermine the relationship, to disrespect the animal."[62] Rotational resting of hunting territories is understood to allow time not only for the species to repopulate, but to overcome anger toward the hunters so that they are willing to make gifts of themselves once more. Territories can be under-harvested, as well: "if animals want to be caught and are not hunted … they have fewer young and more easily succumb to diseases or predation."[63] The obligation, then, is to provide the appropriate conditions for the animals to flourish. This understanding of the need for humans to respect animals is an expression of an overarching law of respect and belonging that governs relations within and among the Cree and the rest of the world — both its animate and inanimate elements. Therefore, as Robert Brightman tells us, "the moral commitments and antagonisms that hunters experience with their prey are as pertinent to our understanding as their knowledge of animal habitat and biomass."[64] Even the most esoteric hunting prac-

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59. Adrian Tanner, *Bringing Home Animals: Religious Ideology and Mode of Production of the Mistassini Cree Hunters* (New York: St. Martin Press, 1979) at 22.

60. Harvey A. Feit, "Hunting and the Quest for Power: The James Bay Cree and Whitemen in the Twentieth Century" in R. Bruce Morrison & C. Roderick Wilson, eds., *Native Peoples: The Canadian Experience*, 3rd ed. (Toronto: McClelland & Stewart, 2004) 101 at 109 [Feit, "Hunting and the Quest for Power"].

61. Ronald Niezen, *Defending the Land: Sovereignty and Forest Life in James Bay Cree Society*. (Boston: Alfyn and Bacon, 1998) at 26-27.

62. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 64.

63. Feit, "Hunting and the Quest for Power", *supra* note 60 at 106.

64. Robert Brightman, *Grateful Prey: Rock Cree Human-Animal Relationships* (Berkeley: University of California Press, 1993) at 3. Brightman's book deals more explicitly with the Rock or Missinippi Cree of northwestern Manitoba, but is referenced here to the extent to which the practices he describes parallel those of the James Bay Cree.

tices are explained by the Cree as "instrumental procedures that secure desired objectives by taking realistic account of the objective characteristics of animals."[65]

More specifically, Cree paradigms contrast with Western Cartesian dualities (such as culture/nature, natural/supernatural) by assuming the essential similarity and interconnectedness of people and animals, who are able to meaningfully communicate with each other across species boundaries. The Cree root metaphors thus lead to "moral standards of positive reciprocity," reflected in hunting behaviours that emphasize respect and generosity.[66] Animate/inanimate is another duality that is largely incomprehensible in the Cree worldview; it is not so much the case that rocks are seen as alive, in the sense that the "attribution of life to the non-living is not what occurs in a world perceived as so many different modalities of life, of emergence … [but that] figurative practice is rather to understand the differences among beings in the world as variations on the underlying themes of life in community."[67] Feit tells us that not only are all elements of the universe living, they are also volitional; the operation of the world is thus predictable to the extent that one is able to predict the actions of intelligent persons, a complex order that is "neither of mechanistic determination nor of random chance."[68]

Legally speaking, the stewardship system of hunting group leaders must be understood in the context of certain constructions of the ability to own property. Specifically, the land itself is often not subject to individual ownership in a Western sense; notions of territory tend to shift with the fluidity and movement of more important subsistence resources such as game. A broadly equitable nominal right is said to exist for all Cree to harvest subsistence resources in any area (in contrast with economic resources, and subject to the practical requirements of seasonal movement and settlement across vast stretches of resource-poor territory, especially as one looks further north).[69] Associated with these rights, however, are significant responsibilities to sustain oneself in a manner that is not detrimental to the resources themselves or to others who rely on them. Feit describes the result as a "community of responsibility" in which rights are exercised according to a personal restraint that takes account of the needs and desires of others in the community.[70] In practice, the stewardship system allows for effective and respectful resource management by drawing upon the expertise of those whose skill and respect at hunting have been recognized by their peers. Ronald Niezen describes the "control of areas of land and resources as a conditional form of authority derived from social recognition of skills and responsibilities," and a manifestation of the key principles of stewardship and sharing.[71] Each steward manages a territory, the assignment of which is overseen by the Elders, and which is generally associated with a particular Cree community. In practice, the steward of an area would most likely have been raised there, allowing him to develop an intimate knowledge of the land and animals that inhabit it. Often, he is said to have "inherited" the stewardship of the land from an elder (who may or may not have been kin) who has passed on his knowledge by teaching the current steward. Tanner describes Mistassini land as "divided into hunting

65. *Ibid*. at 33.

66. Scott, "Science for the West", *supra* note 37 at 74.

67. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 61.

68. Feit, "Hunting and the Quest for Power", *supra* note 60 at 103.

69. See, e.g., Tanner, *supra* note 59 at 183.

70. Feit, "Hunting and the Quest for Power", *supra* note 60 at 107.

71. Niezen, *supra* note 61 at 16.

territories, each of which is associated with an individual who has usufructuary rights by inheritance, by gift, or by establishing long-term occupancy."[72] At the same time, "territory ownership is not based on any attachment to land as such;" rather, it is linked to notions of rights to harvest resources, which were complicated by the introduction of beaver fur as a product sought for trade rather than use.[73] The steward's authority is exercised in the name of the community and the common interest.[74] Fikret Berkes points out that the "presence of social constraints and collective community interest help avoid the pitfalls of the 'tragedy of the commons'"[75] despite the lack of formalized property ownership.

Laws relating to territorial rights are necessarily entwined with those concerning hunting. Animals differ from other types of resources in that they are capable of movement, especially in the case of nomadic species. Due to the centrality of hunting to the Cree lifestyle, Indigenous conceptions of property ownership developed so as to complement the migratory realities of this key subsistence activity. These conceptions are expressed as normative rules governing access to resources, in terms of the conduct of social relations within and between hunting groups. The property relationship "exists in the context of a flexible system of geographic movement and inheritance, such that the central qualification of an owner is the fact of his leadership of a hunting group;"[76] supernatural relationships with animals (such as divination, hunting magic, and animal friendship), provide

> …the ideological link between the short-term rules of access to resources within the territory and the group notion of a 'permanent' relationship which is said to exist between a group leader and the area he habitually uses. The relationship of hunters to the animals may sometimes be likened to having "friends" or "pets" among those animals which inhabit the particular region, but in relation to strangers, that is to people outside the potential members of the individual's hunting group, its relevance is, in effect, that of a relationship to the land area itself, and comes close to the general concept of land ownership.[77]

Tanner explains that to the Cree, the activity of hunting has multiple levels of significance.[78] In the first instance, it is about the use of animals for the provision of material needs; underlying this purpose, however, is a second understanding based upon the social relations between the animals themselves, natural forces, and humans, with whom the animals are understood as having personal relationships. The ideal human-animal relationship model is one where the expressed respect of the human for the superior position of the animal leads it to give itself to the hunter as a gift. This dual understanding of reality, from the perspective of the animal and of the Cree, is often embodied in myths that tell of individuals marrying or going to live among animals that the individual suddenly perceives as human. To the Cree, these men and women are still thought to have an accurate perception of reality — it is just that their reality has become classified by animal categories of un-

72. Tanner, *supra* note 59 at 22.
73. *Ibid*. at 183.
74. Feit, "Hunting and the Quest for Power", *supra* note 60 at 107.
75. Fikret Berkes, ed., *Common Property Resources* (London: Belhaven, 1989) at 92.
76. Tanner, *supra* note 59 at 187.
77. *Ibid*. at 189.
78. *Ibid*. at 136.

derstanding rather than human ones (e.g., home = beaver lodge rather than tepee).[79] Some of these myths also serve as the source of ritual actions involving animal materials, which serve to establish or improve communication between the two levels of reality.[80] But Tanner also reminds us that we must be "careful in assuming that the modern Cree accept at face value the existence of this second level of reality. To the extent that the myths constitute a form of belief, they indicate a state of affairs that existed in the distant past."[81]

The requirement for interspecies respect is taught and reinforced by certain rituals, such as abundant feasting at the opening of the goose hunting season and the generous sharing of the proceeds of the hunt, which are meant to symbolize human generosity and thus invoke a corresponding largesse in the animals. The animal gift of its body for human sustenance incurs corresponding obligations in the hunter; the process is "a complex social and moral relationship of reciprocity in which the outcome of the hunt is a result of the mutual efforts of the hunter and the environment."[82] Scott argues that this generosity in feasting leads literally to animal generosity (hunting success) by reinforcing the cooperation of hunters with "shooting bosses" who manage territories effectively: "[w]hen hunters respect animals in certain practical ways, such as strategic self-restraint in hunting, an ecological scientist might conclude that the sustainability of animal 'gifts' is verifiably enhanced."[83] Harvey Feit also describes the Cree understanding that animals allow themselves to be killed and eaten as a gift: "[h]unting is not in this view solely an application of human labour to passive resources" and animal generosity in giving these gifts must be paralleled in the sharing of food with other humans in order to continue.[84] David Smith observes that "maintaining good relationships with other humans has always been extremely important in an immediate way, for reasons of practical survival. Disruption in the human social community also redounds to cause a breakdown in communication with the animals — a dominant motif in stories."[85]

Ideas about power are important to the Cree; as discussed above, power is "linked to status, hunting leadership, and to the stewardship of hunting territories" and is often seen as manifested in the ability to acquire accurate knowledge about future hunting success through dreams and traditional practices like scapulamancy.[86] This power is less about control and more about openness to information that will predict future events accurately and therefore allow for hunting success; "humans do not ultimately control life, but intimately and respectfully link their thought and action to other power beings who create the conjectures of life."[87]

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79. See Tanner, *ibid*. at 136ff. for a good description of this phenomenon.

80. See Tanner, *ibid*. at 137.

81. *Ibid*.

82. Feit, "Hunting and the Quest for Power", *supra* note 60 at 102.

83. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 52.

84. Harvey A. Feit, "The Enduring Pursuit: Land, Time and Social Relationships in Anthropological Models of Hunter-Gatherers and in Subarctic Hunters' Images" in Ernest S. Burch, Jr. & Linda J. Ellanna, eds., *Key Issues in Hunter-Gatherer Research* (Oxford: Berg Publishers Inc., 1994) at 421-40 [Feit, "The Enduring Pursuit"]. See also Feit, "Hunting and the Quest for Power", *supra* note 60 at 105.

85. David M. Smith, "World as Event: Aspects of Chipewyan Ontology" in Takako Yamada & Takashi Irimoto, eds., *Circumpolar Animism and Shamanism* (Sapporo, Japan: Hokkaido UP, 1997) 67 at 77. Though Smith is referring specifically to the Chipewyan, his point also applies to the Cree worldview.

86. Feit, "The Enduring Pursuit", *supra* note 84 at 435.

87. *Ibid*.

Driben, Auger, Doob, and Auger also echo the idea that animals are understood as people, with the result that

> …the relationship between the Cree and Ojibwa and the animal-persons they pursue is governed by the same ethical considerations that govern human relationships. Their encounters with animals are framed as encounters with persons, and the interpretations (of those encounters) use as analogues, the commonplace social mechanisms, such as coercion, sexuality and gift exchange to express how those encounters can be transformed into mutually beneficial social relationships.[88]

Tanner describes the existence of multiple models of social relationship within the broad understanding of human-animal relatedness: friendship, love (sexual or familial), or enmity (which operates in a context of coercion or a hierarchical structure, rather than the reciprocal model implied by the first two). Animals, like people, have souls that can and do exist separately from their bodies, an attribute that requires humans to interact with them according to certain patterns.

i. The Goose Hunt

The migration of the geese takes place in early fall and late spring, when the Cree summer groups are gathered together. The men divide themselves into hunting groups, each one of which is overseen by the legal authority of a "shooting boss" who is responsible for managing the hunt in a specific area of the Cree territory. These bosses decide where the hunt will be undertaken on any particular day, based upon the need to rotationally "rest" territories in order to avoid having the geese associate any particular area with danger and thus begin to avoid it. The bosses also oversee the use of techniques such as landscape arrangement, decoys, goose calls, and blinds, precautions likewise taken to ensure that the geese do not realize the hunters are present and thus learn to associate certain details with danger.[89]

This management system is based upon Cree ideas about goose intelligence and capacity for communication and learning, which may seem unfamiliar or anthropomorphic to the Western reader; its efficacy, however, is demonstrated by the fact that in certain designated areas, such as the outer islands, Cree who cannot participate in the traditional hunting groups due to year-round modern employment are permitted to hunt when they are able (as opposed to those areas where hunting must occur at the times and in configurations that are overseen by a goose boss). In these areas, the number of geese that return each year to feed has consistently decreased, whereas in other, traditionally managed areas it has remained constant.[90] Feit writes that "inter-species communication is indicated by the intelligent response of animals to the efforts of hunters;"[91] similarly, Cree belief in animal intelligence has its roots in a long history of observation of behaviour. Territorial rotation is also explained as a practice which "respects" the geese by leaving most of the lakes and marshes for unmolested rest and feeding.

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88. Paul Driben *et al.*, "No Killing Ground: Aboriginal Law Governing the Killing of Wildlife Among the Cree and Ojibwa of Northern Ontario" (1997) 1(1) Ayaangwaamizin 91 at 101.

89. The goose hunt is described in detail by Scott, "Science for the West", *supra* note 37.

90. *Ibid*. at 79; for further evidence of the effectiveness of Cree management techniques, see Feit, "Hunting and the Quest for Power", *supra* note 60 at 110.

91. Feit, *ibid.* at 103.

The fact that the Cree describe the above reduction in goose numbers on the uncontrolled islands as a result of the geese 'punishing' these casual hunters for failing to respectfully allow space and time for the flocks to rest and feed does not lessen the empirical validity of the description of the result. The Cree effectively and accurately use this understanding to predict where the geese will stop coming. The description itself is also continuously subject to modification based on new empirical data; "the hunting situations referred to are themselves key interpretants of the appropriate extent and application" of metaphors of human leadership, speech, and other qualities.[92]

ii. The Bear Hunt

Different types of animals invoke different moral and metaphysical associations. The Cree worldview features an understanding of different types of life as existing along a continuum, with the different animal species conceptually located at different points along this scale. The black bear "is the paramount symbol of the imperative for respect" in the Cree system of reciprocity, due to its powerful nature and perceived similarity to humans.[93] In fact, when it comes to intelligence, bears are thought to be the equals, or even the betters, of humans. Brightman notes that different strategies must be employed to hunt bear than are used to trap rabbits, for example; little ritual is involved with hunting the latter, which falls much lower on the chain of respect, while the former is the subject of intense preparation and ceremony. "The existence of particular modes of interaction is based on the understood character of the animal; reciprocally, the character of the animal is built up in terms of the role it plays in human social life."[94] Tanner indicates that bear hunting often exemplifies the 'ideal' of the Cree hunt: the animal's location is known in advance, meaning that sufficient ritual preparations can be made, and though a bear could easily attack and possibly kill a human, attacks happen very rarely — a reality that reinforces the idea that the bears are willingly sacrificing themselves as offerings to the properly respectful hunter, since they, unlike many other animals, arguably have the ability not only to prevent their death but to reverse the relationship by killing the hunter.[95]

Bears can be seen as resembling humans in many ways; they can walk upright, make human-sounding vocalizations (Scott refers to a shot bear "crying"), and eat the same omnivorous diet. These resemblances merge with ideas about the bear's power; it is the only animal that poses the same deadly threat to hunters as hunters do to it. Other animals might be just as intelligent as humans, but only the bears are powerful enough to reverse the relationship of killing and eating. A breach of hunting etiquette, when it comes to the bear, could quite easily invoke an attack on the offending hunter, which is likely to be fatal. Scott describes how "[a]n accident on the ice that ended in a drowning two winters earlier had been attributed (among other possible factors) to the victim's participation the previous summer in killing a bear whose meat, due to improper butchering in hot weather, had spoiled."[96]

Hunting practices are governed by a "respect born of necessity;"[97] if the appropriate behaviours are not observed, hunters will not be successful in retrieving game. One of these

92. Scott, "Science for the West", *supra* note 37 at 80.
93. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 64.
94. Brightman, *supra* note 64 at 34.
95. Tanner, *supra* note 59 at 146.
96. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 57.
97. Brightman, *supra* note 64 at 103.

requirements involves killing game animals quickly and humanely, so as to minimize their suffering. Another is verbal circumspection in referring to the animal killed, especially in the presence of the carcass. Brightman describes a continuum of respectful circumlocution, with the bear at one end and the hare and fish at the other. When bear are hunted during the winter, they are typically located in their dens. Hunters then talk or sing to the bear until it emerges, groggy from hibernation, and is shot. The bear might be asked for its forgiveness and addressed as "grandfather," a further indication of Cree notions of relatedness with animals and the especial similarity of such intelligent animals to humans.[98] This term is also indicative of the nature of those relationships; the animals nurture the hunters by providing sustenance, and the Cree are in turn appropriately respectful of their wisdom and the self-sacrifice involved in providing this care. Offerings of meat and tobacco are often burned to produce smoke that rises up to the spirits as an indication of thanks. This giving — animals of themselves, and humans of gifts — perpetuates an endless cycle of reciprocity that echoes Cree ideas about the structure of the universe. Animal products that are not eaten and do not have a utilitarian purpose are respectfully treated in other ways — for example, the practice of suspending skulls, antlers and bird bills from tree branches to prevent inadvertent carelessness leading to disrespectful treatment.[99]

This practice is also linked to traditional Cree ideas that animals taken in the hunt, if properly treated, are either reincarnated or regenerate themselves. Historically, this belief in regeneration, coupled with ideas of the success or failure of the hunt as determined by the animals themselves, led to the killing of large numbers of animals at one time — such as all the beaver in a lodge or most of the caribou in a herd — since the Cree understood that their actions had no power to effect the total number of animals available. Limiting kills would not be rational, since the number of animals caught could only be manipulated by respectful hunting and ritual practice. Tanner indicates that "[t]he Waswanipi conceive the practice of limiting kills by rotational use of hunting tracts as an obligation that the human hunter owes to the prey;"[100] Brightman seems to contradict him by suggesting it might have been seen as disrespectful to decline an animals' offer of itself. This may be an example of a territorial distinction, but given that Tanner also describes Mistassini understandings of game as reincarnating and undepletable, perhaps these understandings can be differentiated by the fact that Brightman is referring to animal encounters on territory that is in use — given the availability of a safe option to retreat to, the argument that an animal that appears in an active hunting territory is offering itself for use becomes that much stronger. Additional numbers of game animals were thus seen as a direct result of spiritually motivated activities ("respect"), rather than from the Western perspective of breeding stock availability. In both cases, the result can be described as "limiting kills = more animals," but the metaphysical understanding of the process and hence the motivation underlying the restraint is markedly different. Thus, the traditional Cree experience contributes to the argument that "the labor process itself is integrally symbolic to the degree that it is organized by categories and propositions that are not mechanically deducible from human biology, available technology, or the environing ecosystem."[101] There are also ways in which killing or trapping many animals at a time might actually have benefited their overall numbers; as in the case of the beaver, uncontrolled population growth leads

98. *Ibid.* at 115.

99. *Ibid.* at 118-19.

100. *Ibid.* at 282.

101. *Ibid*. at 292.

to numbers that "exceed the amounts of quality food or the number of sites where colonies can be located, so that the health of the animals deteriorates and they fight each other for lodge sites."[102] Taking large numbers of animals from one location at once, then leaving it for a long period of recovery while the hunters rotated through other areas, was also the most efficient practice in terms of Cree labour, given the vastness of the territory and the scattered dispersal of animal resources.[103] Scott describes another understanding that impacted total kill numbers: success might be due to respectful preparation and animal generosity, but overwhelming or unusual success was seen as dangerous for the hunter and a possible sign of his impending death, therefore leading to a desire to limit one's harvest. "An extensive symbolic and ritual repertoire balances signs and circumstances"[104] of each extreme, either of which risks the hunter's death, and leads to an awareness of "the twin necessities of acting alertly and decisively in accepting animal gifts, but taking only what is needed and given. This ambiguity demands attentive judgement, and responsibility."[105]

Ultimately, the traditional model of understanding would have to be modified with the introduction of European settlers and technology, but such a need does not negate the effectiveness of the original model in the conditions for which it was developed. Webber brings this point to its conclusion, arguing:

> not that indigenous societies were infallible stewards of their resources ... Like any other society, indigenous peoples could exhaust a resource as a result of miscalculation, the discovery of a destabilizing new technology, ruinous competition with other groups, or pressures caused by resource commercialization or population displacement following European settlement. My point is rather that a wide range of structures for regulating resources appears to be consistent with sustained economic activity over time.[106]

Cree myths function as narratives that consolidate and articulate the principles identified above. The interconnected nature of all life is embodied in stories that identify the first animals as transformed humans, with literal kinship relations to the first people. Brightman states that "[s]ince Crees say that bears and beaver are closer in their attributes to human beings than other species, it might be expected that some myths would assign these animals human or humanoid ancestry."[107] In addition to being understood in terms analogous to caring relatives, the Cree sometimes also refer to the hunt using metaphors that connote a sexual relationship between hunter and prey. Human sexual encounters in dreams are interpreted as a premonition of a successful hunt. Scott also indicates that the act of consuming meat is often metaphorically expressed as associated with the intimacy of a sexual relationship, specifically in the justification of the consumer/consumed dichotomy.[108]

Love, of course, is not the only way people relate to each other, which also holds true for relations with animal persons. The Rock Cree of Manitoba believe that "hunting medicine"

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102. Harvey Feit, "The Cree of James Bay, Quebec, Canada" in Milton Freeman, ed. *Endangered Peoples of the Arctic: Struggles to Survive and Thrive* (Westport, Connecticut: Greenwood Press, 2000) 39 at 41.

103. Tanner, *supra* note 59 at 191.

104. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 64.

105. *Ibid*. at 65.

106. Webber, "Grammar", *supra* note 1 at 20.

107. Brightman, *supra* note 64 at 40.

108. Scott, "Science for the West", *supra* note 37 at 76.

can be used to bewitch animals and force them to come to the hunter's trap or within range of his rifle.[109] The use of this medicine is considered morally objectionable, both because it fails to respect the animal's free will and ability to punish disrespect by withholding itself, and also because it is believed that no one else in the area will be able to kill any animals and may starve to death.

Some would level accusations of anthropomorphism against the Cree tendency to describe animal behaviours in the same terms as human practices, but Scott argues that as Western science progresses, scientists are beginning to take note of the fact that these types of descriptions may be more objectively accurate than was previously thought. Evidence is being amassed that speaks to a complex communicative structure within species. Furthermore, their non-Western metaphorical structure often allows the Cree to produce an explicit level of rational knowledge that scientists have been unable to reach, due both to insufficient practical engagement and the fact that "because of their preferred metaphors, they lean toward mechanistic models of population dynamics, rather than understandings that also take account of animal perception, intelligence, learning, and social organization, without which it is impossible to anticipate animal response to changing conditions."[110] While the argument has been made that this knowledge does not lead to the targeting of 'goal ranges' for population and kills, this fact does not necessarily make it unscientific; in fact, modern Western wildlife management has recently moved away from this sort of "system management" toward a model of "relational sustainability" similar to that of the Cree — a much more complex objective which relies on continuously adjusting feedback mechanisms rather than exact numerical goals.[111] Finally, as Scott argues:

> To see only the religious dimension of animism is to assert that the major categories and root metaphors underwriting animism, its very ontology, are inherently mystical. This is untrue. The unities, distinctions and relationships posited within an animistic worldview are as capable, epistemologically, of coming to 'objective' knowledge as they are of producing religious propositions — and indeed are likely to do both simultaneously.[112]

III. CANADIAN WILDLIFE LAW

Having identified some of the narratives and metaphysical assumptions of Cree law, we may now be in a better position to return to an examination of our own legal system, in search of normatively distinct elements that play the same essential structuring role. As a parallel to the Cree laws governing hunting and wildlife management discussed above, the next section of this paper will explore the engendering narratives and development of Canadian wildlife law, including the extent to which it informs and is informed by other areas, such as property law and legal personality.

Some critics would deny that norms can play the same role in a legal system with courts and legislatively enacted statutes as they do in more fluidly responsive customary law so-

109. Brightman, *supra* note 64 at 192. Tanner also refers to the coexistence of an adversarial model of human-animal relationships alongside ideas of friendship and love (see Tanner, *supra* note 59).

110. Scott, "Spirit and Practical Knowledge", *supra* note 33 at 63.

111. *Ibid*. at 63.

112. *Ibid*. at 62.

cieties. In part, this position has to do with how one defines customary law; Webber identifies Fuller's tendency to vacillate between a broader formulation that allows for the customary nature of any law expressed in social practice, and a more limited understanding that disqualifies norms which have been ruled upon by legislative or judicial authority.[113] What the latter definition fails to recognize is that normative options determined by more consensus-driven methods are still *determined*, despite any differences in the nature of the authoritative body, the ways in which it achieves or maintains that authority, and the methods by which it uses that authority (e.g., by persuading consensus rather than imposing maxims). In addition, judicial or legislative enactment does not "fix" Canadian common law, any more than the agreements of the Cree people do theirs. The Privy Council has explicitly denied that the law can or should remain static; in order to remain just and relevant, it must be a "living tree."[114] Even if this idea had not been so dramatically declared, its operation is evident in the very process of judicial interpretation of precedent and legislation, and legislative amendment of enacted law. Judges are no less the product of their society's normative structure than any other citizen; as beliefs shift in response to the perpetual application of chosen norms which is part of the practice of living in society, so do the interpretive choices judges make, either in a subtle progression or via repudiation of an obsolete norm that has proven unacceptable in practice. Webber explains the parallel process in legislation: the very authority of the legislature is normative to begin with, and legislation generally modifies and is responsive to prior legal expressions, often customarily influenced ones. Legislators are also products of their society and make decisions which are broadly representative of that society's evolving legal needs and desires. Finally, post-enactment legislation is "quickly 'customized' — overtaken by the process of interpretation and application, elaborated and extended," and future refinements build upon these customarily-applied extensions, gradually creating something entirely new.[115]

A. Introductory Frameworks

Tina Loo's definition of "nature" as a social construction articulates one of this essay's underlying premises: cultural classifications serve to render such complex and abstract concepts intelligible to individuals, yet by doing so they also "impose an ideological order on the world"[116] that is neither self-evident nor universally shared. By failing to recognize that a choice has been made, we fail to recognize the existence of alternate and potentially superior formulations. Loo also notes the invisible conditioning role of language: it embeds certain convictions which then go unquestioned as a basis for understanding, explaining and acting in the world. The feedback loop of belief and practice also exists here, since "states of nature are cultural manifestations of the interplay of people's impact on the environment and their conceptualization of nature."[117] By asking if "the relegation of these fact-value questions to 'technical' experts systematically distort[s] the important values and ethical questions that are necessarily embedded in the environmental questions under

113. Webber, "Grammar", *supra* note 1 at 4.

114. *Reference re: British North America Act, 1867 s. 24*, [1929] J.C.J. No. 2,

115. Webber, "Grammar", *supra* note 1 at 9.

116. Tina Loo, *States of Nature: Conserving Canada's Wildlife in the Twentieth Century* (Vancouver, BC: UBC Press, 2006) at xiii.

117. George Warecki, "Review of Loo, Tina, States of Nature: Conserving Canada's Wildlife in the Twentieth Century" *H-Canada, H-Net Reviews* (June 2008), online: Humanities and Social Sciences Online <http://www.h-net.org/reviews/showrev.php?id=14568>.

consideration,"[118] Donald Brown raises one of the problems that has become evident in modern society. We might also ask how sentiment relates to these embedded values, given Loo's insistence that sentiment as much as science has been responsible for the content and path of wildlife work in the twentieth century.[119]

To answer the questions posed above, we must return to the roots of wildlife law in Canada to understand how it has evolved. Being a colony, this task requires that we look beyond the country itself, to ideas imported with the European colonists, which were based on a different sort of lifestyle.

Game law, from the beginning, has been inextricably entangled with real and personal property ownership; animals are necessarily located on the land, and there has often been a strong tendency to regard them as an adjunct to it in a similar way to immovable resources. This perception becomes problematic, of course, since even relatively sedentary animals are free to move across artificially designated human territories in ways that tree or mineral resources, for example, are not. As long as the European colonists remained clustered in small areas, land that was subject to individual private ownership could be effectively differentiated from the vast unclaimed territories where animal resources could be hunted.[120] As the settlers expanded, however, tensions inevitably increased between those who owned the land itself and those who wished to exercise what they saw as their right to partake in the local commons of wild animals. Gilbert and Dodds suggest that the early North American emphasis on free access might have been a reaction to the prior treatment of the lower classes in England, whose members were restricted from hunting by the underlying feudal ownership of all territory by the monarch after William the Conqueror imposed the system in 1066.[121] Sovereign ownership was exercised to grant privileged upper-class landowners the right to possess any game killed on the land they were granted. Lower-class subjects were effectively barred from hunting by trespass laws. Therefore, even if landowners did not have absolute rights in the living wild animals on their territory, their ability to prevent others from hunting on their property meant that there was nowhere for lower-class subjects to legally exercise any residual common property right in the game. Thus, "the right of killing was annexed to the soil although the landowner did not own the animals while they were living."[122] This situation probably contributed to the development of the view of hunting as a sport; wealthy landowners had little need of the game for subsistence use, seeing it rather in terms of recreational value. The lower classes were further disadvantaged by early regulatory management activities intended to benefit upper-class landowners — rather than the animals or their habitats, which were not generally seen as having an intrinsic value in their own existence and only a secondary value in terms of use for food and clothing.[123] The views that informed early legal sanctions regulating wildlife, therefore, understood animals as either game to be hunted for the sport of the wealthy or vermin to be exterminated because they were in competition with humans for other

118. Donald A. Brown, "Ethics, Science, and Environmental Regulation" in Allan Greenbaum, Alex Wellington & Ron Pushchak, eds., *Environmental Law in Social Context: A Canadian Perspective* (Ontario: Captus Press, 2002) 346 at 347.

119. Loo, *supra* note 116 at 7.

120. Note that this understanding was possible, of course, only because the newcomers were slow and reluctant to recognize Native rights and interests.

121. Frederick F. Gilbert & Donald G. Dodds, *The Philosophy and Practice of Wildlife Management*, 3ed. (Malabar, Florida: Krieger Publishing Company, 2001) at 6.

122. *Ibid*. at 19.

123. *Ibid*. at 2.

game.[124] An aristocratic landowner would no more stand for a wolf depleting the numbers of deer on his land than he would a poaching peasant, which led to bounties for predator animals alongside seasonal and territorial game limits on more desirable species, both of which were ultimately designed to increase the numbers of game animals available for those who controlled all the territory on which they might possibly exist.

Since it was not members of the aristocratic classes who made up the vast majority of those who left Europe for the New World, it would seem to make sense that a different understanding of game management quickly developed in Canada. The nature of early settlement life was also vastly different from that in the civilized world of England; in order to live in their often harsh new environment, colonists relied upon its natural resources and needed to be able to exploit those to their fullest for survival. Animals, therefore, were understood mainly as a local commons. As settlement became more extensive and established, however, and with the introduction of significant commercial pressures such as the fur trade and its associated hunting technology, populations were significantly depleted and the assumption (and its associated narratives) of the new world's infinite natural resources had to be correspondingly re-evaluated. By this time, the nature of life in North America had changed enough to allow for the development of a sport hunt, though admittedly one which differed markedly from the aristocratically centered practice in feudal England. Unlike in Great Britain, subsistence users of wildlife resources in Canada maintained a strong presence at the turn of the century and were correspondingly able to articulate their needs and desires in such a manner that the burgeoning legislative movement toward centralized resource control could not ignore their interests, despite the government's desire to do so. Modern Canadian narratives of wildlife values reflect this multiplicity of generating interests. Different interests led to alternative parallel ethics, which still exist in different forms and degrees of overlap. At any given moment, there is more than one story competing for validation.

The ideology of the "sportsman's creed" was often drawn upon by the Canadian government in its quest to transform the popular understanding of wildlife from a local commons to a national one that was held in trust by the government and managed for the greater good of the Canadian people. The latter model "asserted that wildlife was simply too important to be eaten. It was meant to serve a larger purpose, namely, elevating the human condition by providing sport and diversion for modern men."[125] If true, this perspective could serve as both impetus and justification for laws like the prohibition on selling game meat for food: restriction served the public good, since by the turn of the century the consumption of wild game supposedly "signalled one's primitiveness and geographic and social marginality."[126] Laws limiting the use of technology in hunting could appeal to the sporting concepts of justice or fair play, values that relied upon a lifestyle with a guaranteed food supply. John Sandlos describes the influence of Warburton Pike, a British author and explorer who traveled and hunted widely in northern Canada, in helping to spread the idea that native hunting practices were wasteful; his "immensely popular travel narratives such as *The Barren Ground of Northern Canada* (1892) and *Through the Subarctic Forest* (1896) revealed an attitude toward wildlife that was typical of the Victorian era: a strong attachment to a hunting code of ethics that abhorred the wanton slaughter of the abattoir and

124. Loo, *supra* note 116 at 15.

125. *Ibid*. 116 at 27.

126. *Ibid*. at 26.

favored the more sporting pursuit of a nimble quarry."[127] While it may seem somewhat surprising from a modern perspective in which naturalists and animal rights activists are often the key champions of developments in the conservation movement and sport hunters are vilified as wasteful and even amoral, in the late nineteenth century it was the sport hunters who, when faced with the reality of dwindling wildlife stocks, "effectively lobbied for legal reforms to deal with the problem."[128] Thus, the story of the hunt as a sport became symbiotic with the development of the story of wild animals as a government responsibility. While the former idea has fallen largely out of favour in the popular imagination, it is clear that the latter succeeded in being established; though it may be overstating the case to say that ownership at common law is vested "in the state in its collective sovereign capacity as a representative of all its citizens,"[129] especially in the Canadian North where people frequently exercise their modern right to hunt in the sparsely settled territory, it is certainly true that the federal and provincial governments exercise a much greater degree of control over wildlife management and hunting than they once did and that, by and large, this control is seen as legitimate and even necessary for the good of modern animal populations.

The game-vermin dichotomy also seems to have made its way across the Atlantic Ocean. Some of the first legislation passed in the colonies took the form of bounty laws offering rewards for animals which were seen to interfere with human interests.[130] Early settlers arguably had an even higher stake than English recreational hunters in ensuring that their competition with natural predators for desirable species was limited.

Given their similar sources, one might expect American and Canadian wildlife law to be more broadly alike in their history and present incarnations than is presently the case. The differences, which lie mainly in methods of control, might be explained in part by the distinct set of story-driven values which underlies each country's development of law. Greenbaum makes the case that Canadian environmental law is closer to what he calls the British "compliance model" than the American "sanctioning approach," with its heavier reliance on the adversarial courtroom process. Vogel suggests this might be due to a higher level of deference to British civil servants by the country's business executives,[131] which would stem from the historical class system in that "the rising capitalist class had to accommodate itself to a state still dominated by an aristocratic upper class; the businessman aspired to be a gentleman. In the United States, capitalists formed the ruling class almost from the outset, and tended to look down on civil servants."[132]

Along with the recreational sport hunting model, the development of an urban lifestyle in Canada arguably enabled the development of another parallel narrative of the natural world, one that is commonly identified as the "wilderness ethic" — the tendency to think

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127. John Sandlos, "From the Outside Looking in: Aesthetics, Politics, and Wildlife Conservation in the Canadian North," (2001) 6(1) Environmental History 6 at 10 [Sandlos, "From the Outside Looking In"].

128. Douglas O. Linder, "Are All Species Created Equal — And Other Questions Shaping Wildlife Law," (1988) 12 Harv. Envtl. L. Rev. 157 (Hein Online) at 161.

129. Gilbert & Dodds, *supra* note 121 at 19.

130. Loo, *supra* note 116 at 153.

131. David Vogel, *National Styles of Regulation: Environmental Policy in Great Britain and the United States* (Ithaca, N.Y.: Cornell University Press, 1986).

132. Allan Greenbaum, "A 'Law and Society' Approach to Environmental Law" in Allan Greenbaum, Alex Wellington & Ron Pushchak, eds., *Environmental Law in Social Context: A Canadian Perspective* (Concord, Ontario: Captus Press, 2002) 2 at 18.

of both nature and wild animals as an idealized "other," of the natural world as pristine and unsullied, and as unaffected by human actions and history. The extent to which this very essay, as a product of its culture, tends to speak in terms of a distinction between the natural world and civilization demonstrates the longevity and strength of this classification. William Cronon argues that the nature-culture duality is harmful because it locates us, as people, as external to the natural world and "cultivate[s] a way of seeing and being that precludes forging a truly sustainable relationship with the environment."[133]

B. The Canadian Evolution of Wildlife Narratives

i. Religion — Good Versus Evil

The conceptual division of animals into "good" and "evil" — reflected most dramatically in the bounty system for animals classed as vermin — was significantly informed by religious ideas, most notably those of Christianity, the dominant religion of the colonists. Such moral divisions applied conveniently to the hunt in England, where vilified predator animals directly competed for the most desirable sport game, such as deer. Though the lower-class colonists would not import the practical implications of this division, they would have been exposed to the ideas due to the prominent role of the Church in the daily life of all classes in early England — ideas that would then be reinforced by the experience of struggling to maintain an existence in competition with natural predators. Religious values also served to justify man's right to use wildlife resources for his own benefit, whether that benefit was food or sport. This sense of entitlement persisted despite the growing realization that wildlife resources in Canada were not infinite and were going to require some sort of management to be sustained at levels sufficient for either type of hunt. Beginning in 1904, Jack Miner applied scriptural justifications for human wildlife utilization to make the further argument that such a privilege required a corresponding acknowledgement of a responsibility to maintain populations. The creator of a private Ontario goose sanctuary, Miner spoke out against the thoughtless exploitation of animals in favour of a God-given dominion under which humans were obligated to care for the animals they made use of. Wildlife and nature were ultimately meant "for man's use and for man to control,"[134] as outlined in Methodist scripture: "God gave 'man ... dominion over the fish of the sea, and over the birds of the sky ... and over all the earth, and over every creeping thing that creeps on the earth.'"[135] Far from identifying wild animals as having a sterile utilitarian value, however, "much of the power of Miner's message lay in its appeal to emotions."[136] He understood that if people developed a sentimental attachment to these animals, they might ultimately care more about them and that public opinion might thereby shift in ways that government policy and legislation could not ignore. Miner's religiously grounded ideas also differed from later ecological understandings in a manner that aligned peculiarly with a particular Cree understanding: he believed that although humans had responsibilities toward the animals they used, man could not extinguish a species. If extinction occurred, it was at God's will.[137] He also articulated a hierarchy of values for wildlife that assigned

133. Loo, *supra* note 116 at 2; William Cronon, "The Trouble with Wilderness; or, Getting Back to the Wrong Nature" in William Cronon, ed., *Uncommon Ground: Rethinking the Human Place in Nature* (New York: W. W. Norton & Co., 1995) 69.

134. *Ibid*. at 68.

135. Genesis 1:26, Loo, *ibid*. at 28.

136. Loo, *ibid*. at 66.

137. *Ibid*. at 79.

them different degrees of morality and intelligence, again based on the Bible: according to Genesis, only the "good" animals had reason, while predators were described as robbing humans of what was rightfully theirs. Deer should have been "preserved for man's food and use, and not for the sport of a herd of rapacious wild beasts."[138]

Gilbert and Dodds also note the differential attitudes toward particular species as a possible reflection of actual practice, especially among those such as farmers and hunters who live in more intimate relation with the natural world. Trappers, for example, "tend to see wildlife as an economic entity to be managed to provide maximum numbers of animals for harvest and optimum numbers for habitats," and predators who compete for prey resources are not well tolerated.[139] As the twentieth century progressed, this division of attitudes produced correspondingly arbitrary legal distinctions that resisted the move toward reliance on environmental science narratives. The government was perfectly happy to use new science to justify its interventionist management measures in regards to historically desirable species, but had little use for such suggestions when it came to traditionally maligned animals: as Tina Loo notes, "[w]hereas other kinds of wildlife became the common property of the federal or provincial state, predators remained part of a local commons into the 1960s and '70s."[140] Statutory bounties contributed to the problem; "[e]ach wolf skin, pair of coyote ears, or hawk's wing that was submitted to the authorities for cash payment only reinscribed the distinction between good and bad animals that lay at the heart of North Americans' folk taxonomy."[141] These bounties continued through the twentieth century as a part of provincial law, administered by game departments and, for a long time, "constituting one of their largest ... yearly expenditures."[142] Provinces gradually moved away from a generalized bounty in favour of training government-hired men to kill predators. Scientific reports were produced by wildlife biologists that suggested the management of predator populations according to broadly similar goals as those that had been established for animals seen as useful, but the broader attitudes of society demanded that the lethal control of "bad" animals remain largely unchanged.[143] In order for the scientific suggestions to be accepted in respect of predator animals, a narrative that assigned a different moral rather than merely technical value to these species would be required.

Ecological arguments about population dynamics were insufficient to convince Canadians that bounties should cease, especially for those who lived in close contact and proximity with predator animals and experienced the effects of their competition for prey resources. "Ecology might have deemed that predators be left in peace, but human sentiments — curiosity, fear and greed — often proved equally, if not more, powerful in determining their fate."[144] Sentiment, however, could also be used to turn the tide of policy in the opposite direction. In the 1960's, the work of wildlife authors such as Farley Mowat and Bill Mason "managed to crystallize and mobilize an emerging sentimentality about predators," especially among the urban population.[145] The noble conduct of Mowat's wolves made an implicit argument for the morality of nature, and Mason's documentaries aimed to demonstrate

138. *Ibid*. at 84.

139. Gilbert & Dodds, *supra* note 121 at 48.

140. Loo, *supra* note 116 at 152.

141. *Ibid*. at 153.

142. *Ibid*.

143. See Loo, *ibid*. at 170-72.

144. *Ibid*. at 158.

145. *Ibid*. at 152.

the values of a canine moral universe that he saw as broadly analogous to that of humans. Though they may have been guilty of significantly anthropomorphizing the wolves, these portrayals succeeded in invoking people's sympathy and helped to turn the tide of bounty hunting and attempted extermination toward a model of respectful coexistence that recognized the ecological argument that the balance of nature required a certain predatorial presence. Mowat and Mason also challenged conventional understandings of animals in general by presenting them as individuals, rather than entities subject to ownership as property. Loo criticizes this portrayal as ultimately detrimental to the realization of an interconnectedness between humans and nature, however; she argues that it served to reinforce the abstract nature of wildness by failing to locate the wolves within the bounds of a habitat or ecological community that human action could be perceived to concretely affect.[146]

ii. Scientific Ecology

Some scientists would argue that it is a waste of time to examine historical value models in relation to wildlife, since its legal management today is clearly based upon scientific principles developed around unbiased data to produce the most objectively effective management methods. Brown explains that "[s]cience and its derivative technologies attempt to describe objectively, through an empirical methodology, facts and relationships between facts, and the laws of nature that govern the universe."[147] The value of the scientific method lies in its ability to effectively evaluate the ways in which a particular environmental goal might be achieved, but it hides a corresponding danger in that the goal itself must necessarily be chosen in accordance with an ethical framework that is arbitrary in respect to the facts themselves. Brown notes the tendency of environmental scientists to analyze empirical facts within a value formula embodied in the legislation under which the research is conducted, inevitably biasing the results on a deep level. Implicit value choices include the determination of what is considered a useful object of study, what kinds of animals are worthy of having their habitat included in an environmental impact assessment, the burden of proof and level of detail required in such assessments, and even the amount of government resources to be expended on any particular project. He reminds us that "what one sees is usually a product of cultural tradition; there are no acts of pure perception that are not dependent on prior value choices."[148] It is therefore disingenuous to assert that animal populations can be most effectively managed by relying on an objective assessment of bare technical data that has been separated from complicated and subjective moral assessments, because the very process of gathering and reporting that data is itself utterly dependant on a certain set of fundamental values that are taken for granted. In order to operate in the world, one must choose from among a finite number of possible actions, but it is almost always the case that the chosen path is based on a coherent vision of how the world *works* in its most basic metaphysical sense. Therefore, the "facts" themselves often defy objective analysis, both because their collection might rely on subjective assessments such as aesthetic attractiveness and because systems of scientific understanding are often no more than high-level guesses about how the world works, guesses that are based on metaphors which are constantly being developed and may or may not prove accurate when tested in

146. Loo, *ibid*. at 213.

147. Brown, *supra* note 118 at 347.

148. *Ibid*. at 348.

real-world situations.[149] The difficulty lies in recognizing these metaphors as such, and not just as acontextual descriptive terms.

The superiority of science-based management has itself become a narrative, one that asserts that we have made significant progress toward divorcing ourselves from a reliance on subjective and complicating value systems. The dismissal of values is problematic because an assumption that values are interchangeable fails to recognize that "values are not only subjective preferences, but also have an objective content — that is ... they are capable of being judged to be sound or unsound ... [and as to] which beliefs are morally superior."[150]

The scientific narrative also generates its own descriptive metaphors. Scientists "use mechanical metaphors when they talk of the environment as having energy flows, or of having nutrient or material cycles, and they employ market metaphors when they talk of investing in the environment or the decline in biological capital."[151] Brown identifies the modern prominence of economic terms of reference in the form of cost-benefit analysis of environmental phenomena. The very presence of multiple alternative configurations, discussed further below, ought to alert us to the fact that these data collection systems cannot serve as an unbiased reflection of reality, but too often this reality goes overlooked. Scientists in general are technically trained to restrict their analysis to qualitative issues and to "critique the mathematical model exclusively on a scientific-mathematical basis, omitting any critique of the transformation of the qualitative values into quantitative terms"[152] and thereby implicitly reinforcing the value assumptions which were used to assemble that qualitative data in the first place. This approach results in overlooking significant possibilities for the improvement of accurate understanding, which is important because even if we can never reach a place of objective accuracy in respect of understanding the external universe, we cannot abandon the attempt to move ever closer to one, as discussed in the first section of this essay. For example, much early wildlife data was gathered using methods that were based on the assumption that scientific knowledge of wildlife would be directed toward enabling the sustainable exploitation of animals as a use value, whether that use was food and clothing or human sport. Thus the scientific model both relied upon and participated in the evolution of value models such as usefulness. The attainment of an objective viewpoint was a myth.

The perceived neutrality and authority of the scientific discourse provided a tempting rhetoric for the Canadian government to use in justifying policy decisions. This misconception helped to contribute to a gradual shift in the nature of governmental involvement, which began with regulatory controls and limits on numbers and types of kills and gradually moved toward a post-Confederation interventionist impulse "aimed at actively managing populations and habitats to increase numbers."[153] The movement is demonstrated by the gradual alteration of the types of legislation enacted; Upper Canada's first laws restricting game harvests were passed in 1829, while by 1887 acts such as the *Rocky Mountain Parks Act*, with its specific mandate for the "protection and preservation of game, fish, [and] wild birds generally,"[154] clearly demonstrate a more proactive role for Canadian government,

149. *Ibid*.

150. *Ibid*. at 350.

151. Feit, "Hunting and the Quest for Power", *supra* note 60 at 104.

152. Brown, *supra* note 118 at 355.

153. Loo, *supra* note 116 at 212.

154. Gilbert & Dodds, *supra* note 121 at 87.

which had begun to take direct responsibility for maintaining and increasing certain populations and controlling others, rather than merely seeking to limit the harvest with measures such as off-seasons and bag limits. The move toward a professional, scientific and systematic model also eroded the influence of local knowledge and once again altered the assumptions about property ownership in the animals; the understanding of wildlife as a local commons managed by those who directly relied upon the animals was largely abandoned in favour of "a provincial or national commons, subject to regulations framed by a distant centralized bureaucracy."[155] This conceptual framework may have also contributed to the generalized rather than specific and personal understanding of wildlife and probably helped fuel the "external wilderness" ethic discussed below. The use of the scientific models also meant that animals were often referred to in terms of populations or "factors" which could be manipulated across politically defined jurisdictions,[156] a linguistic model that implicitly enables an impersonal understanding which becomes clear upon critical examination.

Within the broader framework that privileges scientific analysis, several different narratives of how nature works can be observed. When compared with each other, these alternative understandings demonstrate the ultimately subjective nature of each model and help to indicate how metaphysically unfamiliar conceptual structures such as that of the James Bay Cree might conceivably function just as effectively to structure knowledge into forms that make it useful for some (also subjectively determined) purpose. Loo claims that

> …beginning in the 1920s, ecologists started to move away from holistic views of the environment that explained changes in terms of evolution and toward a self-regulating "balance of nature." They also rejected conflict, or more precisely, the Darwinian struggle for survival, as the central dynamic of the natural world.[157]

The dominant position of the conflict metaphor was supplanted by a mechanistic view of nature as a machine functioning according to logic of economics — a system with producers, consumers, and decomposers, described in terms of a flow of energy and its carrying capacity for particular populations and levels of harvest. The concept of carrying capacity was imported from an economic style of understanding, a fact that arguably weakened the model by importing assumptions that led to the failure to take account of "social factors that might limit population size, much less of whether maximum growth was always desirable."[158] Donald Worster characterizes the resulting language and attitude as "agronomic" one, in that they refer to wildlife in terms of "crops" and "yields,"[159] which both reinforced and was reinforced by the now-familiar understanding of nature as grounded in its ultimate usefulness to man (regardless of the changing objective of that use value). Conservation work in the far North also progressed under an economic development model, with the federally-established Canadian Wildlife Service given jurisdiction to manage local

155. Loo, *supra* note 116 at 212.

156. *Ibid*. at 212.

157. *Ibid*. at 144. Note, however, that it is only as a central dynamic that these ideas are rejected; indeed, many evolutionary understanding based on a Darwinian model exist in today's science in a broadly unaltered form.

158. *Ibid*. at 145.

159. Donald Worster, *Nature's Economy: A History of Ecological Ideals*, 2nd ed., (New York: Cambridge University Press, 1994) 291 at 312.

populations — a further example of discrediting the knowledge of local hunters in favour of centralized bureaucratic management.[160]

Scientific understandings could also be employed by recreational hunters to advance the official recognition of their goals for wildlife. Conservation organizations such as Ducks Unlimited Canada arguably owe much of their past success to the fact that they justified their operations with assertions based upon a mainstream contemporary view of the environment: "[a] wetland was 'a factory without a roof,' a unit of production that could be managed scientifically to maximize outputs for the recreational benefit of urban hunters."[161] Negative attitudes toward predators could also be justified with reference to the economic model of animal ecology by "casting wolves, coyotes and cougars as 'limiting factors' that required human management."[162] Opponents of predator bounties, however, could also turn to science for a justificatory narrative, such as "the metaphor of the natural world as a 'community' of organisms, each with its own role and niche, linked to each other through the food chain."[163] Again, the availability of competing narratives within the scientific discourse perhaps should have served as a more obvious red flag to those who championed the movement based on its supposed attainment of objectivity.

The "community of organisms" description was both informed and developed by a movement toward a more holistic understanding of how ecosystems operated, one that involved a shift in focus from conservation of individual animal populations to the protection of integrated ecosystems as they had developed in geographically distinct areas (which might or might not have any correlation to political borders). This recognition contributed to another shift in legislative style, as the government retreated from the heavily interventionist position which had seen its agencies managing specific population numbers in artificially delineated areas, such as parks, toward a non-interventionist policy that Loo feels gained full expression in the 1980s.[164] In order to preserve healthy ecosystems, modern protective legislation seeks to protect animals, such as endangered species, "regardless of how 'useless' they may be in the sense of failing to provide economic benefits to man;" thus, contemporary wildlife law is broader than much of that which existed in the past, in that ecosystem management is governed not by economic considerations but the "scientifically-based goal of optimum sustainable population defined as the maximum population of a species that can be maintained consistent with preserving the integrity of the ecosystem."[165] The underlying value of animals as human use factors had shifted in favour of an acknowledgment that even predator "vermin" might have a role to play in a balanced and integrated ecosystem, and even the idea that animals, whether predator or prey, might possess an innate value in their own existence. It is interesting to note that these beliefs developed at the same time that Christian religion lost much of its hold over the popular imagination. Scripturally-based understandings like Jack Miner's lost ground to arguments such as those implicitly made in the growing body of wildlife literature that described animals as individuals with inner moral lives very similar to those of humans. Good/evil animal taxonomies were also eroded by the realization that concepts of "usefulness" like

160. Loo, *supra* note 116 at 128.

161. Loo, *ibid*. at 193, quoting term from Richard Rajala, "The Forest as Factory: Technological Change and Worker Control in the West Coast Logging Industry, 1880-1930" (1993) 32 Labour/Le Travail 73.

162. *Ibid*. at 155.

163. *Ibid*.

164. *Ibid*. at 148.

165. Linder, *supra* note 128 at 164.

Miner's are unjustifiably anthropocentric, a shortcoming which became obvious with the advance of alternate criteria of usefulness, e.g. to other animals or in the broader ecosystem.[166] Hunter notes the intersection of this recognition with traditional Aboriginal understandings: "many philosophers have argued that the environment deserves our respect and protection for its own sake, independent of any benefit humans derive from it … other living things — and even the systems those living things are a part of — possess intrinsic value, which humans have a duty to respect. While this view has not received widespread acceptance in the law, it reflects views held by many aboriginal groups."[167] Another structural understanding of evolution also developed in accordance with these new conceptions: rather than arranging species in a hierarchical construction like a pyramid, evolution could be understood to function more like a sphere. "As the points on the surface of a sphere are equidistant from the center, all forms of life have evolved an equal distance from their origin. The idea that evolution constitutes an order that has culminated in man is a religious conception, not a scientific one."[168] Like all scientific metaphors, this one both reinforced and was reinforced by its parallel moral understanding. It is important to note that these metaphors have not replaced one another in a linear process: their degree of objective accuracy is a matter of ongoing debate and while certain formulations move into and out of general acceptance, there is invariably more than one plausible alternative available at any given moment; similarly, many of the models this essay describes continue to exist alongside one another in some form. The myth of the "big bad wolf" still exists to a degree in the popular imagination, if no longer as an uncontested social reality.

iii. Wilderness Aesthetic

Ideas of an integrated ecological community also fed back across a more strictly aesthetic understanding that paralleled and in some ways informed the goals of the scientific management movement. Historical understandings of wildlife and nature as "other," as described above in Cronon's work, are linked with the colonial idea of Canada as empty, as a pristine wilderness with a certain intrinsic "wildness" value. Though its emergence may have led to the ultimate preservation of certain animal populations, "conservation was not a politically neutral and principled effort to preserve living things but was intimately associated with the civilizing ideology of the late colonial period in Canada."[169] Sandlos argues that government preservation efforts, especially those associated with northern herd animals like bison and caribou, were the product of "an aesthetic and technical and thus antisocial and nonrelational … idea of landscape as a wilderness, as resource producing factory, and as elemental North."[170] The scientific mode of discourse provided a convenient set of objectively framed goals that could be utilized in policy discourse, rather than acknowledging that conservation was informed by a national idealism that understood wilderness as an idealized aesthetic object, one that could be contrasted to traditional native relational styles of understanding which were largely necessitated by Indigenous hunters' reliance on the animals with which they live as a major source of their food, clothing and tools.

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166. Loo, *supra* note 116 at 83.

167. David Hunter, James Salzman, & Durwood Zaelke, *International Environmental Law and Policy*, 3rd ed. (New York: Foundation Press, 2007) at 105.

168. Linder, *supra* note 128 at 172.

169. Sandlos, *supra* note 127 at 6.

170. *Ibid*. at 6.

The story of pristine emptiness, especially in the far North, has been utilized by politicians such as Diefenbaker, with his Northern Vision of the upper latitudes as Canada's commons, waiting to be tapped for its natural resources.[171] Alongside and sometimes in conflict with this story, however, were ideas of management and conservation that developed based on the ethical relationship between people and nature — ones which did not require a human use value in order to make something worth protecting. The latter understanding may have gained its first expression in the bourgeois search for authentic experiences in the form of an encounter with the primitive, as a reaction to the stresses and limitations of a civilized modern life, the hunt perceived as an opportunity to regain a primeval masculinity.[172] Loo specifically identifies a backlash against the ideology of efficient use as "socially and spiritually debilitating," in favour of an anti-modernist reverence for the natural world. [173] This criticism of use value, of course, is disingenuous; the sport hunt and wilderness tourism used animals for human benefits just as the subsistence hunters did, despite the different methods and values. Wilderness tourism, at least, contained the seeds of a certain reverence for the innate aesthetic values of wild territory and animals. The narratives surrounding both these activities, to the extent that they existed at the relevant times, also contributed to the establishment of such conservation measures as national parks and closed seasons on hunting for certain types of game.

According to Sandlos, "the bureaucratic movement to protect wildlife in Canada was flexible enough to accommodate both the antimodernist desire to preserve wildlife as the most visible remnant of an authentic but fading wilderness and the modern faith in bureaucratic management as a means to cultivate and manage wildlife populations for recreational and commercial purposes."[174] He cites a 1965 Canadian Wildlife Service publication on the agency's caribou conservation program, which not only made technical arguments for preservation but utilized aesthetic rhetoric to describe the tundra as "a land of awesome, naked distance, where the grandeur of the empty land dilutes the mind's ability to comprehend."[175] The federal government thereby justified its restrictive northern wildlife policy regime

> as much by an appeal to the aesthetic of a pure and uninhabited nature as … by a scientific demonstration of objective circumstances. Indeed, the obvious shortcomings of the early biological work on caribou and wood bison populations left biologists with little choice but to construct a crisis in their prose and photographs by juxtaposing images of native "slaughter" of wildlife with those of undefiled bison and caribou herds that could only be saved by the rational hand of state management. In the end, what was being "saved" was as much the appearance of a benevolent state acting in the interests of a pristine nature as a viable population of herd animals. The association of federal wildlife policy in the North with an uncorrupted and inviolate nature thus provided the necessary

171. Loo, *supra* note 116 at 127.

172. *Ibid*. at 30, 33.

173. *Ibid*. at 30.

174. John Sandlos, *Hunters at the Margin: Native People and Wildlife Conservation in the Northwest Territories* (Vancouver: University of British Columbia Press, 2007) at 11 [Sandlos, *Hunters at the Margin*].

175. Fraser Symington, *Tuktu: The Caribou of the Northern Mainland* (Ottawa: The Queen's Printer, 1965) at 24-25.

> moral impetus for the extension of bureaucratic control and scientific management within the region.[176]

In the above excerpt, Sandlos notes how the Native presence was ideologically managed in those instances when it became necessary to admit that the wilderness was not, after all, devoid of human presence; Indigenous hunters were either cast as engaging in wasteful slaughter driven by a primordial bloodlust, or as former inherently conservationist "ecological Indians" who had since been corrupted by the influence and technology of the white man. Either way, "the presence of unruly Native hunters in Canada's hinterland regions was inimical to the implementation of modern and scientific wildlife management intended to produce a useable surplus of wild game,"[177] and to the continuing existence of the unspoiled wilderness.

The common thread among these implicit narratives, as noted above, is their broad distinction between nature and culture: their location of the human as external to the natural. Cronon argues that this understanding is problematic because it allows people to avoid taking responsibility for the ways in which their actions help or harm these deified yet ultimately foreign natural landscapes.[178] What is needed in order to enable genuinely effective conservation (which many people would agree is an ethically superior legal goal) is a sense of connectedness in which people "see themselves as part of a larger ecological whole."[179] Aldo Leopold suggests a need for the development of a "land ethic" that would recognize that humans, too, are a part of an ecological community and must "govern their actions ... in a less anthropocentric way, and one that value[s] the integrity of the whole community over the welfare of any one part."[180]

Cronon and Leopold did not invent this narrative possibility; it can be found developing through Canadian history. As noted above, popular wildlife fiction like Mowat's *Never Cry Wolf* helped to convince people to care about wildlife — even traditionally vilified species — by anthropomorphizing them as human-like moral beings rather than as vermin or as property subject to ownership. Though personification may have been a necessary first step toward bridging the gap between self and wild other, critics dismiss it as ultimately ineffective due to its failure to locate the animals as part of an intimately connected world which daily human life could be understood to affect and be affected by. The "wild" was still precisely that: an external aesthetic reference with little daily relevance.

Andy Russell and Tommy Walker, twentieth-century wilderness-guides-turned-activists, serve as examples of the possibilities for further development of the story of human relatedness to nature. For Walker, living in the wilderness promoted an ethical way of life by visibly demonstrating the consequences of one's actions and necessitating cross-cultural connections for survival; "[p]reserving nature and attending to one's relationship with it was thus a way of cultivating better dealings with other people."[181] Andy Russell filmed a documentary on the grizzly bear, emphasizing the animal's role in the ecosystem and re-

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176. Sandlos, "From the Outside Looking In", *supra* note 127 at 23.

177. Sandlos, *Hunters at the Margin*, *supra* note 174 at 12.

178. Cronon, *supra* note 133.

179. Loo, *supra* note 116 at 207.

180. *Ibid*. at 156, referring to Aldo Leopold, "Thinking Like a Mountain" in *A Sand County Almanac, with Essays on Conservation from Round River* (1949), reprinted in (New York: Ballantine Books, 1970) and Aldo Leopold, *Game Management* (1933) reprinted in (Madison: University of Wisconsin Press, 1986).

181. Loo, *ibid*. at 201.

lationships with other animals and its habitat and ultimately expressing that wildlife can get along without humans, but not vice versa. "[W]hat Russell was asking people to do ... was make biological values a part of the decision making about land use and allocation."[182] He believed that an attitude of superiority and God-given dominion, and the fear which he saw as ultimately responsible for measures like predator bounties, were equally damaging to the possibility of advancing a healthy and mutually beneficial relationship with nature.[183] For both Walker and Russell, the emphasis was on experience: a genuine respect for nature would require that people actually live in it, which would in turn necessitate making certain kinds of use of natural resources (vastly different types of uses, however, than the ones undertaken by distant city-dwellers caught in the tension between seeing nature as pristine vastness or a resource factory). Pragmatic use of immediate natural resources and participation in the natural world would erode the nature/culture duality and promote social integrity along with environmental integrity. "Acknowledging and incorporating human needs and values in conservation ... would clarify their choices and their implications. Moreover, acknowledging that conservation has and should serve human interests would highlight the extent to which nature and culture are interconnected, and diminish the alienation that is the cause of so much environmental destruction."[184]

C. Modern Implications

Canadian hunting and wildlife law has evolved through the years to keep pace with changing social normative understandings. When wildlife was valued exclusively as a source of food and clothing, only those species whose flesh was eaten or fur was worn received protection under the law. As wildlife came to be seen as a source of recreation or amusement, as aesthetic symbols, as objects of ethical concern, or as part of a complete ecosystem, the number of species protected under the law went from a handful to thousands. Thus, the choice of species protected by law is influenced by the values society attaches to wildlife.[185]

The importance of subjective assessment persists in a modern context. The degree of protection provided for any particular species is largely determined by where it falls upon the above scale of values. Thus, Hein argues, pets and livestock animals enjoy similar protections to other types of personal property, game animals are subject to provisions designed to sustain desired annual yields, animals that play a symbolic role in the human imagination will be broadly protected and species that are understood less in terms of intrinsic human benefit and more according to the value of their role in ecosystem diversity and maintenance are protected only when their numbers have been sufficiently depleted to jeopardize this presence.[186] Concrete legislative changes, however, have been and will continue to be made as our social values evolve; the former BC Department of Fish and Game's transformation into the Department of Fish and Wildlife[187] is one small example of the broader historical policy shift from recreational values to environmental ones and is a clear indication that the government is at least partially conscious of the practical importance and implications of the Canadian people's subjective understanding of such abstract concepts.

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182. *Ibid*. at 205.

183. *Ibid*. at 206.

184. *Ibid*. at 214.

185. Linder, *supra* note 128 at 169.

186. *Ibid.* at 175.

187. Loo, *supra* note 116 at 210.

IV. INTERSECTIONS & IMPLICATIONS

The contention that genuinely effective wildlife management will require a practical understanding of the idea that man is intimately connected with the natural world seems suspiciously parallel to the worldview of the James Bay Cree, who understand themselves as subject to the same external forces as the animals which they rely on to serve their needs and interact with as part of interconnected relational world. Russell's admiration for the grizzly bears he filmed, a respectful acknowledgment of the power of these top-level predators, is much closer to the sacred yet still utilitarian relationship between the Cree and the bear than to the revulsion and fear of early settlers who saw them as evil vermin to be destroyed, or to the city-dweller's anthropomorphized idealization of an animal he had never encountered. Russell's understanding, like the Crees', relied upon a respectful mode of coexistence that recognized humans and animals as part of the same ecosystem, where the actions of one species would inevitably affect both the other and itself. Walker strongly believed that living in nature — experiencing it — was the best way to live a truly moral human life. The emphasis on experience is paralleled by the reports of contemporary Cree, who often report that leaving the settled reserves for a life in the bush, even temporarily, leads to a sense of empowerment and self-worth, as well as a practical understanding of the impacts of each of their choices, and revolutionizes both their relationships with others and their own self-understandings. Russell argued that in order for people to ensure their future, they would have to recognize that it was "tied to that of all other associated forms of life."[188]

Given their similarities, there would seem to be a strong possibility that understandings like Walker and Russell's were influenced by contact with Native ideas. Neither spent time among the James Bay Cree, but many other Indigenous societies have similar understandings of the natural world. Walker spent much of his time in the company of the First Nations whom he employed in his guiding business as guides, cooks and wranglers, and relied on them for both their local ecological knowledge and their companionship.[189] If modern arguments for an integrated wildlife ethic have indeed been inspired or influenced by Native understandings, arguably this result could serve as an example of the improvement of Western ideas via the incrementally progressive understanding of metaphysically foreign cultural concepts argued for in the first section of this essay.

Even if it is not the case that Walker and Russell's understandings were enabled by a progressive process of developing metaphysical understanding of other cultures — that is, if these understandings were available to us all along — the fact that post-colonial Canadian culture is drawing on First Nations ideas for the improvement of wildlife law in both moral and practical terms would seem to validate the argument that other cultures, especially those which have arrived at fundamentally different normative and metaphysical understandings from our own, provide rich opportunities not only for the conscious consideration of previously unrecognized alternative moral choices but also for the opportunity to objectively improve our own moral position. Whether or not a genuinely objective moral state of perfection actually exists, the process of continually striving to better our society in pursuit of this goal is essential to the continued justice and relevance of law and government.

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188. Andy Russell, "What is Wildlife Management?" in Andy Russell Fonds, Whyte Museum, M153, file 232.

189. Loo, *supra* note 116 at 195.

ARTICLE

NEW COURTS ON THE BLOCK: SPECIALIZED CRIMINAL COURTS FOR VETERANS IN THE UNITED STATES

By Melissa Pratt*

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INTRODUCTION

"'To deny the frequent connection between combat trauma and subsequent criminal behavior is to deny one of the direct societal costs of war and to discard another generation of troubled heroes.'"[1]

Over 1.7 million American military service members have been deployed to Iraq and Afghanistan in support of the Global War on Terror (GWOT) since the start of combat operations in 2001.[2] Approximately one third of those individuals have been deployed more than once.[3] With plans to withdraw all but 50,000 of the service members from Iraq by August 2010,[4] the United States will face a massive influx of veterans returning from war. It has been estimated that 30 to 40 percent of the 1.7 million Iraq and Afghanistan veterans

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1. Deborah Sontag & Lizette Alvarez, "Across America, Deadly Echoes of Foreign Battles" *N.Y. Times* (13 January 2008), online: NYTimes.com <http://www.nytimes.com/2008/01/13/us/13vets.html?_r=1> (quoting Brockton D. Hunter, criminal defense attorney) ["Deadly Echoes"].

2. *VA Fact Sheet: Impact of Iraq and Afghanistan Wars,* online: Veterans for Common Sense <http://veterans.house.gov/Media/File/110/2-7-08/VA-DoDfactsheet.htm>. See also *Military Personnel Statistics*, online: Statistical Information Analysis Division of the Dept. of Defense <http://siadapp.dmdc.osd.mil/personnel/MILITARY/miltop.htm>.

3. *Responding to the Needs of Justice-Involved Combat Veterans with Service-Related Trauma and Mental Health Conditions,* online: Center for Mental Health Services National GAINS Center <http://www.gainscenter.samhsa.gov/pdfs/veterans/CVTJS_Report.pdf> at 4 [GAINS Report].

4. Julian E. Barnes & Greg Miller, "Obama Orders More Troops to Afghanistan" *The Los Angeles Times* (18 February 2009), online: latimes.com <http://www.latimes.com/news/nationworld/world/la-fg-afghan-troops18-2009feb18,0,1590275.story> ["More Troops"].

("GWOT veterans") will "face serious mental-health injuries" such as Post-Traumatic Stress Disorder (PTSD) or Traumatic Brain Injury (TBI).[5] These disorders can lead to higher rates of drug and alcohol abuse, because many veterans will try to "self-medicate" to help deal with their problems.[6] Higher rates of drug and alcohol abuse often lead to additional drug offences, theft, and ultimately incarceration.[7] As well, the *New York Times* reported in January 2008 that there had been at least 121 cases in which veterans of Iraq and Afghanistan were charged with killings ranging from involuntary manslaughter to first-degree murder, since the return of the first veterans from Afghanistan in 2002.[8] Combat trauma and substance abuse played a part in many of the cases.[9] However, these violent crimes are just a small percentage of the larger estimated number of crimes that veterans will commit.[10]

At the same time, several studies have shown that veterans convicted of crimes have a much lower recidivism rate than other criminals.[11] A 1993 study by the New York Department of Correctional Services indicates that "veterans … return to the [correctional] system at less than 80 percent of the rate at which similarly situated non-veterans return."[12] A 2000 re-

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5. Terri Tanielian & Lisa H. Jaycox, *Invisible Wounds: Mental Health and Cognitive Care Needs of America's Returning Veterans*, online: RAND Corporation <http://rand.org/pubs/monographs/2008/RAND_MG720.pdf> at 2 [RAND Report]. The essential feature of PTSD "is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate." American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed. (Washington D.C.: American Psychiatric Association, 2000) at 465 [Manual of Mental Disorders]. TBI "occurs when a sudden trauma causes damage to the brain. TBI can result when the head suddenly and violently hits an object, or when an object pierces the skull and enters brain tissue." *Traumatic Brain Injury: Hope Through Research*, online: National Institute of Neurological Disorders & Stroke <http://www.ninds.nih.gov/disorders/tbi/tbi_htr.pdf> at 3. There is a strong association between TBI and PTSD. In 2006, the New England Journal of Medicine conducted an anonymous study of 2,525 Army infantry soldiers and found that "of those reporting loss of consciousness, 43.9% met criteria for post-traumatic stress disorder (PTSD), as compared with 27.3% of those reporting altered mental status, 16.2% with other injuries, and 9.1% with no injury. Charles Hoge *et al*., "Mild Traumatic Brain Injury in U.S. Soldiers Returning from Iraq," (2008) 358 New England J. Medicine 453, at 453.

6. Claudia Baker & Cessie Alfonso, "PTSD and Criminal Behavior" in "National Center for PTSD Fact Sheet 1", online: National Center for PTSD <http://www.ncptsd.va.gov/ncmain/ncdocs/fact_shts/fs_legal.html?printable-template=factsheet> [PTSD Fact Sheet].

7. P.T. Bean & C.K. Wilkinson, "Drug Taking, Crime and the Illicit Supply System" (1988) 83 British J. Addiction 533.

8. "Deadly Echoes", *supra* note 1.

9. *Ibid.*

10. *Ibid.*

11. e.g. One study was based on "personal interviews conducted through the 1997 Survey of Inmates in State and Federal Correctional Facilities and the 1996 Survey of Inmates in Local Jails." Christopher J. Mumola, "Veterans in Prison or Jail", online: U.S. Dept. of Justice <http://www.ojp.usdoj.gov/bjs/pub/pdf/vpj.pdf> at 14 [Veterans in Prison]. However, the authors of the study noted that the accuracy of the report may suffer from sampling errors, as well as non-sampling errors (for example, the study relied on inmates to provide their own personal information which resulted in non-responses, different interpretations of the questions, and recall difficulties); but see Dane Archer & Rosemary Gartner, "Violent Acts and Violent Times: A Comparative Approach to Post-war Homicide Rates" (1976) 41 Am. Soc. Rev. 937 at 956: "Direct evidence of whether veterans are overrepresented in the commission of homicide is difficult to obtain."

12. *Veterans' Program Follow-Up July 1993*, online: State of N.Y. Dept. of Correction Services <http://www.ncjrs.gov/app/publications/Abstract.aspx?id=149419>.

port from the Bureau of Justice Statistics concluded that, as a group, incarcerated veterans were less likely to commit future crimes than incarcerated non-veterans.[13]

Additionally, other recent studies have shown that veterans who have completed specialized treatment programs have an even lower recidivism rate, which suggests that veterans would be optimal candidates for rehabilitation and decreased sentencing.[14] Arguably, criminal defendants who are also veterans may require, or benefit from, differential treatment by the criminal justice system.

States are beginning to respond to the increasing numbers of GWOT veterans turning up in their courtrooms.[15] Judges, prosecutors, public defenders, US Department of Veterans Affairs officials, and volunteers are joining forces "to create courts with veterans-only case proceedings, because they have seen a common thread" of PTSD, TBI, substance abuse, and mental illness underlying the veterans' crimes.[16]

This article describes the creation of specialized courts for veterans accused of nonviolent crimes. It argues that such courts are an efficient and appropriate way for the US criminal justice system to streamline the anticipated influx of veterans who may find themselves facing incarceration, providing them with the chance to rebuild their lives.

I. MAGNITUDE OF THE PROBLEM

There is no foreseeable end to the United States' involvement in the GWOT. Although plans have been set in motion to reduce the force in Iraq, the number of U.S. troops in Afghanistan is going to increase, and there is no indication of a complete withdrawal of American forces from either country.[17] Until the GWOT is over, the United States will continue to send men and women into a combat environment, and a percentage of these soldiers will continue to return with PTSD, TBI, or other mental health problems.[18] Veterans who have not received adequate treatment (and even some who have) will continue to find themselves in trouble with the law.

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13. Veterans in Prison, *supra* note 11, at 7; see also "U.S. Sentencing Commission on Recidivism and the First Offender", online: United States Sentencing Commission <http://www.ussc.gov/publicat/RecidivismFirstOffender.pdf> at 23 [First Offender]: (indicating that offenders with prior military service make up a higher proportion of federal offenders with little or no prior criminal history than of federal offenders with lengthier criminal records).

14. The first veterans court in Buffalo, New York reports that of the more than 100 veterans who have passed through its program, only two had to be returned to the traditional criminal court system because they could not quit narcotics or criminal behavior. Nicholas Riccardi, "These Courts Give Wayward Veterans a Chance" *Los Angeles Times* (10 March 2009), online: latimes.com <http://www.latimes.com/news/nationworld/nation/la-na-veteranscourt102009mar10,0,5067070.story?page=2>. A 2007 RAND Corp. study of the county mental health court in Buffalo, New York, showed that only 14 percent of participants committed a crime after going through the program. The Buffalo veterans court is modeled after its mental health and drug courts. The report claims that the recidivism rate for the general population of inmates is 67 percent. RAND Report, *supra* note 5, at 2. King County, Washington reports a recidivism rate of 16 percent for convicted veterans who have completed their prison time, compared to the current recidivism rate of over 50 percent for the general population. *Veterans' Program Client Services*, online: King County Dept. of Community & Human Services <http://www.metrokc.gov/DCHS/CSD/Veteran/Client.htm>.

15. Lynne Marek, "Courts for Veterans Spreading Across U.S.", online: (2008) National L. J. <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202426915992> [Marek].

16. *Ibid.*

17. "More Troops", *supra* note 4.

18. RAND Report, *supra* note 5 at 2.

A RAND Corporation study estimates that 300,000 GWOT veterans are currently suffering from PTSD or depression, and about 320,000 may have experienced a Traumatic Brain Injury during deployment.[19] In an effort to identify soldiers who are at risk for, or who are already suffering from PTSD and other mental health disorders, the Department of Defense (DoD) has enacted certain post-deployment protocols. The DoD requires that a Post-Deployment Health Assessment be administered to all service members at the end of deployment.[20] Three to six months later, the assessment is re-administered.[21] In 2007, during a random-dial survey, the GAINS Center found that of those surveyed, from the time of the initial assessment to the reassessment, positive screens for PTSD jumped 42 percent for those who served in the active Army (from 12% to 17%) and 92 percent for Army National Guard and Army Reserve members (from 13% to 25%).[22] Depression screens increased as well, with Army National Guard and Army Reserve members reporting higher rates than those who were active Army.[23] It is estimated that only around 50 percent of veterans who need treatment for depression, PTSD, or TBI seek it, and only slightly more than half who receive treatment get even "minimally adequate care."[24]

There are no comprehensive statistics on how often veterans get in trouble with the law, and many will never become entangled with the legal system. But psychiatrists, law enforcement officials, and commentators agree that the traumas of combat can lead to addiction and criminality. According to the most recent data available on incarcerated veterans, ten percent of federal and state prisoners were veterans in 2004, before GWOT veterans began returning in large numbers.[25] At that time, veterans were not overrepresented in the justice system in comparison to their proportion in the general population.[26] However, as more veterans with PTSD, TBI, and other mental health disorders are returning from war, the growing concern is that the underlying conditions which cause veterans to become involved with the justice system are not being treated.[27] These conditions in turn cause more veterans to become involved with the criminal justice system, ultimately leading to more veterans ending up in prison.

The best predictor of justice system involvement for veterans comes from the National Vietnam Veterans Readjustment Study (NVVRS).[28] Based on interviews conducted between 1986 and 1988, the NVVRS found that among male combat veterans of Vietnam with current PTSD (about 15% of all male combat veterans of Vietnam), nearly half had been arrested one or more times.[29] At the time of the study, this represented approximately

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19. *Ibid*. at 2.
20. Dept. of Defense Instruction 6490.03 [11 August 2006], online: <www.dtic.mil/whs/directives/corres/pdf/649003p.pdf>.
21. *Ibid*.
22. RAND Report, *supra* note 5 at 5.
23. *Ibid.*
24. *Ibid.* at 2.
25. Margaret E. Noonan & Christopher J. Mumola, *Bureau of Justice Statistics Special Report: Veterans in State and Federal Prison* (Washington, D.C.: U.S. Dept. of Justice, 2007) at 1.
26. *Ibid.*
27. GAINS Report, *supra* note 3 at 1.
28. Richard A. Kulka *et al.*, *Trauma and the Vietnam War Generation: Report of Findings from the National Vietnam Veterans Readjustment Study* (New York: Brunner/Mazel, 1990) at xxiii.
29. *Ibid.* at 186.

223,000 people.[30] If GWOT veterans with PTSD follow the same percentage of justice-involvement as Vietnam veterans, approximately 127,000 of the current 1.7 million veterans will find themselves facing criminal charges.

Based on the serious problems facing GWOT veterans, and the underlying reason why they are facing these problems – their traumatic combat experiences – the United States must recognize these problems and find a solution. American society places a relatively high value on military service. Veterans receive special consideration in a variety of contexts, including employment,[31] education,[32] naturalization,[33] voting rights,[34] medical care,[35] housing loans,[36] and small business loans.[37] That special consideration is given to veterans in large measure as recognition for the service they provided to their country. One current consequence of that service is that large numbers of GWOT veterans will suffer from PTSD, TBI, or other mental health disorders. Many will face substantial obstacles in obtaining healthcare.[38] Others will face difficulties obtaining service-connected compensation,[39] while some will be denied compensation and healthcare altogether.[40] Self-medication and drug and alcohol abuse can exacerbate PTSD symptoms.[41] Additionally, the post-deployment transition is often complicated by adaptive behaviors developed during combat to promote survival.[42] Behaviours that are learned in order to survive in a combat zone can cause difficulties during the transition back to civilian life.[43] Undoubtedly, this is a recipe for disaster.

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30. *Ibid.* at 60, 186.
31. See 5 U.S.C. §§ 2108, 3309 (2009); 38 U.S.C. § 4214 (2009).
32. See 38 U.S.C. §§ 3001-3036 (2009).
33. See 8 U.S.C. §§ 1439-1440 (2009).
34. Miss. Code Ann. § 99-19-37 (West 2009) (restoring the right of suffrage to persons who lost such right by reason of criminal conviction, but who thereafter honorably served in the military during World War I or World War II).
35. See 38 U.S.C. §§1701-1774 (2009).
36. See 38 U.S.C. §§3701-3775 (2009).
37. See 38 U.S.C. §§3117(b), 3701-3775; 15 U.S.C. § 633(b)(1) (2009).
38. The backlog of Veterans Benefits Administration (VBA) compensation claims has been growing since the mid-1990s, but over the past few years, the disability claims backlog has exploded. At the beginning of January 2004, the backlog was around 470,000, and by the end of March 2009, the backlog had reached 697,000. *2009 Monday Morning Workload Reports*, online: U.S. Dept. of Veterans Affairs <http://www.vba.va.gov/reports/mmwr/>.
39. Without an approved service-connected disability rating from the VBA, veterans will not be able to receive certain benefits that come with a service-connected disability. More importantly, a veteran who does not have a service-connected rating will have a lower priority for receiving care at Veterans Affairs (VA) Health Care facilities. *VA Health Care Eligibility & Enrollment*, online: U.S. Dept. of Veterans Affairs <http://www.va.gov/healtheligibility/eligibility/ PriorityGroups.asp>.
40. As of March 2008, veterans who do not currently have a service-connected disability, applied for care after January 16, 2003, and have a certain level of income for the previous year, can no longer enroll for care from the VA. *Ibid*.
41. A study conducted ten years after the end of the Vietnam War found that approximately 75 percent of Vietnam veterans with PTSD also "had a lifetime alcohol abuse or dependence disorder." Kulka, *supra* note 28 at 124.
42. GAINS Report, *supra* note 3 at 5.
43. "Hypervigilance, aggressive driving, carrying weapons at all times, and command and control interactions, all of which may be beneficial in theater, can result in negative and potentially criminal behavior back home." *Ibid*.

II. ATTEMPTS TO SOLVE THE PROBLEM

Several different attempts have been made to address the increasing numbers of veterans suffering from PTSD, or other mental health concerns, who find themselves in trouble with the law as a result of their conditions. Some state and federal courts have taken veteran status into account during the sentencing stage, as a mitigating factor. Other states have allowed PTSD to be used as a diminished capacity defense. Both houses of the US Congress have proposed bills that would create or sustain funding for programs that assist veterans involved with the criminal justice system. The most recent attempt, and the focus of this article, is the creation of courts exclusively for veterans.

Regardless of the specific approach adopted, this article contends that courts should always take a defendant's veteran status and underlying conditions into account. Many courts do not inquire into an individual's veteran status until the sentencing stage, if at all.[44] However, this inquiry should be made at the beginning of any criminal proceeding. If a defendant is found to be a combat veteran, additional inquiries should be made into whether the veteran suffers from a mental-health condition or substance-abuse problem as a result of their combat experience. If the veteran is found to have one of these conditions, and it can be demonstrated that the condition caused the veteran to commit the crime he or she is accused of, the state should offer the veteran probation and treatment for his or her condition. This approach may not be suitable for the most serious crimes, such as murder, but if the veteran is eligible for probation under the applicable state or federal statute, probation and treatment should be offered. This would avoid the apparent costs with creating a new court, by simply modifying the existing procedures.

A. Veteran Status as a Mitigating Factor During the Sentencing Stage

One way to accommodate the special needs of veterans accused of criminal offenses might be to raise a defendant's veteran status during the trial, to show "good character." Under federal and most state laws, a defendant's prior bad acts, such as previous convictions, are generally excluded from evidence at trial.[45] However, evidence of a defendant's good character is almost always admissible.[46] The theory behind excluding prior bad acts is that a jury is likely to improperly conclude that an individual who has committed a crime in the past is more likely to have committed the offense of which he or she is presently accused.[47] This could lead the jury to convict the defendant for reasons other than whether the individual committed the offense in question.[48] However, a defendant is permitted to introduce evidence of good character in an attempt to establish that he or she did not commit the crime in question.[49] The prosecutor can respond by introducing evidence of bad character, but

44. See Carissa Byrne Hessick, "Why Are Only Bad Acts Good Sentencing Factors?" (2008) B.U.L. Rev. 88 at 1109 [Hessick].

45. Fed. R. Evid. 404(b).

46. Fed. R. Evid. 404(a).

47. John W. Strong *et al.*, *McCormick on Evidence*, vol. 1, 5th ed. (St. Paul: West Group, 1999) § 191.

48. *Ibid.*

49. *Ibid.*

only to rebut the evidence of good character.[50] This bias in favour of good character evidence at trial has a long history and is well settled.

During the sentencing phase of a trial (post-conviction), the opposite bias exists: prior convictions are considered relevant to determine the proper punishment.[51] The issue of what role prior good acts should play at this stage is much less certain.[52] Not many jurisdictions explicitly recognize prior good acts as a mitigating sentencing factor, and even fewer recognize military service as one of these factors.[53] Occasionally, trial judges have reduced a defendant's sentence on the basis of prior good actions that are unrelated to the conviction, such as military service or charitable work.[54] But these decisions have met resistance from the US Sentencing Commission and federal appellate courts, and various scholars have expressed the view that prior good acts should not be considered at sentencing.[55]

Federal law on prior good acts for mitigation is inconsistent. Before the Federal Sentencing Guidelines were enacted, oftentimes a defendant's prior good acts were raised and considered at sentencing.[56] However, when Congress formed the US Sentencing Commission to develop the Guidelines, it did not mention an offender's prior good works as a sentencing factor. The Commission was left to decide whether various factors "have any relevance to … an appropriate sentence," and the Commission was directed by Congress to "take them into account only to the extent that they do have relevance."[57] The original Sentencing Guidelines classified many of the factors as not normally relevant in determining a defendant's level of offense but did not mention a defendant's prior good works.

In *United States v. Pipich*[58] ("*Pipich*"), the district court gave a defendant a below-Guidelines sentence, on the basis that:

> An exemplary military record, such as that possessed by this defendant, demonstrates that the person has displayed attributes of courage, loy-

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50. "The prosecution … generally is forbidden to initiate evidence of the bad character of the defendant …. Yet, when the table is turned and the defendant in a criminal case seeks to offer evidence of his good character to imply that he is unlikely to have committed a crime, the general rule against propensity evidence is not applied." *Ibid.*

51. Hessick, *supra* note 44 at 1110.

52. *Ibid.* at 1111.

53. See e.g., N.C. Gen. Stat. § 15A-1340.16(e)(14) (2007) (felony sentencing statute providing for the mitigation of a defendant's sentence if he "has been honorably discharged from the United States armed services"); Tenn. Code Ann. § 40-35-113(13) (2007) (Tennessee trial courts are permitted to consider prior military service as a mitigating factor, but they are under no obligation to mitigate an offender's sentence on that basis; it is not a statutorily defined mitigating factor, but is available under the "catch-all" provision of the annotated statute); but see *People v. Duncan*, 5 Cal. Rptr. 3d 413, 414 (Ct. App. 2003) (observing that the trial court rejected "defendant's claim that his military service should be treated as a factor in mitigation").

54. See e.g., *United States v. Pipich*, 688 F. Supp. 191 (D. Md. 1988) [*Pipich*]; *State v. Kayer*, 984 P.2d 31, 46-47 (Ariz. 1999) ("We have on rare occasions found that a defendant's military record warranted consideration as a mitigating circumstance"); *State v. Anderson*, 631 So. 2d 80, 83 (La. Ct. App. 1994); *State v. Arterberry*, 449 So. 2d 1179, 1181 (La. Ct. App. 1984).

55. See Andrew Ashworth, *Sentencing and Criminal Justice*, 3d ed. (New York: Cambridge U.P., 2000) at 151; Dan Markel, "Against Mercy" (2004) 88 Minn. L. Rev. 1421 at 1437-38; Andrew von Hirsch, "Desert and Previous Convictions in Sentencing" (1980) 65 Minn. L. Rev. 591 at 608.

56. Christina Chiafolo Montgomery, "Social and Schematic Injustice: The Treatment of Offender Personal Characteristics Under the Federal Sentencing Guidelines" (1993) 20 New Eng. J. on Crim. & Civ. Confinement 27 at 37-38.

57. 28 U.S.C. § 994(d) (2000). Some of the factors to be considered were previous employment record, community ties, and criminal history.

58. *Pipich, supra* note 54.

> alty, and personal sacrifice that others in society have not. Americans have historically held a veteran with a distinguished record of military service in high esteem. This is part of the American tradition of respect for the citizen-soldier, going back to the War of Independence. This American tradition is itself the descendant of the far more ancient tradition of the noble Romans, as exemplified by Cincinnatus.[59]

In opposition to *Pipich* and other decisions, the Sentencing Commission adopted a new Guideline mandating that "military, civic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining" whether to impose a sentence outside the Guideline range.[60] Currently, although a district court may consider a defendant's prior good acts in selecting a sentence within the applicable Guideline range, the court may only sentence a defendant below that range when a defendant's prior military service, charitable acts, or other good works are "exceptional."[61]

Additionally, if states were to take veteran status into account as a "good" factor during sentencing, the larger problem of a veteran's underlying condition would still exist. The veteran would still be incarcerated, albeit for a lesser amount of time, and would still suffer from PTSD. Rather than getting treatment, incarceration will likely seriously exacerbate PTSD symptoms and cause the person's level of functioning to deteriorate.[62] Counseling and treatment are generally sub-par in a prison environment, and PTSD sufferers will generally not recover on their own.[63]

Veterans, by and large, are unlikely to benefit from mitigated sentencing approaches. Not only is the law inconsistent and the outcome uncertain, but PTSD symptoms are likely to be exacerbated in prison, and veterans will not be returned to society as law-abiding and functioning citizens.

B. PTSD or Mental Health as an Affirmative Defense

In certain cases, such as for violent crimes and felonies, it is possible for veterans to use their PTSD or other mental-health conditions as an affirmative defense. PTSD has been used by veterans to prove existing criminal law defenses since 1978.[64] After the American Psychiatric Association officially recognized PTSD as a mental disorder in 1980,[65] the use

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59. *Ibid.* at 193. Under the then-existing mandatory sentencing guidelines, district courts had the authority to give sentences outside the mandatory range when they found that "there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." 18 U.S.C. § 3553(b) (2000).

60. United States Sentencing Commission, *Guidelines Manual* (Washington D.C.: United States Sentencing Commission, 2007) at § 5H1.11.

61. *Koon v. United States*, 518 U.S. 81, 95-96 (1996).

62. PTSD is a chronic condition, but with the proper treatment and education, its symptoms can usually be successfully managed. It is unlikely that PTSD sufferers receive the proper treatment during incarceration. In fact, because prison life may re-traumatize a person, a lengthy incarceration will likely seriously exacerbate PTSD symptoms and cause the person's level of functioning to deteriorate. PTSD Fact Sheet, *supra* note 6 at 1.

63. *Ibid.*

64. Samuel P. Menefee, "The 'Vietnam Syndrome' Defense: A 'G.I. Bill of Criminal Rights?'" (1985) Army Law. 1 at 27.

65. American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 3d ed. (Washington, D.C.: American Psychiatric Association, 1980) at 236-39.

of PTSD as a defense dramatically increased.[66] Depending on the jurisdiction, PTSD can be used to prove a defense of insanity, unconsciousness, diminished capacity, or self defense.[67] If PTSD is successfully used as an insanity defense, the veteran will be committed to a mental health institution.[68] If the veteran succeeds with an unconsciousness defense, due to PTSD, the usual result will be a complete acquittal.[69] A diminished capacity defense yields the same result in other jurisdictions.[70] Although there are a wide variety of plausible defenses available to a veteran suffering from PTSD, none of these defenses can fully address the symptoms and results of PTSD. For example, in order to succeed with the unconsciousness defense, the veteran must experience a dissociative state,[71] which is often very difficult to prove.[72]

In California, a veteran recently succeeded with an affirmative defense of PTSD. In January 2009, a former Army Captain, Sargent Binkley, was accused of robbing a pharmacy at gunpoint.[73] Binkley had been diagnosed with PTSD after serving in Bosnia and Honduras, and developed an addiction to painkillers after a hip injury that went untreated for years.[74] He was found not guilty by reason of insanity, based on his diagnosis of PTSD.[75] As a result of the verdict, he will be treated in a state hospital, rather than facing 12 to 23 years in prison.[76]

However, Binkley's story is an exception to the rule. In recent years, the overall use of the insanity defense[77] has decreased significantly, and its successful use has also diminished.[78] The rise of the concept of the "moral agent,"[79] the absence of a uniform application,[80] and

66. C. Peter Erlinder, "Paying the Price for Vietnam: Post-Traumatic Stress Disorder and Criminal Behavior" (1984) 25 B.C. L. Rev. 305 at 317 (explaining that "once PTSD was recognized as a disorder that could be isolated and diagnosed by psychiatrists and psychologists, it became a legitimate issue to be raised in legal proceedings. After the publication of DSM III, therefore, PTSD was raised in several cases as an explanation for a defendant's criminal conduct").

67. Ann R. Auberry, "PTSD: Effective Representation of a Vietnam Veteran in the Criminal Justice System" (1985) 68 Marq. L. Rev. 647.

68. *Ibid.* at 665 ("In many jurisdictions an acquittal based upon an insanity defense creates a situation of automatic commitment to a mental institution").

69. *Ibid.* at 668-69.

70. See e.g., *United States v. Fishman*, 743 F. Supp. 713, 721 (N.D. Cal. 1990).

71. Elizabeth J. Delgado, "Vietnam Stress Syndrome and the Criminal Defendant," (1986) 19 Loy. L.A. L. Rev. 473 at 484.

72. Erlinder, *supra* note 66 at 307.

73. Tracey Kaplan, "Ex-Army Officer Found Not Guilty by Reason of Insanity in Robbery," *San Jose Mercury News* (13 January 2009), online: MercuryNews.com <http://www.mercurynews.com/ci_11444149?iADID>.

74. Daniel DeBolt, "Binkley Avoids Jail Sentence," *Mountain View Voice* (13 January 2009), online: Mountain View Voice <http://www.mv-voice.com/news/show_story.php?id=1101>.

75. *Ibid.*

76. *Ibid.*

77. This is largely analogous to the plea of "Not Criminally Responsible on Account of Mental Disorder" in Canada.

78. Stephen G. Valdes, "Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations" (2005) 153 U. Pa. L. Rev. 1709 at 1722-25.

79. Stephen J. Morse, "Crazy Reasons" (1999) 10 J. Contemp. Legal Issues 189 at 192.

80. Ellen Byers, "Mentally Ill Criminal Offenders and the Strict Liability Effect: Is There Hope for a Just Jurisprudence in an Era of Responsibility/Consequences Talk?" (2004) 57 Ark. L. Rev. 447 at 449.

increased public disapproval of the insanity defense,[81] have created a legal environment that is disapproving of defenses based on mental illnesses. Thus, most veteran defendants will likely not be able to present a successful insanity defense.[82]

Another obstacle to the use of PTSD as a defense is the subjective nature of symptoms in PTSD sufferers. As a result, it is sometimes challenging to establish the presence of PTSD in any particular defendant. In particular, lack of credibility remains a sizable obstacle in the use of PTSD to aid veterans facing criminal charges.[83] Diagnoses of mental health disorders are based on the defendant's own account, and are therefore vulnerable to skepticism in the legal context,[84] especially when a diagnosis would be self-serving when used by a defendant in a criminal case. This skepticism is undoubtedly compounded when a defendant asserts a defense based on PTSD, since no one but the defendant is able to recount and describe the symptoms and behavior that resulted from PTSD and led to the criminal conduct.[85] Oftentimes, a defendant's substance abuse, which is often a by-product of PTSD itself, undermines the defendant's credibility and enables prosecutors to point to a cause of the defendant's behavior apart from his or her mental illness.[86] Thus, credibility remains a significant concern in cases involving evidence of PTSD.

Creating an even bigger obstacle when it comes to credibility is the fact that defendants can easily fake PTSD.[87] With a wealth of information available on the Internet and elsewhere about PTSD, it is all too easy for individuals to use PTSD as an excuse, when they do not in fact suffer from the disorder. PTSD is widely regarded as an easy condition to fake.[88] False claims of PTSD have resulted in criminal acquittals, and have undoubtedly made it more difficult for genuine PTSD sufferers to succeed with a PTSD defense. In *State v. Lockett*[89] ("*Lockett*"), the defendant asserted a defense of "not responsible due to PTSD" as a result of his service in Vietnam, which the Court accepted. However, it was later revealed that Lockett had never actually served in Vietnam.[90] The Court set aside the plea, holding that a defendant "may not use alleged statutory or constitutional rights as a protection for fraud after he put that service in issue."[91] As a result of *Lockett* and other cases involving

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81. This is particularly a result of the public uproar over the acquittal of John Hinckley. See V.F. Nourse, "Reconceptualizing Criminal Law Defenses" (2003) 151 U. Pa. L. Rev. 1691 at 1721 (referring to the Hinckley verdict as "the most notorious of the modern insanity cases" and claiming that the "public rebelled" as a result of the acquittal).

82. Constantina Aprilakis, "The Warrior Returns: Struggling to Address Criminal Behavior by Veterans with PTSD" (2005) 3 Geo. J.L. & Pub. Policy 541 at 542.

83. Daniel E. Speir, "Application and Use of Post-Traumatic Stress Disorder as a Defense to Criminal Conduct" (1989) Army Law. 17 at 18-19 [Speir].

84. M. Keane *et al*., "Forensic Psychological Assessment in PTSD" in Robert I. Simon, ed., *Posttraumatic Stress Disorder in Litigation: Guidelines for Forensic Assessment* (Washington, D.C.: American Psychiatric Publishing, 2003) 119 at 136.

85. Speir, *supra* note 83 at 18-19.

86. *Ibid.* at 18.

87. *Ibid.* at 19.

88. *Ibid.*; see also Betsy Streisand, "Treating War's Toll on the Mind" *U.S. News & World Report* (1 October 2006), online: usnews.com <http://health.usnews.com/usnews/health/articles/061001/9ptsd_7.htm>.

89. *State v. Lockett*, 468 N.Y.S.2d 802 at 803, 805 (1983) (Lockett based his plea of not responsible due to the PTSD he suffered as a result of his service in the United States Air Force in Vietnam. In particular, Lockett asserted "I fought in the jungles in Vietnam" and "I am still a soldier there.")

90. *Ibid.*

91. *Ibid.* at 807.

defendants faking PTSD symptoms, prosecutors and judges will probably be more skeptical of defendants' claims of PTSD.

Additionally, this attaches a stigma to PTSD. As with the Vietnam veterans, society may begin to look at modern veterans as loose cannons. If every veteran with PTSD could be considered "insane," many veterans will be motivated to hide their illness, and will avoid seeking help when they know they are suffering. Already, many veterans avoid seeking help for their mental health problems. The military culture that veterans are a part of insists that psychological injuries "are a sign of weakness."[92] As a result, many veterans are discouraged from asking for help, and do not realize that PTSD is a medically-recognized mental health disorder that many others are suffering from as well.[93]

The majority of veterans are unlikely to benefit from the PTSD defense. Although it has been used successfully in some cases, it is difficult to prove, juries are skeptical of it, and defendants face challenging credibility obstacles in proving this defense.

C. Federal and State Initiatives

Several bills have been proposed in Congress that would have provided special funding for programs that treat veterans involved with the justice system. The *Second Chance for America's Veterans Act*, proposed in 2007, would have extended and provided additional funding for the Incarcerated Veterans Transition Program (IVTP).[94] During its pilot phase from 1989 to 2007, IVTP claimed it reduced recidivism rates amongst participants by 90 percent.[95] IVTP also recorded that 90 percent of its participants were moved into permanent housing, and 72 percent became gainfully employed.[96] On the basis of this data, IVTP claimed it saved taxpayers millions of dollars per year in incarceration costs and stimulated local job growth and economic development by providing former offenders with jobs.[97] However, the pilot program stopped receiving funding as of September 2007. The bill that would have extended funding for the program was sponsored by Kentucky Representative John Yarmuth, and was introduced in August 2007.[98] After the bill was introduced, it was referred to the House Committee, but no further action was taken on the bill, and funding has consequently ceased.[99]

It is not entirely clear why this bill did not become law. However, in a statement before a House subcommittee by Keith Pedigo, an Associate Deputy for the Veterans Benefits Administration (VBA), Pedigo noted that most of the services proposed under H.R. 3467 could be provided through the *Second Chance Act*, which the President had signed into law the previous week.[100] The *Second Chance Act* formally authorized key features of the

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92. Ilona Meagher, *Moving a Nation to Care: Post-Traumatic Stress Disorder and America's Returning Troops* (Brooklyn: Ig Publishing 2007) at xiii.
93. *Ibid.*
94. H.R. 3467, 110th Cong. (2007).
95. *Ibid.*
96. *Ibid.*
97. *Ibid.*
98. *Ibid.*
99. *Ibid.*
100. Keith Pedigo, Address (Statement before the Subcommittee on Economic Opportunity House Committee on Veterans' Affairs Hearing of Legislation Affecting Veterans' Benefit Programs), online: U.S. Dept. of Veterans Affairs, Congressional and Legislative Affairs <http://www.va.gov/OCA/testimony/hvac/seo/080416KP.asp>.

Prisoner Re-entry Initiative, which provides recently released ex-offenders, including veterans, the support and services they need to successfully reintegrate into mainstream society.[101] Although there is nothing to indicate that this testimony was the reason the bill was never enacted, it can be inferred that Pedigo's statement in his capacity as a VBA representative had a detrimental effect on the bill's future.

The *Services, Education, and Rehabilitation for Veterans Act*, proposed by Rhode Island Representative Patrick Kennedy in 2008, would have authorized the Attorney General to make grants to states and other entities: "(1) to develop, implement, or enhance veteran's treatment courts or to expand operational drug courts to serve veterans; and (2) for programs that involve continuing judicial supervision over nonviolent offenders with substance abuse or mental health problems who have served in the U.S. military."[102] This bill would have provided funding for up to 75 percent of the cost for states to create veterans courts, but the bill was not passed. This has left funding for such treatment programs up to individual states. Currently, there have been no attempts to reintroduce the bill or create a similar initiative.

The California legislature understands the need to address the problems faced by veterans who return from combat in Iraq or Afghanistan with psychological problems brought on by their war-time experience. The state recently amended its penal code to provide special relief from harsh sentencing policies specifically for service members with PTSD or substance abuse problems.[103] The State had enacted a similar provision in the past, in response to the influx of Vietnam veterans into the criminal justice system.[104] However, the previous law was found to be ineffective in providing any sort of special relief to veterans, because there was no federal statute that authorized the Federal Bureau of Prisons to house Vietnam veterans serving state sentences.[105] The new amended law applies to:

> [A]ny person convicted of a criminal offense who would otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of post-traumatic stress disorder, substance abuse, or psychological problems stemming from service in a combat theater in the United States military.[106]

After a defendant makes a claim, a court must then hold a hearing to determine whether the person was in fact a combat veteran, and must assess whether he or she suffers from PTSD, substance abuse, or psychological problems as a result of their combat service.[107] If the court finds that the veteran satisfies those requirements, and if the veteran is otherwise

101. *Ibid.*

102. H.R. 7149, 110th Cong. (2008).

103. Cal. Penal Code § 1170.9 (West 2009).

104. Cal. Penal Code § 1170.8 (West 2005).

105. *People v. Abdullah*, 9 Cal. Rptr. 2d 131 (Cal. Ct. App. 1992).

106. Cal. Penal Code § 1170.9(a) (West 2009).

107. *Ibid.*

eligible for probation,[108] the court will then place the veteran on probation, and may order the veteran into an appropriate (local, state, federal, or private nonprofit) treatment program.[109] If the veteran is granted probation and is committed to a residential treatment program, he or she will earn sentence credits for the actual time served in treatment.[110] Although federal attempts at a comprehensive solution have failed so far, states such as California have recognized that there is a problem, and have attempted to solve the problem by creating laws that provide for the treatment of veterans who suffer from PTSD, mental health disorders, or substance abuse.

III. SPECIALIZED VETERANS COURTS

Veterans courts are the newest addition to the larger theory of "therapeutic justice" and "problem-solving courts." Therapeutic justice addresses the root cause of an offender's criminality and treats the offender to remove the problems and returns the offender to the community as a responsible citizen.[111] Problem-solving courts are "specialized courts that seek to respond to persistent social, human, and legal problems, such as addiction, family dysfunction, domestic violence, mental illness, and quality-of-life crime."[112]

While traditional courts focus on processing the cases that come before them, resulting in a revolving door syndrome, problem-solving courts focus on achieving positive outcomes for victims, defendants, and communities.[113] Generally, the new veterans courts have been modeled after the mental health and drug courts that sprung up in the late 1980s.[114] Mental health courts, for example, attempt to "achieve two separate but interrelated outcomes by linking offenders with mental illness to treatment as an alternative to incarceration: improved psychiatric stability for the offenders and improved public safety."[115] Building on the model of drug and mental health courts, veterans courts seek to work with mental health agencies, veteran mentors, substance abuse treatment programs, housing providers, and others to help veterans lead a crime-free life in the community.

Similar to the drug and mental health courts, most of the veterans courts that have been created do not allow defendants accused of violent crimes to participate in their pro-

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108. Defendants are eligible for probation as long as they do not fall within one of the categories restricting the availability of probation. Under California law, probation is precluded primarily for those who commit violent crimes or serious drug offenses, or are recidivist serious offenders. Most of the mandatory provisions are included in the probation provisions of the Penal Code. Cal. Penal Code §§ 1203.06-1203.09 (West 2009). A non-exhaustive list of criminal charges that preclude a defendant from probation are: murder, robbery, kidnapping, lewd acts, first degree burglary, rape, carjacking, torture, and anyone who was previously convicted of one of the aforementioned crimes. Cal. Penal Code § 1203.06 (West 2009).

109. Cal. Penal Code § 1170.9(b) (West 2009).

110. Cal. Penal Code § 1170.9(e) (West 2009).

111. Teresa W. Carns *et al.*, "Therapeutic Justice in Alaska's Courts" (2002) 19 Alaska L. Rev. 1 at 5.

112. John Feinblatt *et al*., "Judicial Innovation at the Crossroads: The Future of Problem Solving Courts" (2000) 15 Ct. Manager 28 at 29.

113. Carol Fisler, "Building Trust and Managing Risk: A Look at a Felony Mental Health Court" (2005) 11 Psychol. Pub. Policy & l. 587 at 589 [Fisler].

114. Michael C. Dorf & Jeffrey A. Fagan, "Community Courts and Community Justice: Foreword: Problem-Solving Courts: From Innovation to Institutionalization" (2003) 40 Am. Crim. L. Rev. 1501 at 1502-03. The first of the modern drug courts opened in Miami in 1989 and included Janet Reno among its key participants. As Attorney General, she provided seed money for drug courts nationwide, and today there are over 1000 operating drug courts. *Ibid.*

115. Fisler, *supra* note 113 at 590.

grams.[116] Judges are naturally apprehensive about releasing violent offenders back into society, even if they are participating in some kind of treatment program.

The bulk of the funding for the existing veterans courts comes from Veterans Affairs,[117] but other funding has come from the Substance Abuse and Mental Health Services Administration of the US Department of Health and Human Services.[118]

Currently, the two best-developed programs are in Buffalo, New York, and Orange County, California, both of which began operations in 2008.[119] Other veterans courts have been proposed or already started in Pennsylvania, Wisconsin, Oklahoma, Massachusetts, Arizona, and Illinois.[120] A review of these programs demonstrates their superiority to the alternatives already explored (taking a defendant's veteran status into account only at the sentencing stage, or using PTSD as an affirmative defense).[121]

A. Buffalo, New York

In early 2008, Buffalo City Court Judge Robert Russell established the first-ever specialized court for veterans accused of nonviolent felonies and misdemeanors.[122] Judge Russell began the program after he noticed a significant increase in veterans (300 in one year), many with drug and psychiatric problems, coming through the system.[123] The program offers defendants an opportunity to avoid incarceration or more serious charges in return for entering addiction or mental health treatment and taking other steps to right their lives.[124] Judge Russell "believed [the veterans] might benefit from being in the courtroom together, given the military's strong sense of camaraderie."[125] The court meets once or twice a week, and veterans are required to report back once a month to report on their progress.[126] Most veterans will be required to stay in the treatment program for at least a year, in order to make enough progress to have their charges diminished or dismissed.[127] Since it began, 82 veterans have enrolled in the program, 65 percent of whom are Iraq or Afghanistan veterans.[128] So far, only two veterans have been unable to avoid incarceration, and only one has been re-arrested.[129]

Several success stories from the Buffalo Veterans Court have been reported. Tom Irish, a Vietnam War veteran, was charged with a felony weapons possession, after he pointed a

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116. Matthew Daneman, "N.Y. Court Gives Veterans Chance to Straighten Out" *USA Today* (1 June 2008), online: usatdoday.com <http://www.usatoday.com/news/nation/2008-06-01-veterans-court_N.htm> ["Chance to Straighten Out"]; but see *Superior Court of California County of Orange, Veterans Court Participant's Handbook* (on file with author, 2008) at 25 [Orange County Veterans Handbook].
117. Marek, *supra* note 15.
118. *Ibid.*
119. *Ibid*.
120. *Ibid.*
121. See Part III above.
122. "Chance to Straighten Out", *supra* note 116.
123. *Ibid.*
124. *Ibid.*
125. Marek, *supra* note 15.
126. *Ibid.*
127. *Ibid.*
128. *Ibid.*
129. *Ibid.*

loaded shotgun at police who were responding to a disturbance call at his home.[130] Irish was drunk during the incident, and claimed that he was suffering from a flashback; he didn't see the police officers during the incident, but instead saw Viet Cong soldiers.[131] Instead of time behind bars, Irish was allowed to participate in the Buffalo Veterans Court.[132] He is undergoing counseling, and the charges against him will likely be dropped if he completes everything that is required by the court.[133]

Thomas Zaborowski, a Korean War veteran, suffered for many years with the aftermath of his experiences from the war.[134] Shortly after returning from war, he found himself facing criminal charges for impaired driving, marijuana possession, and criminal mischief.[135] After his third arrest, he was given the option of going to the Buffalo Veterans Court, rather than spending ten days in jail.[136] After his participation in the program, Zaborowski is now sober and plans to attend college next spring, a first in his family.[137] He plans to use funds that are available to him as a veteran, something he did not know about until the veterans court provided him with the information.[138]

B. Orange County, California

The first of its kind in California, the Orange County Veterans Court began operating in November 2008. The court was an expansion of the county's already-existing collaborative court system.[139] Orange County Superior Court Judge Wendy Lindley, who oversees the mental health and drug courts, helped to start the new veterans court after a young Iraq veteran died of a drug overdose, shortly after passing through her criminal courtroom.[140] She first approached her superiors with the idea of a veterans court, with the newly amended California penal code[141] as support.[142] In order to get a better idea of what the new court would entail, Judge Lindley flew to New York, to talk to Buffalo City Court Judge Robert Russell and observe his court.[143] With the information from the Buffalo Veterans Court and the assistance of the Center for Court Innovation, Judge Lindley helped to successfully create California's first veterans court.[144]

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130. "Chance to Straighten Out", *supra* note 116.
131. *Ibid.*
132. *Ibid.*
133. *Ibid.*
134. Amanda Ruggeri, "New Courts Give Troubled Veterans a Second Chance" *U.S. News & World Report* (3 April 2009, online: usnews.com <http://www.usnews.com/articles/news/national/2009/04/03/new-courts-give-troubledveterans-a-second-chance.html?PageNr=3>.
135. *Ibid.*
136. *Ibid.*
137. *Ibid.*
138. *Ibid.*
139. Orange County has various specialized courts all under one roof: Drug Court, Homeless Outreach Court, Co-Occurring Disorders Court, Domestic Violence Court and the newest addition – Veterans Court. See, *Collaborative Courts*, online: Superior Court of California – County of Orange <http://www.occourts.org/directory/collaborative-courts/ index.html>.
140. Interview of Judge Wendy Lindley (14 April 2009), in Orange County Superior Court, Santa Ana, Cal. [Interview of Judge Lindley].
141. Cal. Penal Code § 1170.9 (West 2009).
142. Interview of Judge Lindley, *supra* note 140.
143. *Ibid.*
144. *Ibid.*

The mission of the Orange County Veterans Court "is to provide an inter-agency, collaborative, nonadversarial treatment strategy for [v]eterans in the criminal justice system who suffer from PTSD, psychological, or substance abuse problems as a result of having served in a combat theater."[145] It was developed to help veterans achieve abstinence from illegal drugs, avoid criminal activity, and to address their mental health issues.[146] The court was "designed to promote self-sufficiency and to return [veterans] to the community as … productive and responsible citizen[s]."[147] The program "is a court-supervised, comprehensive treatment collaborative, whose goal is to help [veterans] address the issues that led to [their] contact with the criminal justice system."[148] The program is voluntary for qualified veterans and includes regular court appearances before a designated veterans court Judge.[149]

After an individual is arrested and is found to be eligible for the program (he or she must be a combat veteran and eligible for probation), the veteran is advised about and offered a choice between prosecution on the pending charges or the veterans court program.[150] Entry into the program requires the defendant to enter a guilty plea.[151] The "[f]inal determination of entry into the program [is] made by the Judge, with the concurrence of the District Attorney, VA, defense counsel, Probation, law enforcement, and other agencies as appropriate."[152]

The court meets weekly, and before the calendar is called a meeting is held with the Orange County Veterans Court Judge, the District Attorney, the public defender or the defendant's own private counsel, and a VA representative, where they discuss each individual that is seeking entry into the program.[153] They review the veteran's case file, the charges against him or her, and any other pertinent information.[154] If the parties agree that the veteran is an optimal candidate, the judge then admits the veteran into the program.[155] A few examples of defendants who will typically not be admitted into the program are those charged with domestic violence or those who are charged with possession of drugs with intent to sell.[156] The court does not have appropriate treatment programs for domestic violence offenders, and the risk of having a drug dealer in the program is too high.[157] The primary purpose of the court is to treat veterans who are suffering from substance abuse, PTSD, or other mental health disorders.[158] If one of these conditions can be reasonably found to underlie the charges the veteran is facing, then he or she will be admitted into the program.[159]

After the veteran pleads guilty to the charges and is admitted into the program, the veteran is then placed on "formal probation" for three years, and immediately reports to the Pro-

145. *Orange County Veterans Court Brochure* at 2 (on file with author, 2008).
146. Orange County Veterans Handbook, *supra* note 116 at 25.
147. *Ibid*.
148. *Ibid.* at 2.
149. *Ibid.*
150. *Ibid.* at 3.
151. *Ibid.*
152. *Ibid.*
153. Interview of Judge Lindley, *supra* note 140.
154. *Ibid.*
155. *Ibid.*
156. *Ibid.*
157. *Ibid.*
158. *Ibid.*
159. *Ibid.*

bation Department.[160] There is a 14-day window during which time the veteran can withdraw his or her guilty plea, presumably resulting in prosecution on the original charges.[161] Additionally, failure or discharge from the program will result in imposition of sentence for the original charges.[162] However, successful completion of the program avoids incarceration, allows the veteran to receive the counseling and help that he or she needs, and "may result in having the charges dismissed."[163] However, the dismissal of charges does not automatically occur. It happens on a case-by-case basis, depending on the degree of the crime (felony or misdemeanor), and whether the attorneys and judge agree that dismissal would be appropriate.[164] Generally, most felonies will be reduced to misdemeanors, and most misdemeanor charges will be dismissed.[165]

During participation in the program, the veteran is required to adhere to specific terms and conditions, including abstinence from drugs and alcohol.[166] The veteran's probation officer is responsible for supervision and enforcement of the probation terms and conditions.[167] Probation supervision includes unannounced home visits, searches of the veteran and his or her residence, and may include random drug or alcohol testing (if appropriate).[168] The majority of the participants in April 2009 were subjected to weekly drug testing.[169] If a veteran violates the requirements of the program, sanctions will be imposed on him or her.[170] For example, if a veteran fails a weekly drug test, he or she may be incarcerated, for a period of time determined by the judge.[171] Other examples of sanctions that may be imposed include an admonishment from the court, increased frequency of court appearances, increased drug testing, demotion to an earlier phase in the program, or a finding of a formal probation violation.[172] If a veteran continually violates the program's requirements, the veteran will be dismissed from the program and will likely face prosecution on the original charges.[173] Most veterans are required to report to the court on a weekly basis, and give the judge an update on their progress.[174] The District Attorney, the defense attorney, and the VA representative will also give the judge an update on the veteran's progress.[175]

Treatment during the program includes "individual and group counseling, drug testing, and regular attendance at self-help meetings if appropriate (such as Narcotics Anonymous or Alcoholics Anonymous), [and] is provided through the combined effort of the Proba-

160. Orange County Veterans Handbook, *supra* note 116 at 3.

161. *Ibid.*

162. *Ibid.*

163. *Ibid.*

164. Interview of Judge Lindley, *supra* note 140.

165. The types of charges that will not be dismissed are DUIs, and other crimes that would constitute a "prior" if the defendant were to re-offend. *Ibid.*

166. Orange County Veterans Handbook, *supra* note 116 at 3.

167. *Ibid.*

168. *Ibid.*

169. Interview of Judge Lindley, *supra* note 140.

170. Orange County Veterans Handbook, *supra* note 116 at 22.

171. *Ibid.*

172. *Ibid.* at 22-23.

173. *Ibid.*

174. Interview of Judge Lindley, *supra* note 140.

175. *Ibid.*

tion Department, the Veterans Administration, and other agencies."[176] Those agencies also help the veterans "with obtaining education and skills assessments and … provide referrals for vocational training, education and/or job placement services."[177] The program lasts at least 18 months, but is determined by each participant's progress.[178] Additionally, ongoing aftercare services are available to all who complete the program.[179]

CONCLUSION: THE FUTURE OF VETERANS COURTS

Although it may be argued that specialized courts, such as veterans, drug, or mental health courts, are fundamentally unfair because they provide a sort of selective justice to the participants, ultimately the good provided by these courts greatly outweighs any of these concerns. Numerous specialized courts have been created over the years, beyond those mentioned above, and there is a significant amount of literature regarding the success of those courts. Drug and mental health courts have been operating in the United States since the late 1980s, and have had significant success. Although the legal system is an adversarial one, which may require treating all defendants the same, American society has come to realize that all defendants are not the same. This is why certain defenses have become more widely accepted over the years, why mitigating factors are taken into account at sentencing, and more importantly, why specialized courts are created and needed.

No one is arguing that veterans should receive a "free pass" after committing a crime. However, veterans who suffer from PTSD should be treated differently in a criminal context. Although sentence mitigation, affirmative defenses, and other efforts may assist in certain circumstances, they are not the most effective way to deal with the massive influx of veteran defendants that the courts will see over the next decade. By creating veterans courts, states will be able to adjudicate veteran defendants, while simultaneously providing treatment and returning them to society as law-abiding citizens. This does not equate to preferential treatment or a lack of justice.

The United States must recognize and confront the problem of hundreds of thousands of veterans returning with mental health issues and subsequently committing crimes as a result of their conditions. With no clear guidance or federal funding, states will have to decide how and whether to confront the issue and try to solve the problem of justice-involved veterans. The Buffalo Court, as the first veterans court, provides the most data for the success of these courts. However, there is limited data on the precise procedures and eligibility requirements of this court. The Orange County Veterans Court, modeled on the Buffalo Court, is so new that it has no data on the success rate of its veterans, but provides a significant amount of information on creating one of these courts.

Nevertheless, states should model their veterans courts after the Buffalo and Orange County courts. Both courts were created with the assistance of the Center for Court Innovation, and are modeled after the highly successful drug and mental health courts that have flourished across the country. Although the Orange County Veterans Court does not specifically require that a veteran be diagnosed with PTSD in order to be eligible for the

176. Orange County Veterans Handbook, *supra* note 116 at 2.

177. *Ibid.*

178. *Ibid.*

179. *Ibid.*

program, a mandatory evaluation of each participant has revealed that most participants suffer from some type of mental-health disorder. States looking to create their own veterans court should require that an evaluation of possible participants reveal some kind of mental-health disorder or substance abuse problem that is causing their criminal behavior. Otherwise, all veterans would conceivably be eligible for the program, when there is no reason for them to be in the treatment program.

The creation of specialized courts for veterans is an innovative idea that will assist many veterans in overcoming their legal problems that have resulted from PTSD and other service-related issues. It is impossible to deny the frequent connection between combat trauma and subsequent criminal behavior. The United States must recognize this as a direct societal cost of war and do everything it can to rehabilitate veterans and return them to society as law-abiding citizens. Veterans courts are the best step in this direction.

ARTICLE

MALE VIOLENCE AGAINST WOMEN IN PROSTITUTION: WEIGHING FEMINIST LEGISLATIVE RESPONSES TO A TROUBLING CANADIAN PHENOMENON

By Corinne E. Longworth*

CITED: (2010) 15 Appeal 58-85

[E]very hierarchy needs a bottom and prostitution is the bottom...
– Andrea Dworkin[1]

INTRODUCTION

Although prostitution[2] is a divisive issue,[3] the Canadian government may soon have to revisit reforming the legislation relating to it. Prostitution predominantly operates "under-

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1. Andrea Dworkin, "Prostitution and Male Supremacy," in *Life and Death: Unapologetic Writings on the Continuing War Against Women* (New York: Free Press, 1997); see also Andrea Dworkin, "Prostitution and Male Supremacy" (31 October 1992) at 2, online: No Status Quo <http://www.nostatusquo.com/ACLU/dworkin/MichLawJourI.html>.

2. Prostitution is a gendered phenomenon. Although men and transgendered persons are also prostitutes, this paper focuses on adult women in prostitution since they make up the vast majority of prostitutes in Canada. This paper does not focus on the sexual sale of girls or boys, which is "sexual exploitation" rather than prostitution. Also, I have chosen to use the term "prostitution" rather than "sex work" because I find the commercialization and commodification of women's embodied sexuality problematic, as I discuss in this paper. Prostitution is heavily imbued with violence and I view it as a concrete extension of the greater phenomenon of the feminization of poverty and gender, race, and class hierarchies, among others, within society. I find the label of "sex work" problematic because I fear that it will minimize and obscure the realities of violence and hierarchy that inform prostitution and, instead, legitimate prostitution as a reasonable and/or rational choice for poor women.

3. Recently, the Subcommittee on Solicitation Laws attempted to reform the prostitution laws in Canada, but were unable to reach consensus on how to do so. The Subcommittee noted that, although they heard from approximately 300 witnesses, reaching consensus was stalled by the diverging philosophical views of witnesses

ground" in Canada, with an estimated 80 to 95 percent of it occurring indoors and hidden from public view,[4] yet its realities are slowly coming to light. The gruesome violence to which prostitutes are all too often subjected became apparent when Robert William Pickton, a pig farmer from Coquitlam, British Columbia, was charged for the murder of over 20 prostitutes and convicted for the second degree murder of six of the women, who were all from the Downtown Eastside of Vancouver (the "DTES").[5] What was originally the "50 Missing Women's Case" soon swelled to over 65,[6] with the mass disappearance and death of survival-sex prostitutes from the DTES finally making the headlines once their quantum grew too large to ignore any longer.[7] The fact that it took close to 50 female prostitutes, many of whom were Aboriginal and lived in abject poverty, to go missing to spur a media frenzy is indicative of the lack of concern prostitutes are generally afforded by society. Surely media and police attention would have been engaged, yet earlier and far more appropriately,[8] if 50 middle-class, white, non-prostituted women had gone missing.

In a plethora of ways, prostitutes do not enjoy the same privileges, protections and human rights that many Canadians take for granted. Rather, they are exposed to stigma, male violence and gender-biased criminalization[9] within Canada. Prostitutes, particularly street prostitutes, are perhaps the most marginalized women in society, often intersectionally-dis-

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and of the Subcommittee's members. The first of the two diverging philosophies and accompanying models is "The Swedish Model," which views prostitution as a form of violence and is predominantly the abolitionist feminist approach; this approach was ultimately recommended by Conservative Party's members. Second, the "Model to Take Consensual Adult Prostitution Out of the Criminal Context" by decriminalization or legalization/regulation is supported by decriminalization feminists; it was ultimately recommended by the Liberal, New Democratic, and Bloc Québécois Parties' members. See Canada, Subcommittee on Solicitation Laws, *The Challenge of Change: A Study of Canada's Criminal Prostitution Laws* (Ottawa: Standing Committee on Justice and Human Rights, 2006) [*Challenge of Change*] at 71-84, 89-92.

4. *Ibid.* at 5.

5. Robert William Pickton was convicted of second-degree murder for six of the 26women he was charged with murdering. See "Pickton found guilty on 6 counts of 2nd-degree murder" *CBC News* (9 December 2007), online: CBC News <http://www.cbc.ca/canada/story/2007/12/09/pickton-verdict.html>.

6. Lori Culbert "Missing women's resting place marked" *The Vancouver Sun* (11 December 2007), online: Canada.com <http://www.canada.com/vancouversun/features/pickton/story.html?id=36d59ccf-9272-4101-b307-82eb9f01443d>.

7. The police were informed that female prostitutes were going missing as many as five years prior to actually treating the women's disappearances as a murder case. See "Robert Pickton Murder Trial Begins with Gruesome Testimony" *CityNews* (22 January 2007), online: CityNews <http://www.citynews.ca/news/news_7107.aspx >.

8. Even when the media and the public were told that a police task force of nine officers were investigating, most of the officers were actually part-time or working two jobs. See Lindsay Kines, Kim Bolan & Lori Culbert, "How the police investigation was flawed, Too few officers, police infighting and lack of experience undermined first probe into disappearances" *The Vancouver Sun* (22 September 2001), online: Vanished Voices <http://www.vanishedvoices.com/ArticleSunSept22.html>.

9. Under the communicating law, s. 213 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*], the conviction rates are higher and the sentences are harsher for female prostitutes. See *Challenge of Change, supra* note 3 at 52-53. Even though this law can be equally enforced against prostitutes and johns, up until recently, enforcement of the law was sexist, with "approximately three prostitutes [being] charged to every trick": John Lowman, *Street Prostitution: Assessing the Impact of the Law* (Vancouver: Communications and Public Affairs for the Department of Justice, 1990) [*Street Prostitution*] at 196. As well, for the bawdy house offences, ss. 210 and 211 of the *Criminal Code*, operators of bawdy houses often escape charges by pleading ignorance to illicit activities occurring on their premises and instead shifting blame to prostitutes. See *Challenge of Change, supra* note 3 at 55. Fran Shaver contends that a "double sexual standard exists" that targets those selling sexual services rather than those purchasing them. See Fran Shaver, "Prostitution: A Female Crime?" in Ellen Alderberg & Claudia Currie, eds., *Conflict with the Law: Women and the Canadian Justice System* (Vancouver: Press Gang Publishers, 1993) 153 at 164-65.

advantaged along race, class and ability lines;[10] their status as prostitutes further entrenches their stigmatization and otherization. The prostitutes who are most visible, street prostitutes, are treated as a nuisance, their lived realities rarely engaging public concern. Furthermore, routine and extreme forms of male violence pervade prostitution, whether occurring indoors or out.[11]

Yet, prostitutes are often thwarted from accessing the state protection they require. Reporting violence at the hands of a john or pimp reciprocally exposes a prostitute to criminal penalties.[12] As well, prostitutes who do report male violence are often blamed by police, as well as the public; they are told that "they asked for it" and are regarded as casualties of their own choices.[13] The Vancouver Police Department has been routinely criticized for systemically ignoring prostitutes' victimization.[14] Not surprisingly, the gender-biased criminalization of prostitutes and their distrust of police encourages adversarial relations between the two groups.

In many ways, the existing prostitution laws and their gender-biased enforcement within Canada serve to make prostitutes more vulnerable. Lowman suggests that, in particular, the communicating law, s. 213 of the *Criminal Code*,[15] encourages "a discourse of disposal" that, along with prostitutes' alienation from police protection, enables predatory, sexist men to perpetrate violence and even murder against prostitutes, and feel justified in doing so.[16] Of course, it is not the laws, but rather certain men, who are ab/using, raping and murdering prostitutes. Yet, these laws, and the adversarial relations they create between prostitutes and police, leave prostitutes more vulnerable to bearing the brunt of misogyny and extreme male violence that stems from gender hierarchy and is amplified, and targeted, because of their stigmatized status.

Given that prostitutes are arguably the most marginalized women in society, prostitution is an obvious women's issue. Yet, paradoxically, it polarizes feminists. This philosophical di-

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10. Prostitutes, particularly street prostitutes, are often intersectionally-marginalized along gender, race, class, and ability lines. For example, in Vancouver, as Lee Lakeman asserts, "It is Aboriginal women in the streets and Asian [immigrant] women in the massage parlours." See a video clip at http://www.workingtv.com/prostitution2010.html. Racialized and intersectionally-disadvantaged women are particularly exposed to the feminization of poverty: "[i]n 2003, 49.4 percent of all unattached women and 58.8 percent of single mothers were living below the poverty line…. In 1996, 73 percent of Aboriginal single mothers were living below the poverty line. In 1998, 85.4 percent of single mothers under twenty-five were living in poverty." See Gwen Brodsky & Shelagh Day, "Women's Poverty is an Equality Violation" in Fay Faraday, Margaret Denike, & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality under the Charter* (Toronto: Irwin Law, 2006) 319 at 321.

11. Male violence in the form of verbal, physical, and sexual abuse and murder is perpetrated against prostitutes, particularly street prostitutes, at alarming rates. See *Challenge of Change*, *supra* note 3 at 17-21. For example, over only a six year span, from 1992 to 1998, more than 86 prostitutes from across Canada were murdered. See John Lowman, "Violence and the Outlaw Status of (Street) Prostitution in Canada" (2000) 6 Violence Against Women 987 at 988. I also discuss the lived realities and dangers imbued within prostitution in Part I of this paper.

12. PIVOT Legal Society, *Voices for Dignity: A Call to End the Harms Caused by Canada's Sex Trade Laws* (Vancouver: The Law Foundation of British Columbia, 2004) at 40-41 [*Voices*], online: PIVOT <http://www.pivotlegal.org/Publications/Voices/index.htm>.

13. *Ibid.*

14. Lowman, *supra* note 11 at 995-97. See also notes 7 and 8.

15. *Criminal Code*, R.S.C. 1985, c. C-46, s. 213 [*Criminal Code*].

16. See Lowman, *supra* note 11. Pickton allegedly wrote to his pen pal in prison that he was "brought into this world" to "change this world of [their] evil ways." See Lori Culbert, "Pickton said he fought world's 'evil': letters" *National Post* (10 December 2007), online: National Post <http://www.nationalpost.com/rss/story.html?id=156913>.

vide has played an unfortunate role in stalling the progress of much needed legislative reform to the prostitution laws in Canada.[17] In response to failed attempts by Parliament to change the current laws, two *Charter* challenges were launched in Canada to interrogate the constitutionality of ss. 210 to 213 of the *Criminal Code*.[18] If the laws are struck down, legislative reform will likely be revisited and Canada will be faced with some significant decisions about what legal changes should be made. Regardless, the current laws, which expose prostitutes to violence and murder, as I will discuss, necessitate immediate legal reform.

In this paper, I argue that in order to effect meaningful change, a theoretical reframing of feminists' approaches to prostitution is necessary to find some middle ground in the seemingly irreconcilable debate between feminists. By focusing instead on feminists' common goals and problematizing the concept of "choice," I argue that the best way to move forward is by embracing the most advantageous legislative model now available: the Swedish model, which criminalizes the buyers rather than the sellers of sexual services. By incorporating Margaret Jane Radin's commodification theory, I argue that a more appropriate approach to the market alienability of sexuality via prostitution, which often involves the commodification of society's most vulnerable members, should be one of incomplete commodification and asymmetrical criminalization, as I will soon discuss. Furthermore, I argue that this approach best upholds the purposes behind prostitution legislation (i.e., lessening both nuisance and exploitation), accepted understandings of contested commodities in Canada as reflected in the *Assisted Human Reproduction Act*[19] (the "*AHRA*") and Canada's commitment to substantive equality under the *Charter* more generally.

In Part I, I canvass the current state of prostitution in the Canadian context, discussing the current laws and analyzing how, in particular, the gender-biased over-enforcement of s. 213 of the *Criminal Code* has made prostitutes more vulnerable and failed to lessen nuisance and exploitation. Further, I explore disturbing narratives of male violence against prostitutes within Canadian case law to render more tangible the lived realities and dangers im-

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17. *Challenge of Change, supra* note 3.

18. In British Columbia, Katrina Pacey of PIVOT and Joseph Arvay, Q.C. have launched a challenge to ss. 210, 211, 212(1) except for subsections (g)(i), 212(3), and 213 of the *Criminal Code* on behalf of the Downtown Eastside Sex Workers United Against Violence Society ("SWUAV"), alleging that these provisions constitutionally infringe ss. 2(b), 2(d), 7, and 15 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*]. SWUAV's Statement of Claim is available online: PIVOT <http://www.pivotlegal.org/pdfs/FiledPleadings.pdf>. However, the challenge was dismissed by Mr. Justice Ehrcke of the B.C. Supreme Court on the basis that the plaintiffs lacked both private and public interest standing: *Downtown Eastside Sex Workers United Against Violence Society v. Attorney General (Canada)*, 2008 BCSC 1726. SWUAV is appealing this decision and its Notice of Appeal and Factum are available online: PIVOT <http://www.pivotlegal.org/pdfs/2009-05-27-SWUAV-Notice-of-Appeal-and-Factum.pdf>. In Ontario, Terri Jean Bedford, a former dominatrix, Amy Lebovitch, a current prostitute, and Valerie Scott, a former prostitute and current Executive Director of Sex Professionals of Canada, have launched a s. 7 *Charter* challenge to ss. 210 and 212(1)(j) of the *Criminal Code* and a s. 2(b) and s. 7 *Charter* challenge to s. 213(1)(c) of the *Criminal Code*: *Bedford v. Canada (Attorney General)* (23 April 2007), Superior Court of Justice, Toronto Court File No. 07-CV-329807PD1; the pre-trial decisions regarding intervenor applications are *Bedford v. Canada (Attorney General)*, [2009] O.J. No. 2739, 2009 CanLII 33518 (Ont. S.C.J.), rev'd 2009 ONCA 669, [2009] O.J. No. 3881.

19. *Assisted Human Reproduction Act*, S.C. 2004, c. 2 [*AHRA*]. The *AHRA* came into force on April 22, 2004, with the exception of certain sections; to date, ss. 12, 14-19, 24(1)(a), (e), (g), 40-59, 76 of the *AHRA* are still not in force. For more details of the legislative and regulatory history of the *AHRA*, see *Quebec (Attorney General) v. Canada (Attorney General)*, 298 D.L.R. (4th) 712, 2008 CarswellQue 9848 (C.A.) at paras. 3-16. The constitutionality of the regime has recently been put in doubt since the Quebec Court of Appeal in *Quebec (Attorney General) v. Canada (Attorney General)* held that ss. 8-19, 40-53, 60, 61, and 68 of the *AHRA* were *ultra vires* the jurisdiction of the Parliament of Canada to enact. The case has been appealed to the Supreme Court of Canada.

bued within prostitution. For these reasons, I argue that immediate action and legal reform are necessary.

In Part II, I foreground the feminist debate regarding prostitution and attempt to depolarize the "coercion/consent dichotomy"[20] by suggesting instead that "choice" should be viewed as a spectrum or continuum, rather than a rigid binary. Informing this continuum of choice are the varied reasons for entry into, and types of, prostitution. However, I will argue that it would be reminiscent of the failures of second-wave feminism not to center the interests of the most marginalized women, whose choices are most greatly circumscribed. Thus, I advocate for something similar to the abolitionist[21] feminist approach to prostitution, with a reframed articulation of "choice." Last, I turn to the common goals of feminists — eliminating stigma, violence and empowering women in prostitution — arguing that these, as well as the amelioration of the most disadvantaged prostitutes, should primarily inform feminist struggle for change.

In Part III, I turn to Radin's conceptualization of sexuality as a contested commodity and advocate her assertion that "prostitution should be governed by a regime of incomplete commodification."[22] By adopting Radin's assertion that "justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us,"[23] and grounded in an understanding that sexism and violence against women are still apparent within Canada, I explore the extra-jurisdictional models currently in place: legalization, decriminalization and asymmetrical criminalization (i.e., the Swedish model). Ultimately, I find decriminalization more desirable than legalization, yet still imbued with the same drawbacks. Thus, I argue that asymmetrical criminalization, informed by the Swedish model, is the best legal framework to adopt in Canada.

In Part IV, I explore how adopting the Swedish model would best promote the purposes behind our current legislation and common feminist goals. Not only does the Swedish model appropriately shift the focus from prostitutes to the men driving demand, it is also consonant with substantive equality and the treatment of similarly contested commodities in Canada. I explore how these contested commodities are treated under the *AHRA* and argue that a similar recognition of the need to protect society's most socio-economically vulnerable members from commodification should be affected by asymmetrically criminalizing prostitution in Canada. Finally, I explore how asymmetrical criminalization is consonant with substantive equality and affirmative action under s. 15 of the *Charter*, as recently rearticulated in *R. v. Kapp* (*"Kapp"*).[24]

In my conclusion, I suggest that legal reform alone will not be enough to truly achieve feminists' goals or the purposes that underpin prostitution laws. To be most effective, legislative change must be buttressed by better social services, education regarding prostitution,

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20. Bertha E. Hernández-Truyol & Jane E. Larson, "Sexual Labor and Human Rights" (2005) 37 Colum. Hum. Rts. L. Rev. 391 at 391.

21. While we may be a long way from "abolishing" prostitution, certainly it can be lessened. Although I do not entirely side with the abolitionist belief that all prostitution, in and of itself, is violence against women, I do think that it is imbued with violence and a circumscription of choice such that it can often be experienced as violence. Making prostitution safer while practiced is necessary, but it should not supersede lessening prostitution and helping women to exit it more generally.

22. Margaret Jane Radin, "Market-Inalienability" (1987) 100 Harv. L. Rev. 1849 at 1921.

23. *Ibid.* at 1915.

24. *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 [*Kapp*].

exit programs and better policing strategies. These supports will ensure the laws are effectively implemented and women's rights and substantive equality are upheld within Canada.

I. PROSTITUTION IN THE CANADIAN CONTEXT

A. The Current Legal Framework in Canada

Although prostitution is "technically legal in Canada,"[25] certain activities related to it are regulated indirectly via ss. 210 to 213 of the *Criminal Code*;[26] the purposes behind these laws are to target prostitution-related nuisance and exploitation.[27] Sections 210 and 211 of the *Criminal Code* are the "bawdy house laws," which relate primarily to indoor prostitution.[28] Sections 212(1) and (3) of the *Criminal Code*, the "procuring laws," relate to offences involving the procurement of adult prostitution, including enticing someone to become a prostitute or living off the avails of prostitution.[29] Section 212 specifically targets exploitation and those who live parasitically off prostitutes, namely pimps.[30] Cory J., writing for the majority of the Supreme Court of Canada in *R. v. Downey*, notes that s. 212(1)(j) is aimed at remedying the social problem of abuse inflicted by pimps upon prostitutes, whom he rec-

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25. John Lowman, "Prostitution in Canada" *Canadian Criminology: Perspectives on Crime and Criminality* (Toronto: Harcourt Brace, 1991) 113 at 118. See also *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123 at 1162, [1990] 4 W.W.R. 481 [*Reference re*], aff'd by Lamer C.J. for the majority in *R. v. Corbeil,* [1991] 1 S.C.R. 830 at 835, 64 C.C.C. (3d) 272 [*Corbeil*], where he stated "prostitution itself is not illegal in Canada."

26. *Corbeil, ibid.*; and *Reference re*, *ibid*.

27. *Challenge of Change*, *supra* note 3 at 37. In regards to nuisance, see *Reference re, supra* note 25. In regards to exploitation, which can also be described as parasitically living off the avails of prostitution, see *R. v. Downey*, [1992] 2 S.C.R. 10, 90 D.L.R. (4th) 449 [*Downey*]; *R. v. Grilo* (1991), 2 O.R. (3d) 514, 64 C.C.C. (3d) 53 (C.A.) [*Grilo*].

28. *Criminal Code, supra* note 15, ss. 210 and 211. Section 197(1) of the *Criminal Code* defines a "common bawdy-house" as "a place that is (a) kept or occupied, or (b) resorted to by one or more persons, for the purpose of prostitution or the practice of acts of indecency." Section 210(1) makes "keep[ing] a common bawdy-house" an indictable offence punishable by imprisonment for up to two years. In *R. v. Milberg*, Robins J.A. of the Ontario Court of Appeal stated that in "each case the Crown must prove a frequent and habitual use of the premises for the purposes of prostitution": *R. v. Milberg* (1987), 20 O.A.C. 75, 35 C.C.C. (3d) 45 (C.A.), affirming *R. v. Patterson,* [1968] S.C.R. 157, [1968] 2 C.C.C. 247. For example, a hotel, house, parking lot, or massage parlour where sexual services are provided would be a "bawdy-house" if prostitution regularly occurs there: *Challenge of Change, supra* note 3 at 45; and *R. v. Ng,* 2007 BCPC 204, [2007] B.C.J. No. 1388. To be convicted of keeping a bawdy-house under s. 210(1) of the *Criminal Code*, the accused would have to 1) have some degree of control over the care and management of the premises and 2) participate to some extent in the "illicit" activities there: *Corbeil, supra* note 25 at 834 (cited to S.C.R.). Section 211 of the *Criminal Code* makes knowingly transporting someone to a bawdy-house a summary offence.

29. *Criminal Code, supra* note 15, ss. 212(1) and (3). These are indictable offences punishable by imprisonment for up to ten years.

30. Section 212(1)(j) of the *Criminal Code*, *supra* note 15, relates to living off the avails of prostitution and is aimed at those who live exploitatively or parasitically off prostitutes, namely pimps: *Downey, supra* note 27. Section 212 will not criminalize those who can adduce evidence that they have "non-parasitic, legitimate living arrangements with prostitutes": *Downey, supra* note 27 at 36-39 (cited to S.C.R.). In *Downey*, Cory J. held for the majority of the Court that s. 212(3) of the *Criminal Code* infringed s. 11(d) of the *Charter*, but was upheld under s. 1. Section 212(3) states that "[e]vidence that a person lives with or is habitually in the company of a prostitute or lives in a common bawdy-house is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution." Cory J. held that s. 212(3) was not an unreasonable inference; it was a rebuttable presumption that an accused could easily displace by providing evidence to the contrary. Although this reverse onus infringed an accused's right to be presumed innocent under s. 11(d) of the *Charter*, it was upheld under s. 1 of the *Charter* given Parliament's recognition that evidence would otherwise be difficult to obtain since prostitutes are often unwilling to testify against a pimp because of fear of violent reprisal. However, someone who has a personal relationship with a prostitute, such as a romantic partner or roommate, can live with a prostitute without committing an offence: *Grilo*, *supra* note 27 at paras. 25-27.

ognizes as "a particularly vulnerable segment of society."[31] Thus, profiting from the commercial sale of a person's sexuality is considered exploitative and illegal within Canadian law. Unfortunately, these sections, which target indoor and exploitative prostitution, are the most under-enforced of the prostitution laws.

In contrast, s. 213 of the *Criminal Code* accounts for "90% of all prostitution-related offences reported by police,"[32] which makes it the most implemented provision of the prostitution laws by far. Section 213 of the *Criminal Code*, the "communicating law," makes it an offence for a person "in a public place" to stop or communicate with any person for the purpose of engaging in prostitution.[33] The provision is targeted at lessening or preventing the social nuisance caused by the public solicitation of prostitutes and johns;[34] thus, it focuses primarily on eliminating street prostitution. This means that street prostitution is targeted by law enforcement far more than indoor prostitution. Furthermore, it also means that the enforcement of prostitution laws is skewed in terms of targeting nuisance, rather than exploitation.

Yet, the communicating law has largely failed to lessen nuisance. According to a census conducted in Vancouver from 1982 through 1993, although street prostitution "abated for a few months after the introduction of the communicating law in December 1985, by the latter half of 1986 the number of [prostitutes] visible on the street had returned to the level of the summer before, and has been rising ever since."[35] Thus, the prostitution laws have failed to achieve their objectives of lessening nuisance and exploitation. Rather, cumulatively, they have simply made prostitutes more vulnerable.

B. The Communicating Law: Exposing Prostitutes to Violence and Murder

Unfortunately, not only has the communicating law failed to lessen street prostitution and its associated nuisances, but it is also gender-biased: it more harshly criminalizes female street prostitutes rather than male johns. This gender bias is made clear if we consider recent statistics:

Within the statistics on the use of s. 213, a gender and role imbalance (client versus prostitute) quickly emerges, both in terms of guilty findings and sentencing…. [I]n 2003-2004:

> 68% of women charged were found guilty under section 213, while 70% of charges were stayed or withdrawn for men charged under the same provision;
>
> Upon conviction, just under 40% of women were given prison sentences, while just under 40% of men convicted under the same provision were fined, and the prison sentence rate for men was just over 5%;

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31. *Downey, supra* note 27 at 39 (cited to S.C.R.).
32. *Challenge of Change, supra* note 3 at 52.
33. *Criminal Code, supra* note 15, s. 213. This offence is punishable on summary conviction,
34. In *Reference re, supra* note 25 at 1134-35 (cited to S.C.R.), Dickson C.J. characterized the legislative objective of s. 213(1)(c), which was then s. 195(1)(c), as "address[ing] solicitation in public places and, to that end, seek[ing] to eradicate the various forms of social nuisance arising from the public display of the sale of sex…. the legislation is aimed at taking solicitation for the purposes of prostitution off the streets and out of public view."
35. "An Award-winning Criminology Professor Issues a Challenge to the Politicians of Canada. The Issue He Wants Them to Tackle: The Hypocrisy of Prostitution Laws" *The Province* (28 September 1997) A47.

> *92% of those sentenced to prison for communicating offences in 2003-2004 were female.*
>
> Because of the marginalized environment in which they live, prostitutes often face criminal records and harsher penalties than their clients…. By contrast, statistics indicate that clients walk away with lighter penalties and fewer convictions than prostitutes under section 213. Clients usually manage to avoid full prosecution and jail sentences by attending "john school", upon completion of which they receive a stay of charges or the charge is withdrawn.[36] [Emphasis added.]

This sexist criminalization of female street prostitutes both reflects and perpetuates gender inequity. The gender-biased criminalization and imprisonment of female prostitutes is indicative of an aberrant and systemic sexism operating within the criminal justice system that needs to be remedied. This gender bias is even more egregious since it is the most intersectionally-marginalized prostitutes who are disproportionately criminalized and imprisoned. The statistics indicate that the most vulnerable women involved in prostitution, female street prostitutes who are often racialized and living in poverty, must bear the blunt force of the criminal law. Criminal charges and imprisonment adversely affect women in street prostitution, many of whom are single mothers who are separated from their children while incarcerated, sometimes losing child custody as a result. Not only are street prostitutes over-incarcerated and disparately impacted by the criminal justice system, they are further affected by conditions placed on them upon release from prison.

Judges often place conditions of release on female street prostitutes and these conditions play an active role in making prostitutes more vulnerable to male violence. In particular, the communicating law causes street prostitutes to disperse and become more susceptible to violence and even murder. Prostitutes that are charged with communicating often disperse because they want to avoid being charged again and are usually given "area restrictions" that prohibit them from returning to the stroll[37] where they were arrested.[38] Dispersal also entails a separation from other prostitutes one may have been working alongside and a movement into areas where one has less of a chance of being noticed and arrested. The areas that Vancouver street prostitutes often move to are in the DTES, where they "spread out over a five-block area, standing alone in poorly lit back alleys and usually working alone."[39] These areas do not allow for protective networks to be formed with other working prostitutes. Therefore, this dispersal allows a man to "easily stop ..., pick up a woman, and drive away without ever being seen."[40]

Clearly, the disproportionate criminalization of prostitutes and their exposure to male violence must be remedied; a legislative overhaul of the prostitution laws is necessary and pressing. Although it may seem exaggerated to claim the communicating law is killing women, the law is certainly rendering prostitutes far more susceptible to male violence. By causing prostitutes to disperse, alienating them from the police and rendering them

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36. *Challenge of Change*, *supra* note 3 at 52-53.
37. A "stroll" is known within the prostitution community to be an area that one frequents.
38. Lowman, *Street Prostitution*, *supra* note 9 at 198.
39. Lowman, "Violence and the Outlaw Status of (Street) Prostitution in Canada," *supra* note 11 at 994.
40. Dan Gardner, "Courting Death (Part 1): The Law has Hounded Hookers Out of Safe Areas and Into Dark Alleys, Making Them Easy Prey for Murderers" *The Ottawa Citizen* (15 June 2002) B1.

more vulnerable to predatory men, the communicating law has led to a sharp increase in the number of prostitutes murdered.[41]

C. All Forms of Prostitution are Imbued with Violence

Violence is pervasive in all forms of prostitution. Although off-street prostitutes are generally subject to less violence, violence occurs in all types of prostitution, from street prostitution, to massage parlours, to escort agencies.[42] The different types of abuse and violence range from "whistles and insults to assault, rape and murder."[43] Again, stigmatization exposes prostitutes to violence as they are predominantly "regarded as criminals and second-class citizens, [such that] some people feel justified in humiliating them, harassing them, throwing things at them and even physically abusing them."[44] Thus, the abuse and violence prostitutes experience ranges from humiliation and degradation to horrifically sadistic murder. I agree with Lowman, who states that "violence against prostitutes ought [also] to be understood as part of a continuum of violence against women more generally."[45] Yet, violence against prostitutes is particularly severe since it is targeted at them and amplified given their stigmatized status.

Canadian case law abounds with narratives of the extremely sadistic, misogynistic brutality and murder that prostitutes are subject to, simply because of their status as prostitutes. In *R. v. Palma*, an Ontario man picked up and fatally shot three women (two of whom were transgendered) within the span of an hour; his murderous rampage was targeted solely at street prostitutes.[46] In *Jones v. Smith*, Jones disclosed to a forensic psychiatrist his detailed plans to murder prostitutes from Vancouver's DTES. Luckily, he was caught before successfully completing his "trial run." He disclosed that he had deliberately chosen a small prostitute who he could easily overwhelm, and had planned to kidnap her, take her back to his home and use her as a "sex slave" before shooting her in the face to erase her identity. He had taken time off work and carefully prepared his apartment to execute his plan. Fortunately, he was unsuccessful.[47]

Despite the violence prostitutes are subjected to, *R. v. Evans* is testament to the resilience and will to survive against all odds of women engaged in prostitution. In this horrific case, a woman was unlawfully confined in a car and driven by two men to a remote locale, where she was sexually and physically assaulted by them, stabbed in the side of her throat, and left to die. By feigning death and then inserting her thumb and forefinger into her knife wounds, she managed to cease the flow of blood and travel on foot to a farmhouse a third

41. John Lowman documents that since the communicating law was enacted and entered into force in 1985, there has been a sharp increase in the number of prostitutes found killed. In British Columbia alone: from 1975-1979, three prostitutes were murdered; from 1980-1984, eight prostitutes were murdered; from 1985-1989, 22 prostitutes were murdered; from 1990-1994, 24 prostitutes were murdered; from 1995-1999, 50 prostitutes were murdered: *Challenge of Change*, supra note 3 at 19. Furthermore, it should be noted that, except for the statistics from 1995-1999 that also factored in the missing women believed to be murdered, these are the number of prostitutes *found* murdered in these years. Thus, Pickton is surely not alone in his murderous violence towards prostitutes.

42. *Ibid.* at 17.

43. *Ibid.*

44. *Ibid.* at 20.

45. Lowman, *supra* note 11 at 1006.

46. *R. v. Palma*, [2001] O.J. No. 3283, 2001 CarswellOnt 3384 (Sup. Ct.) at paras. 16-19 (QL).

47. *Jones v. Smith*, [1999] 1 S.C.R. 455, 169 D.L.R. (4th) 385 at paras. 36-39 and 88.

of a kilometre away. After a tracheotomy and 11 days in hospital, she lived to see both men brought to justice.[48] Of course, many prostitutes have not been as lucky and their male attackers continue to enjoy anonymity.

I use these three cases to illustrate the misogyny and violence that is often directed at prostitutes. In each case, the stigma and dehumanization that flow from the label of "prostitute" are rendered all too real as they manifest in extreme violence. By the act of murder, these men violently dehumanize their victims, obliterating their identities as they callously and senselessly take their lives. The case law all too vividly depicts the danger of extreme violence imbued within prostitution. Clearly, something must be done to protect prostitutes from similar, tragic ends. Since the prostitution laws have failed to achieve their objectives and have only made prostitutes more vulnerable to violence and murder, I argue that legal reform is essential and pressing.

II. FINDING COMMON GROUND WITHIN THE FEMINIST DEBATE

How best to affect legal reform is a divisive issue, particularly among feminists.[49] One way to understand this polarization of feminists over the issue of prostitution is to consider the magnitude of what is at stake: women's safety and lives. Yet, this feminist divide must be overcome; it has already contributed to an ideological impasse in 2006, when the Canadian federal government reconsidered the prostitution laws but could not reach the consensus needed to affect legal change.[50] I argue that in order for this feminist divide to be overcome, we need to reframe the debate. In this section, I first present the two opposing feminist positions and then attempt to rearticulate the concept of "choice" so central to the divide between feminists, viewing "choice" as a continuum rather than a binary. Ultimately, I do advocate the abolitionist approach, which I argue most appropriately re-centres prostitutes at the most disadvantaged end of the continuum and upholds feminists' common goals for prostitution: lessening stigma, ending violence and empowering prostitutes. I will now begin by foregrounding the two opposing feminist positions: those of "full-decriminalization"[51] and "abolitionist" feminists.

A. The Full-Decriminalization Feminist Position

Full-decriminalization feminists "seek... tolerance and legitimation" of what they term "sex work," arguing that "some prostitution and trafficking… is a free choice by an autonomous individual, and one often made out of economic necessity."[52] Thus, they conceive of the sex-worker as an agent and assert that "difficult choices made under constrained conditions are still choices."[53] Furthermore, full-decriminalization feminists view consensual adult sex work as "a legitimate form of labour" that, therefore, necessitates "the same labour and

48. *R. v. Evans*, [1990] O.J. No. 517, Action No. DCOM 2628/88 (Dist. Ct.) (QL).

49. *Challenge of Change, supra* note 3.

50. *Ibid*.

51. I should note that various other names are attributed to these two positions. What I term "full-decriminalization" feminists have also been termed sex radicals, autonomists, pro-prostitution advocates or simply decriminalization feminists, while the term "abolitionist" has also been referred to as the radical feminist position. I use the term "full-decriminalization" feminists to avoid confusion with abolitionist feminists who also advocate decriminalization, yet only for prostitutes.

52. Hernández-Truyol *et al.*, *supra* note 20 at 402.

53. PIVOT, *Voices, supra* note 12 at 8.

human rights protections" that other workers enjoy.[54] While they desire sex work to be treated the same as other employment, they also "advocate the establishment of an effective support network and exit strategies for those who are exploited or have not freely chosen to be where they are."[55] Viewing the sex-worker as agent, establishing a protective framework and attempting to empower prostitutes are obviously worthy aims. Yet, I argue that full-decriminalization feminists' attempt to do so within a larger context of gender, race and class inequity is somewhat misguided.

Full-decriminalization feminists advocate a libertarian approach that views government interference with sex work as an encroachment on liberty and freedom of expression.[56] In terms of decriminalization, full-decriminalization feminists agree with abolitionists that the criminalization of prostitutes must end since it simply renders prostitutes more vulnerable. Yet, they want most or all of the provisions of the *Criminal Code* relating to prostitution, ss. 210 to 213, to be repealed or struck down. Although some suggest that s. 212 "could be kept to protect children and prostitutes from exploitation," others believe that it should also be removed from the *Criminal Code*.[57] Full-decriminalization feminists believe these changes will reduce harms to women in prostitution since women will be able to run their own brothels and co-operatives, "have better control over their physical surroundings and transactions with male buyers,"[58] be able to enter into employment contracts and have their rights protected by employment and labour standards like other workers.[59]

Although these are all worthy goals, the effect of repealing these provisions of the *Criminal Code* is that the laws that also apply to johns, pimps and prostitution industrialists will be removed,[60] and, thus, a more neo-liberal approach will cause the sex trade to grow and flourish. Decriminalization advocates suggest that since "the *Criminal Code* is replete with provisions that can already be used to effectively protect all adults and children from [physical and sexual] abuse… the prostitution-related provisions are redundant."[61] Yet, although these other provisions can be used, they often are not;[62] this is not likely to change in the absence of prostitution laws. Also, the removal of laws that criminalize the coercive, commercial exploitation of prostitutes will surely have detrimental effects long-term.

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54. PIVOT, *Beyond Decriminalization: Sex Work, Human Rights and a New Framework for Law Reform* (Vancouver: The Law Foundation of British Columbia, 2004) [*Beyond Decriminalization*] at 12, online: PIVOT <http://www.pivotlegal.org/pdfs/BeyondDecrimLongReport.pdf>.

55. *Challenge of Change*, *supra* note 3 at 77.

56. Shelagh Day, "Prostitution: Violating the Human Rights of Poor Women" *Action ontarienne contre la violence faite aux femmes* (June 2008) at 14, 15, online: Francofemmes <http://www.francofemmes.org/aocvf/documents/Prostitution_v.angl_FINALE_WEB.pdf>.

57. *Challenge of Change*, *supra* note 3 at 77. There is concern amongst some full-decriminalization feminists that s. 212 could be used to criminalize a prostitute's own children or partner who she lives with, although the case law suggests that this is unlikely: *supra* note 30. Some want to decriminalize s. 212 since it limits sex workers' ability to "create safer working conditions" by not permitting referrals from one sex worker to another and criminalizing anyone who runs a bawdy-house as a procurer or someone who is living off the avails of prostitution: PIVOT, *Voices*, *supra* note 12 at 23. Thus, some full-decriminalization feminists believe that all of the provisions of the *Criminal Code* relating to sex work should be repealed.

58. Shelagh Day, *supra* note 56 at 14.

59. PIVOT, *Beyond Decriminalization, supra* note 54 at 145-8.

60. Day, *supra* note 56 at 9.

61. *Challenge of Change*, *supra* note 3 at 77.

62. For example, in *R. v. Seaboyer; R. v. Gayme*, [1991] 2 S.C.R. 577 at 649, L'Heureux-Dubé J. notes that, in the context of sexual assault, despite the fact that, "by all accounts, women are victimized at an alarming rate…. The prosecution and conviction rates for sexual assault are among the lowest for all violent crimes."

B. The Abolitionist Feminist Position

In contrast, abolitionists believe that the legitimation and expansion of prostitution will do little to protect women from the violence that is inherent in all its forms. Abolitionists oppose full-decriminalization, which they assert will only expand the sex trade and, as an organization of abolitionist ex-prostitutes stated, "put more power into the hands of the men who abuse… [prostitutes] by telling them that they are … entitled to do so."[63] Instead, they believe that the laws that criminalize prostitutes should be removed, but the laws relating to johns, pimps and profiteers should remain intact. They believe this approach will deter buyers, decreasing the purchase of sexual services and making markets less lucrative, which in turn will decrease prostitution and trafficking.[64]

Abolitionists refuse to describe prostitution as "work," instead arguing that "force or coercion—albeit tacit or circumstantial—is always present wherever prostitution is found."[65] They argue that women are "coerced into prostitution by various factors: poverty, racism, a history of previous sexual abuse, drug addiction [and] lack of housing."[66] Statistics and demographic profiles of prostitutes largely support these contentions.[67] Furthermore, given that abolitionists view prostitution as largely informed by coercion that negates "choice," they view prostitution as an act of violence against women and "the most extreme and crystallized form of all sexual exploitation."[68] As well as gender, abolitionists view prostitutes as victimized by the race, ability and/or class hierarchies that circumscribe "choice" so severely that the sale of one's embodied sexuality even seems a viable option. Thus, they view prostitutes as having been in/directly oppressed and coerced, or as having internalized gender hierarchy such that prostitutes "come to acquiesce in their own subordination."[69]

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63. Ex-Prostitutes Against Legislated Sexual Servitude (X-PALSS), "NO Legal Brothel in Vancouver" (December 2007), online: Sisphe.org <http://sisyphe.org/article.php3?id_article=2830>.

64. Gunilla Ekberg, "The Swedish Law That Prohibits the Purchase of Sexual Services: Best Practices for Prevention of Prostitution and Trafficking in Human Beings" (2004) 10 Violence Against Women 1187 at 1193-94, 1199-1201.

65. Cynthia Meillón, "References to Trafficking in the Beijing + 5 Document" in Cynthia Meillón & Charlotte Bunch, eds., *Holding onto the Promise: Women's Human Rights & the Beijing + 5 Review* (New Jersey: Center for Women's Global Leadership, 2001) at 156.

66. Day, *supra* note 56 at 19.

67. The federal Standing Committee found that most people enter prostitution as only a temporary measure and while "[s]ome people are forced by a third party, others do it to make ends meet, pay the rent or buy groceries, or to cope with a drug habit or a life marked by violence, incest, rejection": *Challenge of Change, supra* note 3 at 10-11. Melissa Farley found in her study of 100 prostitutes in or near Vancouver's DTES, that at least 57 percent of participants were racialized, 54 percent entered prostitution before the age of 18, 86 percent experienced current or previous homelessness, and 73 percent and 84 percent had been physically and sexually abused as children, respectively: Melissa Farley *et al.*, "Prostitution and Trafficking in Nine Countries: An Update on Violence and Posttraumatic Stress Disorder" (2003) 2 Journal of Trauma Practice 33 at 37-38, 40, 43. Of the participants, 91 percent had been physically assaulted and 76 percent had been sexually assaulted during prostitution, with 95 percent stating they needed to leave prostitution: *ibid.* at 43, 51.

68. Kathleen Barry, *The Prostitution of Sexuality* (New York: New York University Press, 1995) at 296.

69. Kate Sutherland, "Work, Sex, and Sex-Work: Competing Feminist Discourses on the International Sex Trade" (2004) 42 Osgoode Hall L.J. 139 at 142.

C. Choice: The Abolitionist Position

Because some abolitionists view prostitutes as victims and refuse to support the sale of women's bodies, they are critiqued as "paternalistic."[70] Yet, this critique misses the ideological underpinnings of abolitionist's unwillingness to see anything less than full, meaningful, voluntary consent as "choice" in prostitution. This viewpoint needs to be re-examined and "choice" reframed such that abolitionists are no longer viewed as negating prostitutes' agency.

Abolitionists predominantly conceive of "choice" in a positive liberty rather than a negative liberty sense. Positive liberty entails empowering a person to reach their full potential. Thus, this positive view of liberty sets as a minimum that "choice" not include the voluntary assumption of risks that would infringe or endanger proper self-development, human dignity, equality, security of the person and/or life. Prostitution, as an inherently violent and often dehumanizing and degrading transaction, may give women money, but it often, given coerced circumstances, in no way gives them a sense of self-betterment or satisfaction. Thus, although abolitionists do not necessarily oppose the "amelioration of [prostitutes'] working conditions," "abolitionists historically have been wary of any compromise that might suggest the legitimation of prostitution or trafficking"[71] by articulating prostitution as something that is chosen.

Abolitionists critique full-decriminalization feminists' neo-liberal notions of "choice" or contractual consent as well-intentioned, yet de-contextualized and misguided. Abolitionists express concern that espousing that prostitution is "choice," even if constrained, will effectively obscure the contextual constraints themselves. As Wanda A. Weigers states, "to attach normative significance to choice without regard to its social context can systematically obscure and impair our understanding of the conditions and pervasive effects of social inequality."[72] Thus, the focus on prostitution as a discrete instance of "choice" detracts from a focus on the larger context of oppression informing that choice. This does little to lessen stigma, but instead renders "less visible the social conditions that make prostitution a palatable choice for many women."[73] As a result, the underlying conditions of inequality remain largely unexamined and unchallenged. As well, on an individual level, reducing prostitution to a single contractual exchange in which a woman exercises voluntary, rational "choice" allows a man to further stigmatize her for that choice and ignore the depth of her human identity as well as her disadvantagement within the monetary transaction. Further, there is a concern that the rhetoric of "choice" may be misappropriated by men rationalizing their lack of empathy for, and violence against, prostitutes.

The full-decriminalization, neo-liberal concept of free, voluntary "choice" is viewed as misguided by abolitionists since, over time, it may obscure or even preclude "victims" within the exchange. As autonomous agents, prostitutes will be "presumed to have enhanced their welfare or to have consented to risk."[74] Therefore, any negative impacts that may flow from prostitution, including violence or emotional trauma, will be minimized. Through legiti-

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70. Iain McDonald, "Criminalizing 'Punters': Evaluating the Swedish Position on Prostitution" (2004) 26(2) *Journal of Social Welfare and Family Law* 195 at 197.

71. Hernández-Truyol *et al.*, *supra* note 20 at 401.

72. Wanda A. Weigers, "Economic Analysis of Law and 'Private Ordering': A Feminist Critique" (1992) 42 U. Toronto L.J. 170 at 198.

73. *Ibid.* at 196.

74. *Ibid.* at 192.

mation and a focus solely on the positive benefits that presumptively flow from "chosen" contracts between rational actors seeking to better their lot, prostitution may even be encouraged as an option or a "rational choice for poor women."[75] Therefore, as has occurred in Nevada, to "the extent that prostitution is seen as a legitimate choice, women on welfare and unemployment insurance may also be encouraged or required to turn to it."[76]

D. The Crux of the Feminist Divide: Depolarizing the Consent/Coercion Dichotomy

The polarization of feminists largely involves whether, in constrained circumstances, the concept of "choice" should be viewed as coercion or consent and, consequently, prostitutes should be seen as victims or agents, respectively. As well, abolitionists and full-decriminalization feminists support very different models of legislative reform. Personally, I believe that a middle-ground approach to choice is possible. I find merit in both positions and think that, instead of viewing choice as a rigid binary of choice/coercion or prostitutes as either agent/victim, we should instead understand choice as a continuum along which prostitutes, as victims, agents or victim-agents, are aligned. However, I also believe that we should strive for an understanding of choice that engages a positive view of liberty. "Choice" should only be viewed as such if consent is meaningful, free and voluntary, rather than coerced. This is also consistent with Canadian contract law since duress, undue influence and the unconscionable exploitation of an inequality of bargaining power between parties vitiates consent. Thus, I argue that choice, although possible, should not and cannot be *presumed* in a context where women's choices are so heavily circumscribed. We need a different presumption and starting point.

The variety of reasons for entering into, as well as types of, prostitution illustrate the continuum of choice. Often women enter into prostitution due to a lack of economic alternatives, but this is not always the case. Prostitution (at least certain kinds) has been suggested to be "probably the one job where women earn more than men" besides modelling.[77] Thus, surely there are white, middle-class women who enter prostitution as "high-end escorts" because prostitution gives them "the opportunity to meet interesting people, work flexible hours and earn decent wages."[78] However, these women are surely a minute minority. On the other hand, there are also women at the other end of the continuum, those who are Aboriginal, impoverished, sexually abused as children and entering into prostitution as minors,[79] mentally-ill and addicted to hard drugs, which they began to consume because

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75. Day, *supra* note 56 at 13.

76. Weigers, *supra* note 72 at 196.

77. Frances Shaver, "The Regulation of Prostitution: Avoiding the Morality Traps" (1994) 9 Can. J.L. & Soc. 123 at 144; Naomi Wolf, *The Beauty Myth* (Toronto: Vintage Canada, 1997) at 50.

78. *Challenge of Change*, *supra* note 3 at 12.

79. Does "choice" ascribe to a sexually-exploited girl when she reaches the age of consent? Annabel Webb of Justice for Girls raises a significant weakness in the argument of full-decriminalization feminists who claim that women who were sexually-abused at home and/or sexually exploited as children in prostitution gain the ability to "choose" prostitution when they turn 18 years old. Certainly, we would never view a girl under the age of 18 as exercising "choice" in entering prostitution, which we term instead "sexual exploitation." Yet, this is what some believe when the same young woman reaches the age of majority. Given that most female prostitutes enter prostitution as minors and become trapped in prostitution, this is a noteworthy critique. Although studies conflict, "the average age for women entering prostitution is sixteen, although the number of nine-, ten-, and eleven-year-old girls in the industry is on the rise." See Sarah Wynter, "WHISPER: Women Hurt in Systems of Prostitution Engaged in Revolt" in Frederique Delacoste & Priscilla Alexander, eds., *Sex Work* (London: Virago Press, 1988) 266 at 268. When I worked at Justice for Girls, one young woman told me that she entered into

they could not stand the feeling, emotionally and physically, of men entering them over and over and over again.[80] This is a woman that the streets of Vancouver know all too well; she is the forgotten face of Vancouver's DTES. This woman may desperately want to leave prostitution, view herself as a victim of a white supremacist, capitalist and colonialist patriarchy, and fervently tell you she in no way "chose" this life, but rather it chose her. However, there may also be a woman who had the same constrained set of choices but who views herself as an agent or a victim-agent. Who is right? Whose perspective do we privilege? I argue we must view choice within prostitution as a continuum, yet privilege the most disadvantaged woman along it.

One critique of second-wave feminism was that the simplifying of experience and centring of viewpoints and voices of more privileged feminists, whether intentional or not, silenced those who spoke from the margins.[81] A central tenet of feminism is envisioning and striving for a better world, in which women can be fully-actualized, equal, autonomous and empowered. Abolitionist feminists cannot tell women who assert that they have "choice" that they do not since this would be demeaning, even if such women's choices are coerced and constrained. Similarly, full-decriminalization feminists cannot tell a woman who says that she did not choose prostitution that, in fact, she did. The greater socio-cultural context of sexism, racism and classism, which often makes prostitution the only choice besides homelessness or starvation, can isolate a woman in a place where she feels like she has no choice at all. As long as women exist who can plausibly claim they have no choice,[82] I argue they should be centred as our starting point. Centring this woman does not negate the other voices that claim they do have choice and agency, but it centres the person who is most disadvantaged on the continuum: the self-identified victim.

E. A New Starting Point Within the Law

Given that some women say their experience of prostitution is devoid of choice, and most want to leave it, I argue that full, meaningful and voluntary choice should not be a presumption within prostitution. Rather, I assert that full, meaningful and voluntary choice should be seen as *an exception* to a general assumption that consent and choice are often absent within prostitution. This needs to be the basic starting point for legal reform. Rethinking the use of "choice" in this important debate ensures that the most marginalized people on the continuum of choice are centred. In the rest of my analysis, I centre the woman from my city, Vancouver, who is the most marginalized on the continuum of choice and claims she did not choose prostitution: the Aboriginal, street prostitute, living in poverty on the DTES, who self-identifies as a victim of colonialism, capitalism and patri-

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prostitution at the age of 15 because her boyfriend's father introduced her to and made her addicted to crack cocaine; he then forced her to prostitute herself if she wanted to continue to live with them.

80. Most prostitutes who are addicted to drugs did not enter prostitution as addicts. In one study, it was found that only "forty-percent [of prostitutes addicted to drugs] were addicted before prostitution." Most prostitutes begin taking drugs because they find prostitution so physically and emotionally taxing. See Priscilla Alexander, "Prostitution: A Difficult Issue for Feminists" in Frederique Delacoste & Priscilla Alexander, eds., *Sex Work* (London: Virago Press, 1988) 184 at 202.

81. See bell hooks, *Feminist Theory: From Margin to Center* (Cambridge: South End Press, 2000).

82. Sarah-Maria, Ramona and hermoine magdelene of PEERS, *Stories from the Margins* (Victoria: PEERS, 2003) at 14, 37, online: PEERS <http://www.peers.bc.ca/storieswrite.html>.

archy (the "centred woman").[83] By centering her in my analysis, I hope to destabilize the victim/agent dichotomy and instead envision a legal framework that more readily enables her to transition from victim, to victim-agent and ultimately to agent.

As a final point in this section, the common goals of feminists should be stressed. First, feminists agree the stigma ascribed to prostitutes must be lessened for them to live in greater dignity, equality and safety. Second, and related to lessening stigma, feminists most importantly want the violence against and murder of prostitutes to end. Third, feminists want prostitutes to be empowered to leave prostitution if they wish, or to engage safely in prostitution if they stay. These three feminist goals— lessening stigma, ending violence and empowering prostitutes— as well as the amelioration of the most disadvantaged prostitutes will inform my analysis as I analyze how best to approach legislative reform within Canada. First, however, I explore one additional concern, commodification, which I argue should also inform legal reform.

III. RADIN, INCOMPLETE COMMODIFICATION AND LEGAL MODELS

In addition to the concept of the centred woman and the idea that full, meaningful and voluntary choice should be presumed absent within prostitution, it is important to explore what else may be at stake in turning sexual services into market-alienable commodities. By exploring the legal theory of Margaret Jane Radin, I argue that we can come to a more complete understanding of the anxiety and stigma that often attaches to the sale of sexual services. Furthermore, I argue that Radin's approach, which is grounded in women's realities, particularly those of the centred woman, also enables "human flourishing"[84] such that we do not "foreclose progress to a better world of more equal power (and less susceptibility to the domino effect of market rhetoric),"[85] as I will explain. With this theoretical lens, I again stress that criminalizing the sellers of sexual services must cease and then examine other extra-jurisdictional models in place: legalization, decriminalization and asymmetrical crim-

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83. The Aboriginal Women's Action Network (AWAN) has this message: "We, the Aboriginal Women's Action Network, speak especially in the interests of the most vulnerable women — street prostitutes, of which a significant number are young Aboriginal women and girls. We have a long, multi-generational history of colonization, marginalization, and displacement from our Homelands, and rampant abuses that has forced many of our sisters into prostitution. Aboriginal women are often either forced into prostitution, trafficked into prostitution or are facing that possibility. …The Aboriginal Women's Action Network opposes the legalization of prostitution, and any state regulation of prostitution that entrenches Aboriginal women and children in the so-called 'sex trade.' We hold that legalizing prostitution in Vancouver will not make it safer for those prostituted, but will merely increase their numbers. Contrary to current media coverage of the issue, the available evidence suggests that it would in fact be harmful, would expand prostitution and would promote trafficking, and would only serve to make prostitution safer and more profitable for the men who exploit and harm prostituted women and children. Although many well-meaning people think that decriminalization simply means protecting prostituted women from arrest, it also refers, dangerously, to the decriminalization of johns and pimps. In this way prostitution is normalized, johns multiply, and pimps and traffickers become legitimated entrepreneurs." Read more of AWAN's message: AWAN, "Inteligenta Indigena: Aboriginal Women's Action Network Statement Against the Plans for Vancouver Brothel" *Fire Witch Rising* (20 February 2008), online: Fire Witch Rising <http://fire-witchrising.blogspot.com/2008/02/inteligenta-indigena-aboriginal-womens.html>.

84. Margaret Jane Radin conceives of "human flourishing" in a positive liberty sense. She describes a "positive view of freedom ... in which the self-development of the individual is linked to pursuit of proper social development, and in which proper self-development, as a requirement of personhood, could in principle sometimes take precedence over one's momentary desires or preferences": Radin, *supra* note 22 at 1905.

85. *Ibid.* at 1924.

inalization (i.e., the Swedish model). Ultimately, I advocate asymmetrical criminalization as the best alternative available, and perhaps the same one envisioned by Radin.

A. Radin: Stigma and the Slippery Slope to Market Domination

In her article, "Market-Inalienability," Radin explores the anxiety and stigma that often attach to the commodification of sexual services. First, she adeptly articulates people's often indefinable feelings of anxiety that arise in regard to the market-alienability of "contested commodities," such as babies, surrogacy and sexual services.[86] Some argue that conceiving of attributes that are "integral to the self," such as sexuality, as "monetizable or detachable from the person… is to do violence to our deepest understanding of what it is to be human."[87] Thus, an anxiety arises around the selling of such personal attributes, such as sexual services. As well, since the sale of one's embodied sexuality implicates in an entirely literal way one's bodily integrity, some people feel discomfort or insult, or a fear of degradation or loss of value, in considering sexuality to be a "fungible object;"[88] they may also feel that such considerations are "intuitively wrong."[89] To feel that selling sex is "wrong" gives rise to stigma. When viewed through this lens, the position of abolitionist feminists becomes more complicated. Of course, abolitionist feminists do not wish to stigmatize prostitutes for their need to sell their bodies. Rather, they view prostitution as intuitively wrong because of concerns that "commodification will exacerbate, not ameliorate, oppression and powerlessness [as well as] the social disapproval connected with marketing one's body."[90] Also, as Radin suggests, commodifying women's bodies may cause a "domino effect" or "a slippery slope leading to market domination" and a fundamental transformation such that women's bodies are sold at such a dystopian scale that everyone's discourse and views of sexuality, particularly women's, suffer tremendously.[91] I agree with Radin that these are real concerns and, thus, that the commodification of women's bodies should be approached cautiously to preclude and deter such market domination.

In an ideal world, abolitionist feminists would not want women's bodies to ever be considered "for sale," or market-alienable, particularly not the centred woman. However, as Radin asserts, "we are situated in a nonideal world of ignorance, greed, and violence; of poverty, racism and sexism."[92] Thus, "[i]n spite of our ideals, justice under nonideal circumstances, pragmatic justice, consists in choosing the best alternative now available to us."[93] Radin views the crossroads that feminists are at, and prostitution more generally, as a dilemma she calls the "double bind": to commodify women's bodies may entrench oppression and do violence to their personhood values, but to disallow women from commodifying themselves means "forc[ing] women to remain in circumstances… worse than becoming sexual commodity-suppliers."[94] The criminalization of prostitutes "exacerbates

86. *Ibid.* at 1856.
87. *Ibid.* at 1906.
88. *Ibid.* at 1881.
89. *Ibid.* at 1880.
90. *Ibid.* at 1916.
91. *Ibid.* at 1912, 1922.
92. *Ibid.* at 1915.
93. *Ibid*.
94. *Ibid.* at 1916-17.

the double bind" for it harms their personhood by rendering them more marginalized, stigmatized and vulnerable.[95]

B. Circumventing the Double Bind: Incomplete Commodification

To circumvent the double bind, Radin suggests "incomplete commodification" in the context of prostitution.[96] She seems to contemplate a regime quite similar to the one in place in Sweden:

> I think we should now decriminalize the *sale* of sexual services in order to protect poor women from … degradation and danger…. At the same time, in order to check the domino effect, we should prohibit the capitalist entrepreneurship that would operate to create an organized market in sexual services even though this step would pose enforcement difficulties.[97] [Emphasis added.]

Radin concludes her article with a recognition that legal models must rest "on our best conception of human flourishing," but must also dialectically evolve.[98] I interpret this to mean that we must choose as a starting point the best legal regime for prostitution in Canada now available. Yet, we must allow this regime to alter as the conditions of disadvantaged groups are ameliorated and power shifts, or as we find a way to regulate the regime in a manner that does not endanger human flourishing. Still, our starting point and aim must be the most ideal approach available, despite non-ideal circumstances, so that we do not "foreclose progress to a better world."[99]

By adopting Radin's theoretical lens and focusing on common feminists goals, the centred woman and the purposes behind prostitution legislation (lessening nuisance and exploitation), I now evaluate the different extra-jurisdictional models in place: legalization, decriminalization and asymmetrical criminalization.

C. Legalization

Prostitution has been legalized in the Netherlands and Victoria, Australia. In both jurisdictions, not all forms of prostitution are legal: child prostitution, trafficking and some aspects of street prostitution remain criminalized.[100] Legalization often involves removing criminal laws relating to adult prostitution and regulating prostitution through licensing, health and safety regulations.[101] Although legalization has some benefits since it does not criminalize prostitutes and attempts to support their well-being, it unfortunately has multiple drawbacks.

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95. *Ibid.* at 1921-22.
96. *Ibid.* at 1921.
97. *Ibid.* at 1924 [emphasis added].
98. *Ibid.* at 1937.
99. *Ibid.* at 1924.
100. Julie Bindel & Liz Kelly, "A Critical Examination of Responses to Prostitution in Four Countries: Victoria, Australia; Ireland; the Netherlands; and Sweden" *Routes Out Partnership Board* (2003) at 12, online: Network of Sex Work Projects <http://www.nswp.org/pdf/BINDEL-CRITICAL.PDF>.
101. *Challenge of Change*, *supra* note 3 at 82.

In both jurisdictions, legalization has spurred a marked growth in the sex industry.[102] For example, in Victoria, legal brothels more than doubled over a span of 11 years: "the number of legitimate brothels grew from 40 in 1989 to 94 in 1999."[103] This growth of the sex industry is linked directly to increased demand, which stems from the legitimation and accessibility of prostitution domestically, and these countries' increased popularity as sex tourist destinations.

With an increase in demand, there has been an increase in the legal and illegal, underground forms of the trade.[104] Demand must be met with a supply of bodies, and a variety thereof, to be made available for male sexual consumption. Thus, demand has resulted in an increase in the exploitation of women and children who are trafficked or otherwise forced to enter prostitution.[105] In the Netherlands, there has been a disturbing increase in child sexual exploitation, with a growth of 11,000 children in the sex trade since 1996, mainly trafficked from other countries.[106] As Anne-Marie Lizin of Belgium has stated, "You cannot say you're fighting the trafficking of people and at the same time legalise (brothels) because you open the market."[107] This seems to be a sound argument since, in the Netherlands, approximately 80 to 85 percent of prostitutes are non-Dutch[108] and thus have voluntarily relocated or been trafficked from other countries to work in locations like Amsterdam. In this way, prostitution, trafficking and child sexual exploitation should be viewed as inextricably linked. For these reasons, it is not surprising that the Mayor of Amsterdam recently announced that a third of the red light district will be shut down since, not only did legalization not bring the Dutch what they had "hoped and expected," but it increased organized crime, exploitation and trafficking.[109]

As well, in jurisdictions with legalization, an increase in legal indoor prostitution has increased illegal street prostitution rather than moving women in off the streets,[110] thus allowing the nuisance associated with prostitution to linger or worsen. Of course, this is not surprising since legalization does not ameliorate the basic conditions of disadvantage that keep women— particularly the centred woman— poor, homeless and on the street to begin with. Overall, legalizing prostitution has not decreased nuisance or exploitation, but has largely exacerbated them.

Legalization has also failed to lessen the stigma and extreme violence associated with prostitution. In Amsterdam, known internationally for its open-minded attitudes toward the sex industry, legalization has not minimized the stigma attributed to prostitutes.[111] Instead, as

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102. Bindel *et al.*, *supra* note 100 at 13; *Challenge of Change*, *supra* note 3 at 82.

103. Bindel *et al.*, *ibid.*

104. Judith Kilvington, Sophie Day & Helen Ward, "Prostitution Policy in Europe: A Time of Change?"(2001) 67 Feminist Review 78 at 86; Bindel *et al.*, *supra* note 100 at 14; *Challenge of Change*, *supra* note 3 at 82.

105. Mary Sullivan, "What Happens When Prostitution Becomes Work?: An Update on Legalisation of Prostitution in Australia", online: (2005) Coalition Against Trafficking in Women at 3 <action.web.ca/home/catw/attach/Sullivan_proof_01.pdf>; Bindel *et al.*, *supra* note 100 at 15; *Challenge of Change*, *supra* note 3 at 82.

106. Bindel *et al.*, *supra* note 100 at 15; *Challenge of Change*, *supra* note 3 at 83.

107. Bindel *et al.*, *ibid.* at 29.

108. *Challenge of Change*, *supra* note 3 at 83.

109. "Mayor unveils plan to clean up Amsterdam's red-light district" *CBC News* (18 December 2007), online: CBC News <http://www.cbc.ca/world/story/2007/12/17/amsterdam-district.html>; "Amsterdam to cut back on brothels" *BBC News* (21 September 2007), online: BBC News <http://news.bbc.co.uk/1/hi/world/europe/7005768.stm>.

110. Sullivan, *supra* note 105 at 4; Bindel *et al.*, supra note 100 at 14.

111. *Challenge of Change*, *supra* note 3 at 82-83.

businesswomen, "accountants, banks and health insurance companies want nothing to do with [prostitutes]."[112] This stigma may relate to Radin's recognition that many feel unease and disapprobation at a person commodifying their sexuality. Not surprisingly, just as stigma remains, violence also still pervades and is a recognized reality within the legalized sex industry, even though indoors.[113] As one brothel owner in Amsterdam stated, "[y]ou don't want a pillow in your room. It's a murder weapon."[114] Some even suggest that violence has increased, particularly for those who work in the illegal sectors and, thus, are still alienated from police protection.[115] A further concern is that violence has been legitimated and normalized as simply a "workplace hazard" that prostitutes must accept and prepare for.[116] In some locales, panic buttons are affixed in rooms and prostitutes are encouraged to undergo hostage negotiation training.[117] These precautions indicate that violence remains a serious, alarming and consistent risk.

Yet another drawback of legalization is that it has generally not empowered prostitutes to get out of the sex trade if they wish nor enjoy better working conditions. In the Netherlands, only four percent of prostitutes have registered with authorities[118] to access the health and safety regulations, pension benefits and employment rights available. Therefore, only a small proportion of prostitutes have bettered their legal status in the system, and even then they are still subject to social stigma and violence. The prostitutes in the Netherlands who refrain from the legalized regime do so for many reasons: fear of the stigma and repercussions that would flow from being officially recognized as a prostitute,[119] ineligibility because of age or illegal immigrant status,[120] and unwillingness to declare a commitment to work they view as temporary. Thus, even in jurisdictions where prostitution is legalized, a large proportion of the sex trade still operates illegally and underground, unable to benefit from the legalized regime in place. As well, most prostitutes have not been empowered to "move indoors" and enjoy "better" working conditions or exit the trade since the same socio-economic reasons that put them on the street remain.

For these many reasons, very few people suggested legalization or regulation to the 2006 Standing Committee as an approach to adopt in Canada.[121] Furthermore, both sides of the feminist debate strongly discourage legalization. Clearly, the centred woman would largely not benefit from legalization: she would be excluded from the legal regime as a street prostitute and the stigma, violence and disadvantage that informs her life would likely not abate.

D. Decriminalization

Instead of legalization, full-decriminalization feminists advocate "decriminalization" as separate from, and more advantageous than, legalization. The jurisdiction that full-de-

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112. Bindel *et al.*, *supra* note 100 at 17. See also *Challenge of Change*, *supra* note 3 at 82-83.

113. Bindel *et al.*, *ibid.* at 16.

114. Suzanne Daley, "New Rights for Dutch Prostitutes, but No Gain" *The New York Times* (21 August 2001), online: The New York Times <http://www.nytimes.com>.

115. Bindel *et al.*, *supra* note 100 at 16; *Challenge of Change*, *supra* note 3 at 83.

116. Sullivan, *supra* note 105 at 23.

117. *Ibid.* at 22.

118. *Challenge of Change*, *supra* note 3 at 83.

119. *Ibid.* at 82-83.

120. Kilvington *et al.*, *supra* note 104 at 84.

121. *Challenge of Change*, *supra* note 3 at 81.

criminalization feminists usually refer to as a success is New Zealand, which adopted a decriminalized regime in 2003. Decriminalization in New Zealand is similar to legalization in Victoria, Australia and the Netherlands in terms of enabling prostitutes to access better working conditions via employment contracts, lessened stigma and better relations with law enforcement officials. New Zealand differs from legalized regimes in that street prostitution has been decriminalized and child sexual exploitation has been more seriously criminalized. These are both commendable improvements over legalization regimes. Also, there is less of a division between the il/legal sex trade for workers in terms of in/out-door prostitution given the decriminalization of street prostitution. Yet, it is still illegal for immigrants to be sex workers and access the labour and employment benefits of legal workers. Despite the advantages of decriminalization over legalization and an optimistic report from the New Zealand Prostitution Law Review Committee (the "Committee"), many problems still remain and "progress [has been] slower tha[n] may have been hoped."[122]

Violence, stigma, nuisance, exploitation, poor working conditions, low rates of reporting of violence and a normalization of prostitution making it more difficult for women to exit are all apparent in New Zealand and cited within the report,[123] even if they differ from the Committee's optimistic conclusions. What is most apparent in the report is the dismissal of concerns relating to an increased "visibility" of street prostitution. First, even though vastly different approaches were implemented to count the number of prostitutes in 2003 and 2008 and the Committee conceded that reliable figures were "difficult to obtain," the Committee still made an estimate that numbers went from 5,932 to 2,332 over five years.[124] Thus, it concluded that the number of people in prostitution had not increased and that although there was much greater visibility of street prostitutes, this should not necessarily be attributed to "growth of that industry."[125] Thus, the Committee made conclusions based on questionable methods of numerical comparison and was dismissive of citizens' concerns regarding the increased visibility and nuisance of street prostitution.

Second, the Committee claimed that the media had created an "exaggerated impression of the numbers involved" in child prostitution, suggesting instead that these children were not necessarily street prostitutes, but might simply be "hanging around."[126] Thus, it was similarly dismissive of concerns that a large number of youth were being sexually exploited. Based on the questionable and perhaps overly optimistic conclusions drawn in the report, it is not surprising that the Committee has been critiqued for having five out of eleven members with a "clear vested interest" in maintaining the regime.[127] Others contend that the report actually shows that the New Zealand laws are failing to accomplish their objec-

122. "Report of the Prostitution Law Review Committee on the Operation of the Prostitution Law Reform Act" *Ministry of Justice* 14 May 2008 at s. 14, online: <http://www.justice.govt.nz/policy-and-consultation/legislation/prostitution-law-review-committee/publications/plrc-report/report-of-the-prostitution-law-review-committee-on-the-operation-of-the-prostitution-reform-act-2003> [Report of the Prostitution Law Review Committee NZ].

123. *Ibid.*

124. *Ibid* at s. 2.7.

125. *Ibid*.

126. *Ibid*. at s. 7.

127. "NZ Prostitution Law Review Committee: Report" *The Humanitarian Chronicle* (23 May 2008), online: The Humanitarian Chronicle <http://www.humanitarianchronicle.com/2008/05/nz-prositution-law-review-committee-report/>.

tives.[128] Furthermore, as in legalized regimes, there has been a clear normalization of prostitution in New Zealand: only two of all the local authorities in the country told the committee that they had done "anything to assist sex workers to exit the industry."[129] This was also minimized by the Committee, which expressed uncertainty about how many prostitutes actually wanted to exit, although they acknowledged "that it is difficult to exit."[130]

E. Legalization and Decriminalization Are Not Suitable in the Canadian Legal Context

In her article, "Prostitution: Violating the Human Rights of Poor Women,"[131] Shelagh Day clarifies the decriminalization/legalization distinction and takes full-decriminalization feminists' arguments for a labour and employment rights regime to their logical conclusions, suggesting them to be incompatible with human rights legislation in Canada. First, she argues that decriminalization and legalization only vary in terms of the extent of regulation, and that both would expand prostitution.[132] Although the two regimes are presented as different by full-decriminalization feminists, Day asserts "this does not seem to be the case."[133] Rather, both regimes cause an increase rather than a decrease in trafficking and child prostitution.[134] Thus, given the questionable and counterintuitive findings of the New Zealand Committee, and decriminalization's similarities to legalization, I agree with Day that decriminalization will probably not produce different results from legalization.

What largely results from legalization or full-decriminalization is that the sex trade expands, causing legal and illegal aspects of the trade to increase commensurately (in particular, child prostitution, trafficking and illegal immigrant prostitutes finding themselves unable to benefit from the legal regimes available). Furthermore, under both models, violence may diminish slightly but still persists, stigma continues and prostitution is "normalized" such that women who want to exit are often unsupported. As well, under either a legalization or full-decriminalization regime, poor working conditions continue, particularly for street prostitutes, whose most immediate needs are not addressed. These negative effects make legalization and full-decriminalization undesirable in the Canadian context.

Another reason why full-decriminalization and legalization are not suitable in Canada is that the expectation that prostitutes will be able to have their labour and employment rights protected is perhaps overly optimistic and unfounded: such rights arguably conflict with Canadian human rights legislation, which no employer or collective agreement can contract out of. This conflict is apparent in three key ways. First, Day points out that unionization will be difficult since many prostitutes want to maintain anonymity or view prostitution as only temporary employment.[135] Second, Day argues that prostitution cannot conform to human rights legislation since it depends upon discrimination on the basis

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128. Maxim Institute, Media Release, "Report Shows Prostitution Reform Act is Failing to Accomplish its Objectives" (23 May 2008), online: Scoop – New Zealand News <http://www.scoop.co.nz/stories/PO0805/S00385.htm>.

129. Report of the Prostitution Law Review Committee NZ, *supra* note 122 at s. 5.

130. *Ibid*.

131. Day, *supra* note 56.

132. *Ibid.* at 16.

133. *Ibid.* at 15.

134. Gunilla Ekberg, "The Swedish Law that Prohibits the Purchase of Sexual Services" (2004) 10 *Violence Against Women* 1187 at 1189, 1210.

135. Day, *supra* note 56 at 33-34.

of gender, age, race and ability.[136] For example, Day states that "[i]t is well established in human rights jurisprudence that an employer discriminates if he permits a customer to exercise a preference about whom he is served by on the basis of sex, race, age, disability."[137] Third, prostitution is problematic since it is tantamount to "consent to sexual harassment," which women in other workplaces are legally protected from.[138] Thus, Day persuasively concludes that prostitution cannot "fit within the framework of anti-discrimination law"[139] in Canada.

For the reasons discussed, full-decriminalization and legalization are questionable in terms of fulfilling the common feminist goals and objectives behind Canada's current legislation. They will surely expand the sex trade by readily turning women's embodied sexuality into commodities advertised, bought and sold, regardless of whether this is the intent of full-decriminalization feminists. This expansion of the trade will allow violence and stigma to continue for prostitutes and cause women's sexuality, equality and dignity to be negatively impacted more generally. Rather than keep women safe or empower them, legalization and decriminalization predominantly expand the trade, which only exposes more women to stigma, violence, largely unacceptable working conditions and murder. Surely the equality, well-being and dignity of women, particularly the centred woman, require us to set our sights for change higher.

F. Asymmetrical Criminalization: The Swedish Model

Based on the starting assumption previously discussed (that women should not be presumed to be freely, voluntarily and meaningfully consenting to or choosing prostitution) and given the reasons postulated by Radin for making sexuality incompletely commodified rather than a market-alienable commodity, I will now argue that the Swedish model is the best alternative for Canada. Instead of encouraging the sex trade to increase, the Swedish model decriminalizes prostitutes since it recognizes their often marginalized and vulnerable position, while also targeting the demand side of the sex trade such that prostitution decreases. The law has had favourable results since it was passed in Sweden in 1999, as I will now discuss.

The Swedish approach, which asymmetrically criminalizes prostitution, decriminalizes those selling sexual services while still criminalizing those who buy, attempt to buy, or exploitatively encourage others to sell sex. Thus, it targets and criminalizes demand, not supply. Specifically, the law targets the johns, pimps, traffickers and profiteers in the sex industry. The rationale behind decriminalizing prostitutes in Sweden is that "it is not reasonable to punish" prostitutes since "in the majority of cases, this person is the weaker partner who is exploited."[140] In Sweden, prostitutes are viewed as victims of male violence since "pimps, traffickers, and prostitution buyers knowingly exploit the vulnerability of the victims caused by high rates of poverty, unemployment, discriminatory labour practices, gender inequalities, and male violence against women and children."[141] The law is also

136. *Ibid.* at 34.

137. *Ibid*.

138. *Ibid.* at 35.

139. *Ibid.*

140. Ekberg, *supra* note 134 at 1188.

141. *Ibid.* at 1189, 1208.

premised on the assumption that prostitution is inextricably linked to human trafficking and child prostitution.[142] Thus, the objective behind the legislation is to deter prostitution by making markets less lucrative and, in effect, encouraging traffickers and sex tourists to view the country as an unprofitable and undesirable destination.[143]

Since the law was implemented in Sweden in 1999 and backed up by a well-funded law enforcement regime,[144] the country has reported excellent results and a majority of the Swedish public, approximately 80 percent, are still in support.[145] The law's success is based on several factors. First, the law has significantly reduced prostitution: the number of women involved in street prostitution has decreased by an estimated 30 to 50 percent, prostitution in general has dropped approximately 40 percent and recruitment has become almost non-existent.[146] Second, some suggest that men have been significantly deterred from purchasing sexual services.[147] Third, the market has become far less lucrative and, as a result, prostitution, child sexual exploitation and trafficking have been deterred.[148] Fourth, the law has significantly reallocated stigma to the buyers of sexual services instead of prostitutes,[149] who are regarded as "victims"[150] rather than criminals. Fifth, the law has given prostitutes the upper hand over abusers since they can now report instances of violence, exploitation, or even simply prostitution to the police. Lastly, Sweden's regime is buttressed with social services, exit programs, and drug and alcohol rehabilitation,[151] allowing prostitutes to access support and leave prostitution if they wish.

The Swedish model has also been critiqued. Critics suggest that the decrease in prostitution, particularly street prostitution, is exaggerated, arguing that the sex trade has simply moved "underground" and is now occurring primarily over the internet and indoors.[152] Yet, this argument fails to recognize that women are often involved in street prostitution precisely because they lack the economic ability to move indoors. Furthermore, even if some street prostitutes have moved indoors, the same critics recognize prostitution is safer there. The movement indoors and reduction in prostitution generally both surely mean that fewer women are subject to violence. As well, the demand and exploitative side of indoor and underground prostitution can be targeted by law enforcement. Although admittedly resource intensive, this different approach would be more beneficial since it would target exploitation, trafficking and organized crime.

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142. *Ibid.* at 1189, 1210.

143. *Ibid.* at 1187, 1200-01, 1210; Karl Ritter, "Sweden prostitution law attracts world interest" *USA Today* (16 March 2008), online: USA Today <http://www.usatoday.com/news/world/2008-03-16-sweden-prostitution_N.htm>.

144. Approximately $4.1 million over three years was granted to Swedish police to combat prostitution and trafficking: Ekberg, *supra* note 134 at 1193. Between January 1999 and April 2004, 734 men were reported under the law: *Ibid.* at 1195.

145. Bindel *et al.*, *supra* note 100 at 26-27; Ekberg, *supra* note 134 at 1208; André Anwar, "Prostitution Ban Huge Success in Sweden" *Spiegel Online* (8, November 2007), online: Spiegel Online <http://www.spiegel.de/international/europe/0,1518,516030,00.html>.

146. Ekberg, *supra* note 134 at 1193, 1204; Ritter, *supra* note 142.

147. The approximate number of purchasers of sexual services has "decreased by 75% to 80%": *Ibid.* at 1193-94.

148. Ekberg, *supra* note 134 at 1194, 1199, 1202, 1209.

149. Bindel *et al.*, *supra* note 100 at 25, 27; Ritter, *supra* note 143.

150. Bindel *et al.*, *supra* note 100 at 25.

151. *Ibid.* at 27.

152. McDonald, *supra* note 70 at 199; Anwar, *supra* note 144.

Another concern with the Swedish regime is that the "good" johns have been deterred and the frequency[153] of more violent johns has increased.[154] Although this may unfortunately be true, surely these violent johns were already in existence, yet now are more exposed. As well, regardless of the legal regime adopted, prostitutes will likely always be susceptible to violence. Thus, the primary focus should be on getting street prostitutes off the street and out of the trade, which can only be done by alleviating the poverty that put them there in the first place. Lastly, there has been criticism that Sweden has not provided enough support services for prostitutes; this has been improving and now some of the Swedish legislation's most avid critics feel it has been beneficial overall.[155]

Ultimately, I think that the Swedish model, in comparison to legalization and decriminalization, has yielded the most beneficial results. Rather than normalizing prostitution, asymmetrical criminalization still problematizes prostitution and thus does not support the view that it is a legitimate option for poor women with few, if any, options. Thus, there can be a greater focus on enabling women who want to leave prostitution to do so. Although violence is still a problem associated with prostitution in Sweden, as it is wherever prostitution is found, at least Sweden is moving in the direction of minimizing the number of women exposed to it by minimizing prostitution and the number of prostitutes. Since the Swedish model reduces prostitution by making the market for the sex trade and sex tourism less lucrative, and additionally decreases trafficking, child prostitution and stigma, I argue it is the best model to incorporate within the Canadian context.

IV. THE SWEDISH MODEL IN CANADA

Ultimately, the Swedish model will best promote the objectives behind Canada's current legislation — lessening nuisance and exploitation — as well as the common feminist goals of lessening stigma, violence and empowering women in prostitution. The Swedish model is also consistent with Canada's approach to similarly "contested commodities" in the *AHRA* and substantive equality under the *Charter*. Thus, I argue it is the best approach for Canada.

The Swedish model upholds the common feminist goals of lessening stigma and violence and empowering prostitutes. First, as in Sweden, the decriminalization of prostitutes and criminalization of johns, pimps, traffickers and profiteers will appropriately shift the stigma attributed to the sale of sexual services from prostitutes to the demand and exploitative side of prostitution. This asymmetrical criminalization will emphasize that most women engage in prostitution because they lack economic alternatives, for which they should not be criminalized. Prostitutes often do the best they can with limited options; to penalize them is unjust and only renders them more vulnerable. Second, since decriminalizing prostitutes will likely lessen their stigma and vulnerability, this will hopefully lessen violence. Although violence will likely always be present in prostitution, the Swedish model, by decreasing the number of prostitutes, will cause fewer women to be exposed to it. Decreasing street prostitution may also enable prostitutes to leave the trade or, if full-decriminalization feminists are correct about Sweden, move indoors and be relatively safer. Furthermore, the decrimi-

153. It is important not to confuse my use of the term "frequency" with the term "number." I am not implying that the *number* of violent johns has increased in Sweden; rather, I mean that their *frequency* has increased or grown larger within the now smaller pool of johns generally.

154. Anwar, *supra* note 145.

155. *Ibid.*

nalization of prostitutes will lessen their adversarial relations with police, allowing them to more readily report violent johns, exploitation and human trafficking. Asymmetrical criminalization may also ameliorate prostitutes' disadvantaged position in the exchange. Since prostitutes gain a legal advantage over criminalized johns, pimps and profiteers, this enables them to more readily report abuse. This legal advantage may elicit more care for prostitutes; those criminalized will have a vested interest in ensuring prostitutes' contentment in the exchange to ensure that they are not reported.

In terms of the objectives behind the current legislation, lessening nuisance and exploitation, the Swedish model seems to be the best way to achieve these ends in Canada. First, there has been an obvious decrease in street prostitution in Sweden due to a decrease in prostitution more generally and support for women working in street prostitution to exit. Therefore, public nuisance has also decreased. Second, exploitation by pimps, traffickers and profiteers living off the avails has also decreased under the Swedish regime since these individuals and johns are targeted and more subject to legal repercussions, causing less demand for sexual services. This decreased demand makes the sex market less lucrative, which in turn lessens the economic incentive to view prostitution as profitable. Therefore, as a model of deterrence and prevention, the Swedish model, backed up by adequate enforcement, could cause a marked decrease in prostitution, which would in turn affect a decrease in nuisance and exploitation also.

The Swedish model's treatment of embodied sexuality, by criminalizing the demand rather than supply side, is also consonant with the treatment of other "contested commodities," such as ova, sperm, embryos and services like surrogacy, in Canada. The *AHRA* regulates these "contested commodities" by prohibiting, or acting as an intermediary in, their purchase, yet it does not criminalize their sale.[156] If these prohibitions relating to purchase are violated, penalties include incarceration and/or hefty fines.[157] Similarly, the Swedish model criminalizes the purchase of, or acting as an intermediary (i.e. a pimp or profiteer) in the purchase of, sexual services. Thus, the Swedish model can be seen as seamlessly adopting the same asymmetrical approach to the criminalization of contested commodities already embodied under the *AHRA* in Canada.

The *AHRA* and the Swedish model also reflect Radin's suggested approach to selling personal attributes in a nonideal world. In terms of the *AHRA*, the asymmetrical criminalization of "contested commodities" is informed by "ethical concerns" about the commercial exploitation and commodification of reproductive capacities, expressed in s. 2(f) of the *AHRA*, which states that the "Parliament of Canada recognizes and declares that trade in the reproductive capabilities of women and men and the exploitation of children, women and men for commercial ends raise health and ethical concerns that justify their prohibition."[158] These "ethical concerns" are analogous to anxieties surrounding the commercialization and commodification of women's embodied sexuality. Radin would likely assert that these anxieties attach to reproductive capacities as well as sexuality because their sale implicates bodily integrity and raises concerns that a "slippery slope" to market domination could result. Radin's resolution of incomplete commodification, embodied in the *AHRA* and the Swedish model as asymmetrical criminalization, "protect[s] poor women from [the] degradation

156. *AHRA*, *supra* note 19 at ss. 6 and 7.

157. *Ibid.* at s. 60.

158. *Ibid.* at s. 2(f).

and danger" they would otherwise be exposed to by criminalization, while also "check[ing] the domino effect"[159] and increased commercial exploitation that would arise from making these personal attributes monetizable within the capitalist market.

Furthermore, the Swedish model and the *AHRA* are both attuned to Radin's concern of the "double bind" such that those most willing to commodify their bodies — individuals marginalized along race, class and gender lines — are not criminalized or commercially exploited by purchasers and profiteers. Thus, the Swedish model and *AHRA* are both worthy approaches in the Canadian context for they attempt to remedy inequality, rather than entrench it further. Therefore, the Swedish model is consonant with another aspect of contested commodities articulated in the *AHRA*: the need to protect society's most socio-economically vulnerable members. This parallel further justifies incorporating the Swedish model in Canada since the policy direction under the Swedish model is consistent with the policy direction embodied in the *AHRA*.

The Swedish model also attempts to remedy the inequality of prostitutes in keeping with substantive equality under s. 15 of the *Charter.* Although the criminalization of the purchasers rather than sellers of sexual services may be viewed as "reverse discrimination" against purchasers or adverse effects discrimination against men, substantive equality "does not necessarily mean identical treatment"[160] for those involved in the prostitution exchange. Rather, substantive equality recognizes that promoting equality in a context of inequality sometimes requires treating differently-situated people differently in order to affect justice and equality. The Swedish model, which shifts the balance of power in the prostitution exchange and works to ameliorate the stigma, gender-biased criminalization and extreme forms of violence that prostitutes are exposed to by society and our current laws, will surely be constitutionally valid as affirmative action law in Canada.[161] As Abella J. stated in *Kapp*, the "law ... may be experimental. If the sincere purpose is to promote equality by ameliorating the conditions of a disadvantaged group, the government should be given some leeway to adopt innovative" laws.[162] The Swedish model is precisely the type of innovative legal model that could promote women in prostitution's substantive equality in Canada.

CONCLUSION AND ADDITIONAL SUGGESTIONS FOR CHANGE

As in any approach to prostitution, women will not be empowered to leave prostitution unless the needs that drew them into it are met. Since most of the reasons women enter prostitution stem from poverty and disadvantage, there must be better social services to address these realities for anything to be fundamentally altered. As well, exit programs are absolutely essential in enabling women to leave prostitution. Hopefully women's lives will be viewed as valuable enough that the provincial and federal governments appropriately allocate funding to such programs and assist those most in need by providing a better social welfare regime. Furthermore, education about the reasons women enter prostitution, as is commonly done in john schools, is necessary to raise social awareness of the disadvantage and violence that prostitutes are subject to, such that stigma and discrimination against

159. Radin, supra note 22 at 1924.

160. *Kapp*, *supra* note 24 at para. 15.

161. A "purpose-driven approach" is adopted in assessing an affirmative action law under s. 15(2) of the *Canadian Charter of Rights and Freedoms*: Ibid. at para. 47.

162. *Ibid.*

prostitutes are ended. Also, policing strategies targeting trafficking, exploitation, child prostitution and violent johns are essential.

A middle-ground approach is still possible between the full-decriminalization and abolitionist approaches to law reform: the Swedish model does not necessarily preclude the existence of certain exceptions to the starting point that full, voluntary and meaningful consent is presumed absent in prostitution. For those who claim they have chosen prostitution, exemptions could be given to prostitute-run, non-profit co-operatives such that prostitutes could safely self-regulate; ensuring that prostitutes keep the full consideration they are paid would mean third party exploitation is precluded. I understand this modification is a concession that most abolitionists will disagree with, but it is perhaps the best way to achieve a middle ground between the two feminist positions and ensure that prostitution, when it does occur, happens in a safe, non-exploitive environment that still precludes a booming sex trade. Sweden's "zero tolerance"[163] approach to prostitution, in which no exemptions are permitted, is perhaps too rigid in a context where we agree that some prostitutes can choose prostitution. As well, co-operatives could still be regulated by the government to deter abuse. Of course, it is imperative that any change to the laws should be informed by consultation with prostitutes.

In a speech entitled "Prostitution and Male Supremacy" and in response to her own rhetorical query, "Prostitution: what is it?", the late Andrea Dworkin stated that prostitution "is the use of a woman's body for sex by a man, he pays money, he does what he wants. The minute you move away from what it really is, you move away from prostitution into the world of ideas."[164] In this basic sense, prostitution is not so much about women. Rather, prostitution is about the men who pay to be sexually serviced; it is about the money that women need; and it is about the larger context of hierarchy and gender inequity that make prostitution even an option. However, if we are to focus on women in prostitution, then as long as we remain in the "world of ideas", we must also strive to honour the women involved in prostitution and the reality that their lives are at stake.

If keeping women engaged in prostitution alive and if lessening stigma, deterring violence and empowering prostitutes are to be part of that focus, then the Swedish model— combined with exit programs as well as an adequate social welfare and law enforcement regime— is the most desirable starting point from which to engage in further conversations about how to move forward. Ultimately, the Swedish model, with the presumption that full, meaningful and voluntary consent and choice are often absent in prostitution, serves as the best starting point for legal reform. Not only does the Swedish model incorporate the legislative objectives of our current prostitution laws (lessening prostitution-related nuisance and exploitation), it also ensures that another significant policy direction, the protection of society's most socio-economically vulnerable members, is implemented also. Such a model upholds the well-being and dignity of the centred woman, our Canadian commitment to substantive equality, and yet does not forestall progress to a better society for prostitutes and women more generally.

163. Ekbert, *supra* note 134 at 1187.

164. Dworkin, "Prostitution and Male Supremacy", *supra* note 1 at 1.

ARTICLE

CHASING HAMLET'S GHOST: STATE RESPONSIBILITY AND THE USE OF COUNTERMEASURES TO COMPEL COMPLIANCE WITH MULTILATERAL ENVIRONMENTAL AGREEMENTS

By Robert K. Omura*

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Even if you are on the right track, you will get run over if you just sit there.
– Will Rogers

Thou shalt be both the plaintiff and the judge of thine own cause.
– William Shakespeare

INTRODUCTION

The past twenty years have witnessed an explosion in the number of international instruments dealing with the environment. From climate change to biological diversity and from the protection of endangered species to the restriction of the transboundary movement of hazardous wastes, the length and breadth of international environmental law is its own topic, one that includes a variety of multilateral-, regional-, and bilateral-agreements as well as their compliance regimes. How effective are these regimes in compelling compliance? And more so, where a compliance regime cannot effectively compel a non-compliant party to perform its legal obligations is there recourse to the Law of State Responsibility and to the use of countermeasures?

This paper examines the interaction between the Law of State Responsibility, as explained by the International Law Commission's ("ILC") *Draft Articles on the Responsibility of States*

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for Internationally Wrongful Acts[1] ("Draft Articles") and Multilateral Environmental Agreements ("MEAs"). In particular, I am interested in the role of countermeasures in compelling compliance, where the compliance regime of a MEA has failed. This paper will not address the legal consequences for provable environmental damages to an injured state, but will focus instead on the thorny issue of the collective interests of non-injured states. It will also not address regional- or bilateral-agreements, and the host of legal consequences that arise under those mechanisms.

Every breach of a norm of international law by a state, whether from treaty, custom, general principle of international law, or other source of law, gives rise to state responsibility and legal consequences. But when is an act or omission of a state a breach? To this end, a number of international instruments attempt to codify norms of international law. For treaties, the *Vienna Convention on the Law of Treaties*[2] ("VCLT") sets out the basic rules of treaty interpretation and operation. In the case of state responsibility, the Draft Articles adopted by the UN General Assembly in 2001 codifies the principles of state responsibility for breaches of the norms of international law and the legal consequences that flow therefrom.[3]

This paper will show that recent developments in international law restrict the role of legal consequences of general application when a state fails to fulfil its obligations under a MEA. These legal consequences, codified in the Draft Articles, may include the use of countermeasures. A countermeasure, or reprisal, is a form of self-help by a state in international law aimed at restoring the *status quo* between the parties where there is a material or less-than-material breach of a treaty.

While not foreclosing the possible use of countermeasures, the limitations inherent in current MEAs and the restrictions posed by the Draft Articles make the use of countermeasures unlikely, except in the case of persistent and egregious breaches of international duties. It is more likely that the use of countermeasures will most often be ruled out by the compliance regimes employed under most MEAs, and restrictions on countermeasures under international law will prevent their use in most other situations. Thus, similar to the moral dilemma portrayed in Shakespeare's *Hamlet*, retribution or reprisal have their own costs. It may place an aggrieved party "offside" at international law, making the enforcement of international environmental norms difficult to achieve. For many breaches of international environmental norms, the existing compliance regime represents a "complete code" and if the regime provides no remedy an aggrieved party may have no adequate solution except to "take arms against a sea of troubles" and hope that their conduct is considered reasonable.

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1. ILC, *Draft Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the International Law Commission on the Work of Its Fifty-Third Session*, UN GAOR, 56th Sess., Supp. No. 10, UN Doc. A/56/10 (2001) chp. IV.E.1. [Draft Articles].

2. *Vienna Convention on the Law of Treaties*, 1155 U.N.T.S. 331 [VCLT].

3. It is important to note that the Draft Articles are not law in the sense that they have not been adopted by states or even the UN General Assembly. Although not law, as one scholar notes, "the general concept reflects the shared opinion of the international community of States": see Karl Zemanek, "Does the Prospect of Incurring Responsibility Improve the Observance of International Law?" in Maurizio Ragazzi, ed., *International Responsibility Today, Essays in Memory of Oscar Schachter* (Leiden, Nld.: Martinus Nijhoff, 2005) 125 at 126.

I. WHAT IS THE RELATIONSHIP BETWEEN THE LAW OF STATE RESPONSIBILITY AND MULTILATERAL ENVIRONMENTAL AGREEMENTS?

Compliance regimes attached to MEAs are a relatively new concept in public international law. Most spring from a renewed optimism in the 1990s that international organizations and instruments could be used to compel states to honour their environmental commitments, coinciding with a general concern by all states for the environment. Compliance regimes developed while the ILC wrestled with the codification of the Law of State Responsibility, yet surprisingly the nexus between the two is less than obvious. The jurisprudence has not addressed this problem directly, although the International Court of Justice ("ICJ") touches upon the relationship between environmental law and the Law of State Responsibility in *Case Concerning the Gabçíkovo-Nagymaros Project (Hungary/Slovakia)*[4] ("*Gabçíkovo*"). Compliance regimes and the Law of State Responsibility overlap. In order to get to countermeasures, I propose to examine first the relationship between compliance regimes and the Law of State Responsibility.

A. The Law of State Responsibility

The Law of State Responsibility, as codified in the Draft Articles,[5] creates secondary obligations on the conditions that give rise to state responsibility and the legal consequences that flow from a finding of state responsibility.[6] The Draft Articles do not in themselves determine the content of an international obligation, the breach of which gives rise to state responsibility. They interpret and supplement primary obligations, such as an obligation under a MEA. That is, the Draft Articles set out norms of general application.

Under the Law of State Responsibility an internationally wrongful act occurs when a state breaches an international obligation,[7] leaving the nature of the breach to be determined by the particular rule, custom or instrument in question. There are a number of exceptions for consent, self-defence, lawful countermeasures, force majeure, distress, necessity, and compliance with peremptory norms.[8] When an internationally wrongful act is committed, the wrongdoer: (a) has a continued duty to perform its legal obligations; (b) has a duty to cease

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4. *Case Concerning the Gabçíkovo-Nagymaros Project (Hungary/Slovakia)*, [1997] I.C.J. Rep. 7 [*Gabçíkovo*]. For a general discussion on the jurisprudence, see Malgosia Fitzmaurice, "The International Court of Justice and the Environment" (2004) 4 Non-State Actors & Int'l. L. 173.

5. While the Draft Articles are not binding law, having only been noted and annexed by the U.N. General Assembly, "the Draft Articles have already exerted considerable influence on international practice and judicial decisions.": Hugh A. Kindred *et al.*, eds., *International Law Chiefly as Interpreted and Applied in Canada*, 7th ed. (Toronto: Emond Montgomery, 2006) at 635.

6. On the Draft Articles generally, see James Crawford, Pierre Bodeau & Jacqueline Peel, "The ILC's Draft Articles on State Responsibility: Toward Completion of a Second Reading" (2000) 94 Am. J. Int'l. L. 660; Pierre-Marie Dupuy, "A General Stocktaking of the Connections between Multilateral Dimension of Obligations and Codification of the Law of Responsibility" (2002) 13 E.J.I.L. 1051; Marina Spinedi, "From One Codificaiton to Another: Bilateralism and Multilateralism in the Genesis of the Codification of the Law of Treaties and the Law of State Responsibility" (2002) 13 E.J.I.L. 1099; Linos-Alexander Sicilianos, "The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility" (2002) 13 E.J.I.L. 1127; and ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001* (New York: United Nations, 2008) [Commentaries, Draft Articles].

7. Draft Articles, *supra* note 1, Art. 2.

8. *Ibid*., Arts. 20-26.

the wrongful conduct and provide assurances for its non-repetition; and (c) has a duty to make reparations for injuries caused by its wrongful conduct.[9]

A primary obligation is owed to an injured state for a breach of an obligation owed to it pursuant to a treaty, convention or rule of international law.[10] Primary obligations between states are sometimes referred to as bilateral obligations.[11] The injured state is directly affected by the breach of a primary obligation owed to it. As a result, the injured state is entitled to take reasonable action to protect its interests or to restore a loss suffered by it. Joint action by aggrieved states is approved in international law where the obligation breached is owed to a group of states, including a moving state, and the obligation is established to protect a *collective interest*, or where the obligation breached is owed to the *international community as a whole*.[12] That is, action is permitted where the breach "specifically affects" a state. Joint action is permitted where a breach "radically [changes] the position of all the other states" with respect to the further performance of an obligation (interdependent obligations or obligations *erga omnes partes*),[13] or where the breach is to an obligation owed to the international community as a whole (integral obligations or obligations *erga omnes* absolute).[14]

It is highly unlikely that an obligation under a MEA creates an obligation *erga omnes* absolute. *Barcelona Traction, Light and Power Co. Case (Belgium* v. *Spain)*[15] ("*Barcelona Traction*") limits obligations *erga omnes* absolute to acts of aggression, acts of genocide, and basic human rights. However, the multilateral nature of MEAs gives rise to obligations *erga omnes partes* to protect a collective interest of the member states. The wide range of subject-matter forming the basis of regional and multilateral treaties indicates the variety of collective interests expressed by states, the environment being one of them. However, even in environmental law the collective interests are diverse.

i. Collective Interests under MEAs

What are the collective interests expressed in MEAs? These principles include the protection of human health and the environment and the duty to notify other states of any adverse environmental effects, but also recognize the special difficulties of developing countries, the importance of state sovereignty, the desire for economic development to proceed sustainably and the need for cooperation between states. These principles are found in the preambles and texts of most MEAs, such as the *Rio Declaration on Environment and Development*[16] and the *Convention on Biological Diversity*.[17] Intuitively, the protection of human health and the environment is a primary collective interest, but there is no established hierarchy of principles in international law despite the impact of *jus cogens*

9. *Ibid*., Arts. 29-31.
10. *Ibid*., Art. 42(a).
11. Dupuy, *supra* note 6 at 1072.
12. Draft Articles, *supra* note 1, Art. 48(1).
13. *Ibid*., Art. 42(b)(ii).
14. Dupuy, *supra* note 6 at 1072-73. See also the discussion in the Commentaries, Draft Articles, *supra* note 6 at 126-28.
15. *Barcelona Traction, Light and Power Co. Case (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at 32 [*Barcelona Traction*].
16. *Rio Declaration on Environment and Development*,1992, 31 I.L.M. 874.
17. *Convention on Biological Diversity*, 1992, 31 I.L.M. 822.

in international legal scholarship.[18] The collective interests enshrined in each MEA must be assessed and balanced on their own merits.

B. Toward a Purposive Approach

MEAs create international obligations for party states, the breach of which gives rise to internationally wrongful acts.[19] The Law of State Responsibility establishes secondary rules, rules designed to assess the legal consequences of a breach of an international obligation. In this light, the Draft Articles are interpretative guidelines and gap-fillers where a MEA is otherwise silent or ambiguous as to the legal consequences that follow a breach. This is made clear by the *lex specialis* provision of Article 55,[20] which holds special rules as presumptively either an *elaboration of*, or an *exception to*, a general rule.[21]

There is nothing inherently wrong with states contracting out of general rules of customary international law. The ILC notes: "[t]hat treaty rules enjoy priority over custom is merely an incident of the fact that most of general international law is *jus dispositivum* so that parties are entitled to derogate from it by establishing specific rights or obligations to govern their behaviour."[22] Compliance regimes create those *special rules*. What then is the effect of MEA compliance regimes?

Malgosia Fitzmaurice sees MEA compliance regimes as "a softer approach" aimed at "assisting party states to achieve compliance rather than punishing non-compliance."[23] They are "not intended to establish culpability" but "to aid" a non-compliant party in meeting their obligations.[24] The compliance regime must carefully balance the need to obtain full compliance with state sovereignty,[25] keeping in mind the capacity of the non-compliant party to achieve its obligations. According to Jutta Brunnée, the focus should be on compliance rather than non-compliance,[26] on positive actions rather than negative responses. To this end, most MEAs focus on facilitation, capacity-building, and assistance — a "help desk approach."[27]

The shift from the traditional, confrontational approach to a "more flexible, non-confrontational and cooperative approach" is perceived by many scholars as more effective.[28]

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18. On the development of "jus cogens" on international law, see Ulf Linderfalk, "The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did you Ever Think About the Consequences?" (2007) 18 E.J.I.L. 853.
19. Draft Articles, *supra* note 1, Art. 12 states, "There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."
20. *Ibid*., Art. 55.
21. *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, ILC, 58th Sess., UN Doc. A/CN.4/L.682 (2006) at 35, 54-59 [*Fragmentation of International Law*].
22. *Ibid*. at 45.
23. Malgosia Fitzmaurice, "The Kyoto Protocol Compliance Regime and Treaty Law" (2004) 8 S.Y.B.I.L. 23 at 25.
24. *Ibid*. at 26.
25. Jutta Brunnée, "A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol" (2000) 13 Tul. Envtl. L. J. 223 at 226.
26. *Ibid*. at 227.
27. Rosalind Reeve, "Wildlife Trade, Sanctions and Compliance: Lessons from the Cites Regime" (2006) 82 Intl. Aff. 881 at 885.
28. Svitlana Kravchenko, "The Aarhus Convention and Innovations in Compliance with Multilateral Environmental Agreements" (2007) 18 Colo. J. Int'l Envt'l. L. & Pol'y 1 at 28.

Fitzmaurice distinguishes the compliance mechanism in MEAs from the Law of State Responsibility:

> The underlying logic is that the failure to fulfil these obligations will affect the achievement of the common goals of a treaty, such as a treaty which has the protection of the environment as its principal aim. These treaty regimes are designed to protect the environment in such areas where the pace, magnitude and irreversibility of environmental damage render remedial measures futile and preventive action to forestall environmental damage imminent. Thus, *inter partes* punitive enforcement is ineffective in any event and compliance regimes are now focused on creating procedures that aid in securing compliance so as to prevent or forestall environmentally harmful activities in the first instance.[29]

So, how does this mechanism affect the collective interests of the member states? There is a fine balance between two sometimes opposing values in MEAs: between, on the one hand, the protection of human health and the environment and, on the other, the need to secure compliance through cooperation and capacity-building, while being mindful of state sovereignty. The need to balance invites a purposive approach. The interpretative section of the VCLT, Article 31(1) states: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[30] Thus, object and purpose are central interpretative guides.

A purposive approach restricts and limits the use of the Law of State Responsibility in applying legal consequences. First, a "help desk" approach, focused on facilitation and assistance, suggests that the legal consequences for a breach of a MEA is intended to be soft — more carrot than stick. Second, the creation of compliance regimes independent of customary international law moves MEAs toward "complete codes" or "special regimes" that limit or restrict the use of legal consequences of general application. Most compliance regimes create their own internal set of legal consequences of specific application. Third, legal consequences under the Law of State Responsibility often flow from an injury to a state, whether directly or indirectly. In some cases it is not possible to point to a specific injury or injured state, precluding the use of countermeasures for breaches.

i. The "Help Desk" Approach as Special Rule: Compliance by Carrot

The "help desk" approach to compliance seeks to facilitate, build capacity and assist the non-compliant party. Examples of the "help desk" approach are seen in the *Montreal Protocol on Substances that Deplete the Ozone Layer*[31] ("Montreal Protocol") and the *Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal*[32] ("Basel Convention"). The approach explicitly recognizes the financial and technical needs of de-

29. Fitzmaurice, *supra* note 23 at 26-27.

30. VCLT, *supra* note 2, Art. 31(3).

31. Ozone Secretariat, UNEP, *The Montreal Protocol on Substances that Deplete the Ozone Layer* (Nairobi: United Nations Environment Programme, 2000) [Montreal Protocol].

32. *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal,* 1989, 28 I.L.M. 657 [Basel Convention].

veloping countries while respecting state sovereignty. Capacity-building is a central feature of this approach. The "help desk" approach is generally adopted in a MEA where potential non-compliant parties lack the capacity to fully implement a treaty on their own.

First, the purpose of the "help desk" approach is capacity-building. A primary obligation of member states is to cooperate with and assist the non-compliant party to build the infrastructure necessary to effectively manage their obligations. It does so by recognizing a state's right to implement internal laws and, where those laws are insufficient, by providing both financial and technical assistance. The goal of capacity-building may have precedence over other collective interests. It becomes a *special rule* of implementation and enforcement.

Second, the conduct of a non-compliant party is "coloured" by their lack of capacity, rendering the breach not necessarily wrongful. While wrongfulness or moral culpability is not necessarily a requirement of legal consequences in international law, it may be necessary where there is no specific injury to a specific injured party. The school of *subjective responsibility* holds that a state is only responsible for wrongfulness or moral culpability.[33]

The school of *objective responsibility*, on the other hand, holds a state responsible where its conduct results in injury.[34] A state that fails to meet its obligations, not from a lack of effort but a lack of capacity, should therefore not be penalized. Where there is neither a culpable act nor a specific injury, upon what basis may a non-injured state interfere with a non-compliant state's right to sovereignty? While an injurer can be held accountable for its conduct on the basis of strict liability, objective responsibility implies an injury.[35] Without a discernible injury, a party whose conduct is not also a culpable act appears to fall through the cracks.

Third, many compliance regimes are not intended to be punitive. They were designed with consensus in mind. Patrick Széll suggests that many states are strongly encouraged to endorse and ratify a MEA during the negotiation phase, before they are in a position to implement their treaty obligations.[36] Often, states are encouraged by the promise of capacity-building and assistance measures offered within the compliance mechanisms of a MEA. The general view adopted by the international community is that more parties to a treaty are better because more parties indicate a high degree of international consensus about a problem. However well-meaning such an approach is for developing broad-based international treaties, it comes at a cost with regard to enforcement. First, it weakens the *pacta sunt servanda* principle codified in Article 26 of the VCLT,[37] since some parties do not feel obliged to meet standards until some unspecified time in the future: a time when they have developed sufficient capacity to fulfil their obligations. Second, it makes treaty obligations contingent on collateral agreements for assistance. It becomes easy for a non-compliant state to blame their non-compliance on a lack of adequate assistance. As a result, some states simply don't take their obligations as seriously as they should.

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33. See Mansour Jabbari-Gharabagh, "Type of State Responsibility for Environmental Matters in International Law" (1999) 33 R.J.T. 59 at 66-69.

34. *Ibid*. at 69-73.

35. The Commentaries, Draft Articles, *supra* note 6 at 36, para. 10 is unclear about the role of fault in the Law of State Responsibility. According to the Commentaries, the rules exclude fault if it means an intention to harm. Otherwise, the Draft Articles leaves it to the terms of the particular instrument to decide if a mental element is required for a finding of liability. Where an instrument does not expressly require a finding of fault, absolute liability is presumed.

36. Patrick Széll, "Supervising the Observance of MEAs" (2007) 37 Env'tl. Pol. & L. 79 at 79.

37. VCLT, *supra* note 2, Art. 26.

Here, I will outline two examples of the "help desk" approach to MEA compliance, the Montreal Protocol and the Basel Convention. The Montreal Protocol, entered into force in 1989,[38] is a classic example of the "help desk" approach. It is an "outstanding example" of the integration of financial and technical assistance.[39] Eric Neumayer calls it the "closest to the ideal model of the carrot approach."[40] It is a protocol to the 1992 *United Nations Framework Convention on Climate Change*[41] ("The Framework Convention"). The Montreal Protocol regulates the production, trade, and consumption of ozone-depleting substances.[42] It requires parties to license the import and export of controlled substances[43] and imposes trade restrictions on the import and export of those controlled substances.[44]

The target states of the compliance mechanism are developing countries and countries in transition. The Montreal Protocol establishes a Compliance Committee with the power to investigate instances of non-compliance, and report and make recommendations to the Meeting of the Parties[45] ("MOP"). Anyone, including a party in breach, may report non-compliance to the Ozone Secretariat.[46] The MOP may provide assistance, issue a caution and suspend rights and privileges under the Montreal Protocol.[47]

What are the consequences of a breach? In a number of instances, the MOP has issued cautions along with a recommendation for further financial assistance. There are no reported suspensions in the 111 cases of non-compliance up to 2007.[48] Of the 11 requests for a change of baselines, all were approved.[49] The mechanism works largely because of the financial assistance[50] and technology transfer[51] aspects that serve to build capacity and make compliance by developing countries and countries in transition attractive.[52] So far, no punitive action has been taken under the Montreal Protocol. The goal of capacity-building is given primacy over other collective interests, even over the protection of the ozone layer.

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38. Montreal Protocol, *supra* note 31, Art. 16.
39. OECD, *Experience with the Use of Trade Measures in the Montreal Protocol on Substances that Deplete the Ozone Layer*, Doc. No. COM/ENV/TD(97)107 (Paris, OECD, 1997).
40. Eric Neumayer, *Multilateral Environmental Agreements, Trade and Development: Issues and Policy Options Concerning Compliance and Enforcement* (Jaipur, India: Consumer Unit & Trust Society, undated) at 43.
41. *United Nations Framework Convention on Climate Change*, U.N. Doc. A/AC.237/18 (Part II)/Add.1 and Corr. 1 (1992) [The Framework Convention].
42. Montreal Protocol, *supra* note 31, Art. 2 and Annexes A to E. These include CFCs, halons, other fully halogenated CFCs, carbon tetrachloride, methyl chloroform, hydrochlorofluorocarbons, hydrobromofluorocarbons, methyl bromide, and bromochloromethane.
43. *Ibid*., Art. 4B.
44. *Ibid*., Arts. 4.1, 4.2.
45. Ozone Secretariat, *Implementation Committee under the Non-compliance Procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer, Primer for Members* (Nairobi: UNEP, 2007) at 7-8 [Primer for Members].
46. *Ibid*. at 7.
47. *Ibid*. at 8.
48. Ozone Secretariat, *Decisions of the Parties Related to the Non-Compliance Procedure of the Montreal Protocol on Substances that Deplete the Ozone Layer* (Nairobi, UNEP, 2007) at 31-114 [Decisions of the Parties]. In the past, the MOP treats with leniency even chronic repeat offenders such as the Russian Federation, Nepal, and Pakistan.
49. *Ibid*. at 25-27.
50. Montreal Protocol, *supra* note 31, Art. 10.
51. *Ibid*., Art. 10A.
52. Shawkat Alam, "Trade Restrictions Pursuant to Multilateral Environmental Agreements: Development Implications for Developing Countries" (2007) 41 J. World Tr. 983 at 993-1000.

As a result, breaches to the Protocol are dealt with by pledges of further assistance, easing of baselines and extensions of time for compliance rather than punishment.

The Basel Convention, restricting the movement of certain listed hazardous and other wastes,[53] creates a slightly different problem. It is the result of the collective action of developing countries concerned about the unregulated global trade in hazardous wastes.[54] The Basel Convention operates on a system of prior informed consent, which requires the exporting state to notify and obtain the consent of the importing state and any state of transit of a trans-boundary movement of restricted hazardous or other wastes.[55] Any movement of restricted wastes without proper notification or consent is illegal.[56]

While the target of the Basel Convention is developed countries and countries in transition (as the exporters of hazardous wastes), capacity-building is aimed instead at the monitoring capacity of developing countries and the development of environmentally sound management practices. The obvious problem with the Basel Convention is that it does not make the actual movement of hazardous wastes illegal, only the failure to do so without proper notice and consent.[57]

The compliance mechanism, agreed to at the *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*[58] ("COP-6") in 2002, is "non-confrontational," "preventative" and "non-binding."[59] Similar to the Montreal Protocol, a Compliance Committee is authorized to investigate, report and make recommendations to the Conference of the Parties ("COP"). Akiho Shibata considers this "one of the most important legal achievements" since the Basel Convention came into force in 1992 because of its comprehensiveness.[60] The focus of compliance under the Basel Convention is on facilitation, first through the specific facilitation procedure,[61] and second, where there is persistent non-compliance,[62] through rec-

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53. Basel Convention, *supra* note 32. Article 4 sets out the obligations of the Parties. Controlled wastes are categorized according to their waste stream (where they come from) and their constituent parts (the chemical composition); see Basel Convention, Annex I. Some wastes are specifically controlled (Annex VII) and some wastes are only controlled if they also have special characteristics (Annex VIII).

54. In particular, the high volume of hazardous wastes OECD countries dump on non-OECD countries, see Alam, *supra* note 52 at 1000.

55. Basel Convention, *supra* note 32, Art. 6.1.

56. *Ibid*., Art. 9.

57. The Ban Amendment, if adopted, would ban the movement of specific hazardous wastes from OECD nations to non-OECD nations. It will come into force upon the ratification of at least three-fourths of those who accepted the amendment. See *The Basel Convention Ban Amendment*, COP-3, Dec. III/1, UNEP (1995), online: Basel Convention <http://www.basel.int/pub/baselban.html>. So far only 65 countries have ratified the Ban Amendment. See Basel Convention, *Ban Amendment to the Basel Conventionon the Control of Transboundary Movements of Hazardous Wastes and their Disposal Geneva (*22 September 1995), online: Basel Convention <http://www.basel.int/ratif/ban_alpha.htm>.

58. *Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, COP-6, Dec. VI/12, UN Doc. UNEP/CHW.6/40 (2003) [COP-6, Dec. VI/12].

59. *Ibid*. at para. 2.

60. Akiho Shibata, "The Basel Compliance Mechanism" (2007) 12 RECIEL 183 at 183. However, the effectiveness of the compliance mechanism is still open to debate.

61. COP-6, Dec. VI/12, *supra* note 58 at para. 19.

62. *Ibid*. at para. 20. The Implementation Committee may recommend further measures to the COP only after: (1) undertaking the facilitation procedure in paragraph 19; (2) taking into account the cause, type, degree and frequency of the compliance difficulties; (3) taking into account the capacity of the Party, and; (4) considering the objective and nature of the compliance mechanism. It should come as no surprise that a referral to the COP is rare.

ommendations about support or for the issue of a cautionary statement.[63] Since the compliance mechanism is non-binding, the failure to adopt a decision of the COP is probably not a breach of an international obligation under Article 2 of the Draft Articles.[64]

ii. Special Regimes: Compliance by Carrot and Stick

The idea of a "special regime" in international law is not new.[65] In *Case of the S.S. "Wimbledon"*[66] ("*Wimbledon*"), a decision of the Permanent Court of International Justice in 1923, the transit provisions for the Kiel Canal in the Treaty of Versailles were found to be a special regime — they would lose their *raison d'être* if supplemented and interpreted. A special regime sets down a state's legal obligations, while anticipating their future breach and specifying the remedies to counter that breach.[67] It represents the idea of a "complete code" in international law. The difficulty, and the centre of debate, is the extent to which a special regime is *porous* to rules of general application. In the view of Special Rapporteur Willem Riphagen, a "self-contained regime" is a part of a more or less closed system, functioning in concert with other subsystems.[68] The system is closed, the special regime is not. Gaetano Arangio-Ruiz, his successor, sees a "self-contained regime" as itself more or less closed.[69] Bruno Simma limits the term "self-contained regime" to subsystems with a full set of secondary rules that "exclude more or less totally the application of the general consequences of wrongful acts."[70]

According to Bruno Simma and Dirk Pulkowski, *lex specialis* is "the methodological tool" that connects a special regime to rules of general application.[71] This is the approach Special Rapporteur James Crawford takes in formulating the final version of Article 55 of the Draft Articles, leaving it open to interpretation on a case-by-case basis.[72] States are free to negotiate special regimes and, in fact, the very process of negotiating a special regime gives those rules "particular importance" so that in the absence of "a clear indication, [those] special rules must be deemed to embody a particular commitment."[73] In other words, the

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63. *Ibid*. at paras. 20(a), (b).

64. Draft Articles, *supra* note 1, Art. 2.

65. The term often used in the literature is "self-contained regime." The ILC notes in the Fragmentation of International Law that "the notion of a 'self-contained regime' is simply misleading. Although the degree to which a regime or responsibility, a set of rules on a problem or a branch of international law needs to be supplemented by general law varies, there is no support for the view that anywhere general law would be fully excluded. …[S]uch exclusion may not be even conceptually possible. Hence, it is suggested that the term 'self-contained regime' be replaced by 'special regime.'" See Fragmentation of International Law, *supra* note 21 at 82.

66. *Case of the S.S. "Wimbledon"* (1923), P.C.I.J. (Ser. A) No. 1 at 23-24.

67. In the *United States Diplomatic and Consular Staff in Tehran*, [1980] I.C.J. Rep. 3 at 40, the Court said: "The rules of diplomatic law, in short, constitute a self-contained regime which, on the one hand, lays down the receiving State's obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse."

68. For a summary of Willem Riphagen's functional approach, see Fragmentation of International Law, *supra* note 21 at 74-78.

69. For a summary of Gaetano Arangio-Ruiz's view, see *ibid*. at 78-79.

70. Bruno Simma, "Self-Contained Regimes" (1985) 14 N.Y.I.L. 115 at 115-16.

71. Bruno Simma & Dirk Pulkowski, "Of Planets and the Universe: Self-contained Regimes in International Law" (2006) 17 E.J.I.L. 483 at 510.

72. For a summary of James Crawford's approach, see Fragmentation of International Law, *supra* note 21 at 80-81.

73. Simma & Pulkowski, *supra* note 71 at 507.

rules established by a specific MEA are peremptory and take precedence over rules of general application.

I have spoken about the Basel Convention and the Montreal Protocol as leading examples of the "help desk" approach. It is useful to examine two additional MEAs as better examples of "complete codes" in international environmental law. In the case of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*[74] ("CITES"), entered into force in 1975, the COP has imposed trade sanctions on non-compliant parties and non-parties in a number of instances.[75] CITES regulates the trade in endangered species.[76] It operates through permits, certification and licenses, and it requires that parties submit annual reports.[77] The target of compliance is developing countries and countries in transition, although the Standing Committee did impose trade sanctions against Italy for trading in illegal goods.[78]

CITES does not include a Compliance Committee as do the previously discussed MEAs; rather, the power to recommend action resides with a Standing Committee of the COP.[79] The Standing Committee makes its recommendations to the COP. The CITES compliance regime includes limited technical assistance, a national legislation project, a written caution, action plans, warnings and, as a last resort, trade sanctions.[80] The focus of compliance is largely capacity building, although limited financial resources require firmer action. However, trade sanctions are *subject-specific*, focusing on the suspension of trade in CITES listed species.[81]

So far, CITES has met with "only limited success."[82] As an instrument for protecting species at risk, it has not been particularly effective.[83] Despite this limited success, no state has resorted to legal consequences outside the terms of CITES and the COP to compel compliance; trade sanctions internalize compliance, banning trade in CITES-listed species.

The Kyoto Protocol,[84] which is a protocol to The Framework Convention,[85] was adopted in 1997 and came into force in 2005. Of the 184 signatories to the Kyoto Protocol, all are parties except Kazakhstan and the United States. It requires developed countries and countries

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74. *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1973, 993 U.N.T.S. 243 [CITES].

75. Between 1985 and 2006 the MOP has issued trade suspensions 41 times against both parties and non-parties: see Reeve *supra* note 27 at 890-91.

76. CITES, *supra* note 74, Arts. III-V.

77. *Ibid*., Arts. VI, VIII.

78. *Recommendations of the Standing Committee Concerning Italy*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 24th Meeting of the Standing Committee, No. 675 (30 June 1992); *Interpretation and Implementation of the Convention, Review of Alleged Infractions and Other Problems of Implementation of the Convention, Report of the Secretariat*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, Doc. 9.22 (Rev.) [undated] at 521; and *Summary Report*, Convention on International Trade in Endangered Species of Wild Fauna and Flora, 31st Meeting of the Standing Committee, SC31 (1994) at 24.

79. Reeve, *supra* note 27 at 882-83.

80. Guide to CITES compliance procedures, Conference of the Parties, COP-14, Annex, Conf. 14.3 at paras. 29-30.

81. Reeve, *supra* note 27 at 886, 888-92.

82. *Ibid*. at 885.

83. Neumayer, *supra* note 40 at 45.

84. *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, UNFCCC, COP-3, UN Doc. FCCC/CP/1997/L.7/Add.1 (1998) [Kyoto Protocol].

85. See generally the Framework Convention, *supra* note 41.

in transition, so-called Annex I countries, to limit and reduce their emissions of six major greenhouse gases, so-called anthropogenic carbon dioxide equivalent emissions,[86] below 1990 levels.[87] It places no new commitments on non-Annex I countries. For this reason, it is a significant departure from the Montreal Protocol and CITES, which I noted earlier focus on developing countries and countries in transition.

The main provisions of the Kyoto Protocol impose legally binding emissions limitations and reductions on Annex I countries[88] and a series of monitoring and reporting commitments.[89] To help Annex I countries meet their "qualified emission reduction and limitation commitments" ("QELRCs"), Annex I countries have access to a number of "flexibility mechanisms," such as clean development mechanisms,[90] joint implementations[91] and emissions trading.[92]

Some scholars view the Kyoto Protocol as a significant step forward from other MEAs because the compliance regime has "teeth"[93] — though small and not particularly sharp. Unlike the previously-mentioned MEAs that rely on decisions of the COP/MOP, the Kyoto Protocol establishes a separate Enforcement Branch with "the power to actually *apply* the consequences, not just recommend action to the COP."[94] In addition, the procedure is "fully *predetermined*."[95] The Enforcement Branch need only ascertain whether a party is in breach and the consequence is "automatic."[96] There is no discretion.

The Marrakesh Accords[97] to the Kyoto Protocol create a compliance regime that imposes "punitive consequences"[98] on Annex I countries who fail to comply with the Kyoto Protocol. The Marrakesh Accords establish a Compliance Committee with two branches: a Facilitative Branch and an Enforcement Branch. The Facilitative Branch is "managerial and not confrontational"[99] and aims to assist developing countries and countries in transition by providing advice, facilitating implementation and promoting compliance (the "help desk" approach).[100] The Enforcement Branch is new to MEAs; it is an "adjudicative-type

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86. These are identified in Annex A as carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulphur hexafluoride (SF_6). Kyoto Protocol, *supra* note 84.

87. Generally, the commitment is between 5-8 percent, however, there are notable exceptions for Australia, Iceland, New Zealand, Norway, the Russian Federation, and the Ukraine. Canada's commitment is 6 percent. The United States committed to a 7 percent reduction. See Kyoto Protocol, *supra* note 84, Annex B.

88. *Ibid*., Art. 3.

89. *Ibid*., Arts. 5, 7.

90. *Ibid.*, Art. 12.

91. *Ibid*., Art. 4.

92. *Ibid*., Art. 6.

93. Anita Halvorssen & Jon Hovi, "The Nature, Origin and Impact of Legally Binding Consequences: The Case of the Climate Regime" (2006) 6 Intl. Envtl. Ag. 157 at 158.

94. *Ibid*. at 162 [emphasis in original].

95. *Ibid*. [emphasis in original].

96. *Ibid*.

97. *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, UN FCCC, 8th Sess., Dec. 24/CP.7, UN Doc. FCCC/KP/2001/13/Add.3 (2001) [Procedures].

98. Halvorssen & Hovi, *supra* note 93 at 158.

99. *Ibid*. at 160.

100. Procedures, *supra* note 97, s. IV.6.

body"[101] that targets only Annex I countries. It may investigate and determine whether an Annex I country is complying with its QELRCs, the monitoring and reporting requirements, and the eligibility requirements for clean development mechanisms and emissions trading.[102] The Enforcement Branch may impose a specific set of consequences for non-compliance by: (1) issuing a declaration of non-compliance;[103] (2) issuing a development plan;[104] (3) imposing a 30 percent fine on a country's second commitment period;[105] (4) suspending eligibility for clean development mechanisms;[106] and (5) suspending eligibility for emissions trading.[107] The consequences are intended to be soft-handed, "aimed at the restoration of compliance to ensure environmental integrity" and to provide non-compliant parties with "an incentive to comply."[108] In applying consequences, the Enforcement Branch is to consider "the cause, type, degree and frequency of the non-compliance."[109]

The compliance mechanism is not legally binding, though it probably holds significant political weight for a non-compliant party. Article 18 of the Kyoto Protocol *specifically* requires an amendment to impose binding consequences.[110] The compliance mechanism has not been passed as an amendment yet, despite its adoption by the parties at COP/MOP-1 in Montreal in 2005. Decisions of the COP are not usually considered legally binding.[111] Consequently, without amendment there are no legal consequences *within* the Kyoto Protocol system. Even if the amendment is passed — which is unlikely — it is not binding on a non-compliant party until the non-compliant party ratifies it. In addition, a party may simply withdraw from the Kyoto Protocol, upon one year written notice to the Depository, any time after three years from the date it came into force for that party.[112]

The Kyoto Protocol is the nearest thing we have to a *complete code* in international environmental law. It is a a more complete carrot and stick approach than CITES because CITES merely imposes trade sanctions in the subject-matter, while the Kyoto Protocol seeks to impose penalties. As such, Fitzmaurice suggests that the Kyoto Protocol may be a species of *lex specialis*, containing a form of collective action and elements of both material treaty breach and countermeasure.[113]

What then are the consequences for a breach of the Kyoto Protocol? While fines for non-compliance were discussed by parties,[114] the final compliance mechanism adopted under the Marrakesh Accords to the Protocol mentions no fines. Penalties under the Kyoto Pro-

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101. Halvorssen & Hovi, *supra* note 93 at 160.
102. Procedures, *supra* note 97, s. V.4.
103. *Ibid*., ss. XV.1(a) and XV.5.
104. *Ibid*., ss. XV.1 and XV.5(b).
105. *Ibid.*, s. XV.5(a).
106. *Ibid.*, s. XV.4.
107. *Ibid*., ss. XV.4 and XV.5(c).
108. *Ibid.*, s. V.6.
109. *Ibid.*, s. XV.1. This echoes the compliance mechanism under the Basel Convention, see COP-6, VI/12, *supra* note 58 at para. 20, and CITES: see Guide to CITES, *supra* note 80 at para. 32(b).
110. Kyoto Protocol, *supra* note 84, Art. 18.
111. Brunnée, *supra* note 25 at 242.
112. Kyoto Protocol, *supra* note 84, Art. 27.
113. Fitzmaurice, *supra* note 23 at 40.
114. Brunnée, *supra* note 25 at 249.

tocol are limited to the consequences set out in Sections XIV and XV.[115] These provisions provide for non-binding, self-punishment when a state fails to meet its QELRCs. Despite its appearance, the Kyoto Protocol is very much a tool of voluntary compliance based on "self-punishment."[116] Even if the compliance procedures were legally binding, they would make "only a modest difference" to compliance.[117] All the Enforcement Branch can do is exclude the non-compliant party from participating in Protocol flexibility mechanisms or assess a penalty for the second commitment period under the Kyoto Protocol. As Anita Halverssen and Jon Hovi point out, only the non-compliant party can implement the decision to impose a lower target for the second commitment period.[118] The targets for a second commitment period require the approval of the non-compliant party, an amendment and ratification. What if the non-compliant party refuses to do so? A non-compliant party is not penalized for failing to comply with a decision of the Enforcement Branch, either.[119] For that reason, a decision of the Enforcement Branch is likely to be a hollow one. As a last resort, a non-compliant party can simply withdraw from the Kyoto Protocol or refuse to take on a second commitment period. If a party decides not to proceed with a second commitment period, the penalty amounts to nothing.

Does this lack of enforceability preclude the use of legal consequences of general application, such as countermeasures, for a serious breach of a MEA? The ILC has yet to directly answer this question.[120] We have no legal opinion on the interaction between MEAs and the Law of State Responsibility. Still, it is possible to venture an educated guess. It is likely that rules of general application are residual, so the use of countermeasures is not precluded. However, the legal consequences established by the special regime take precedence over legal consequences of general application. Some scholars call for a move to an integrated compliance regime,[121] which would close the gaps in MEA compliance regimes and further restrict the potential use of countermeasures. Before members can resort to legal consequences of general application there must be an effort to guide a non-compliant party within the framework of the compliance regime. The internal process must come to its logical conclusion, unless the non-compliant party's conduct is flagrant or causes immediate harm. Only a persistent and egregious violation of a MEA could justify filling the gap using the Law of State Responsibility.

iii. The Injured State Problem: Obligations *Erga Omnes*

Although the Law of State Responsibility is primarily concerned with the injured state,[122]

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115. The consequences in Procedures, Section XIV refer to those set by the Facilitation Branch and are therefore applicable to developing countries. This relates to the "help desk" approach previously described. See Procedures, *supra* note 97.

116. Halvorssen & Hovi, *supra* note 93 at 167.

117. *Ibid*. at 171.

118. *Ibid*. at 166.

119. *Ibid*.

120. See Christian Sano Homsi, "'Self-Contained Regimes' – No Cop-out for North Korea!" (2000) 24 Suffolk Transnat'l L. Rev. 89 at 106-08.

121. See Sebastian Oberthür, "Clustering of Multilateral Environmental Agreements: Potentials and Limitations" (2002) 2 Int'l Envt'l Agreements: Pol. L. & Econ. 317 and Udo E. Simonis, "Advancing the debate on a world environment organization" (2002) 22 The Envt'list 29. Oberthür is less convinced of integration in a later article: Sebastian Oberthür & Thomas Gehring, "Reforming International Environmental Governance: An Institutionalist Proposal for a World Environment Organisation" (2004) 4 Int'l Envt'l. Agreements: Pol. L. & Econ. 359.

122. Draft Articles, *supra* note 1, Art. 42.

it does contemplate circumstances where a non-injured state may demand that a wrongdoer cease a wrongful act, provide assurances for its non-repetition and demand that reparations be made.[123] As noted above, the school of objective responsibility imposes responsibility on a state where there is an injury. In *Avena and Other Mexican Nationals (Mexico v. United States of America)* ("*Mexican Nationals*"), the ICJ said:

> The general principle on the legal consequences of the commission of an internationally wrongful act was stated by the Permanent Court of International Justice in the *Factory at Chorzów* case as follows: "It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form." (*Factory at Chorzów, Jurisdiction, 1927, P.C.I.J., Series A, No. 9*, p. 21.) What constitutes "reparation in an adequate form" clearly varies depending upon the concrete circumstances surrounding each case and the precise nature and scope of the injury, since the question has to be examined from the view point of what is the "reparation in an adequate form" that corresponds to the injury.[124]

In some cases there is a clear wrongdoer, a clear injury, and a clear injured state. In 1978, Cosmos 954 crashed in northern Canada, scattering radioactive debris over a 500 mile area. The Liability Convention,[125] entered into force in 1972, establishes an absolute liability regime for damages caused by the re-entry of space objects. It requires the launching state to pay compensation for any damages caused by its space objects.[126] Compensation is guided by the principle of *restitutio in integrum*, to restore the injured state to the position it would have been in had the accident not occurred.[127] Where the parties cannot agree on liability or damages, either party can request the creation of a Claims Commission.[128] The Claims Commission may decide the claim on the merits and determine the amount of compensation payable.[129] However, the procedures are not mandatory and the Commission's decision is not binding.[130] This is thus a "political" dispute settlement,[131] rather than a legal one.

In the Cosmos 954 incident, the procedures were never invoked as the parties negotiated an *ex gratia* settlement in 1982, without the USSR admitting legal responsibility or liability for the damages and with Canada accepting $3 million, less than half of its claim (and about 20% of its actual costs).[132] As a result of the political nature of negotiated settlements between states in general, Steven Freeland anticipates that attempts to compensate under the

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123. *Ibid*., Art. 48.

124. *Avena and Other Mexican Nationals (Mexico v. United States of America)*, Judgment, [2004] I.C.J. Rep. 12 at 59, para. 119.

125. UN, *Convention on International Liability for Damage Caused by Space Objects, United Nations Treaties and Principles on Outer Space* (U.N. Doc. ST/SPACE/11) (New York: United Nations, 2002) 13 [Liability Convention].

126. *Ibid*., Art. II.

127. *Ibid.*, Art. XII.

128. *Ibid*., Art. XIV.

129. *Ibid.*, Art. XVIII.

130. Kevin D. Heard, "Space Debris and Liability: An Overview" (1986) 17 Cumb. L. Rev. 167 at 188, 192-93.

131. Steven Freeland, "There's a Satellite in my Backyard! – Mir and the Convention on International Liability for Damage Caused by Space Objects (2001) 24 U.N.S.W.L.J. 462 at 483.

132. *Ibid*. at 473.

Liability Convention will do little to actually restore victims.[133] The Cosmos 954 incident serves to demonstrate that compliance often remains a political, rather than a legal, act between states.

In other cases, it is not clear who is harmed by a breach of a treaty such as a MEA. In the case of a breach of the Basel Convention's notice and consent requirements for the transit of hazardous wastes, for example, is a state of transit harmed by the breach? Let us suppose that a transport filled with listed hazardous wastes leaves State A. It passes through the territorial waters of State B bound for storage and incineration at a facility in State C. State B discovers the breach after the hazardous wastes are incinerated at the facility in State C. All are parties to the Basel Convention. If State A fails to inform State B, is State B harmed? Since the incident has already transpired, there is no conduct to cease and assurances of no future incidents rings hollow. The remedy under the Law of State Responsibility is limited to reparation for injury, as codified under Chapter II of the Draft Articles.[134] But reparation for what injury? There are no reparable damages to give rise to restitution or compensation. And while reparations also include satisfaction, which may include declarations and formal apologies,[135] I am not convinced that vindication of an aggrieved state is an effective legal strategy. Legal rules that do not deter future wrongful conduct are at best weak normative rules. In our example above, what effect does State A's apology to State B really have? The answer to that question will depend on the importance each state places on their international relations and the relationship between the parties.

In the absence of damages, on what basis can legal consequences be applied? Attila Tanzi argues that legal consequences can be applied where there is an obligation *erga omnes*.[136] This might mean the protection of a collective interest or a duty owed to the international community as a whole. But the latter is restricted to situations such as war, aggression, genocide and serious violations of human rights.

Let us take as another example a state party to the Montreal Protocol that fails to provide annual reports on the manufacture and use of restricted pesticides, though it adheres to its quotas. What harm is done to other member states? There is no discernible injured state or specific injury. The duty to report is unlikely to be characterized as an obligation *erga omnes* absolute because the protection of the ozone layer is a collective interest and reporting furthers that interest. The problem lies in that there are a number of collective interests, not one, and that there is no hierarchy between those interests. Even if reporting were so fundamental to the goal that without it the effort to protect the ozone layer would be severely hampered, the protection of the ozone layer must be balanced with other goals such as capacity-building and state sovereignty.

While a breach of a MEA gives rise to an internationally wrongful act, without damages or provable damages it is unclear what remedies are available to non-injured states, or even how they can justify countermeasures to compel compliance. Countermeasures are used

133. *Ibid*. at 483.

134. Draft Articles, *supra* note 1, Art. 31.

135. *Ibid*., Art. 37. It is interesting that the Draft Articles expressly provide for compensatory goals (restitution and compensation) and vindication (satisfaction) but not for general deterrence. According to P. S. Atiyah, a liability regime should seek three objectives: compensation, vindication or satisfaction, and deterrence. See P. S. Atiyah, *Accidents, Compensation and the Law*, 2d. ed. (London: Weidenfeld and Nicholson, 1975) at 475-560.

136. See generally Attila Tanzi, "Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?" in Marina Spinedi & Bruno Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 1.

when a non-compliant state refuses to comply after being notified of its breach of obligation and informed that action will be taken against them. Without damages, how is the collective interest furthered by actions outside the MEA compliance regime? As noted above, capacity-building is a central feature of MEAs. A state cannot be sanctioned if the failure is due to a lack of capacity. So long as a state in breach of its international obligations makes its best efforts to comply, countermeasures are an inappropriate remedy. It is not the fact of non-compliance, but rather the belligerence of a non-compliant state, that attracts legal consequences under the Law of State Responsibility. In other words, where there are no damages, international law requires bad faith or belligerence on the part of the non-compliant state to bring about the conditions necessary for countermeasures.

II. HOW SHOULD COUNTERMEASURES BE APPLIED TO BREACHES OF OBLIGATIONS UNDER MEAS?

If countermeasures are not precluded by a MEA, then under what conditions are countermeasures permissible to compel compliance? According to Simma and Pulkowski, a state may "fall back" on rules of general application based on the following process:

> (1) If states create new law — whether it be in the field of human rights, trade or regional cooperation [or environmental law] — there is a presumption that such rules embody a particularly strong commitment.
>
> (2) General international law vests a state with certain capacities to ensure that its rights be respected, including a restricted right to unilateral enforcement action (countermeasures).
>
> (3) Among several possible constructions, the principle of effective interpretation requires adopting the interpretation that best gives effect to the norm in question. Effectiveness includes the notion of enforceability. Consequently, it cannot be easily inferred that a state was willing to give up "the rights or *facultés* of unilateral reaction it possessed under general international law" by complementing special primary obligations with a specific set of secondary obligations. If states create new substantive obligations along with special enforcement mechanisms, they merely relinquish their *facultés* and under general international law in favour of a special regime's procedures to the extent that and as long as those procedures prove efficacious. When such procedures fail, enforcement through countermeasures under general international law becomes an option.[137]

According to Simma and Pulkowski's view, a non-compliant party has expressed a strong commitment to the legal obligations of a MEA such that another member state may enforce its rights against the non-compliant state, including a restricted right to countermeasures, and the rules of general application act as gap fillers. Every member of a MEA has a restricted right to countermeasures and may use them to compel compliance. But what are those restrictions? To answer this, I propose to first explain the law of countermeasures and then examine the practical limitations to their use.

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137. Simma & Pulkowski, *supra* note 71 at 508-09.

A. The Use of Countermeasures

Before I discuss countermeasures it is important that I restate the difference between bilateral obligations, interdependent obligations, and integral obligations. An injured state or group of states may take countermeasures against a wrongdoer for breach of a bilateral or interdependent obligation.[138] The state or states are injured and entitled to a remedy by the principle of objective responsibility; the injury caused by the wrongful conduct is sufficient to justify the countermeasure. The status of the non-injured state is less certain.[139] Non-injured states may also take action against a wrongdoer to protect a collective interest of a group of states[140] because of the multilateral nature of the obligation (interdependent obligation without harm), but as I've pointed out above, only in limited cases of persistent egregious conduct. This specifically includes breaches of environmental law.[141] Non-injured states may also take action against a wrongdoer for breaches of an obligation owed to the international community as a whole (integral obligation).[142] However, these cases refer to situations of war, aggression, genocide, and serious violations of human rights. The Draft Articles permit a non-injured state to take lawful measures in these cases.[143]

The ILC, in the Draft Articles, uses the term lawful measures instead of countermeasures.[144] It appears that the ILC expects that lawful measures by non-injured states would be limited to actions to address breaches of *erga omnes* absolute obligations, with the Commentaries referring to Chapter VII of the UN Charter and actions taken by an international organization.[145] However, the content of lawful measures is not defined; it is open-ended. The Law of State Responsibility does not preclude the use of countermeasures by non-injured parties. Nevertheless, as Linos-Alexander Sicilianos suggests, lawful measures include countermeasures if the measures used are otherwise consistent with the Draft Articles.[146] What then are lawful measures? Lawful measures may include, but are certainly not limited to, retortion,[147] countermeasures or reprisals, and collective military action. For my purposes, I am only interested in countermeasures.

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138. Draft Articles, *supra* note 1, Arts. 22, 42, 49. An injured state may take lawful countermeasures against a wrongdoer. An injured state or group of states may invoke state responsibility for a breach of an obligation owed to it. In the case of a group of state, injured states may invoke state responsibility where the breach specifically affects them or the breach radically changes the position of all the other states relative to the further performance of the obligation.

139. According to Brigitte Stern, the distinction between injured states and non-injured states was adopted to address the problem created by the integration of countermeasures in the Draft Articles, see Brigitte Stern, "A Plea for 'Reconstruction' of International Responsibility based on the Notion of Legal Injury" in Maurizio Ragazzi, ed., *International Responsibility Today, Essays in Memory of Oscar Schachter* (Leiden, Nld.: Martinus Nijhoff, 2005) 93 at 102-03.

140. Draft Articles, *supra* note 1, Art. 48(2)(a).

141. Commentaries, Draft Articles, *supra* note 6 at 126, para. 6.

142. Draft Articles, *supra* note 1, Art. 48(2)(b).

143. *Ibid.*, Art. 54.

144. *Ibid.* Article 54 uses the term "lawful measures" instead of countermeasures. It permits a state "to take lawful measures … to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached."

145. Commentaries, Draft Articles, *supra* note 6 at 137, para. 2.

146. Sicilianos, *supra* note 6 at 1143. See Draft Articles, *supra* note 1, Arts. 22, 49-53.

147. Retortion refers to "an unfriendly act against another State with the object to persuade that State to end its harmful conduct": see Peter Malanczuk, "Countermeasures and Self-Defence as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Articles on State Responsibility" in Marina Spinedi & Bruno Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 197 at 207.

A countermeasure, or reprisal, is a form of self-help by a state in international law.[148] It is aimed at "regaining equivalence" between the parties in response to a material or less-than-material breach of a treaty.[149] For Enzo Cannizzaro, countermeasures are "instrumental."[150] It may be used by an injured state[151] in response to a current and continuing wrong[152] after the injured state has provided proper notice to the wrongdoer.[153] The measure must be proportional in all the circumstances, aimed only at inducing the wrongdoer to comply with its obligations and must cease once the wrongdoer complies.[154]

Crawford would have non-injured parties taking a backseat to an injured party's choice and desires.[155] To Crawford, the injured party drives the process. This approach places some practical constraints on non-injured parties taking up the cause on behalf of an injured party. The aproach makes sense because countermeasures are not used for the breach, but in the failure by the wrongdoer to address the consequences of its breach. The failure of a wrongdoer to address the consequences of its breach impacts the injured party directly.

Countermeasures arise because there is no central authority with the power to compel compliance in international law. Without a central authority, an aggrieved state[156] may find it necessary to resort to some form of self-help. In a global village in which states are constantly bumping into each other, a form of "outlawry" or "blacklist" is not a practical option. While community pressure (retortion) and the revocation of certain privileges may be viable options available to an aggrieved state, these may prove insufficient to compel a non-compliant party to comply with its obligations. As a result, countermeasures, often in the form of trade sanctions, are frequently employed by an injured state against a wrongdoer.

The central problem with countermeasures lies with its self-judging nature.[157] In Hans Kelsen's view, countermeasures are necessary in a decentralized system of law, but should

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148. See generally Mary Ellen O'Connell, "Controlling Countermeasures" in Maurizio Ragazzi, ed., *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Nld: Martinus Nijhoff, 2005) 49 at 50.

149. Sano Homsi, *supra* note 120 at 114.

150. Enzo Cannizzaro, "The Role of Proportionality in the Law of International Countermeasures" (2001) 12 E.J.I.L. 889 at 891.

151. Draft Articles, *supra* note 1, Art. 49(1).

152. *Ibid*., Art. 52(3).

153. *Ibid*., Art. 52(1).

154. *Ibid*., Art. 51.

155. Crawford, *supra* note 6, states at 671-72: "The primacy of the interests of the actual victim needs to be acknowledged in the taking of countermeasures. Where a state is the victim of a breach (and other states' interests, if any, are more general), the victim state should have the right to decide whether and what countermeasures should be taken, within the overall limits laid down by the draft articles. …Countermeasures by third states may thus be taken only at the request and on behalf of an injured state, subject to any conditions that it lays down and to the extent that it is itself entitled to take those countermeasures."

156. I think it is important to differentiate between an "aggrieved state" and an "injured state." An aggrieved state may simply have a moral right to complain about the wrongful conduct but is not necessarily injured. An injured state, on the other hand, has a calculable loss as a result of the wrongful conduct, and may be entitled to take countermeasures in international law. It is unclear whether an aggrieved state, who is not also an injured state, has the right to take countermeasures in international law. The *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 at 127 suggests otherwise. In that case, the Court held that only the victim of wrongful conduct may take lawful countermeasures against the wrongdoer. The commentary in Article 54 of the Draft Articles is a useful starting point. Article 54 specifically permits an aggrieved state to take "lawful measures" to compel compliance and to exact reparations. It is not certain if "lawful measures" equates to "countermeasures" as the question remains unanswered in international law.

157. O'Connell, *supra* note 148 at 50.

be set, monitored and approved through an objective third-party decision maker such as an arbitrator or tribunal.[158] In Quincy Wright's view, when a state acts as both judge and sheriff, the remedy is not a legal sanction at all, but an act of policy.[159]

Countermeasures may also offend principles of fairness since they are more likely to be used by powerful states against weaker states.[160] In a decentralized system, such as that existing in international law today, the use of unilateral enforcement is a function of power.[161] Weaker states are unlikely to seek countermeasures against a more powerful wrongdoer, largely because the impact on the more powerful wrongdoer is likely to be minimal and the benefits of association with the non-compliant party will often outweigh the costs. This is particularly problematic in environmental law, where the target of the compliance regime is often developing countries or countries in transition.

Even if a countermeasure takes into account the gravity of the wrongful conduct and is commensurate with the injury suffered, the measure taken may have a disproportionate effect. The measure itself could become wrongful.[162] This outcome is demonstrated by *Gabçíkovo*, where neither the response of Hungary nor Slovakia was lawful, both failing to take measures proportional to the breach and failing to negotiate an appropriate settlement.

As a background, *Gabçíkovo* involved a dispute between Slovakia and Hungary over an agreement to build a series of dams along the Danube River at the border between them for the generation of hydroelectric power, flood control, and the better navigation of the river.[163] Shortly after the collapse of the Eastern Bloc, Hungary terminated its involvement in the project, claiming the project would unduly interfere with the natural ecosystem of the river and Budapest's fresh water supply. After negotiations failed to resolve the impasse, Slovakia proceeded with its own project, Variant C, wholly on Slovakian territory and without Hungary's consent. Variant C, built on the Danube upstream from Hungary, inevitably interfered with the flow of the Danube on the Hungarian side.

The ICJ held that Slovakia's Variant C was not a proportionate response to Hungary's refusal to proceed with the project, since Variant C interfered with the Danube on the Hungarian side and the benefits of the hydroelectric dam were intended to be shared by both parties.[164] Equally, Hungary's refusal to complete its works were not reasonable since there was no imminent danger to the natural ecosystem or to Hungary's water supply from the project that, at the time Hungary breached the agreement, negotiations could not resolve.[165]

Countermeasures may also lead to escalation, as the target state may consider the application of a particular countermeasure wrongful in itself and take counter-countermeasures. The result may be a prolonged and costly trade war, or in the case of environmental measures, further environmental degradation.

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158. See reference to Hans Kelsen, *ibid*. at 52.

159. See reference to Quincy Wright, *ibid*. at 53.

160. Lance Davis & Stanley Engerman, "History Lesson, Sanctions: Neither War nor Peace" (2003) 17 J. Econ. Perspectives 187.

161. Zemanek, *supra* note 3 at 128.

162. Draft Articles, *supra* note 1, Art. 22. Article 22 permits a countermeasure to the extent that the measure meets the requirements set out by Part III, Chapter II. This implies that a disproportionate measure is not lawful.

163. For a history of the dispute between Slovakia and Hungary, see the discussion in *Gabçíkovo*, *supra* note 4 at paras. 15-45.

164. *Ibid*. at para. 85.

165. *Ibid*. at paras. 105-10.

Despite these problems, countermeasures are an established part of customary international law.[166] As Oscar Schachter notes, "as long as unilateral countermeasures are considered acceptable measures of law enforcement, it is surely in the common interest to try to prevent their illicit and arbitrary use."[167] The Draft Articles enshrine them and by doing so authorize their use. Karl Zemanek opines that countermeasures may be effective where a state values "reciprocity,"[168] because it strikes at the relations between states.

What then are the conditions for their use? A state may invoke countermeasures under Article 48 and 54 of the Draft Articles. For Sicilianos, the only issue is the "threshold of seriousness" required for a party to trigger countermeasures.[169] It is only where the wrongdoer continues the wrongful conduct or refuses to pay reparations that a state may resort to countermeasures.[170] This is an important point. Countermeasures are not designed to respond to a breach of obligation, but rather a non-compliant party's refusal to stop the wrongful conduct or to pay reparations upon notice. That is, it is not invoked because of the seriousness of the breach of a MEA, but the seriousness of the non-response.

What then are the elements of a lawful countermeasure? In *Gabçíkovo*, decided on other grounds, the Court lists the elements of a lawful countermeasure. A countermeasure may be justified if it meets certain conditions:[171]

> (a) It must be taken in response to a previous international wrongful act of another State and must be directed against that State (the wrongdoer);
>
> (b) The injured State must have called upon the wrongdoer to discontinue the wrongful conduct or to make reparations;
>
> (c) The effects of the countermeasure must be commensurate with the injury suffered, taking into account the rights in question;[172] and
>
> (d) Its purpose must be to induce the wrongdoer to comply with its international obligations, and so the measure used must be reversible.

To this list should be added the elements of *urgency* and *necessity*.[173] Article 52(2) allows an injured state to "take such *urgent* countermeasures as are *necessary* to preserve its rights."[174] By logical extension, a non-injured state cannot do more than the injured one, so the lawful measures of non-injured states must also be urgent and necessary. Urgency and necessity are interrelated concepts. At once, there must be a circumstance that seriously impairs an injured state's rights as well as a detriment from the continued breach that other

166. See Zemanek, *supra* note 3 at 125.

167. Oscar Schachter, "Dispute Settlement and Countermeasures in the International Law Commission" (1994) 88 Am. J. Int'l. L. 471 at 477.

168. Zemanek, *supra* note 3 at 129.

169. Sicilianos, *supra* note 6 at 1140.

170. See Crawford, *supra* note 6 at 671.

171. *Gabçíkovo*, *supra* note 4 at 55-57.

172. This is taken almost directly from Article 51 of the Draft Articles, *supra* note 1, which states that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question."

173. As Denis Alland points out, self-defence and reprisals invoke a state of necessity: see Denis Alland, "International Responsibility and Sanctions: Self-Defence and Countermeasures in the ILC Codification of Rules Governing International Responsibility?" in Marina Spinedi & Bruno Simma, eds., *United Nations Codification of State Responsibility* (New York: Oceana Publications, 1987) 143 at 151.

174. Draft Articles, *supra* note 1, Art. 52(2) [emphasis added].

avenues, such as negotiation or arbitration, cannot adequately remedy. As Denis Alland points out, "the concept of necessity is ... the force that gives rise to countermeasures: in practice, necessity takes the form of urgency."[175] In *Gabçíkovo*, both Hungary and Slovakia argued necessity to justify their actions as lawful countermeasures, but the Court concluded that neither party could evoke necessity to justify their actions.[176] The parties should have continued negotiations under the treaty.

B. The Duty to Negotiate or Settle in Good Faith

A state contemplating the use of countermeasures must provide prior notice to the wrongdoer and offer to negotiate.[177] Does this impose a duty to negotiate? According to the *Air Service Agreement* Case:

> Their aim is to restore equality between the Parties and to encourage them to continue negotiations with mutual desire to reach an acceptable solution. ... Counter-measures therefore should be a wager on the wisdom, not on the weakness of the other Party. They should be used with a spirit of great moderation and be accompanied by a genuine effort at resolving the dispute.[178]

The *Naulilaa* case, which is viewed as the foundation for the customary law on countermeasures, permits reprisals *only after an unfulfilled demand* for reparation.[179] On this basis, it would seem that an injured party has a duty to negotiate before taking countermeasures. However, good faith negotiations neither end countermeasures nor prevent them. On balance, the Draft Articles rank the right to take countermeasures higher than the duty to negotiate. The Draft Articles are concerned with restoring the *status quo ante*. It encourages negotiation but does not demand it. A state is not required to submit to dispute resolution prior to taking countermeasures.[180] An injured state may continue countermeasures so long as the wrongful conduct continues.[181] What triggers the suspension or termination of countermeasures is the cessation of the wrongful conduct and the seizing of the matter by a competent authority with the power to bind the parties.[182] A competent authority is left only to resolve the question of reparations.[183]

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175. Alland, *supra* note 173 at 161.

176. *Gabçíkovo*, *supra* note 4.

177. Draft Articles, *supra* note 1, Art. 52(1).

178. *Case Concerning Air Services Agreement of 27 March 1946 between the United States of America and France* (1978), 18 R.I.A.A. 417 at 444-45 [*Air Services Agreement case*].

179. *Naulilaa*, 2 R.I.A.A. 1025.

180. *Air Services Agreement* case, supra note 178 at 444-46.

181. Draft Articles, *supra* note 1, Arts. 52(3) and 53.

182. *Ibid*., Art. 52(3)(b). Under Article 52(3)(b), countermeasures must be suspended where the wrongful act ceases and the matter is before a court or tribunal with the authority to make decisions binding on the parties.

183. *Ibid.*, Arts. 52(3)(b), (4). This principle derives from the discussion in the *Air Services Agreement case*, *supra* note 178 at 445-46.

C. The Harm Principle and Proportionality

Even though culpability and damages are not explicit features of the Draft Articles, they are implicit factors when assessing proportionality.[184] Either a wrongdoer is acting in bad faith or its conduct has caused harm. A wrongdoer, acting in good faith, who has not caused injury, would simply cease the wrongful conduct upon request. There would be no need to impose countermeasures. So in the absence of injury it is the failure to comply with its obligations in bad faith that brings about the possibility of countermeasures. In the absence of damages, countermeasures are aimed at non-compliant parties.

Let us take our prior example of the state who fails to inform another state, under the Basel Convention, that a shipment of hazardous wastes is passing through its territory. State B discovers the shipment while the transport ship is passing through State B's territory. State B informs State A of the breach prior to its arrival at State C. This situation is resolved by State A providing proper notice and obtaining the consent of State B. State B could send warships out and redirect the transport ship out of its territorial waters, but that does not seem to be proportional in the circumstances. If State A is in the habit of not advising State B of the same conduct, then the persistence of the breach creates culpability and indicates bad faith on State A's part. State B calling out the navy may be proportional in those circumstances. What about the position of State D, a non-injured member of the Basel Convention? What right does State D have to take countermeasures against State A, even where State A has habitually failed to obtain the proper informed consent from State B? Can State D call out its navy? In the absence of injury and without culpability or bad faith on the part of State A, a countermeasure by State D would likely be wrongful. Such action by State D will almost always lack proportionality until the protection of the environment has the same normative value in international law as war, aggression, genocide, and serious violations of human rights.

How is proportionality to be addressed? In essence, proportionality requires that the measure be commensurate with the injury suffered, taking into consideration both the gravity of the wrongful act and the rights in question.[185] That is a tall order. Without injury it is hard to imagine a circumstance so grave that it requires a countermeasure, except persistent and egregious violations of an obligation. Brigitte Stern calls for the principle of "legal injury" to be adopted into the Draft Articles, as the justification for legal consequences for breach of obligations.[186] I agree, but go further and call for an explicit finding of wrongfulness or culpability where there is no specific injury. Otherwise, on what basis can countermeasures be justified in the absence of injury?

What is the role and content of proportionality? A useful theoretical framework is set out by Cannizzaro. For Cannizzaro, proportionality links means and aims:

> Proportionality requires not only employing the means appropriate to the aim chosen, but implies, above all, an assessment of the appropriateness of the aim itself. The latter requirement fills a lacuna in the legal

184. Article 51 of the Draft Articles, *supra* note 1, states that "[c]ountermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question." Any assessment of what is a commensurate response, and also the gravity of the wrongful conduct and the rights of the parties *vis-à-vis* the subject-matter of the dispute, necessarily implies resort to considerations of culpability and damages.

185. *Ibid*., Art. 51.

186. Stern, *supra* note 139 at 98-106.

> discipline of countermeasures. A state is free to determine the aim of its action in self-redress. However, international law curtails this otherwise unbounded discretion by requiring that the aim pursued is not manifestly inappropriate to the situation, considering the structure and content of the breached rule.[187]

Depending upon the aim of the measure, Cannizzaro suggests four possible standards: (1) a normative standard, (2) a retributive standard, (3) a coercive standard, and (4) an executive standard.[188]

A *normative standard* attempts to restore the balance that arises from the breach in a reciprocal relationship.[189] It is best used where the obligations of one party are balanced by similar obligations of another. The breach of the obligation justifies a reciprocal response by the moving party. It might go as far as to include *exceptio non adimpleti contractus*, the expulsion of the wrongdoer from the treaty.[190] In the case of our Basel Convention situation, this might amount to State B refusing to provide notice to State A when it transports hazardous wastes through State A's territory. This response would create an unsatisfactory situation for both parties, as well as all other members to the Basel Convention. A normative standard entails functional equivalency. In the collective interest, the other members of the Basel Convention, through the action of the MOP, may terminate or suspend the wrongdoer's rights and benefits, including the right to financial and technical assistance. In certain serious cases, it could lead to the suspension of State A from the treaty.

A *retributive standard* imposes a cost on the wrongdoer for the injury caused by its wrongful conduct.[191] This approach invites a quantitative assessment to ensure the measure taken produces costs roughly equivalent to those caused by the original breach. It also expects rough identity between the wrong and the response. In our Basel Convention example, a quantitative assessment might impose the costs of investigating, monitoring, and verifying the transport of hazardous wastes leaving State A (and likely passing through the territory of State B) on State A. The assessment of costs imposes a quantitative measure. It should attempt equivalency, but only approximately so. The costs of investigating, verifying and monitoring are not exact but a rough equivalency.

A *coercive standard* attempts to induce the wrongdoer to cease the breach and comply with its obligations.[192] It is an exceptional measure based not on equivalence but on appropriateness. The measure may impose damages on the wrongdoer that are far greater than the injury caused by the original breach. Coercive measures may be used for breaches of interdependent and integral obligations, those that involve collective interests or obligations to the international community as a whole. It is usually limited to obligations *erga omnes* absolute, for serious breaches such as war, aggression, genocide, or serious violations of human rights. It is not aimed at breaches of environmental law, although it could be anticipated

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187. Cannizzaro, *supra* note 150 at 897. For Cannizzaro, there are two conceptual operations to proportionality: (1) external proportionality — the means must be appropriate to the subjective aim, but the aim must be reasonable and appropriate to address the specific breach; and (2) internal proportionality — the content of the measure adopted must be appropriate for the result sought to be achieved, see Cannizzaro, *supra* note 150 at 899.

188. *Ibid*. at 900.

189. *Ibid*. at 900-05.

190. Malanczuk, *supra* note 147 at 208-10.

191. *Ibid*. at 905-08.

192. Cannizzaro, *supra note* 150 at 905-08.

that some breaches of environmental law could be so persistent and egregious that coercive measures are appropriate. In my Basel Convention example, this could include trade sanctions by State B against State A, which are not equivalent but may be appropriate. This might mean a refusal of State A's ships in State B's ports. It might also include State B calling out the navy and turning the transport ship out of State B's territorial waters.

An *executive standard* tries to reverse the adverse effects of a breach and restore the benefits back to the injured party.[193] This represents true "self-help" in that it aims at securing the benefits of a treaty without the cooperation of the wrongdoer, much as the Slovak response in *Gabçíkovo* by its sole construction of Variant C. It amounts to a legal substitution, whereby the benefit owed to the moving party by the wrongdoer is of such great importance that the moving party is entitled to wrestle those benefits back, including by unilaterally reordering the legal relations between the parties. It is only intended for the most serious breaches of integral obligations, such as egregious violations of human rights. It is highly unlikely this would apply to enforcement of MEAs. In my Basel Convention example, such a remedy would amount to State B boarding the transport ship by force and impounding it until State A provided assurances of non-repetition and paid appropriate reparations for breaching its duty to notify State B. The shear ludicrousness, and potential folly, of this proposition demonstrates the tenuous position of pure "self-help" measures, not just in environmental law but in international law generally.

In the case of MEAs, countermeasures should compel a non-compliant party to comply with its obligations. As Alland points out, "[c]ountermeasures ought only to exist for the purpose of stopping a State, which has committed an internationally wrongful act, from persevering in its illegal action or to force it to make reparation if he refuses to do so. The idea of punishment in this connexion is not only pointless and premature, it is downright dangerous."[194] Considering both the means and the aim of countermeasures, a response to a breach of a MEA that attempts to restore the balance or to impose equivalent costs may be justified; however, more coercive measures are probably not. What does that leave? It appears to leave only those measures already contemplated within the compliance regimes of most MEAs: termination or suspension, withdrawal of the benefits, trade sanctions in the subject-matter and imposition of the costs of compliance (i.e., investigation, verification, and monitoring) on the non-compliant party. If this is the case, countermeasures hover close to the existing mechanisms already in place under most MEAs and would act as gap fillers where a compliance regime fails to specify the measure to be taken. For the most serious breaches of a MEA, it might be possible to impose trade sanctions in the subject-matter or to expel a non-compliant party from a treaty.

D. A Brief Discussion of Sanctions under GATT/WTO

Despite its appeal, the imposition of trade sanctions, even in the subject-matter of the MEA, may pose problems for the sanctioning party. For example, suppose Denmark decided to impose trade sanctions on plastic containers imported from Canada and manufactured using "unclean" petroleum products and manufacturing processes connected to Canada's failure to adhere to its greenhouse gas emission targets under the Kyoto Protocol. Beyond the difficult question of attributing Canada's failure to meet its emission targets to

193. *Ibid*. at 911-13.

194. Alland, *supra* note 173 at 176.

a particular manufacturing process, a trade sanction against Canadian plastic products may trigger a General Agreement on Tariffs and Trade ("GATT")[195]/World Trade Organization ("WTO") dispute. A measure, even one contemplated within the framework of a MEA, may be an unfair treatment of a "like product." In the case of countermeasures, this measure is more problematic, as a countermeasure is "directed against"[196] a state rather than a "product." In our example, Denmark may, by countermeasure, ban the import of Canadian plastic products made from a manufacturing process that contributes to greenhouse gas emissions above Canada's target under the Kyoto Protocol. However, if Denmark does not also ban all "like products," that is, all plastic containers, wherever made, the trade sanction is not legal under the GATT. All "like products" must be treated the same no matter from where the product originates. It is a wholly different matter to ban the import of products made from endangered species under CITES, such as elephant tusks, tortoise shells or even sealskin boots.

In the case of the GATT/WTO system, trade sanctions act in the reverse to countermeasures. It is the imposition of trade restrictions against a wrongdoer that triggers a potential breach of GATT. Article I of GATT requires that any advantage, favour, privilege or immunity granted by a WTO member for any product originating in or destined for any other country shall be accorded the same status for the "like product" of all other WTO members.[197] By imposing trade sanctions for a breach of a MEA, such as the restriction on trade with non-parties to the Montreal Protocol, a party may be in breach of the GATT's Most Favoured Nation provisions. Article III requires imported and domestic "like products" to be treated the same for the purpose of internal regulations and taxes.[198] Article XI prohibits import or export bans.[199] Finally, Article XIII requires that "like products" coming from or going to all countries be treated the same.[200] The use of export and import licenses may violate this requirement. However, the unfair treatment of a non-party may be justified under Article XX.[201]

A countermeasure may be struck down under GATT/WTO, as in the Tuna/Dolphin cases,[202] if it is not a direct measure to ban or restrict a specifically enumerated product. A derivative product, created from a method of production that uses a banned or restricted product, is a "like product" under Article III, and therefore not subject to trade restrictions. In 1972 the US enacted the *Marine Mammal Protection Act*[203] ("MMPA") to reduce the in-

195. *General Agreement on Tariffs and Trade, Text of the General Agreement* (Geneva: WTO, 1986) [GATT].

196. *Gabçíkovo*, *supra* note 4 at 55-56, para. 83.

197. GATT, *supra note* 195 at 2.

198. *Ibid*. at 6-7.

199. *Ibid*. at 17.

200. *Ibid*. at 21-22.

201. *Ibid*. at 37.

202. The Tuna/Dolphin cases involved two GATT disputes over the implementation of the US *Marine Mammal Protection Act*, used to ban the import into the United States of tuna caught using commercial fishing methods that resulted in the incidental killing of marine mammals above those standards set out by the Act. The first Tuna/Dolphin case in 1991 involved Mexico: see *United States – Restrictions on Imports of Tuna* (1993), GATT Doc. DS21/R, 39th Supp. B.I.S.D. (1993) at 155. The second Tuna/Dolphin case, three years later, involved the European Union: see *United States – Restrictions on Imports of Tuna* (unpublished decision), GATT Doc. DS29/R (June 23, 1994). In both cases, the GATT held that the U.S. Act violated Article XI by adopting quantitative restrictions.

203. 16 U.S.C. § 1371(a)(2)(1988 & Supp. II 1990).

cidental killing of marine mammals from commercial fishing.[204] The MMPA imposed an import ban on any fish products that derived from the incidental killing of marine mammals. The embargo was characterized as a quantitative trade restriction under Article III, which was not saved by the exemptions of Article XX. By ignoring the principles underlying MEAs in rendering its decision, the GATT panel "made soft law even softer."[205]

CONCLUSION

So where does this leave us? Basically, it leaves us in an unsatisfactory position. The compliance regimes of many MEAs create special regimes with the goal of capacity-building and assistance. In many cases, parties have joined MEAs lacking the capacity to meet their targets, with the expectation that financial and technical assistance will be made available. The purpose of these special regimes is to encourage compliance, but there are exceptions. In the case of the Kyoto Protocol, for example, the parties established punitive measures for non-compliance that anticipates both breach and countermeasures. In the case of CITES, which also anticipates punitive measures, trade sanctions have been used, but have not been particularly successful. Nevertheless, the general movement of MEAs is toward complete codes that restrict the operation of legal consequences of general application. While countermeasures may be used as gap fillers there are serious limitations to their use in protecting collective interests. Countermeasures may be used against non-compliant states who refuse, after proper notice, to cease their wrongful conduct or to make reparations. It is not intended as a fall back in support of the existing compliance regime, but rather as a means to compel a non-compliant state to return to the table. Except in the case of obligations *erga omnes* absolute, proportionality seems to require equivalent measures. This simply returns us back to the measure contemplated within the compliance regime; that is, termination or suspension, withdrawal of the benefits, trade sanctions in the subject-matter and imposition of the costs of compliance on the non-compliant party. We thus return to where we started, a bit like chasing ghosts.

If countermeasures and legal consequences of general application are merely gap fillers, then the road for greater compliance is clear. Compliance requires stronger and more meaningful conformity within existing MEA compliance regimes, taking into account the high value placed on capacity-building. It requires a firm commitment by members to addressing both breaches and internal countermeasures. The particular importance placed on a specific MEA by each member indicates their commitment to the terms of the treaty. The continued development of the internal regulation of the treaty is encouraged through the MOP/COP.

The Law of State Responsibility is clearest at the extremes. In the case of bilateral obligations and internal obligations where there is injury, the law provides for specific remedies. An injured state may impose countermeasures against a non-compliant state because it is injured. Non-injured states may also take action in defence of the injured state. Where there is no specific injury, the law requires bad faith or culpability. While non-injured states may impose countermeasures against a non-compliant state for the protection of collective interests (obligations *erga omnes partes* without harm), how are collective interests to be

204. For a detailed examination of the cases, see Robert Weir, "The GATT and the Unmaking of International Environmental Law" (1996) 5 Dalhousie J. Legal. Stud. 1.

205. *Ibid*. at 13.

balanced? The protection of the environment has not reached the same status as the protection of fundamental human rights, so without a hierarchy of collective interests, it must always be carefully balanced against other interests such as state sovereignty. This area of the law needs further development and advancement.

Finally, despite the formal removal of injury as a factor to be considered in the Law of State Responsibility, it remains an implicit feature of the Draft Articles and a real factor in its interpretation. Some scholars call for an explicit return to the principle of "legal injury," but I would suggest that in the absence of injury there must be a finding of wrongfulness or culpability in order to invoke countermeasures against a wrongdoer. Countermeasures are a special case.

ARTICLE

RETURNING TO FIND MUCH WEALTH: IDENTIFYING THE NEED FOR A REVISED JUDICIAL APPROACH TO ABORIGINAL KINSHIP IN BRITISH COLUMBIA

By Kisa Macdonald*

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INTRODUCTION

This article explores how the Canadian legal system might recognize the kinship relationships of Aboriginal children.[1] First, I will briefly introduce the concept of kinship. Next, I will outline how the federal and provincial governments have enacted decisions about Aboriginal kinship. I will then explain how the courts have interpreted this legislative framework, significantly narrowing the statutory, as well as common law, obligations to act in the best interests of Aboriginal children, families, and communities. I will also discuss rationales that could inform a new approach to kinship. Finally, I will show how a Gitksan narrative may provide the appropriate legal principles and remedies to recognize and restore kinship.

I. IMPORTANCE OF ABORIGINAL KINSHIP

A thorough description of Aboriginal kinship would explain the unique, diverse and complex nature of kinship structures and outline the breadth of circumstances in which kin-

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1. This paper will provide an analysis of whether the courts ought to recognize an Aboriginal right to maintain kinship. My legal research has also been a journey of the heart, as I have sought to understand the underlying causes of the breakdown and loss of kinship bonds. While writing, I have been aware of the tragic losses experienced by Aboriginal families. I have held to the hope that the legal system will choose to take a new approach to custody and adoption decisions about Aboriginal children. I am hopeful that there will be an opportunity for government and judicial decision-makers to recognize the unique identity, language, culture and kinship that are intrinsic to the lives of Aboriginal children.

ship obligations occur. Unfortunately, this article does not allow room for a comprehensive examination of the many distinct Aboriginal kinship systems that exist within Canada. Instead, I will provide specific examples of how Aboriginal kinship is a significant theme in narrative, common law reasoning, and contemporary art.

A. Restoration of Kinship in Narrative

The antamahlaswx narrative about the origin of Gitanmaax provides an example of kinship's centrality to an indigenous society.[2] This is the story of the beginning of *Gitanmaaxs*:

> *A young girl, the daughter of a chief, became ubin (pregnant). No one knew who the father was. The young girl did not know who the father was either. Each night she climbed a ladder that the servants put up for her and after she climbed up the ladder was taken away, so no one could get to her and she could not get out. Yet each night a handsome young stranger would come to her.*
>
> *Her father, the chief, was very angry and the Gitxsan were afraid. The chief ordered the Gitxsan to pack their belongings and load up the canoes. They were going to abandon the young girl. The handsome young man had disappeared.*
>
> *The young girl wept as she watched the canoes disappear around the bend in the river. Her mother had left her food and given her hurried instructions on how to deliver her babies when the time came. They did not know that she was going to have triplets.*
>
> *Her food supply ran out. She sat on the banks of the 'Xsan thinking she could easily slip into the water. Who would know and who would care. It was at this time the babies decided to be born. She knew she had to eat to keep up her strength and feed her babies. She held her three tiny babies and wept.*
>
> *In the Gitxsan culture, in times of great distress, Uun ts'iits' (a supernatural being) comes from the earth, to help. Uunts'iits' appeared before the weeping mother and instructed her to take strips of bark from the birch trees and make torches. Uun ts'iits' explained that the girl must then place the torches along the riverbank. The light would attract fish and she could spear them. The grateful young mother gave the Uun ts'iits' her earrings in payment and the Uun ts'iits' disappeared.*
>
> *Each night the mother would bundle her babies together and leave them in the longhouse and she would go to the river to fish. She became strong and confident and soon she had many salmon hanging in the smokehouse. Her children grew very quickly and soon were a help to her. They hunted and trapped small animals, they fished and they picked berries.*

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2. Val Napoleon, *Ayook: Gitksan Legal Order, Law and Legal* Theory (PhD dissertation, University of Victoria Faculty of Law, 2009) [unpublished] at 272 [Napoleon]. "Gitxsan means people of the River of Mist. Salmon has always been the source of wealth for the *Gitxsan*; *Gitanmaaxs* means People who harvest salmon by torchlight. The first village of *Gitanmaaxs* was located by the banks of the *'Xsan* (Skeena River).

> *The mother explained to her children that their people had moved away because she did not know who their father was. She instructed her children and taught them about the land. Many years passed and her father, the chief, forgot his anger. He sent out his warriors to fetch the bones of his daughter so that he could mourn her. The warriors returned with astonishing news. The chief's daughter and his three grandchildren were alive and well.*
>
> *The chief and his people returned to the first Gitanmaaxs to find a woman with much wealth in the smokehouses. A great feast was held to celebrate the reunion and Gitxsan names were given to the children.*[3]

It is important to note the process by which kinship relationships are restored in this *Gitanmaax* narrative. When the kinship relationships break down, *Uun ts'iits*' provides strength and practical wisdom to the forsaken woman and children. After many years, when the broken kinship bonds are restored, the community hosts a great feast to recognize the reunification. In the kinship restoration process, each child is given a *Gitxsan* name.

B. Recognition of Kinship at Common Law

Increasingly, the common law has utilized the principles of Aboriginal kinship to determine appropriate legal remedies.[4] For example, in *Forsythe v. Collingwood Sales Ltd.*[5] the courts in British Columbia were able to use the kinship system of Wet'suwet'en to resolve a conflict and determine a remedy. The judicial references to "kinship" generally denote spiritual principles, social ordering and intergenerational inheritance of social legitimacy (e.g. family history, regalia, stories, songs and names).[6]

C. Loss of Kinship in Art

The systemic loss of kinship, which has been the experience of many Aboriginal people over the past decades, has been expressed in Aboriginal art. For example, Alex Janvier's *Blood Tears*,[7] provides a personal account of the losses incurred during the artists' education at a residential school.[8] On the back of the painting, Janvier has inscribed a list of losses experienced during his education: loss of childhood, language, culture, customs,

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3. *Ibid.* at 272-73. See also: Mary Jane Smith, *Placing Gitxsan Stories in Text: Returning the Feathers. Guuxs Mak'am Mik'Aax*, (PhD Dissertation, University of Victoria Faculty of Law, 2004) [unpublished].
4. Napoleon, *supra* note 2 at 166. See also Mary Clark, *In Search of Human Nature* (London: Routledge, 2002) at 8-16. The application of kinship obligations to the determination of appropriate legal remedies is a broad topic, the details of which will vary between Aboriginal societies.
5. *Forsythe v. Collingwood Sales Ltd.,* [1988] B.C.J. No. 683 (C.A.). In this case, the British Columbia Court of Appeal upheld the trial judge's decision to award damages to the plaintiff, who had been wrongfully detained on charges of shoplifting, in order to pay the costs of a shame feast.
6. Richard Daly, *Pure Gifts and Impure Thoughts* (Paper presented at the Ninth International Conference on Hunting and Gathering Societies, Heriot-Watt University, Edinburgh, September 2002), online: University of Aberdeen <http://www.abdn.ac.uk/chags9/1daly.htm at 7>.
7. Alex Janvier, *Blood Tears*, 2001, Acrylic on linen [*Blood Tears*].
8. The federal government established Residential Schools for the education of Aboriginal children, a regime which lasted from 1831 until 1998. For a detailed account of the losses incurred see: Marlene Brant Castellano, Linda Archibald & Mike DeGagné, *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Aboriginal Healing Foundation, 2008) online: Keewaytinook Okimakanak <http://media.knet.ca/node/3522> [Castellano *et al*.].

parents, grandparents and traditional beliefs. He notes that the policy of isolating children from their parents, extended family, community, language and culture resulted in many "broken bodies" and "broken spirits."[9]

The detrimental effect of government decisions, which caused Aboriginal children to lose their familial relationships, cultural knowledge and traditional languages has since been politically acknowledged[10] and legally addressed in a settlement agreement.[11]

II. POLITICAL DECISIONS ABOUT ABORIGINAL KINSHIP

Historically, legislative decisions have significantly deterred Aboriginal peoples from maintaining kinship relationships. Three aspects of government policy have impaired Aboriginal kinship relationships: Residential Schools, child protection and adoption.[12] The federal government has, through statute, permitted the removal of Aboriginal children from their families and communities by implementing the Residential Schools program. In more recent years, provincial governments have dismantled the kinship ties between Aboriginal children and their communities through the application of child protection and adoption policies. Recently, the government of British Columbia has attempted to ameliorate the loss of kinship through amendments to child protection and adoption legislation.

A. Residential Schools: Removing Kinship for Education

In 1920, the federal government used its constitutional authority[13] to make a significant legislative change. Under the *Indian Act*,[14] government officials were given the power to forcibly remove Aboriginal children from their parents in order to attend Residential Schools. The legislation also made parents who chose to hide their children, in order to prevent them from attending Residential Schools, punishable by law.[15] The rationale for forcibly removing children was based on the mistaken belief that an Aboriginal child's education would be more effective if the school severed daily contact with their families.[16] Parliament's intent was to remove children from the influence of their parents and elders,

9. *Blood Tears*, *supra* note 7.

10. On June 11, 2008, the government of Canada recognized the widespread losses experienced by Aboriginal children, families and communities in a formal apology. See: *House of Commons Debates,* No. 110 (11 June 2008) at 1519 (Hon. Peter Milliken).

11. *Residential Schools (Re)* 96 A.C.W.S. (3d) (Alta. Q.B.). Approximately $1.9 billion has been awarded to students who lived at a residential school for their "common experience." A former student is generally eligible to receive $10,000 for the first school year and $3,000 for each additional school year. See: Residential Schools Settlement, online: Indian Residential Schools Class Action Settlement <http://www.residentialschoolsettlement.ca/english_index.html>.

12. Castellano *et al.*, *supra* note 8.

13. *The Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 [*The Constitution Act, 1867*]. Section 91(24) allows the federal government to pass legislation regarding "Indians and Lands reserved for the Indians."

14. *Indian Act,* R.S.C. 1985, c. I-5 [*Indian Act*].

15. *Indian Act*, *ibid*. See also Castellano *et al., supra* note 8 at 24.

16. Castellano *et al., supra* note 8 at 23-25.

preventing the transmission of Aboriginal culture, language and custom.[17] Although recent policy reports, settlement agreements and apologies indicate a political intention to remedy the negative effects of Residential Schools, the federal government has not yet utilized its constitutional power to introduce legislation that would explicitly recognize the importance of Aboriginal kinship.[18]

Because of the lack of federal legislation to adequately define a right to maintain Aboriginal kinship, provincial governments have been able to enact provincial legislation that allows government officials to remove Aboriginal children from their parents and communities.[19]

B. Child Protection: Removing Kinship for Safety

In the 1960's, the government of British Columbia implemented a child protection policy that resulted in the permanent removal of numerous Aboriginal children from their families and communities.[20] In recent years, the number of Aboriginal children in government care has remained high.[21] In recognition of the significant percentage of Aboriginal children in long-term care, the government in British Columbia has introduced a statutory requirement for courts to consider the interests of the Aboriginal community. The *Child, Family and Community Services Act* ("*CFCSA*")[22] explicitly states that a court must consider the following factors when determining the best interests of an Aboriginal child:

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17. *Ibid*. at 23-25. The purpose of the Residential Schools was to instill a Euro-Canadian identity in Aboriginal children. The Crown's explicit objective was to "remove the Indian from the child." As a result, Residential Schools implemented detrimental policies such as forbidding the use of Aboriginal languages, cutting children's hair and physically punishing children for observing customary practices. Although public perception of Residential Schools policies has significantly changed since 1831, there are modern-day accounts of Aboriginal children being denied the right to express their heritage or practice customs. A recent example occurred in a school in Thunder Bay, Ontario where a teacher's aid cut an Aboriginal child's hair without permission, denying his ability to participate in an indigenous dance. For the details of this event, see: "Thunder Bay mom wants answers after teacher's aide chops off son's hair" *CBC News,* (21 May 2009), online: CBC News <http://www.cbc.ca/canada/toronto/story/2009/05/21/thunder-bay-hair.html>.

18. In 1996, the federal government received a commissioned report on the plight of Aboriginals in Canada. See the *Report of the Royal Commission on Aboriginal People* (Ottawa: Royal Commission on Aboriginal People, 1996). In 1998, the government issued a statement on reconciliation: *Gathering Strength:* Minister of Indian Affairs and Northern Development, *Canada's Aboriginal Action Plan* (Ottawa: Public Works and Government Services Canada, 2000) . Only in 2006, however, did the federal government sign the *Indian Residential Schools Settlement Agreement.* See *supra,* note 11. Finally in 2008, the federal government explicitly recognized the injustices caused by the residential school policy in an *Apology to the First Nations of Canada*. See *House of Commons Debates,* No. 110 (11 June 2008).

19. *Re Adoption Act* (1974), 44 D.L.R. (3d) 718 (B.C.C.A.) at para. 1. Farris C.J. writes that "the [British Columbia] *Adoption Act* does apply to Indians subject to the provisions of the *Indian Act*." On this basis, the Court allowed a petition by non-Indian parents to adopt an Indian child. This decision was affirmed in *Natural Parents v. British Columbia (Superintendent of Child Welfare),* [1976] 2 S.C.R. 751. There has not been a further constitutional challenge to provincial legislation concerning child protection and the adoption of Aboriginal children. It remains to be determined by the courts whether a right to kinship, or a right to retain cultural heritage, is included in the existing rights of Aboriginals affirmed in s. 35 of the *Constitution Act, 1982,* c. 11, Schedule B (U.K.) [*Constitution Act, 1982*].

20. Castellano *et al., supra* note 8 at 80.

21. Darcie Bennett and Lobat Sadrehashemi, *Broken Promises: Parents Speak About B.C.'s Child Welfare System,* (February 2008), online: Pivot Legal Society <http://www.pivotlegal.org/Publications/reportsbp.htm> [*Broken Promises*]. In 2006, over 9,271 children were living in foster care, more than half of whom are Aboriginal.

22. *Child, Family and Community Services Act*, R.S.B.C. 1996, c. 46 [*CFCSA*].

> (2) This Act must be interpreted and administered so that the safety and well-being of children are the paramount considerations and in accordance with the following principles:
>
> …
>
> (f) the cultural identity of aboriginal children should be preserved;
>
> …
>
> 3(b) aboriginal people should be involved in the planning and delivery of services to aboriginal families and their children;
>
> …
>
> 4(2) If the child is an aboriginal child, the importance of preserving the child's cultural identity must be considered in determining the child's best interests.[23]

In addition to these statutory provisions, the provincial government recently signed a *Recognition and Reconciliation Protocol*,[24] which explicitly states as a policy objective, increasing the involvement of Aboriginal communities in the care of at-risk children. As will be discussed in more detail below, despite a clear legislative and political intent to consider the interests and needs of Aboriginal communities, the courts have chosen to apply these statutory requirements narrowly. As such, the current judicial approach towards the protection of Aboriginal children has resulted in a lack of recognition of kinship.

C. Adoption: Removing Kinship for… Good?

The government of British Columbia has attempted to recognize the interests of the Aboriginal community in maintaining kinship when one of its children is adopted. Under s. 7 of the *Adoption Act*,[25] an Aboriginal community must be consulted before a child is placed for adoption. Further, an adoption order does not affect a child's statutory rights embodied in Aboriginal status.[26] The courts may also legally recognize customary adoptions.[27] Significantly, although the legislation provides for adopted children to initiate contact with their families and communities, there is no explicit mention of the Aboriginal community's right to maintain a relationship with the child.

As will be discussed below, the courts have failed to adequately consider the views of the Aboriginal communities regarding adoption, have allowed a child's Band membership to

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23. There are also statutory provisions for Aboriginal organizations to be notified of custody hearings and interim plans. See: *CFCSA, ibid.* at ss. 33.1, 35, 36 and 39.

24. *Recognition and Reconciliation Protocol on First Nations Children, Youth And Families* (30 March 2009), online: Ministry of Children and Family Development, <http://www.mcf.gov.bc.ca/publications/Recognition_Reconciliation_Protocol.pdf>. The Minister of Children and Family Development and delegates of the "First Nations Leadership Council" (which includes the First Nations Summit, Union of BC Indian Chiefs and the BC Assembly of First Nations) entered into "a shared vision under the *New Relationship*, which includes respect for each others' laws and responsibilities."

25. *Adoption Act*, R.S.B.C. 1996, c. 5 [*Adoption Act*].

26. *Ibid.* at s. 37(7).

27. *Ibid.* at s. 46.

be removed, and have significantly limited the scope of custom adoption.[28] For now, it is important to keep firmly in mind that the provincial government has attempted to ameliorate the negative effects of permanently removing children from their community by enacting legislation that requires the courts to consider Aboriginal kinship.

D. Summary of Legislative Approaches to Aboriginal Kinship

Legislative decisions that have defined the parameters of Aboriginal kinship within the Canadian legal system reveal two distinct approaches. The first approach assumes that the Crown is entitled to make decisions on behalf of Aboriginal children, families and communities. This approach is informed by the protectionist assumption that the government is primarily responsible for ensuring that an Aboriginal child receives a certain standard of education, physical protection and daily care. The second approach assumes that the Crown must consult and consider the views and interests of the community when determining the best interests of an Aboriginal child.

As will be seen below, the courts have generally adopted the first approach, assuming that the appropriate role of the legal system is to protect vulnerable children regardless of the cultural damage that "protection" might inflict. A more progressive approach to Aboriginal kinship could include detailed consideration the needs of Aboriginal children in the context of their communities. This contextual approach would recognize the social importance of maintaining, strengthening and restoring kinship relationships.

III. JUDICIAL APPROACH TO ABORIGINAL KINSHIP

The courts have narrowly interpreted the statutory and common law obligations placed on the Crown to act in the best interests of Aboriginal children, families and communities. To follow are examples of how the courts in British Columbia have chosen not to recognize Aboriginal kinship in each of the above-noted contexts: Residential Schools, child protection, and adoption.

A. Residential Schools: Narrowing Relationship

> *Their children will be as in days of old,*
> *and their community will be established before me;*
> *I will punish all who oppress them.*
> – Jeremiah 30:20[29]

The courts in British Columbia have considered whether the federal government's decision to remove children from their parents, in order to attend Residential Schools, was a

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28. Although the courts have allowed an adopted Aboriginal child's Band membership to be revoked by a Band that controls its own membership. See: *G.(J.-G., Re),* [2000] 4 C.N.L.R. 104 (C.Q.), affirmed (2001), 2001 Carswell Que 3112 (Que. C.A.).

29. After much deliberation, I decided to incorporate scripture into my paper in recognition of the emotional, physical and spiritual wounds experienced by Aboriginal children and their communities as a result of the conduct of the Crown and the Church. As will be discussed in this section of the paper, the Crown and the Church were found to have breached their statutory duties (but not their fiduciary obligations) towards Aboriginal children who attended the Residential Schools. Jeremiah 30:20 is considered by some Biblical scholars to be a prophetic declaration of healing and spiritual restoration to a nation suffering from wounds that were once deemed too extensive to be properly healed.

breach of the Crown's fiduciary obligations.[30] In both *W.R.B. v. Plint* ("*Plint*")[31] and *F.S.M. v. Clarke* ("*Clarke*"),[32] the British Columbia Supreme Court found that the Crown had not breached its fiduciary obligation to act in the best interests of Aboriginal children.

The plaintiffs, who had each attended Residential Schools as children, claimed that the Crown breached its fiduciary duties in the following ways: a) it removed them from their families and communities; b) it deprived them of family love and guidance, community support and the knowledge of their language, culture, customs and traditions of their nation; and c) it placed them in an environment where they were subjected to racial epithets, physical abuse and intolerable living conditions.[33] In *Plint*, Brenner C.J. summarized the claim for a breach of fiduciary duty as follows:

> As against both Canada and the Church, the plaintiffs allege a breach of fiduciary duty in operating a residential school whose students and residents were systematically subjected to abuse, mistreatment, and racist ridicule and harassment, particulars of which include:
>
> a) isolation from family and community;
>
> b) prohibition of the use of Native language and the practice of Native religion and culture;
>
> c) use of racist epithets, sexual and physical violence, physical beatings, abuse, degradation and humiliation as forms of discipline, training or punishment;
>
> d) creation of an environment of coercion and fear; and
>
> e) overcrowded and inhuman residence conditions.[34]

In *Clarke*, the Court cited two other decisions of the British Columbia Supreme Court: *K.L.B. v. British Columbia* ("*K.L.B.*")[35] and *C.A. v. Critchley* ("*Critchley*")[36] to the effect that: "everyone charged with responsibility for the care of children is under a fiduciary duty towards such children."[37] As a result, the key legal issue became whether the Crown had breached its fiduciary obligations owed to Aboriginal children in Residential Schools.

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30. The *Constitution Act, 1867, supra* note 13, was brought into effect after Residential Schools were established and does not explicitly protect the rights of Aboriginal peoples. The statutory provision regarding existing Aboriginal and treaty rights was introduced in s. 35 of the *Constitution Act, 1982, supra* note 19. To date, the federal and provincial courts have not considered whether kinship is considered an existing Aboriginal right.

31. *W.R.B. v. Plint*, 2001 BCSC 997 (QL) [*Plint* cited to QL].

32. *F.S.M. v. Clarke* [1999] 11 W.W.R. 301 (B.C.S.C.) [*Clarke* cited to W.W.R.].

33. *Ibid.* at paras. 233-34.

34. *Ibid.* at para. 234.

35. *K.L.B. v. British Columbia* (1996), 66 A.C.W.S. (3d) 262 (B.C.S.C.).

36. *C.A. v. Critchley* (1997), 35 B.C.L.R. (3d) 234 (S.C.) (QL) [*Critchley* cited to QL]. For an interesting case comment on the *Critchley* decision see Clea Parfitt & Melinda Munro, "Whose Interests Are We Talking About?: *A.(C.) v. Critchley* and Developments in the Law of Fiduciary Duty", (1999) 33 U.B.C. L.Rev. 199.

37. *Critchley, supra* note 36 at para. 18.

In both *Clarke* and *Plint*, the Court had relied on *Critchley* to narrow the "ever-widening application of the principles of fiduciary duty."[38] In that case, the Court reasoned that the fiduciary obligations of the Crown could only be breached where there was dishonesty, intentional disloyalty or personal advantage taken in a relationship of trust or confidence.[39] The court then found that the Crown's conduct in implementing and facilitating the residential school was not dishonest, intentionally disloyal or to the Crown's advantage.[40] Brenner C.J. stated in *obiter* that the residential school policy was badly flawed, but reasoned that,

> Even a badly flawed policy does not necessarily equate to a breach of fiduciary duty in law. It is only when the flawed policy contains within it the necessary indicia of dishonesty or disloyalty that the breach of fiduciary cause of action is engaged.[41]

A number of concerns emerge from this judicial approach. First, the Court did not provide a legal definition of what could satisfy the dishonest or disloyal elements of the *Critchley* test. The Court's finding that the plaintiffs had not met the burden under the *Critchley* test, insofar as they had failed to establish that the Crown was intentionally disloyal, implies a problematic definition of "disloyalty."[42] The political decision to forcibly remove Aboriginal children from their parents contains an element of inherent disloyalty because the Crown intentionally infringed the reasonable expectations of those parents. The statutory right for Aboriginal peoples to maintain kinship is not explicitly stated in Canadian law. However, Aboriginal peoples may have a constitutional right to maintain decision-making power about kinship. The *Constitution Act, 1982*, states that the Aboriginal rights in the *Royal Proclamation of 1763* ("*Royal Proclamation*")[43] cannot be adversely affected by the *Canadian Charter of Rights and Freedoms* ("*Charter*"):[44]

> The guarantee in this *Charter* of certain rights and freedoms shall not be construed as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including:
>
> a) any rights or freedoms that have been recognized by the *Royal Proclamation* of October 7, 1763; and
>
> b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.[45]

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38. The courts in *H.(J.) v. B.C.*, [1998] B.C.J. No. 2926 (S.C.) (QL) and in *EDG v. North Vancouver School District No. 44*, 2001 BCCA 226 (QL) held that the requirement for fiduciary obligations only arose in situations in which the party behaved with dishonesty or intentional disloyalty. In both of these cases, the courts found further that *Critchle*y requires that a fiduciary breach can only be found if the fiduciary takes advantage of a relationship of trust or confidence for his or her own direct or indirect personal advantage.

39. *Plint, supra* note 31 at paras. 244 and 246.

40. *Ibid.* at para. 247. In *W.R.B. v. Plint,* 2003 BCCA 671 (QL), the British Columbia Court of Appeal found that the trial judge did not err in dismissing the claim for breach of fiduciary duty and reasoned that the loss of culture and limitation claims were not properly pleaded and could not be raised at this stage.

41. *Plint, supra* note 31 at para. 248.

42. *Ibid.* at para. 247.

43. *Royal Proclamation of 1763*, R.S.C. 1985, App. II, No. 1 [*Royal Proclamation*].

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

45. *Constitution Act, 1982, supra* note 19 at s. 25.

Importantly, Aboriginal peoples considered the *Royal Proclamation* to be a declaration that the Crown would "protect their interests, and not allow them to be interfered with, especially, with regard to their land use and means of livelihood."[46] The expectation that the lives of Aboriginal families would not be interfered with was also encoded in the two-row wampum belt, which represents the agreement of respect and autonomy between the Crown and Aboriginal communities. Assuming that the forced removal of children from their families would endanger the means of livelihood of the Aboriginal communities, the judicial reasoning that no disloyalty occurred during the implementation and facilitation of Residential Schools significantly ignores the historical basis of the Crown-Aboriginal relationship.[47]

Secondly, the explicit purpose of the Residential Schools policy, which was to eradicate the influence of Aboriginal culture, language and custom, should be subject to modern constitutional principles. The British Columbia Supreme Court's unwillingness to consider the legal validity of "badly flawed policy" stands in direct contrast to the reasoning in *Eldridge v. British Columbia (Attorney General)* ("*Eldridge*")[48] and *Auton (Guardian ad litem of) v. British Columbia (Attorney General)* ("*Auton*"),[49] in which the Supreme Court of Canada thoroughly analyzed whether the British Columbia government's policy decision to cut health care funding breached s. 7 and s. 15 of the *Charter*. The government's "badly flawed" policy decisions about Residential Schools and health care funding both had a detrimental effect on a minority group in Canada. As such, the courts should have applied constitutional principles in order to assess the validity of the government's Residential Schools' policy.

The counter-argument can be made that the *Charter* should not be applied retroactively to pre-1982 government decisions. However, the social and legal impacts of the residential school policy reverberate to this day. More importantly, new government decisions about Aboriginal children and families continue to be introduced. As such, the judiciary should be more aggressively assessing ongoing government decisions involving Aboriginal children and families in light of the *Charter*.

Finally, in *Plint,* the BC Supreme Court found that the Crown was in breach of its statutory duty to perform due diligence for the plaintiffs.[50] The finding that the Crown did not breach their fiduciary duty to act in the best interests of Aboriginal children, but did breach the statutory standard of care to provide special diligence, may indicate that the principle of fiduciary duty is being overshadowed by the principles of tort law. In an attempt to maintain

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46. John Borrows, *Constitutional Law From a First Nation Perspective: Self-Government and the Royal Proclamation,* (1994) 28 U.B.C. L. Rev. 1 at 45. See also John Borrows, "*Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*" in Aboriginal and Treaty Rights in Canada, ed. Michael Asch. (Vancouver: UBC Press, 1997) 155; John Borrows, "Domesticating Doctrines: Aboriginal Peoples after the Royal Commission" (2001) 46 McGill L.J. 615; Leonard Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (Toronto: University of Toronto Press, 1996).

47. "Statement at Meeting of Ministers, Ottawa, 20-21 March 1986" in *Assembly of First Nations, Our Land, Our Government, Our Heritage, Our Future* (Ottawa: A.F.N., September 1990) at 18. The Statement reads: "As Indian First Nations we have an inherent right to govern ourselves. We have had this right from time immemorial (i.e., centuries before the arrival of the Europeans) and this right exists today. Neither the Crown in the right of the United Kingdom nor of Canada delegated the right to be self-governing to the First Nations. It existed in Canada long before Canada itself was a nation." The inherent right of North American Indians to sovereignty was first recognized by the Two-Row Wampum in 1650, and later, by the Royal Proclamation of 1763 which speaks of "The several Nations or Tribes of Indians with which we are connected ..." and by subsequent treaties. The purpose was not to give rights to the First Nations but to give rights to the European settlers.

48. *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 (QL).

49. *Auton (Guardian ad litem of) v. British Columbia (Attorney General),* 2004 SCC 78 (QL).

50. *Plint, supra* note 31 at para. 259.

a distinction between fiduciary obligations and the principles of tort or contract law, the Court has created a common law test that makes fiduciary obligations significantly harder to breach. The eventual outcome of creating a higher threshold to show that there was a breach in a fiduciary relationship may be that fiduciary obligations become obsolete.

The significantly flawed judicial treatment of the experiences of Aboriginal children at Residential Schools highlights the need for the common law to provide more consideration to indigenous legal principles. Unfortunately, the existing common law approach to the Crown's fiduciary relationship with Aboriginal families has not been limited to the experience of Residential Schools.[51] The courts have also failed to adequately define the Crown's obligations in situations in which Aboriginal children are removed from their parents and placed in child protection and adoption programs.

B. Child Protection: Reforming Families

> Felicia Wale burst out in tears when the child protection worker told her that the government was not going to give back her two daughters. Two weeks after her 21-month-old son, Jor-el Macnamara, died while in government care, she could not understand why her worker believes her children were better off under government supervision.[52]

The courts in British Columbia have applied a limited interpretation of the statutory requirement to consider an Aboriginal child's cultural heritage before allowing the permanent removal of a child from the care of her parents. To illustrate this, I will provide an analysis of two cases, which involve applications by extended family members to obtain custody of an Aboriginal child. First, I will discuss the unfairness of the Director of Child Protection's actions toward a child's grandparents in *N.M. v. J.M.*[53] Then I will discuss the evidentiary burden faced by a family with a history of violence and excessive drinking in *N.P. v. British Columbia* ("*N.P. v. B.C.*").[54] The following legal issues loom large in the jurisprudence regarding the removal of children from their families: 1) whether extended family members can obtain custody; 2) to what extent the court should consider the views of a community; and 3) how heavily the courts must weigh the importance of cultural heritage.

i. Grandparents' Kinship Rights

In *N.M. v. J.M.,* the British Columbia Provincial Court dismissed an application by the Director for a continuing custody order and granted custody to the child's maternal grandparents. This case is illustrative for two reasons: first, it is one of the rare decisions as the result of which grandparents are given custody of the child; and second, the social worker's

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51. *Ibid.* at para. 247. It would be interesting to consider whether the outcome of these cases would be different if the lack of dishonesty, intentional disloyalty or personal advantage arguments were available as possible defense arguments, or mitigating factors, rather than requirements for the establishment of a breach.

52. Robert Matas, "Tragic consequences" *The Globe and Mail* (20 June 2009), online: The Globe and Mail <http://www.theglobeandmail.com/news/national/british-columbia/tragic-consequences/article1190221/story.html>.

53. *N.M. v. J.M.*, [1999] B.C.J. No. 1652 (Prov. Ct.) (QL) [*N.M.* cited to QL].

54. *N.P. v. British Columbia (Director of Child, Family and Community Services),* [1999] B.C.J. No. 470 (S.C.) (QL) [*N.P. v. B.C.* cited to QL].

decision to remove the child from his home raises significant concerns about the lack of judicial review of the use of discretion.[55]

In June 1997, a three-year-old boy was removed from the care of his grandparents. The boy's removal from his grandparents' care was the direct result of a medical practitioner's failure to adequately consult with the family. The child's mother, who was not the primary caregiver, had begun to experience depression and thoughts of suicide. She sought medical advice from Dr. McKinnon, who admitted her to psychiatric care.[56] Dr. Kinnon mistakenly believed that the grandparents were not prepared to care for the child. The Public Health Nurse and a Band Councilor were consulted about removing the child from his grandparents' care.[57] Unfortunately, Dr. McKinnon did not consult the grandparents themselves. Further, the grandparents were led to believe that the child was being taken for a visit to Tsay Keh with his mother. Instead, the mother was admitted to hospital and the child was placed in foster care.[58]

During the three years that the boy was in foster care, he was diagnosed as having moderately severe attention deficit hyperactivity disorder, fetal alcohol effect, developmental delays, sleep disorder, expressive speech delay, oppositional defiant disorder and suspected post-traumatic stress disorder. To treat these conditions, the child was prescribed Ritalin and clonidine.[59]

On October 28, 1998, sixteen months after the boy was removed from his grandparents' care, the Director of Child Protection applied for a continuing custody order. During the custody hearing, three witnesses testified that returning the child to the grandparents might not be in the child's best interests. First, the foster mother described the child as "wild, undisciplined, extremely hyperactive, impulsive and suffering from a sleep disorder."[60] Second, a pediatrician diagnosed the child as "a high needs child with a moderately severe attention deficit hyperactivity disorder and fetal alcohol effect, developmental delays and a sleep disorder as well as expressive speech delay, an oppositional defiant disorder and suspected post-traumatic stress disorder."[61] Finally, a child psychologist described the child as

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55. There are conspicuously few cases involving custody of children by grandparents. This appears to be the leading case in British Columbia. Unfortunately, it is ten years old and does not seem to have been followed.

56. *N.M., supra* note 51 at para. 3. The child's mother was just 15 when her child was born; her parents were the primary caregivers. The time period between the removal of the child and this court decision is two years. Studies show that children need certainty in their attachment with primary caregivers during the first six years of their lives. A lack of certainty can result in significant developmental delays. In recognition of this, the federal, provincial and municipal governments have participated in a long-term research-based project, which seeks to mitigate the negative effects of poverty and emotional distress in the lives of children who are under the age of six. The "Success by Six" initiative is coordinated and funded by the United Way of Canada, a national non-profit organization. Aboriginal Engagement Coordinators associated with the program have been assigned to regions throughout the province. Details about it can be found at: "Aboriginal Engagement," online: Success By Six <http://www.successby6bc.ca/aboriginal-engagement>.

57. *N.M., supra* note 51 at paras. 1, 4 and 5. Importantly, the Band Councilor John McCook testified that he had no recollection of being consulted by Dr. McKinnon and would certainly not have said the grandparents could not care for the child. He testified that the grandparents were devoted to all their grandchildren. The Band supported the grandparents' application for custody of the child.

58. *Ibid.* at para. 5.

59. *Ibid.* at para. 7.

60. *Ibid.*

61. *Ibid.* at paras. 7, 18 and 19. The child pediatrician had prescribed Ritalin and clonidine for the child. At the initial continuing custody trial, she raised concerns that the grandparents would not conscientiously administer the medication. She also raised concerns that the child would be emotionally disturbed if he was returned to the grandparents.

"one of the most destructive and impulsive children tested."[62] Despite these diagnostic testimonies, Ramsay Prov. Ct. J. noted that the boy did not exhibit these negative patterns of behaviour before he was unexpectedly removed from his grandparents and placed in foster care and granted a three-month continuing custody order on the condition that the child return to his grandparents. He also imposed terms of supervision.[63] Despite this order, the Director did not return the boy to his grandparents.[64]

On May 26 and 27, 1999, two years after the boy was removed from his grandparents' care, the Director applied for another continuing custody order. The Director expressed some concerns about the grandparents' drinking.[65] However, the Director's primary concern was that the grandparents were not "persons that can be entrusted with administering the child's medication."[66] The Provincial Court found that the Director relied on "anticipatory concerns" when, contrary to the terms of the previous continuing custody order, the child was not returned to his grandparents.[67]

Auxier Prov. Ct. J. held that the benefits of the child being with his family should take precedence over the willingness of the foster family to administer care and medication or the Director's ability to provide speech therapy.[68] The Court heavily weighed the benefits of the permanent, unconditional acceptance offered by the grandparents. The child's desire to be with his grandparents and the importance of preserving his cultural identity were also accorded significant consideration.[69] Thus, in accordance with the statutory obligation to consider the child's Aboriginal community ties, the Court chose to return the child to his grandparents.

There are a number of areas of weakness in this process. First of all, the statutory requirements, set out in s. 16 of the *CFCSA*, which requires the Director to make an assessment about whether a child is in need of protection and to report the outcome of that assessment to the primary caregivers or to "any other person necessary …to ensure the child's safety and wellbeing" and in s. 35 of the *CFCSA*, which requires the Director to provide the court with an interim plan of the "steps taken to preserve the child's aboriginal identity" and to

62. *Ibid.* at para. 7.

63. *Ibid.* at paras. 2, 7 and 8.

64. *Ibid.* at para. 15.

65. *Ibid.* at paras. 21-25. Testimony was given that drinking occurred at the grandparents' home after they had been served notice of the Director's second attempt to obtain a continuing custody order. The grandparents had expected the child to be returned to them. The Director required that the grandparents attend residential treatment. The grandparents testified that employment and family responsibilities would make it difficult to attend residential treatment. Expert evidence was also provided that residential treatment would not be appropriate. The Court found that the key factor motivating the grandparents' drinking was "their sense of being defeated." The Court also accepted that the grandparents had made a commitment to sobriety, shown significant strength in remaining sober during difficult circumstances, and were able to receive adequate support from work colleagues and friends to maintain sobriety.

66. *Ibid.* at paras. 19, 26, 32, 33, 34 and 42. The child's pediatrician had prescribed Ritalin and clonidine. The grandparents were of the opinion that the child did not have behavioural problems prior to his removal from their home. They therefore opposed the prescription of this medication. The Public Health Nurse expressed concerns about the administration of medication without the grandparents' consent. She suggested that the grandparents work with the child's teacher to assess the appropriate administration of medication. The court held that the terms of custody did not necessitate an order requiring the grandparents to administer medication.

67. *Ibid.* at para. 15.

68. *Ibid.* at paras. 35 and 36.

69. *Ibid.* at paras. 37 and 40.

explain the less disruptive measures considered before removing the child, were not met.[70] No evidence was proffered to support the assertion that the child was in need of protection while in the grandparents' care.[71] Further, the child was removed from his grandparents without notice and without adequate consultation with the child's family. Second, the Director was able to ignore the terms of the initial judicial order to return the child to his grandparents. Third, the decision to administer medication to the child, without the consent of his primary caregivers or consultation with members of the child's community, was not addressed. Finally, there is a significant human concern that was recognized but not remedied by the courts: the grandparents' emotional distress as a result of the deprivation of custody. Although the court order was a "success" for the grandparents, there were two years where the child's wellbeing and development were significantly disrupted. The loss of security, the emotional and financial cost imposed by the judicial process and the emotional distress experienced by the community were not remedied.

The experience of this Aboriginal family, deprived of a care-giving relationship with a young grandchild without legal cause, raises an important issue: should the courts be able to provide a remedy to a family that suffers a loss because of the illegal conduct of government decision makers? As in the cases of Residential Schools abuse, the Court did not thoroughly address the profound way in which the decisions of the state have detrimentally impacted the seized child and his family. Although the Court's reasoning assesses the best interests of the child, there is no remedy provided for the losses incurred by the family as a result of government misconduct.

An informed common law approach would seek to understand and apply indigenous legal principles in order to compensate the shame, loss and harm experienced by the family. Later in this paper, I will suggest how Aboriginal narrative contains the legal principles and remedies to properly restore the integrity of families. This new approach would allow for judicial assessment of "badly flawed" discretionary decisions and provide a remedy where illegal actions have severely damaged the wellbeing and security of Aboriginal families.

ii. Substance Abuse in Families

To elaborate on how the court applies the principle of "anticipatory concerns," which were raised by the Director in *N.M. v. J.M.*, I have chosen a similar custody application from the same Aboriginal community:[72] *N.P. v. B.C.* involves an appeal by an uncle seeking custody of two children who had been apprehended from their home because of their parents' excessive drinking and incidents of violence. The children's uncle submitted that the trial judge had not given adequate weight to the importance of Aboriginal heritage and the need to preserve the children's cultural identity.[73] The appellant also submitted that the Court placed too much emphasis on the drinking patterns of the parents.[74] Finally, the appellant asked the Court to interpret the statutory principles, set out in ss. 2-4 of the *CFCSA*,

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70. *Ibid.* at para. 7. *CFCSA, supra* note 22 at ss. 16 and 35.

71. *Ibid.* at para. 8.

72. *N.M., supra* note 51, and *N.P. v. B.C., supra* note 52, both involved applications for custody of children from the Kwadacha Nation (home of the Tsek'ene people). The principal settlement in the Nation's territory is Fort Ware, located approximately 570 km north of Prince George, British Columbia.

73. *N.P. v. British Columbia, supra* note 52 at para. 2. The appellant relied on s. 4(2) of the *CFCSA, supra* note 22.

74. *Ibid.* note 52 at para. 4. The appellant argued that the learned trial judge placed undue emphasis on the drinking patterns of the family.

in light of evidence that Aboriginal children experience significant feelings of disconnection from their Aboriginal roots by the time the long-term care of the Director ends.[75] The important legal issue in *N.P. v. B.C.* was to what extent the Court should weigh the history of substance abuse, and anticipatory concerns about the children's future safety because of that substance abuse, against the need to consider Aboriginal kinship relationships.

The trial judge relied on the facts of the drinking incident to dismiss the appellant's application.[76] In recognition of the need to maintain Aboriginal kinship, the trial judge had ordered the following terms of access: at least one month in the summer, at least half of the spring break holiday, one-half of every Christmas holiday, access visits in Mackenzie or in Fort Ware at the expense of the Director and telephone access at the expense of the Director.[77]

In reviewing the trial judge's decision, Chamberlist J. of the British Columbia Supreme Court reasoned that, "where there is a real apprehension of risk then the paramount concerns of safety and security will generally outweigh any concerns about the preservation of cultural identity."[78] He relied upon this reasoning to uphold the trial judge's finding that, because of excessive drinking, there was a "real possibility" of harm to the children.[79] As a result, the application for custody of the children was dismissed.

The Court has determined that the paramount consideration should be the safety of children. This reasoning follows the plain language of s. 2 of the *CFSDA,* which states: "the safety and well-being of children are the paramount considerations." In assessing the safety of the children, however, the Court has chosen to allocate heavy weight to all *possible* harms. As a result, Aboriginal children have been removed from their communities because the family has failed to convince the Court that they have addressed some potential risk.

Although this judicial approach is proactive, in the sense that it protects children from unsafe circumstances, it presents a legal dilemma for Aboriginal families and communities. The Court's practice of heavily weighing an anticipated harm places an extremely high burden of proof on the Aboriginal community. *N.P. v. B.C.* is an example of the plight faced by many Aboriginal families. If a history of substance abuse exists, the court will choose to ignore the good (i.e. child-care support from within the Aboriginal community) and emphasize the bad (i.e. previous incidents of alcohol abuse). There is no consideration of whether community resources for treatment are available or the extent to which an applicant has been personally involved in excessive drinking or violence that may be taking place elsewhere in the extended family.

In comparison with the common law approach, the antamahlaswx narrative deals explicitly with both the breakdown and the restoration of kinship. In the narrative, the difficult experiences of the abandoned mother are transformed into a situation where the family becomes prosperous and the children are able to receive adequate education, nourishment and care. Whereas the common law approach seeks to protect children by permanently removing them from the family, an indigenous law approach would look for the practical

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75. *Ibid.* at para. 5. Mavis Henry, former Deputy Superintendent for Aboriginal Children and Aboriginal Services, and Chief Emil McCook, then Chief of the Kwadacha Band, both provided evidence.

76. *Ibid.* at paras. 28 and 29. The drinking party incident occurred in 1998. As a result of this incident, S.M. suffered stab wounds to her leg and was treated at hospitals in MacKenzie and Prince George, British Columbia.

77. *Ibid.* at para. 30.

78. *Ibid.* at para. 43.

79. *Ibid.* at para. 45.

solutions (e.g. provision of basic resources) to resolve the circumstances faced by the family. Later in this paper, I will discuss the principles that could be implemented to begin recognizing and cultivating "the good," by providing a long-term plan of care for the wellbeing of Aboriginal children and by allocating resources to Aboriginal communities, rather than presuming that a policy of forcible removal should prevail.

C. Adoption: Removing Identity

> *At that time I will gather you; at that time I will bring you home.*
> – Zephaniah 3:20[80]

The jurisprudence in British Columbia provides some possibility that custom adoption could be recognized as an existing Aboriginal right under s. 35 of the *Constitution Act, 1982*.[81] The judicial treatment of Aboriginal adoption raises two important legal issues: 1) whether custom adoption may be recognized[82] and 2) to what extent the court must weigh the interests of an Aboriginal community in approving an adoption.

First, the courts in British Columbia have recognized the existence of custom adoptions in some situations.[83] For example, in *Casimel v. ICBC* ("*Casimel*"), the Court recognized custom adoption in the context of an application for a civil remedy.[84] Despite the decision in *Casimel*, the judicial approach to custom adoption has not recognized other forms of custom adoption (e.g. open adoptions, common law adoption, elder adoption, etc.).

Second, the "duty to consult" the Aboriginal community has not been consistently upheld. For example, in *C.D. v. P.B.*,[85] the Court disregarded evidence available from elders in the community. Without an explicit right to maintain kinship with a child, the community is able to participate in the adoption process, but not able to determine its outcome.

D. Summary of Judicial Approach to Aboriginal Kinship

The current judicial interpretation places paramount importance on a child's safety, with-

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80. Historically, many Aboriginal adoptions were influenced by an underlying assumption that a child would be better off in a white, Christian home. The effects of this policy have been, in many ways, similar to the effects of Residential Schools as it reflects a prejudicial bias against Aboriginal families. In contrast to this adoption-as-severance policy, I chose to incorporate this scripture because it reflects the concept that a child always be retrieved by a caregiver and returned to their home.

81. See Bill Lomax, "Hlugwit'y, Hluuxw'y –My Family, My Child: The Survival of Customary Adoption in British Columbia" (1997) 14 Can. J. Fam. L. 197 at 206.

82. In addition to the legal issues, there are procedural issues with respect to facilitating the reunification of adopted children and their kinship communities. Unfortunately, a fuller consideration of whether Aboriginal children are adequately informed of their statutory rights, whether the Aboriginal community is provided with the resources to facilitate reunification and whether open adoptions are enforceable are beyond the scope of this article. I will, however, briefly touch on these points in discussing the policy objectives of a new judicial approach.

83. Cindy Baldassi, "The Legal Status of Aboriginal Customary Adoption Across Canada: Comparisons, Contrasts and Convergences" (2006) 39 U.B.C. L. Rev. 63. See also Kisa Macdonald, "Customary Adoption in British Columbia: Recognizing the Fundamental Differences" (2009) 14 Appeal 17.

84. *Casimel v. ICBC* (1993), 106 D.L.R. (4th) 720 (B.C.C.A.) (QL).

85. *C.D. v. P.B.*, 2006 BCSC 1515 (QL).

out giving adequate weight to the interests or needs of the child's community.[86] A common theme recurs throughout the above-mentioned cases: the discretionary powers allocated to government officials (e.g. social workers) ill-serve the need of Aboriginal communities to find solutions to situations involving mental health, substance abuse and poverty.

IV. PRINCIPLES FOR A NEW APPROACH

The pre-emptive approach of the court, together with the government policy of intervention and removal, has resulted in a continuation of permanent, widespread displacement of children from their communities. Unsatisfied with the social consequences of this outcome, I will suggest four policy objectives that could inform a new judicial approach: 1) recognizing social conditions; 2) supporting a caregiver; 3) reuniting kinship; and 4) providing resources.[87] As will be seen, the courts must consider the social need to provide support and facilitate reunification of families when determining the long-term placement of Aboriginal children.

A. Recognizing Social Conditions

> *She sat on the banks of the 'Xsan thinking she could easily slip into the water.*
> *Who would know and who would care.*

The issue of despair, identified by the Court in *N.M. v. J.M.,* is an emotional reality for many Aboriginal families. The first branch of a new judicial approach should consider the social hardships faced by many caregivers.[88] Aboriginal children, in particular, often live in circumstances of violence, alcoholism and extreme poverty.[89] The case law reveals that the court will recognize instances of substance abuse and violence in cases concerning the protection of children. However, it is difficult for the court to accurately identify the extent of substance abuse. It is equally difficult for the court to order a remedy that would facilitate treatment.

The Gitksan narrative, at the beginning of this paper, speaks openly of the hardship of a young, single mother's life. It provides an accurate portrayal of the bleak circumstances she faces. The courts should likewise be able to recognize and weigh the hardship of Aboriginal families.

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86. In weighing the best interests of the child, the courts have maintained an underlying assumption that the appropriate role of the Crown is to intervene in the lives of Aboriginal families. This is protectionist in the sense that the Crown assumes control of the situation, disciplining Aboriginal families, rather than considering the long-term social consequences of their intervention and acting in the best interests of Aboriginal society.

87. These four policy objectives are found in the Gitksan narrative given at the beginning of this paper. Ideally, the courts would adopt a new line of legal reasoning that adequately measures the practices of the Crown. This "new approach" is not so new, as it would be analogous to the courts' approach to judicial review processes and criminal sentencing practices. For example, in immigration law, the discretionary decision of a visa officer about whether a family can enter Canada can be reconsidered when adequate written reasons for refusing a visa are not given, or when a material fact is not properly considered. I am curious as to why the courts do not take a similar approach to the procedural fairness of decision makers who are responsible for removing children from their families. Likewise, there is no judicial consideration of the disproportionate number of Aboriginal children in the child welfare system.

88. See *British Columbia Aboriginal Child Care Society*, online: Aboriginal Child Care Society <http://www.accsociety.bc.ca>.

89. See *Broken Promises*, *supra* note 21.

Judicial consideration of the hardship faced by Aboriginal families could be achieved in a way that is analogous to the sentencing provisions applied to Aboriginal inmates, which require that judges pay "particular attention to the circumstances of aboriginal offenders."[90] In other words, the courts could take into consideration the fact that Aboriginal communities have a disproportionate number of children taken from the care of their families. The courts could then, in recognition of the unique rights of Aboriginal children, apply specific legal principles to address this social disparity. Currently, the number of Aboriginal children in the provincial government's care is estimated at roughly 4,600.[91] This statistic is particularly alarming given the relatively small proportion of the provincial population that is Aboriginal.[92] Another alarming trend to take into consideration is the high incidence of suicide among Aboriginal youth.[93]

The current legal approach that looks to remove Aboriginal children from their family, without an accurate assessment of the circumstances faced by that family, does not provide an adequate resolution of the social conditions that may be found in Aboriginal communities. A revised legal approach would find a way of recognizing the correlation between the social factors of despair, suicide, substance abuse and the high rate at which Aboriginal children are apprehended.

B. Supporting a Caregiver

> *She became strong and confident and soon she had many salmon hanging in the smokehouse. Her children grew very quickly and soon were a help to her. They hunted and trapped small animals, they fished and they picked berries.*
>
> *The mother explained to her children that their people had moved away because she did not know who their father was. She instructed her children and taught them about the land.*

The second policy objective of a new approach towards decisions about Aboriginal children should be to provide an opportunity for a caregiver to gain strength, confidence, and prosperity. The Gitksan narrative tells of the responsibilities of a caregiver to tell stories, instruct and teach about the land. The path to restoring the caregiver's role is spiritual: *Uun ts'iits* (supernatural being) comes to the weeping mother to help, teaching her how to effectively fish so that her children receive proper care. In other words, support is provided from beyond the caregiver's own resources.

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90. *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.2 (e). See also *R. v. Gladue*, [1999] 1 S.C.R. 688.

91. *Broken Promises*, *supra* note 21.

92. Statistics Canada, *Aboriginal identity population by age groups, median age and sex, 2006 counts, for Canada, provinces and territories*, (Ottawa: Statistics Canada, 2008), online: Aboriginal Peoples Highlight Tables, 2006 Census <http://www12.statcan.ca/english/census06/data/highlights/aboriginal/index.cfm?Lang=E>. The total population of British Columbia is 4,074,385. The Aboriginal population in British Columbia is 196,075. The North American Indian population in the province is 129,580, the Metis population is 59,445 and the Inuit population is 795. The non-Aboriginal population in British Columbia is 3,878,310.

93. Health Canada, *Acting on What We Know: Preventing Youth Suicide in First Nations* (Ottawa: Health Canada, 2005) online: First Nations, Inuit and Aboriginal Health <http://www.hc-sc.gc.ca/fniah-spnia/pubs/promotion/_suicide/prev_youth-jeunes>. Between 1987 and 1992, in British Columbia, First Nations youth (aged 15-24) had 108.4 suicides per 100,000 persons, while during the same period non-Native youths (aged 15-24) had 24.0 suicides per 100,000. First Nations youth in B.C. therefore have a suicide rate 4.5 times that of non-Native youth.

The current approach to child protection and adoption emphasizes the need for a child's immediate safety. There is little recognition of the need for support to be provided to the child's caregiver.[94] A revised legal approach would consider the fiduciary obligations of the Crown towards Aboriginal caregivers, recognizing that the best place for a child is with his family. It would also recognize that a child's safety may also be determined by a number of other contributing factors including: the ability to provide food, shelter, clothing, nurture, acceptance and affirmation to a child.[95] Like the experience of the weeping mother, a child's safety is best protected when the child's caregiver has the opportunity to bring about positive changes, utilizing unique Aboriginal knowledge and skills to support, nurture and educate.[96]

In practical terms, a judicial approach that supports the caregiver would need to utilise all the individuals subject to kinship obligations, such as grandparents, other extended family members and community leaders, in order to assist in raising the child. Rather than focusing on the dysfunction of the family or imposing onerous requirements (e.g. requiring, as the Director of Child Services did in *N.M. v. J.M.*, that caregivers attend a distant residential treatment program, regardless of whether employment and family responsibilities make that attendance impossible), the Director would need to show that appropriate measures have been taken to provide adequate support to the family. Appropriate support could include mediation, in-home assistance or the involvement of public health services.[97] For example, in *N.M. v. J.M.,* the public nurse had a long-standing relationship with teachers, the grandparents, the Kwadacha Band and the medical community, which enabled her to provide a realistic assessment of the caregivers' ability to ensure the child's health. This assessment stands in stark contrast to the child's pediatrician who feared that the grandparents would simply disregard her prescribed course of treatment. The case clearly showed how a system that relies on community-based support services is more likely to be effective than the adversarial, lengthy and costly process of forcibly removing a child and resolving the custody matter in the courts.

C. Reuniting Kinship

> *Many years passed and her father, the chief, forgot his anger. He sent out his warriors to fetch the bones of his daughter so that he could mourn her. The warriors returned with astonishing news. The chief's daughter and his three grandchildren were alive and well.*

The third aspect of a new legal approach would recognize the importance of facilitating family reunification. A proactive approach to reunification would ensure that adopted children are aware of their rights to pursue relationship with their biological families and to maintain Aboriginal status. There would also be a broader judicial recognition of custom-

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94. For a feminist critique of the (lack of) support available to mothers in the adoption process, see Katrysha Bracco, "Patriarchy and the Law of Adoption: Beneath the Best Interests of the Child" (1997) 35 Alb. L. Rev. 1035.

95. In *N.M., supra* note 51, the B.C. Provincial Court recognized that the child received "unconditional acceptance" from his grandparents and that such acceptance was significantly lacking in his foster care experience.

96. For a theoretical approach that also considers the concepts of transformation, universalism and the acceptance of different perspectives and physiological experiences see Jennifer Nedelsky, "Embodied Diversity and the Challenges to Law" (1997) 42 McGill L.J. 91.

97. In other areas of family law (e.g. where a couple has separated, is seeking to reach a custody agreement or wants to divorce), the courts require the parties to have made attempts to reconcile prior to bringing the matter to court.

ary adoption and open adoption principles, which allow for continual contact between the biological parents and adoptive family.

A more innovative approach towards Aboriginal kinship would devolve responsibility for child welfare and adoption services to the First Nations.[98] The legal issue that would need to be resolved is whether s. 35 of the *Constitution Act, 1982* includes an existing right to maintain Aboriginal families.[99]

D. Providing Resources

> *The chief and his people returned to the first Gitanmaaxs to find a woman with much wealth in the smokehouses.*

The final objective of a revised approach to Aboriginal kinship would be to recognize the need for Aboriginal families to be able to access support services and to benefit from more expedient, solution-oriented decisions about the care of their children.[100] As a general rule, out of deference to Parliament, the Supreme Court of Canada has not been willing to order the federal or provincial governments to take on positive obligations to expend resources. As a result, it is likely that the government, rather than the courts, would need to implement an appropriate resource strategy.[101]

A possible step forward would be for the federal or provincial governments to implement an alternative dispute-resolution system, which would employ the expertise of persons in

98. The Carcross Tagish, Kwanlin Dun, Ta'an Kwach'an and Kluane First Nations have recently commenced a constitutional challenge against the child welfare policies of the Yukon government. See: "Yukon First Nations Want Control over Child Welfare" *CBC News* (17 July 2009), online: CBC News <http://www.cbc.ca/canada/north/story/2009/07/17/yukon-child-welfare.html>.

99. As explained in the discussion above regarding the potential constitutional analysis of Residential Schools, First Nations may have legal grounds under s. 25 and s. 35 of the *Constitution Act, 1982* to claim an existing right to maintain kinship relationships. For an elaboration of how this would apply to British Columbia, see Ardith Walkem, *Calling Forth Our Future*: *Options for the Exercise of Indigenous Peoples' Authority in Child Welfare* (2002), online: Union of B.C. Chiefs <http://www.ubcic.bc.ca/files/PDF/UBCIC_OurFuture.pdf>.

100. Patrick Macklen, "Aboriginal Rights and State Obligations," (1997) 36 Alb. L. Rev. 97. This article investigates the nature and scope of Canada's constitutional obligations towards Aboriginal people. More specifically, the author explores the question of whether or not constitutional recognition of Aboriginal rights imposes a positive obligation on governments in Canada to provide economic or social benefits to Aboriginal people. He examines the arguments on both sides and argues for a middle path which would require governments to provide some benefits in certain circumstances. Whether or not a particular social or economic benefit is required by s. 35(1) of the Canadian Constitution would depend on whether or not it is integral to the protection of one of the purposes or interests served by constitutional recognition and affirmation of Aboriginal rights in general. These purposes or interests include respect for Aboriginal identity, territory and sovereignty. In addition, domestic fiduciary obligations and international human rights documents support the view that federal, provincial, and territorial governments ought to provide certain social and economic benefits to Aboriginals.

101. The urgent need for a more collaborative, supportive approach to the care of Aboriginal children was brought to my attention while researching this paper. On July 29, 2009, the B.C.'s Representative for Children and Youth issued a report on an incident involving the illegal apprehension of an Aboriginal child. The social worker in question did not have statutory authority to remove the child. The reason for the child's apprehension was poor housing conditions, not the parent's inability to care for the child. Rather than providing assistance to those parents, the social worker moved the child to a foster home located off of the reserve. Subsequently, the child was permanently injured while in foster care. See Lindsay Kines, "B.C.'s child watchdog says injured baby should never have been in care: advocate" *Times Colonist,* (29 July 2009), online: Times Colonist <http://www.timescolonist.com/life/child+watchdog+says+injured+baby+should+never+have+been+care+advocate/1839748/story.html>.

the community who have knowledge about the care and resources available to families.[102] The revised approach could involve a tribunal process, which would be analogous to the way the legal system handles human rights complaints, refugee hearings or employment standards inquiries. Each of these tribunals has a review procedure that aims to resolve conflicts in a way that is timely, remedial and fair. A review panel could involve expert members from the health care, addictions treatment, non-profit organizations and Aboriginal communities. Rather than leaving the removal decision solely to the discretion of a social worker and arriving at a subsequent custody decision only after a lengthy wait, the tribunal process would be focused on the immediate problems of the family. A tribunal may also be able to order restorative measures in situations where an individual has been mistreated or harmed.

The allocation of resources for a tribunal would likely mean significant savings in legal for fees for the family fighting removal. The outside-the-court model would also be more likely to provide Aboriginal families with restorative outcomes. For example, a panel of experts are more likely to be able to direct a young couple to alternative housing funds or to provide suitable addictions counselors, as they are more closely integrated into the governmental bureaucracy and have experience working in Aboriginal social services. Ideally, the tribunal system would allow experts from both Canadian and Aboriginal societies to exercise problem-solving skills in a transparent fashion, while identifying both the short-term needs and long-term goals of a family. The hope would be to facilitate collaborative, constructive decisions that take into account various sources of knowledge and ensure the best interests of the child.

V. LEGAL REMEDIES FOR RESTORING ABORIGINAL KINSHIP

> *A great feast was held to celebrate the reunion and Gitxsan names were given to the children.*

The Gitksan narrative provides two remedies for establishing a child's kinship rights: hosting a feast and giving the child a name. Within the Gitksan House system, there are two types of adoption feasts: adoption of an individual (*ts'ilimdoogamnidiit*) and adoption of a whole family (*dimk'aphlwilp*). In addition, citizenship among the Gitksan is managed by the giving of names.[103]

As mentioned earlier in this paper, the common law is beginning to apply indigenous legal principles to determine appropriate legal remedies. In order for kinship to be adequately recognized, the Canadian legal system will need to gain an understanding of the applicable customary processes. Each Aboriginal community will have their own narratives and customs, which provide protocols for the restoration of Aboriginal kinship. Therefore, a common law system that intends to uphold kinship will need to be adapted to each community's cultural norms.

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102. See Cindy Blackstock and Nico Trocmé, "Community-based Child Welfare for Aboriginal Children: Supporting Resilience through Structural Change" (2004), online: Centres of Excellence for Children's Well-Being <http://www.cecw-cepb.ca/publications/576>.

103. Napoleon, *supra* note 2. Gitksan citizenship and adoption laws are distinct from Band membership guidelines as per the *Indian Act, supra* note 14.

CONCLUSION

Throughout this article, I have argued for a revised legal approach to Aboriginal kinship, which recognizes both the unique interests of Aboriginal children, as well as the cultural norms of their communities.

Although the federal government recently offered political recognition of the historical losses experienced by Aboriginal children, this recognition has not yet resulted in statutory reform. Likewise, the Court has not yet considered whether Aboriginal children, families, and communities have a constitutional right to maintain kinship.

The statutory reforms implemented by the British Columbia government, which intended to protect the unique interests of Aboriginal children and attempted to recognize the decision making power of Aboriginal communities, continue to be narrowly interpreted by "front-line" government decision makers. As such, the practical application of the law continues to result in limited consideration of the needs of Aboriginal children to maintain kinship relationships and little — or no — consultation with Aboriginal caregivers.

I have suggested that an appropriate judicial approach would seek to incorporate four principles found in a Gitksan narrative, namely: recognizing social conditions, supporting the caregiver, reuniting kinship, and providing resources. I have also shown that narrative provides at least two remedies for recognizing and restoring kinship.

Future developments of Canadian law will need to implement culturally appropriate mechanisms from which government workers and the Courts may make informed decisions concerning the care of Aboriginal children. It is my hope that future legal reforms create practical legal tools, either by statute or in the common law, that explicitly recognize the inherent interest that an Aboriginal child has in maintaining kinship and allow practical consideration of the legitimate concerns of Aboriginal communities.

ARTICLE

MSM BLOOD DONATION BAN: (IN)EQUALITY, GAY RIGHTS AND DISCRIMINATION UNDER THE *CHARTER*

By Rachael Lake*

CITED: (2010) 15 APPEAL 136-149

INTRODUCTION

"Blood. It's in you to give," proclaims Canadian Blood Services ("CBS"), on their official website and in their advertising campaigns; that is, unless you are a man who has ever had sex with another man, even once, since 1977.[1] If you are a sexually active gay or bisexual man, or a male who has ever engaged in sexual acts with another man (regardless of your sexual orientation) then you are banned for life from donating blood.[2] CBS states that the reason for this ban is that men who have sex with men ("MSM") are at a greater risk for being infected with HIV.[3] The organization does not identify risky sexual behaviours that actually increase the chances of HIV infection; rather, it creates a policy that makes a sweeping generalization about a group of people (gay men) based upon a perceived characteristic of that group (engaging in non-monogamous or promiscuous sexual behaviour). In short, CBS discriminates on the basis of sexual orientation, one of the acts against which the equality provision in s. 15(1) of the *Canadian Charter of Rights and Freedoms*[4] ("*Charter*") is intended to guard.

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1. Canadian Blood Services, *Record of Donation,* online: Canadian Blood Services – Société Canadienne du sang – Donor Questionnaire <http://www.blood.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/Can-I-Donate/$file/01127-F020831-E.pdf > (last accessed 12 January 2010) [*Record of Donation*].

2. Canadian Standards Association Criteria, reprinted in Adrian Lomaga, "Are Men Who Have Sex With Men Safe Blood Donors?" (2007) 12 Appeal 73 at 78.

3. Canadian Blood Services, "Media Questions and Answers –Why do you not allow gay men to donate blood?", online: Canadian Blood Services - Société Canadienne du sang – Questions and Answers <http://www.blood.ca/centreapps/internet/uw_v502_mainengine.nsf/page/Questions%20and%20Answers?OpenDocument&CloseMenu#HT3> (last accessed 12 January 2010).

4. *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11, s. 15(1) [*Charter*].

Despite the claims of some scholars that a *Charter* challenge to Question 18 of the Record of Donation[5] would succeed,[6] I argue that if brought before the courts today, CBS's discriminatory blood donation policy would likely withstand *Charter* scrutiny. The courts' approach to equality under s .15(1), combined with the reification of monogamy through institutionalized homophobia, enables and perpetuates discrimination on the basis of sexual orientation that is informed by fears of non-monogamy or promiscuity. To make this argument, I will first examine gay and lesbian rights claims that have been successfully litigated under s. 15(1) of the *Charter* to show that cases are most successful when courts are asked to engage in formal rather than substantive equality reasoning and when the claim asks for recognition of a right instead of redistribution of public funds. I will then turn to s. 15(1) jurisprudence and scholarship to argue that the current framework is inadequate to capture a substantive understanding of discrimination that would be necessary to find that CBS's policy violates s. 15(1). I will conclude by considering the ways in which advocates may begin to break out of the formal equality gridlock by speaking the language of substantive equality.

I. LITIGATING SEXUAL ORIENTATION

In order to understand why this particular s. 15(1) claim would not be successful, it is necessary to understand the limitations of the success that gay and lesbian rights claims have had in the past. Although not originally enumerated in the prohibited grounds of discrimination when the equality provision came into force on April 17, 1985, the Supreme Court of Canada ("SCC") established sexual orientation as an analogous ground in 1995 in *Egan v. Canada*[7] ("*Egan*"). Since then, litigation of gay and lesbian rights claims under s. 15(1) of the *Charter* has been seemingly successful. Gays and lesbians have sought and won inclusion of sexual orientation as a prohibited ground of discrimination in provincial human rights codes,[8] status as spouses for the purposes of spousal support,[9] and the right to marry,[10] among other seeming victories. An examination of these cases, however, reveals that courts are only willing to accept certain arguments related to homosexuality. I will argue that courts reify monogamy and exclude arguments that require recognition of the validity of non-monogamous behaviour. To make this argument I will examine the courts' reasoning in *M. v. H.*, *Egan* and *EGALE Canada Inc. v. Canada (Attorney General)*[11] ("*EGALE*"). I will also show that litigation of a gay and lesbian rights claim under s. 15(1) is most successful when it asks the court to engage in formal rather than substantive equality reasoning, and in particular when the values in the claim overlap with those of the majority and do not challenge deeply held social norms and institutions.[12] A further

5. The question on the *Record of Donation* asks, "Male donors: Have you ever had sex with a man, even one time since 1977?" A positive answer results in a lifetime deferral from giving blood. See Canadian Standards Association Criteria, as cited in Lomaga, *supra* note 2 at 78.

6. See, for example, Lomaga, *ibid*.

7. [1995] 2 S.C.R. 513 [*Egan*].

8. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*].

9. *M. v. H.*, [1999] 2 S.C.R. 3 [*M. v. H.*].

10. See for example *EGALE Canada Inc. v. Canada (Attorney General)*, 2003 CarswellBC 1006 (C.A.) (WeC) [*EGALE*].

11. *Ibid*.

12. Andrée Lajoie, "When Silence Is no Longer Acquiescence: Gays and Lesbians under Canadian Law" (1999) 14 Can J.L. & Soc. 101 at 120.

requirement of success is that the claimant seeks recognition of a right rather than redistribution of public funds.[13]

The Court in *M. v. H.* was asked to consider whether M and H (a lesbian couple) were spouses for the purposes of the spousal support provisions of Ontario's *Family Law Act*.[14] The majority found that the definition of spouse was in violation of s. 15(1) and could not be justified under s. 1. Canadian legal scholar Judy Fudge reasons that the case was successful because "*M. v. H.* neither involved the expenditure of public funds nor challenged the hegemony of heterosexual marriage."[15] The majority justices were very clear that their decision was intended *only* for the purposes of spousal support and did not apply to any other definition of spouse in the Act.[16] They also clarified that they were *not* being asked to determine whether or not same-sex partners could marry, nor whether the Act must treat same-sex partners the same as unmarried opposite-sex partners for all purposes.[17] They insisted that their decision had no impact on "marriage *per se*."[18] The justices were quick to engage in formal equality reasoning and acknowledged that same-sex couples (like opposite-sex couples) often form "long, lasting, loving, intimate relationships" which are able to be "conjugal" and may give rise to financial interdependence.[19] If not for the opposite-sex requirement in the legislation then same-sex relationships like M and H's satisfied the definition of "spouse" in the impugned provisions. As a result, the opposite-sex requirement was declared to be of no force and effect and was suspended for six months to allow the Ontario government to change the legislation. The Court reiterated "twenty-one times in as many paragraphs that the remedy favour[s] reducing the expenditure of public money."[20] The majority was comfortably able to find discrimination in *M. v. H.* because it merely required comparing this monogamous dyadic lesbian relationship to a monogamous dyadic heterosexual relationship and finding them to be the same. Marriage as a heterosexual monogamous institution was not threatened by the claim in *M. v. H.*, since the Court was able to limit the application of its decision to spousal support.

The judgment in *M. v. H.* stands in stark contrast to *Egan*, wherein the majority held that excluding same-sex couples from old age pensions violated s. 15(1) but was justified under s. 1. As Judy Fudge demonstrates, *Egan* ultimately failed because it involved both the expenditure of public funds and challenged the hegemony of heterosexual marriage.[21] The majority reasons delivered by LaForest J. in *Egan* emphatically rejected the notion that same-sex couples could qualify as spouses. They stated that because procreation is central to the institution of marriage, same-sex couples cannot marry and are therefore rightfully denied the old age security pensions that are designed to support and provide security for

13. Nancy Fraser, "From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age", (1995) 212 New Left Review 68.
14. R.S.O. 1990, c. F. 3, s. 29.
15. Judy Fudge, "The Canadian Charter of Rights: Recognition, Redistribution, and the Imperialism of the Courts" in Tom Campbell, K.D. Ewing & Adam Tomkins, eds., *Skeptical Essays on Human Rights* (New York: Oxford University Press, 2001) at 342.
16. *M. v. H.*, *supra* note 9 at para. 55.
17. *Ibid*.
18. *Ibid.* at para. 52.
19. *Ibid.* at para. 58.
20. Fudge, *supra* note 15 at 342.
21. *Ibid*.

married couples into old age. In the majority's strong defense of the institution of marriage as heterosexual, one can sense an affront to this deeply valued social institution:

> [M]arriage has from time immemorial been firmly grounded in our legal tradition, one that is itself a reflection of long-standing philosophical and religious traditions. But its ultimate *raison d'être* transcends all of these and is firmly anchored in the biological and social realities that heterosexual couples have the unique ability to procreate, that most children are the product of these relationships, and that they are generally cared for and nurtured by those who live in that relationship. In this sense, marriage is by nature heterosexual. It would be possible to legally define marriage to include homosexual couples, but this would not change the biological and social realities that underlie the traditional marriage.[22]

Unlike *M. v. H.*, the claim in *Egan* clearly challenged the heteronormativity of marriage and sought the redistribution of public pension funds; as such, it did not succeed.

Eight years later, however, social values had shifted sufficiently to allow for the inclusion of gays and lesbians in the deeply valued social institution of marriage, but success still required using formal equality arguments. The path to same-sex marriage began with various s. 15(1) challenges at the provincial court level to the common law definition of marriage. The definition comes from *Hyde v. Hyde and Woodmansee*,[23] in which Lord Penzance stated, "I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."[24] In the British Columbia challenge in *EGALE,*[25] Prowse J.A. endorsed a substantive approach to equality while finding a s. 15(1) violation through formal equality reasoning. Prowse J.A. agreed with the reasons of Mr. Justice Blair in *Halpern v. Canada*[26] that "[i]f heterosexual procreation is not essential to the nature of the institution, then the same-sex couples' sexual orientation is the only distinction differentiating heterosexual couples from homosexual couples in terms of access to the institution of marriage."[27] Since the rules of formal equality dictate that like persons should be treated the same to the extent that they are alike, then all couples were allowed to marry regardless of their ability to procreate. The success of the case can again be attributed to the fact that it sought recognition of a right rather than the redistribution of public funds and because it was argued in a formal equality manner.

The *EGALE* case in particular offers a clear picture of the limitations of gay and lesbian rights claims based upon formal equality reasoning. Importantly, the case also reveals the court's fear of non-monogamous behaviour. The Court in *EGALE* was willing to accept arguments that procreation was no longer at the heart of the institution of marriage. As such, the inclusion of gays and lesbians in the institution of marriage reveals that its essential requirement is not heterosexuality, but rather exclusivity.[28] In other words, marriage is an inherently monogamous institution.

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22. *Egan*, *supra* note 7 at para. 21.
23. (1866), L.R. 1 P & D. 130 (H.L.).
24. *Ibid.* at 133.
25. *EGALE*, *supra* note 10.
26. 2002 CarswellOnt 2309 (Sup. Ct J) (WeC) [*Halpern*].
27. *EGALE, supra* note 10 at para. 90.
28. Gillian Calder, "Penguins and Polyamory: Using Law and Film to Explore the Essence of Marriage" (2009) 21:1 C.J.W.L 55 at 74.

The formal equality manner in which *EGALE* was argued reveals fears that challenging the monogamous norm of marriage would likely have resulted in failure. The EGALE factum for the trial decision[29] stressed monogamy, its success was founded on comparing same-sex relationships to opposite-sex relationships and finding them to be the same.[30] The factum stated that same-sex couples' reasons for wanting to marry were the same as heterosexual couples' reasons: romance, social recognition, financial and emotional security, legal protection, and strengthening their commitment to their relationship.[31] It spoke briefly to the diversity of the couples seeking the right to marry in terms of age, ethnicity, religion, occupation, regional location, length of relationship and family form,[32] but quoted only individuals who were all involved in monogamous relationships.[33] Avoiding the "taint of polygamy and other more 'deviant' forms of non-monogamy" was critical to the success of this case.[34] The SCC has confirmed that monogamy is now the essence of marriage, stating in *Reference re Same-Sex Marriage*[35] that "[m]arriage is the lawful union of two persons to the exclusion of all others."[36] Indeed, *EGALE* was successful because it used formal equality reasoning that avoided challenging the inherent monogamy of marriage.

I have argued that a gay and lesbian rights claim will more likely be successful when it asks the court to engage in formal rather than substantive equality reasoning. The more the values in the claim overlap with dominant opinion and do not challenge deeply held social norms the more likely the claim is to succeed. Finally, a claim is more likely to be successful when it seeks the recognition of a right rather than the redistribution of public funds.

At first glance the application of this framework to the MSM blood donation ban might seem optimistic. The claim seeks the recognition of a right rather than the redistribution of public funds. Furthermore, framing the claim in a formal equality manner premised on treating like risks alike might be successful. An affirmative response to Question 18 on the Record of Donation currently results in a lifetime deferral from giving blood. If all individuals who were at an increased risk for HIV infection were treated the same, then men who have sex with men would be deferred for six months or one year. Six months is the time period of deferral for anyone who has had sex with a person whose sexual history they do not know.[37] One year is the time period of deferral for women who have had sex with men who have had sex with men and for persons who have had sex with a sex trade worker.[38] Regardless, success using a formal equality approach in this context would undermine the ultimate goal of the claim because it would still result in sexually active gay men being excluded from donating blood.

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29. *EGALE Canada Inc. v. Canada (Attorney General)*, 2001 BCSC 1365 (Factum of the Appellant), online: Equal Marriage for Same-Sex Couples <http://www.samesexmarriage.ca/legal/bc_case/egalefactum_appeal.htm> (last accessed 12 January 2009) [*EGALE* Factum].
30. Calder, *supra* note 28 at 75.
31. *EGALE* Factum, *supra* note 29 at para. 3.
32. *Ibid.* at para. 2.
33. *Ibid.* at para. 3.
34. Calder, *supra* note 28 at 76.
35. 2004 SCC 79, [2004] 3 S.C.R. 698 [*Reference*].
36. *Ibid.* at para. 1.
37. Canadian Standards Association Criteria, as cited in Lomaga, *supra* note 2 at 78.
38. *Ibid*.

A formal equality approach does not serve to question the underlying power structures that oppress sexual minorities and perpetuate social stigmas (such as non-monogamy being deviant or dangerous) that result in discrimination. Formal equality is a valuable tool for dismantling "the legal architecture of (formal) distinctions that so often map over socially entrenched, materially patterned and culturally normalized substantive inequalities."[39] Indeed, formal equality is an effective tool for remedying formal inequalities. But because formal equality merely attempts to organize the world into things that are the same and things that are different, it makes invisible the complexity of social relations.[40] As a result, oppressive social structures are subverted to the equality claim and become invisible.[41] Thus, formal equality erases the very structures that equality claimants seek to transform.

In *M. v. H.* and *EGALE*, formal equality functioned to accord public recognition to gay and lesbian relationships that conformed to the dominant monogamous dyadic conjugal relationship structure. Engaging in formal equality strategies in these cases, however, was a fundamentally assimilative endeavour. The line between legitimate and illegitimate relationship structures merely shifted, "implicitly authoriz[ing] the exclusion of a reconfigured group of outsiders."[42] Gays and lesbians whose relationships do not conform to the publically recognized, socially valued, legally reified monogamous dyadic conjugal form are beyond formal legal protection. The difference between monogamy and non-monogamy remains a relevant social distinction that justifies formal legal exclusion. Under the rubric of formal equality, gays and lesbians who engage in non-monogamy are considered to be differently situated based upon this "relevant" characteristic, justifying the application of different formal legal regimes.

What is required to achieve actual equality in this claim is a truly substantive approach that contextualizes the position of gay men in society by recognizing and accommodating the diverse sexual identities and different approaches to relationships that exist within the gay community. Despite the court's insistence that it guarantees substantive equality, its approach to equality both historically and presently allows an easy slip back into formalism, which defeats the ultimate goal of this claim. The next part of my paper seeks to examine the deficiencies of the court's approach to equality that would serve to defeat a claim of this nature. I will argue that the court must identify and articulate the substantive values that s. 15(1) seeks to protect in order to allow for a truly substantive approach to equality.

II. CANADIAN COURTS' APPROACH TO EQUALITY UNDER SECTION 15(1)

> Equality is valued nearly everywhere but practiced almost nowhere. As an idea, it can be fiercely loved, passionately sought, widely valued, legally guaranteed, sentimentally assumed, or complacently taken for granted. As a reality, in lives lived or institutions run, it hardly exists anywhere.[43]

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39. Hester Lessard, "Charter Gridlock: Equality Formalism and Marriage Fundamentalism" in Sheila McIntyre & Sandra Rodgers, eds., *Diminishing Returns: Inequality and the Canadian Charter of Rights and Freedoms* (LexisNexis: Butterworths, 2006) at 295.

40. *Ibid*.

41. *Ibid*.

42. *Ibid.* at 296.

43. Catharine A. MacKinnon, *Women's Lives, Men's Laws* (Cambridge, Mass.: Belknap Press of Harvard University Press, 2005) at 44. Many thanks to Chris Tait for directing me towards this apt quotation.

In the same chapter of *Women's Lives, Men's Laws* from which the above quotation is taken, Catharine MacKinnon lauds Canada's promise of a substantive approach to equality. Canadian courts' commitment to substantive rather than formal equality, however, has been rhetorical.[44] In its first s. 15(1) decision, *Law Society of British Columbia v. Andrews*[45] ("*Andrews*"), the SCC laid a foundation for the pursuit of substantive equality; the test, however, was inherently deficient because it failed to articulate what substantive equality was meant to protect. *Andrews*' conception of equality as a comparative concept additionally served to undermine the court's commitment to substantive equality. The new equality framework articulated in *Law v. Canada (Minister of Employment and Immigration)*[46] ("*Law*") exacerbated the existing problems with the court's approach to s. 15(1) by articulating a singular, abstract notion of what equality is meant to protect: human dignity. Further, the SCC maintained that equality is a comparative concept. Finally, the framework articulated in *R v. Kapp*[47] ("*Kapp*") left us with problematic aspects of the *Andrews* and *Law* tests and failed to articulate the full range of wrongs caused by unequal treatment. We remain with a conceptually problematic framework that is unlikely to be applied substantively in a manner that will recognize discrimination of the type that is at play in MSM blood donation ban.

In other places and other times equality has been understood in a formal manner. Since Aristotle's *Ethica Nichomachea*, equality has been understood to mean that likes should be treated alike to the extent that they are alike and differently to the extent that they are different.[48] Formal equality (based upon this "similarly situated test") is prevalent in American equality jurisprudence surrounding the interpretation of the 14th Amendment,[49] and it disappointingly informed the interpretation of the equality guarantee in the *Canadian Bill of Rights*.[50] In *Bliss v. Attorney General of Canada*[51] ("*Bliss*"), the similarly situated test was used to deny a pregnant woman unemployment benefits that she would have received had she not been pregnant. According to *Bliss*, the legislation treated all pregnant persons equally, and any inequality was created by nature rather than the legislation.[52]

In 1989, the SCC sat poised to interpret what equality would mean for Canada, and its words were encouragingly distant from the reasoning in *Bliss*. In *Andrews*, the Court rejected a formalist approach and the similarly situated test.[53] McIntyre J. acknowledged that sometimes treating people the same may exacerbate inequalities, whereas accommodation of difference is "the essence of true equality."[54] He acknowledged that in order to achieve

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44. Fay Faraday, Margaret Denike & Kate M. Stevenson, "In Pursuit of Substantive Equality" in Fay Faraday, Margaret Denike & Kate M. Stevenson, eds., *Making Equality Rights Real: Securing Equality Rights Under the* Charter (Toronto: Irwin Law, 2006) at 17 [*Making Equality Rights Real*]. In this introductory chapter the authors state that the "project of this book, then, is to re-examine the gap between the aspirations for substantive equality enshrined in our *Charter* and the failure to implement them in practice."

45. [1989] 1 S.C.R. 143 [*Andrews*].

46. [1999] 1 S.C.R. 497 [*Law*].

47. 2008 SCC 41, [2008] S.C. J. No. 42 (QL) [*Kapp*].

48. MacKinnon, *supra* note 43 at 45.

49. *Ibid*.

50. S.C. 1960, c-44, s. 1(b).

51. [1979] 1 S.C.R. 183.

52. *Ibid.* at 190.

53. *Andrews*, *supra* note 45 at para. 30.

54. *Ibid.* at para. 31.

"full equality," one must consider the impact of the law.[55] Furthermore, McIntyre, J. stated that not every distinction or differentiation in the law will amount to a breach of the equality guarantee — only those that discriminate. The Court subscribed to a concrete and contextual (rather than abstract and blind) approach to applying s. 15(1), which is consistent with a substantive approach to equality. Justice Wilson is the most explicit in her call for a contextual approach,[56] although McIntyre, J. implicitly calls for such an approach, stating that "[c]onsideration must be given to the content of the law, to its purpose, and its impact upon those to whom it applies and also upon those whom it excludes."[57] In *Andrews*, the Court distanced itself from a formal equality interpretation and called for a contextual, purposive approach to interpreting the *Charter* equality guarantee.

A truly substantive approach to equality has incredible potential to change past patterns of oppression. It allows, encourages, and requires law-makers to redress past oppressive relationships in society. Sheila McIntyre (a prominent scholar in Canadian equality jurisprudence) maintains that *Andrews*' strengths are its rejection of formalism, its embrace of a purposive and contextual analysis and its focus on the effects of the impugned law "that bear some relation to social, political, or legal disadvantage."[58] MacKinnon, too, is most encouraged by the Court's purposive approach to interpreting s. 15(1) as intending to promote and actually produce social equality.[59] She states:

> This does not sound like much, but it is everything: given social inequality, it requires that law has to move the world to be legal. It no longer leaves equality law standing neutrally in the face of an unequal world, sorting sameness from difference, reinforcing social inequalities by law.[60]

I agree that *Andrews* offers direction for securing substantive equality, but I maintain that the decision was inherently deficient. Although McIntyre, J. stated that not every legal distinction will constitute discrimination, he nevertheless offers little direction for determining what does. Denise Réaume (another prominent Canadian equality scholar) notes that "some implicit grasp of the need for a substantive foundation for equality rights is only dimly apparent [in the judgment]."[61] The second part of the two-part *Andrews* test asks whether or not the distinction creates a disadvantage through the perpetuation of prejudice or stereotyping,[62] but tells us nothing about how or why distinctions based on stereotypes violate the principle of equality.[63] A broader articulation of the harms that flow from unequal treatment (that is unfair for reasons other than the perpetuation of prejudice or stereotyping)[64] are absent in the judgment. Without an understanding of what precisely is

55. *Ibid.* at para. 26.
56. *Ibid.* at para. 5.
57. *Ibid.* at para. 30.
58. Sheila McIntyre, "Answering the Siren Call of Abstract Formalism with the Subjects and Verbs of Domination" in Faraday, Denike & Stevenson, *Making Equality Rights Real*, *supra* note 44 at 102.
59. MacKinnon, *supra* note 43 at 55.
60. *Ibid.* at 54-55.
61. Denise G. Réaume, "Discrimination and Dignity" in Faraday, Denike & Stevenson, *Making Equality Rights Real*, *supra* note 44 at 127.
62. *Andrews*, *supra* note 45 at para. 43.
63. Réaume, *supra* note 61 at 130.
64. Sophia Moreau, "The Wrongs of Unequal Treatment" (2004) 54:3 U. T. L. J. 291 at 294 [Moreau, "Wrongs"].

harmed by unequal treatment, the Court's commitment to substantive equality was vulnerable to slipping into familiar formal equality reasoning.

A further critique of *Andrews* that contributes to understanding the Court's propensity to use formal equality reasoning lies in Justice McIntyre's assertion that equality is a comparative concept. The condition of equality, he states, "may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises."[65] This assertion requires an equality claimant to choose a comparator group, which shifts the focus away from patterns of systemic inequality to a formal-equality-inspired analysis of sameness and difference with the comparator group.[66] Sheila McIntyre notes the Court's use of passive language, finding that it,

> speaks generically of groups lacking political power, "disadvantaged groups", groups subject to "stereotyping" or "stigmatization", groups "excluded from the mainstream." …There is no indication of who does the disempowering, stigmatizing, or marginalizing, of who enjoys entrenched political power, of how disadvantage and the inferiorizing stereotypes that legitimate second class status come about and whose hold on privileged entitlement such stereotypes shore up.[67]

The comparator group requirement allows courts to avoid recognizing relationships of dominance and subordination, as well as active roles of oppressor vs. oppressed and of stigmatizers vs. the stigmatized. Regressing to a formal equality reasoning that is based upon comparing *x* to *y* is easy, since the underlying systems producing inequalities remain hidden.

The original deficiencies of *Andrews* were added to in *Law*. The SCC in *Law* attempted to pinpoint the substantive value underlying the right to equality that had been missing from the *Andrews* judgment. Speaking for the Court, Justice Iacobucci identified that the purpose of s. 15(1) is to prevent the violation of human dignity.[68] Iacobucci J. reaffirmed that equality is a comparative concept that requires the claimant to establish a comparator group.[69] He established a new three-stage test that focused on finding harm to the claimant's feeling of human dignity and articulated four contextual factors that may be taken into account at the third stage of this test to determine whether the law is discriminatory within the meaning of s. 15(1). The factors include: the existence of pre-existing disadvantage of the claimant group; correspondence between the grounds of the claim and the claimant's actual need, capacity, or circumstances; the ameliorative purpose or effect of the impugned law upon a more disadvantaged person or group; and the nature of the interest affected.[70] The Court problematically maintained that equality is a comparative concept and articulated only one substantive value to ground constitutional equality (harm to the claimant's feelings of human dignity).

Although the Court articulated this substantive reason for why unequal treatment is wrong, Sophia Moreau argues that there are three additional wrongs of unequal treatment that the

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65. *Andrews*, *supra* note 45 at para. 26.
66. McIntyre, *supra* note 58 at 103.
67. *Ibid.*
68. *Law*, *supra* note 46 at para. 51.
69. *Ibid*. at para. 55.
70. *Ibid.* at para. 88.

Law test fails to separately recognize. Its failure to do so, she states, makes the test "conceptually problematic and less able to recognize as discriminatory certain instances in which the claimant has indeed suffered one or more wrongs."[71] Moreau argues that the *Law* test rightly begins with the abstract ideal that the state should treat each individual with equal concern and respect and value every person's inherent worth and dignity.[72] The test, however, relies upon a subjective concept of dignity when it asks how a person *feels* when confronted with the impugned law, and it restricts findings of violation under s. 15(1) to instances when those feelings are caused by unfair unequal treatment. Moreau states that this is problematic because "although the test purports to be about the feelings of the claimant, the question on which it really turns is whether or not the treatment received by the claimant was unfair."[73] Whether or not the unequal treatment in question is wrong (and should therefore be found to violate s. 15(1)) is only fully determined having regard to the three additional wrongs Moreau identifies: unequal treatment wrongs people when it is based upon prejudice or stereotyping, when it perpetuates oppressive power relations, when it leaves people without access to necessary basic goods, and when it diminishes an individual's feelings of self-worth.[74] The *Law* test conflates these different conceptions of the wrong[75] and ultimately fails to offer "a comprehensive and explicit analysis of the kinds of treatment that amount to a violation of dignity";[76] the test, therefore, is unlikely to recognize certain types of discrimination when they do exist.

A gay man who attempts to donate blood and is rejected because he is gay would most certainly *feel* as though his dignity had been harmed. To establish whether or not this treatment is in fact discriminatory, however, a court would likely justify the policy based upon the broader social objective of ensuring the safety of the blood supply under the second and fourth contextual factors of the *Law* test. The burden on the claimant to find a link between his treatment and his actual needs (the second contextual *Law* factor) has been identified as problematic because it shifts the analysis of the purpose of the legislation from s. 1 to s. 15(1). The government (unlike the claimant) has unlimited resources and is in the unique position to be able to know what the purpose of the legislation is since it enacted the law or policy. Furthermore, incorporating the broad objective of the legislation into the equality analysis shifts the focus of the inquiry away from the claimant's lived experience of discrimination.[77]

The previously-mentioned example is illustrative of the ease with which an equality claim can be defeated without a proper understanding of what s. 15(1) is meant to address. What then, does substantive equality aim to address? How does unequal treatment wrong people beyond the fact that it is unfair? Moreau finds that unequal treatment is arbitrary when it is motivated by or publicly justified in terms of prejudice or stereotypes. A stereotype does not correspond to an individual's actual circumstances or abilities and serves to lessen an individual's autonomy to define his abilities for himself.[78] Arbitrarily unequal treatment lim-

71. Moreau, "Wrongs", *supra* note 64 at 294.
72. *Ibid.* at 319.
73. *Ibid*.
74. *Ibid.* at 297-314.
75. *Ibid.* at 318.
76. *Ibid.* at 319.
77. Fiona Sampson, "The Law Test for Discrimination" in Faraday, Denike & Stevenson, *Making Equality Rights Real*, *supra* note 44 at 256.
78. Moreau, "Wrongs", *supra* note 64 at 298.

its an individual's "power to define and direct his life in important ways - to shape his own identity and to determine for himself which groups he belongs to and how these groups are to be characterized in public."[79] Thus, injury to dignity can be part of the explanation for why unequal treatment is wrong when based upon stereotypes or prejudice, but it does not offer the full explanation of the harm that is caused by this type of discrimination.[80]

The stereotype that gay men practice sex in a manner that increases their risk of HIV infection is arbitrary. The ban is an antiquated policy implemented in 1983,[81] when little was known about HIV and AIDS. At that time, gay men represented 61 percent of all new cases of AIDS and Haitian immigrants represented 37 percent.[82] Since there was no test available to detect HIV and the safety of the blood supply was their paramount concern, the Canadian Red Cross Society (the predecessor of CBS) asked gay and bisexual men as well as Haitian immigrants to abstain from donating blood.[83] Categorical exclusion of these groups was the only way to maintain the safety of the blood supply.[84] CBS now uses three different tests for HIV that are between 99 and 100 percent effective.[85] The window period for infection has dropped from six to eight weeks to eleven days.[86] The risk of transfusion infection from HIV-infected blood is estimated to be one unit per 4.7 million donations.[87] Additionally, although MSM remain the group with the highest number of new cases of HIV infection at 39.6 percent, their rate of infection has dropped every year since 2001.[88] Tests that virtually guarantee that HIV-infected blood will be detected and will not enter the blood supply expose the arbitrariness of categorical exclusion of donations from gay men.

This arbitrary distinction harms gay men by limiting their power to shape their own identity and to decide how the group to which they belong is to be characterized in public. The stereotype that gay men practice unsafe sex that puts them at a higher risk of HIV infection results in gay men being publicly defined by another group's image of them. A gay man is less able to shape his sexual identity based upon his own sexual practices. His ability to publicly characterize the group to which he belongs as safe and responsible is thwarted. Ultimately, the public proclamation of the worthlessness of this very personal part of himself serves to weaken his sense of what is possible for himself.

The second reason Moreau identifies as why unequal treatment is wrong is because it perpetuates oppressive power relations, which deny individuals such "goods" as "the opportunity to participate as equals in public political argument [and] equal influence in certain

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79. *Ibid.* at 299.

80. *Ibid*.

81. Lomaga, *supra* note 2 at 75.

82. *Ibid.*

83. André Picard, *The Gift of Death: Confronting Canada's Tainted-Blood Tragedy* (Toronto: Harper Collins Publishers, 1995) at 73 as cited in Lomaga, *ibid*.

84. Lomaga, *supra* note 2 at 75.

85. *Ibid.* at 79.

86. Canadian Blood Services, "Nucleic Acid Amplification Testing for HIV", online: <http://www.bloodservices.ca/CentreApps/Internet/UW_V502_MainEngine.nsf/resources/PDF/$file/general_Document.pdf> at 3 (last accessed 12 January 2010).

87. Lomaga, *supra* note 2 at 79.

88. Public Health Agency of Canada & Centre for Infectious Disease Prevention and Control, *HIV and AIDS in Canada: Selected Surveillance Tables to June 30, 2007* (Ottawa: Surveillance and Risk Assessment division, 2007), online: < http://www.phac-aspc.gc.ca/aids-sida/publication/survreport/pdf/tables0607.pdf> at 13 (last accessed 12 January 2010).

social contexts."[89] She notes that these goods have value in and of themselves; denying them to someone harms that individual separately from whether or not that individual's autonomy has also been lessened by this wrong.[90]

By further entrenching heterosexist views about sexuality and relationships, the blood donation ban accords with this wrong. The ban premises heterosexual sex as safe and normal and stigmatizes gay sex as dangerous and deviant. This stigmatization leaves gay men without sufficient social influence, since it generates fear about their suitability for certain positions. Canada's report on HIV/AIDS in 2003 revealed that 30 percent of adults in Canada would be uncomfortable working in an office with a person with HIV and 50 percent do not think that people with HIV should be allowed to serve in such public positions as dentists or cooks.[91]

As I have illustrated, these two conceptions of the wrong flowing from unequal treatment are precisely those that are at play in CBS's MSM blood donation ban. The *Law* test fails to recognize these wrongs as discriminatory because injury to dignity is the singular conception of the harm caused by unequal treatment. The SCC further fails to address *Law*'s lack of a substantive underpinning in its most recent reformulation of the equality framework in *Kapp*.[92]

In *Kapp*, the SCC addressed some of the problematic aspects of the *Law* test but left us with a framework that insists on equality as a comparative concept, one which is unlikely to recognize the wider range of discriminatory actions identified by Moreau. The decision acknowledged that the comparator group requirement had allowed formal equality reasoning to resurface in the post-*Law* period.[93] The Court's comments, however, were limited to this acknowledgement and failed to address any of the comparator group concerns raised by academics in the literature the Court cited.[94] The Court seems to continue to require equality claimants to establish comparator groups, leaving us with an equality analysis that is vulnerable to a regression towards formal equality reasoning.

Encouragingly, the majority did recognize that the human dignity requirement established in *Law* was — as a legal test — burdensome on claimants, abstract, subjective and "confusing and difficult to apply."[95] The Court seems to have removed this requirement from the test. In its place, however, the Court failed to articulate what their vision of substantive equality entails. The reasons merely state that s. 15(1) and 15(2) "work together to promote the vision of substantive equality that underlies s. 15 as a whole."[96] *Kapp* implied that the *Law* test was never meant to stray from the approach established in *Andrews*,[97] but, as I argue

89. Moreau, "Wrongs", *supra* note 64 at 305.

90. *Ibid.*

91. A. Anne McLellan, *Looking Forward: Focusing the Response* (Ottawa: Minister of Public Works and Government Services Canada, 2003) at 3.

92. *Kapp*, *supra* note 47.

93. *Ibid.* at para. 22.

94. Jonette Watson Hamilton and Jennifer Koshan, "The End of *Law*: A New Framework for Analyzing Section 15(1) Charter Challenges" The Court (15 April 2009), online: The Court <http://www.thecourt.ca/2009/04/15/the-end-of-law-a-new-framework-for-analyzing-section-151-charter-challenges/> (last accessed 12 January 2009).

95. *Kapp*, *supra* note 47 at para. 22.

96. *Ibid.* at para. 16.

97. *Ibid.* at para. 24.

above, *Andrews* is inherently problematic because it, too, failed to fully articulate the substantive wrongs that the equality provision is intended to protect.

Kapp encouragingly removed the harm to dignity requirement, shifted the analysis back to considerations of prejudice and stereotyping, and added disadvantage as a separate indicator of discrimination. The decision, however, must be interpreted broadly in order to recognize the additional wrongs of unequal treatment previously identified by Moreau.[98] In two SCC decisions that have interpreted *Kapp*,[99] the Court has "simply dropped all reference to disadvantage as an independent element."[100] Moreau cautions: "[s]uch a narrow interpretation will likely have the unfortunate effect of blinding us to other ways in which individuals and groups, that have suffered serious and long-standing disadvantage, can be discriminated against."[101] In order to recognize discrimination based upon oppression or dominance of one group over the other (or based upon the denial of basic or necessary goods), Moreau insists that courts "must be careful to treat the three ideas in *Andrews*, 'disadvantage,' 'prejudice' and 'stereotyping,' as related but distinct ideas, rather than collapsing disadvantage into prejudice and stereotyping."[102] A careful and broad interpretation of the three conceptions of discrimination articulated in *Kapp* is required to substantively ground s. 15(1). Disadvantage in particular must be interpreted broadly and purposively to recognize the wider wrongs (perpetuation of oppressive power relations and denial of basic or necessary goods) caused by unequal treatment.

Under the *Kapp* framework, a challenge to the MSM blood donation ban would likely not succeed for the same reasons that it would likely not succeed under the *Law* framework: the Court insists that equality is a comparative concept and it has not separately recognized the wider wrongs caused by unequal treatment. While it is possible that a court may recognize the ban as discriminatory because it is based upon stereotype, it is more likely that *Law*'s second and fourth contextual factors (which *all* lurk within the *Kapp* decision as "relevant to the *Andrews* question of whether the claimant has suffered the right sort of disadvantage, prejudice or stereotyping, rather than to the *Law* question of whether the claimant's dignity has been demeaned")[103] would undermine a finding of discrimination. The court would likely not recognize the ways in which the ban perpetuates oppressive power relations, since this type of unequal treatment remains absent from its understanding of the equality guarantee. If the court continues to gloss over disadvantage as a separate wrong caused by unequal treatment then it will remain blind to discrimination that is based upon the unfair dominance of one group over another.[104] Additionally, the court's insistence that equality is a comparative concept reintroduces the temptation to understand and apply equality in a formal manner. Non-monogamy will therefore continue to be a relevant difference that justifies differential treatment.

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98. Sophia Moreau, "R. v. Kapp: New Directions for s. 15", (2009) 40:2 Ottawa L. Rev. 283 at 292 [Moreau, "New Directions"].

99. *Ermineskin Indian Band and Nation v. Canada*, 2009 SCC 9, 302 D.L.R. (4th) 577, [2009] 2 C.N.L.R. 102; *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30, [2009] W.D.F.L. 2957.

100. Moreau, "New Directions", *supra* note 98 at 292.

101 *Ibid*.

102 *Ibid*.

103. *Ibid*.

104. *Ibid.*

CONCLUSION

As I have argued, a s. 15(1) challenge to CBS's discriminatory MSM blood donation ban would likely not succeed if brought before the Court. Because *Andrews*, *Law* and *Kapp* failed to establish a comprehensive conception of the substantive values that underlie the equality provision in the *Charter*, the Court's approach to equality remains without a substantive underpinning that will recognize all forms of discrimination where they exist. These cases, in combination with the Court's insistence that equality is a comparative concept, indicate that facial judicial reaffirmation of substantive equality approaches is undermined by a tendency towards formal equality reasoning. Previous gay rights claims litigated under s. 15(1) were successful only when they asked courts to engage in formal equality reasoning and when they sought recognition of a right. *M. v. H.*, *Egan* and *EGALE* show that formal equality strategies have reified monogamy as the dominant relationship form; *EGALE* in particular reveals the Court's fear of non-monogamous behaviour. Formal equality cannot transform the social structures that equality claimants seek to change because the structures are subverted and are made invisible by formal equality's concern with sameness and difference. In this case, a formal equality approach will not be successful because it would nevertheless result in the banning of gay men from donating blood. Confronting this fear of non-monogamy and contextualizing the position of gay men in society would be necessary to achieve success in a s. 15(1) challenge to the blood donation ban. A successful challenge to the MSM blood donation ban requires the Court to adopt a truly substantive equality approach that accommodates the different relationship structures and diversity of sexual expression within the gay community.

Sheila McIntyre urges advocates to "speak substantively" to overcome these barriers.[105] Former Justice L'Heureux-Dubé suggests that substantive equality is "a language like every other; an embodiment of the norms, attitudes and culture that are expressed through equality's rules of grammar and syntax, nuances, exceptions and dialects."[106] Advocates should therefore make explicit the links between inequalities and the homophobic laws and policies which produce those inequalities. McIntyre argues that using active descriptor words such as disenfranchised and disempowered "invites questions of authorship," and "disrupt[s] the privileged innocence and unreflectively supremacist habits that formalism authorizes."[107] The Court will be more likely to find discrimination where it sees the claimant as oppressed or subordinated rather than simply having been disadvantaged in some way that remains unlinked to the wrongs of unequal treatment. Explicit recognition of the links between gay oppression, judgments that reify monogamy and discriminatory government policies may eventually lead to the elimination of the blood donation ban and the future of a more equitable society.

105. McIntyre, *supra* note 58 at 110.

106. Claire L'Heureux-Dubé, "Conversations on Equality" (1999) 26 Man. L. J. 273 at para. 23.

107. McIntyre, *supra* note 58 at 112.

CASE COMMENTARY

MACARAEG V. E CARE CONTACT CENTERS LTD.: SHORTCOMINGS OF THE BRITISH COLUMBIA COURT OF APPEAL'S ANALYSIS

By Marcus F. Mazzucco*

CITED: (2010) 15 Appeal 150-159

INTRODUCTION

At issue in *Macaraeg v. E Care Contact Centers Ltd.*[1] ("*Macaraeg* (BCCA)") was whether rights conferred in employment standards legislation could be implied as a matter of law into an employment contract and, if so implied, could then be enforced in a civil action. The British Columbia Court of Appeal's unanimous decision rejecting both of these positions is troubling for several reasons. First, by failing to distinguish between a civil action arising from breach of contract and one arising from breach of statutory duty, it may be argued that the Court embarked upon a misguided analysis for determining whether rights conferred by employment standards legislation can be implied into employment contracts. Second, the Court's assessment of the adequacy of the administrative structure in place to enforce statutory employment rights is inconsistent with the object of employment standards legislation, as it fails to recognize the ways in which the current enforcement regime insufficiently protects employees' interests and encourages the breach of minimum employment standards by unscrupulous employers. The decision creates several practical difficulties for employees in British Columbia. In effect, it puts an onus on employees to know their statutory rights so that they are in a position to either negotiate such rights into employment contracts as express terms (which can then be enforced in a civil action), or to enforce them using existing statutory remedies.

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1. *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (QL) [*Macaraeg* (BCCA)].

The following is the background of the case. The complainant, Ms. Macaraeg, had been hired by E Care Contact Centers Ltd. ("E Care") in May of 2004 and had signed a written employment contract which set out her rate of pay, but was silent on the issue of overtime pay. From July 2004 to February 2006, Ms. Macaraeg regularly worked overtime hours: more than 8 hours per day and more than 40 hours per week. When Ms. Macaraeg inquired as to her entitlement to overtime pay, she was informed by her supervisor that E Care did not pay overtime rates for extended work days. However, under sections 35(1) and 40 of the British Columbia *Employment Standards Act*[2] ("BC *ESA*"), Ms. Macaraeg was entitled to overtime pay. Ms. Macaraeg's employment was terminated without cause in February 2006. She was given two weeks' pay in lieu of notice. Ms. Macaraeg brought an action for wrongful dismissal. She claimed damages in lieu of reasonable notice for herself, and payment for overtime hours for herself and as the representative of a class of E Care employees.

At the British Columbia Supreme Court, *Macaraeg v. E Care Contact Centers Ltd.*,[3] ("*Macaraeg* (BCSC)," Justice Wedge ruled on two points of law: first, whether the minimum overtime pay requirements of the BC *ESA* were implied terms of law in the contract of employment between Ms. Macaraeg and E Care; and second, whether Ms. Macaraeg was entitled to bring a civil action to enforce her statutory right to overtime pay, or whether such an action was precluded by statutory ouster. After reviewing several case authorities, notably the SCC's decision in *Machtinger v. HOJ Industries*[4]("*Machtinger*"), and the decisions of several provincial appellate courts involving similar cases,[5] Wedge J. concluded that the mandatory overtime pay requirements of the BC *ESA* were implied terms of the employment contract. Justice Wedge further held that the BC *ESA* did not preclude Ms. Macaraeg from pursuing her claim for overtime pay in a civil action for breach of her employment contract.

On appeal, however, the Court of Appeal unanimously overturned the Superior Court's decision. Justice Chiasson, writing for the Court, concluded that Ms. Macaraeg was not entitled to enforce her statutory right to overtime pay, since the exclusive jurisdiction to determine such claims lies with the Director of Employment Standards ("the Director") under the enforcement mechanisms of the BC *ESA*. And as a result, the overtime pay requirements of the BC *ESA* could not be implied terms of the contract of employment between Ms. Macaraeg and E Care.

The Court of Appeal's path in reaching this conclusion is perplexing. First, the Court's failure to separate a civil cause of action based on breach of contract from one based on breach of statutory duty led it to depart from established contract law principles governing the implication of contractual terms as a matter of law. Second, the Court's assessment of the enforcement remedies under the BC *ESA* was far removed from the policy objectives underlying employment standards legislation, leading it to a conclusion that is at odds with the practical realities that many employees face in the employment relationship. Both of these positions create a series of impediments for employees in British Columbia seeking to enforce their statutory right.

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2. *Employment Standards Act*, R.S.B.C. 1996, c. 113 ["BC *ESA*"].
3. *Macaraeg v. E Care Contact Centers Ltd.*, 2006 BCSC 1851 (QL) [*Macaraeg* (BCSC)].
4. *Machtinger v. HOJ Industries*, [1992] 1 S.C.R. 986 (QL) [*Machtinger*].
5. *Stewart v. Park Manor Motors Ltd.*, [1967] O.J. No. 1117 (C.A.) (QL) [*Stewart*]; *Kolodziejski v. Auto Electric Service Ltd.*, [1999] S.J. No. 276 (C.A.) (QL) [*Kolodziejski*]; *Beaulne v. Kaverit Steel & Crane ULC*, [2002] A.J. No. 1066 (Q.B.) (QL) [*Beaulne*].

I. CONFLATING THE COMMON LAW ACTION FOR BREACH OF CONTRACT AND THE COMMON LAW ACTION FOR BREACH OF STATUTORY DUTY

The Court of Appeal seems to have failed to apply the distinction between common law and statutory rights of action in its reasoning. Justice Chiasson correctly noted, "in the absence of an appropriate provision in an employment contract, compensation for overtime is not payable at common law."[6] He further noted that where general statutory rights exist, they may be enforced in a civil action as breach of statutory duty, or where those rights are incorporated into a contract, as breach of contract. Yet, Chiasson J.A.'s analysis, which concluded that Ms. Macaraeg could not seek compensation in a civil claim, appears to merge these two foundations for a civil action. By doing so, his reasoning appears inconsistent with established principles of contract law, as articulated by Justice McLachlin (as she then was) in *Machtinger*.

As McLachlin J. noted in her concurring judgment in *Machtinger*, the test for when a term can be implied into a contract as a matter of law is necessity.[7] She added that the test for "necessity" is whether the term "was necessary in a practical sense to the fair functioning of the agreement, given the relationship between the parties."[8] In *Machtinger*, at issue was whether the common law right of reasonable notice was an implied term in an employment contract. Justice McLachlin concluded that since a legal duty to provide reasonable notice of termination had been imposed on contracting parties by the law for many years, it was clearly a "necessary condition" in the employment relationship.[9]

It is not difficult to conceive how a statutory duty imposed on employers for several years, such as the duty to provide overtime pay, could be considered an implied term as a matter of law. A recognized objective of employment standards legislation is that it seeks to redress the imbalance of bargaining power between employers and employees, which so often prevents employees from achieving more favourable contract provisions than those offered by employers, by imposing certain minimum standards to ensure the fair functioning of the employment agreement.[10]

Indeed, this appears to be the inference drawn by Wedge J. in *Macaraeg* (BCSC) and affirmed by the court in *Holland v. Northwest Fuels Ltd.*[11] ("*Holland*"). Justice Wedge recognized that McLachlin J.'s judgment in *Machtinger* was concerned with the implication of the common law right to reasonable notice; however, she astutely noted that in the absence of such a common law right, McLachlin J. would have concluded that the statutory minimum right to notice was an implied term of the employment agreement.[12]

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6. *Macaraeg* (BCCA), *supra* note 1 at para. 4.
7. *Machtinger*, *supra* note 4 at paras. 51-53. Justice McLachlin essentially affirmed the test for the implication of a term as a matter of law as suggested by Le Dain J. in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, [1987] 1 S.C.R. 711, relying on the decision of the House of Lords in *Liverpool City Council v. Irwin*, [1977] A.C. 239.
8. *Ibid*. at para. 52.
9. *Ibid*. at para. 54.
10. Katherine Swinton, "Contract Law and the Employment Relationship: The Proper Forum for Reform" in Barry J. Reiter & John Swan, eds., *Studies in Contract Law* (Toronto: Butterworths, 1980) 357 at 363.
11. *Holland v. Northwest Fuels Ltd.*, 2007 BCSC 569 at para. 22 (S.C.) (QL) [*Holland*].
12. *Macaraeg* (BCSC), *supra* note 3 at para. 32. It should be noted, however, that Wedge J.'s comment concerned both the majority and concurring judgments of Iacobucci J. and McLachlin J. respectively.

The Court of Appeal ultimately rejected Wedge J.'s interpretation of *Machtinger*, distinguishing that case on the grounds that it did not concern the implication of statutory rights. While this conclusion itself may be criticized as a narrow reading and interpretation of *Machtinger*, it may be argued that a much larger and more problematic issue is the Court of Appeal's approach in determining whether overtime statutory requirements were implied terms in Ms. Macaraeg's employment agreement as a matter of law.

To critically analyze the Court of Appeal's approach to this issue, it is necessary to briefly revisit the litigation context of *Macaraeg* (BCSC). Justice Wedge presided over an interlocutory motion whereby E Care had made an application for a ruling on two points of law under Rule 34 of the British Columbia *Supreme Court Rules*.[13] As previously mentioned, the two points of law were the following:

> 1. As a matter of law, were the minimum overtime pay requirements of the [BC *ESA*] implied terms of the contract of employment between E Care and its employee, Cori Macaraeg?
>
> 2. Is Ms. Macaraeg entitled to bring a civil action to enforce her statutory right to overtime pay, or does the jurisdiction to determine such claims lie exclusively with the Director of Employment Standards under the enforcement mechanisms of the [BC *ESA*]?[14]

When Wedge J. came to her conclusion on the first point of law, namely that the statutory requirements were implied terms of the employment contract as a matter of law, it was unnecessary for her to consider the second point of law, namely, whether the BC *ESA* precluded a civil action to enforce that contractual right. Once a term has been implied into a contract of employment as a matter of law, and is breached by an employer, it may be enforced in a civil action as breach of contract. As the Saskatchewan Court of Queen's Bench noted in *Watson v. Wozniak (c.o.b. W5 Eld'r Care Homes)*, if employment standards are implied into a contract of employment, then "[i]t rests on the court's jurisdiction in matters of contract ... to determine [whether there has been a] breach of contractual terms, notwithstanding that the contractual terms have been deemed into effect by statute."[15] Justice Wedge echoed this proposition in *Macaraeg* (BCSC) where she stated: "As a matter of law, every employment contract must contain certain minimum benefits. Whether the benefit is conferred by statute or the common law is not relevant to the question of whether the benefit is an implied term of the employment contract."[16]

For greater certainty that the implication of a statutory right into a contract of employment can be enforced in a civil cause of action for breach of contract, s. 118 of the BC *ESA* provides, in part:

> 118 … [N]othing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

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13. British Columbia, *Supreme Court Rules,* B.C. Reg. 221/90. Rule 34(1) states: "A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set down by requisition for hearing and disposed of at any time before the trial."

14. *Macaraeg* (BCSC), *supra* note 3 at para. 1.

15. *Watson v. Wozniak (c.o.b. W5 Eld'r Care Homes)*, 2004 SKQB 339 at para. 22 (QL) [*Watson*].

16. *Macaraeg* (BCSC), *supra* note 3 at para. 59.

Relying on *Fuggle v. Airgas Canada Inc.*[17] ("*Fuggle*"), Wedge J. noted that s. 118 of the BC *ESA* preserves the right of an employee to bring any action existing at common law, such as breach of contract. She cited the example of overtime pay provisions being express terms in a contract, and thus enforceable under the common law action for breach of contract. Arguably, the same proposition would apply where a statutory overtime pay requirement is an implied term in a contract.

Despite this finding, Wedge J. went on to consider the second point of law put before her by E Care, namely whether the BC *ESA* precluded Ms. Macaraeg from enforcing her statutory right to overtime pay in an action. However, in doing so she acknowledged, albeit in passing, that it was not necessary to determine the second point of law once statutory rights are found to be implied terms of an employment agreement. She noted that "the minimum requirements of the [BC] *ESA* are implied terms of employment contracts and, on that basis, *prima facie* within the jurisdiction of the court."[18] However, by considering the second point of law, Wedge J. appears to have led the Court of Appeal astray in its own analysis of the issue.

Before considering the Court of Appeal's analysis, it is important to distinguish between a statutory requirement giving rise to a cause of action at common law for breach of contract and a cause of action arising from breach of statutory duty. With respect to breach of statutory duty, it is well established that there is no independent cause of action for breach of statutory duty at common law.[19] As articulated in *Orpen v. Roberts* ("*Orpen*") and *Vanderhelm v. Best-Bi Food Ltd.*("*Vanderhelm*"), where a statute confers a right, and defines particular remedies to enforce that right, *prima facie* the right-bearing party can only avail themself of the statutory remedies, and no other.[20] However, as a *prima facie* presumption, it is rebuttable if, on an examination of the impugned statute as a whole, it may be determined that it was the intention of the legislature to create rights enforceable by civil action.[21] Courts have attempted to ascertain the intention of the legislature by considering whether the legislation provides an effective enforcement of the right conferred by statute.[22] If the statute does, there is no need for enforcement external to the statute, and thus no civil cause of action.[23]

Significantly, the test in *Orpen* is specific to the issue of whether a civil action is available for damages or other relief based on the breach of a statutory duty, and does not concern instances where a statutory right has been implied into a contract as a matter of law.

In *Macaraeg* (BCCA), however, the Court of Appeal failed to acknowledge this, possibly because Wedge J. did not clarify that the two points of law she considered were separate and independent of one another: the first, involving the implication of statutory rights as a matter of law, concerned a civil cause of action for breach of *contract*; whereas the second, in-

17. *Fuggle v. Airgas Canada Inc.*, 2002 BCSC 1696 (QL) [*Fuggle*].

18. *Macaraeg* (BCSC), *supra* note 3 at para. 116.

19. See e.g. *Seneca College of Applied Arts and Technology v. Bhadauria*, [1981] 2 S.C.R. 181; *Orpen v. Roberts*, [1925] S.C.R. 364 (QL) [*Orpen*]; *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Vanderhelm v. Best-Bi Food Ltd.* [1967] B.C.J. No. 180 (S.C.) (QL) [*Vanderhelm*].

20. *Orpen*, *ibid.* at 4; *Vanderhelm*, *ibid.* at para. 3.

21. *Vanderhelm*, *ibid*.

22. See *Stewart*, *supra* note 5 at paras. 8-9; *Kolodziejski*, *supra* note 5 at paras. 28-30; *Macaraeg* (BCCA), *supra* note 1 at para. 74.

23. *Macaraeg* (BCCA), *ibid.*

volving an examination of legislative intent (to which Wedge J. also applied *Orpen*), concerned a civil cause of action for breach of *statutory duty*.

Instead, Chiasson J.A. viewed the presumption articulated in *Orpen* as the starting point for determining whether the statutory overtime pay requirements could be implied into Ms. Macaraeg's employment contract; thus, in effect, conflating a cause of action based on breach of statutory duty and a cause of action based on breach of an implied term of a contract. As Chiasson J.A. noted,

> the inquiry is whether the legislation allows pursuance of statutorily-conferred rights in a civil action. In my view, the answer to that question ends the inquiry: if yes, in a case such as this, the right is an implied contractual term and enforceable in an action for breach of contract; if no, the employee is obliged to rely exclusively on the enforcement mechanism in the legislation.[24]

Relying on this process of inquiry, Chiasson J.A. distinguished the findings of the Ontario Court of Appeal in *Stewart v. Park Manor Motors Ltd.* ("*Stewart*") and the Saskatchewan Court of Appeal in *Kolodziejski v. Auto Electric Service Ltd.* ("*Kolodziejski*"), wherein each court held that rights conferred by employment standards legislation were implied into contracts of employment,[25] by noting that "statutory enforcement of regimes in those cases were determined to be unsatisfactory and this afforded the plaintiffs a cause of action for breach of contract."[26]

With respect, it is arguable that Chiasson J.A. may have erred in his analysis. What may be inferred from McLachlin J.'s judgment in *Machtinger* (BCSC) is that the test for the implication of a term in an employment contract as a matter of law, even where that term derives from statute, is necessity. It is not, as Chiasson J.A. suggests, whether the legislature intended outside enforcement of the statutory right. The implication of a term into a contract involves the principles of contract law, not statutory interpretation. Had the issue in *Macaraeg* (BCSC) only concerned the maintenance of an action for breach of statutory duty, the Court of Appeal's analysis of the adequacy of the statutory enforcement regime would have been correct.

Alternatively, the Court of Appeal could have applied the test of necessity to determine whether the statutory overtime pay provisions could be implied into Ms. Macaraeg's employment contract as a matter of law. Ironically, had Chiasson J.A. engaged in such an analysis, that is, had he examined whether the statutory right to overtime pay was necessary in a practical sense to the fair functioning of the agreement, he might have looked to the adequacy of the enforcement regime in the BC *ESA* and come to the same conclusion about the implication of the statutory terms. In other words, since Chiasson J.A. found that the BC *ESA* provides a sufficient mechanism to enforce employees' rights to overtime pay, it would not be "necessary" to imply such rights into an employment agreement. But let there be no confusion, this is not the approach that the Court of Appeal took. Justice Chiasson, with respect, misapplied the test for determining whether a civil action can exist based on a breach of statutory duty to determine whether a statutory right was implied into an employment agreement as a matter of law. Interestingly, the Court of Appeal's analy-

24. *Ibid*. at para. 84.

25. *Stewart*, *supra* note 5 at para.10; *Kolodziesjki*, *supra* note 5 at para. 21.

26. *Macaraeg* (BCCA), *supra* note 1 at para. 77.

sis of the enforcement scheme of the BC *ESA* may have been relevant had it actually applied the test of necessity for the implication of contractual terms.

So what does it mean for employees in British Columbia that the Court of Appeal concluded that the rights conferred by the BC *ESA* are not implied into employment agreements as a matter of law? It means that if employees want to enforce a statutory right in a civil action (for example, a right to overtime pay), they will have to ensure that some express term in the employment contract addresses that issue. If the term violates the BC *ESA*, it is very likely that a court will then enforce the minimum standards set out in the legislation.[27] However, this assumes that employees have an awareness of their statutory rights and the bargaining power to negotiate such minimum standards. For Ms. Macaraeg, this was clearly not the case: her contract was silent on the issue of overtime pay and when she inquired as to whether she was entitled to such a benefit her employer denied having a statutory duty. The Court of Appeal's decision forces employees like Ms. Macaraeg to rely on the enforcement mechanisms under the BC *ESA*, which, as will become evident in the following section, can be of limited value.

II. APPLYING *ORPEN*: ASSESSING THE OBJECT OF THE BC *ESA* AND THE ADEQUACY OF ITS ENFORCEMENT

Although the Court of Appeal appears to have erred in its analysis of whether the statutory overtime provisions were implied terms in Ms. Macaraeg's employment contract, the Court's assessment of the object and provisions of the BC *ESA* is still relevant in determining whether a breach of an employer's statutory duty is actionable, independent of a breach of contract claim. As mentioned above, the test set out in *Orpen* and *Vanderhelm* for determining whether a statutory right may be enforced outside of the statutory regime involves an examination of the object and provisions of the statute as a whole to ascertain whether the legislature intended external enforcement.

In the Court of Appeal's review of the BC *ESA*, it examined the object of the Act and the adequacy of its enforcement provisions. Justice Chiasson concluded that the BC *ESA* provided a "complete and effective administrative structure for granting and enforcing rights to employees."[28] With all due deference, Chiasson J.A.'s analysis is troubling in two respects. First, too little emphasis was placed on the intention of the legislature in discerning the object of the BC *ESA*. In *Machtinger*, Iacobucci J., writing for the majority, stated the following:

> The objective of the Act is to protect the interests of employees by requiring employers to comply with certain minimum standards ...
>
> Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible, is to be favoured over one that does not. In this regard, the fact that many individual employees

27. In *Macaraeg* (BCCA), *supra* note 1 at para. 53, Chiasson J.A. cited the case of *Beaulne*, *supra* note 5, where an employer had made an oral promise to pay an employee for her overtime, but because an amount was not specified, the promise was in breach of the Alberta *Employment Standards Code*. The Court found that the provision for overtime was therefore void and implied the minimum overtime pay provisions required by the statute.

28. *Macaraeg* (BCCA), *ibid*. at para. 103.

> may be unaware of their statutory and common law rights in the employment context is of fundamental importance.[29]

This articulation of the objectives of employment standards legislation was affirmed and supplemented in *Re Rizzo & Shoes Ltd.* ("*Rizzo*"), wherein Iacobucci J. stated that the employment standards legislation could be characterized as "benefits-conferring legislation" and, as a result, "it ought to be interpreted in a broad and generous manner" with any ambiguity in its interpretation being resolved in favour of the employee.[30]

It follows that, under the *Orpen* test, a court should use the policy objectives of employment standards legislation to inform its assessment of the adequacy and comprehensiveness of a statute's administrative regime. Relevant questions to aid such an analysis could include whether the statutory regime encourages employers to comply with the BC *ESA*, or whether the provisions sufficiently protect employees who are unaware of their statutory rights.

Justice Chiasson acknowledged this policy-driven approach where he noted, "[t]here is a relationship between [the objective of] 'benefits-conferring' and enforcement. That is, if the statutory enforcement mechanism were inadequate to enforce the conferred benefit, the recipient of the benefit should have recourse to a civil cause of action."[31] However, in his review of the enforcement regime in the BC *ESA*, Chiasson J.A. appears to have abandoned this sentiment as he examined the provisions of the Act in a mechanical fashion without regard for the policy objectives of the legislation. For example, Chiasson J.A. noted that s. 74(3) of the BC *ESA* requires a complaint to be brought within six months of the last day of employment. Further, s. 80(1) limits the amount of wages recoverable on a Director's determination to six months before the earlier of the date of a complaint or the date of termination. In *Stewart* and *Kolodziejski*, similar provisions were interpreted to signify that the statutory remedies were not adequate.[32] Yet, Chiasson J.A. disagreed and simply stated that "[c]onsidering the [BC] *ESA* as a whole," the provisions provide sufficient enforcement without further explanation as to how he reached such a conclusion.[33]

This finding appears inconsistent with the objectives of employment standards legislation as articulated by Iacobucci J. in *Machtinger* and *Rizzo*. The interpretation has the effect of barring the enforcement of a benefit conferred by the legislature in cases where employees are not aware of their statutory rights. Consider, for example, Ms. Macaraeg, who was working overtime on a regular basis for 19 months. When she inquired as to whether she was entitled to overtime pay, she was told by her supervisor that E Care did not pay overtime rates for extended work days. It is likely that it was not until Ms. Macaraeg's employment was terminated and she sought legal advice that she became aware of her entitlement to overtime pay. However, under the statutory recovery regime her claim would only be for the last six months of overtime that she worked. Further, had she waited more than six months to bring a complaint to the Director, she would not be entitled to any remedy under the BC *ESA*. E Care, however, has benefited from not paying Ms. Macaraeg for her months of overtime, without penalty. How can such a provision be deemed "adequate" when it fails

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29. *Machtinger*, *supra* note 4 at paras. 31-32.
30. *Re Rizzo & Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 36 (QL) [*Rizzo*].
31. *Macaraeg* (BCCA), *supra* note 1 at para. 76.
32. *Stewart*, *supra* note 5 at para. 11; *Kolodziejski*, *supra* note 5 at paras. 29-30.
33. *Macaraeg* (BCCA), *supra* note 1 at para. 98.

to protect the interests of employees and fails to encourage employers to comply with the minimum standards of the BC *ESA*?

The second troubling aspect of Chiasson J.A.'s analysis is his apparent oversight of certain amendments that were made to the BC *ESA* in 2002[34] that have had a significant impact on the enforcement of statutory rights. For instance, Chiasson J.A. described the "investigative powers" of the Director and essentially concluded that the Director provides an adequate enforcement of employees' statutory rights.[35] However, as Fairey notes, because of the 2002 amendments, "[t]he Director is no longer required to 'investigate' every complaint received, only to 'accept and review' complaints."[36] In addition, Chiasson J.A. seems to have ignored the fact that s. 76 of the BC *ESA* replaces the once active investigation of complaints with a mediation process designed to obtain settlement agreements.[37] As a result, he failed to consider how, in practice, such an enforcement procedure not only undermines the minimum statutory benefits conferred to employees, but also creates incentives for employers to breach the BC *ESA*.[38]

In the context of mediation, the imbalance of power between employers and employees is likely to be reproduced as most employees act on their own without legal representation. In contrast, employers will often have legal counsel present and, therefore, may be able to exert greater pressure on employees to accept a settlement that is less than what the BC *ESA* prescribes.[39] Moreover, given that the choice for employees is to either accept a settlement or run the risk that their claims will be unsuccessful in an adjudicative hearing following the failed mediation, they may be more likely to accept a settlement.[40]

Further, such an enforcement procedure does not encourage employers to comply with the BC *ESA*. In fact, the opposite is true. Unscrupulous employers may be encouraged to breach the BC *ESA* if they know that an employee's complaint is more likely to lead to a mediated settlement, rather than a formal investigation. It is, therefore, curious that Chiasson J.A. did not consider these amendments in his analysis.

In short, had Chiasson J.A. adhered more closely to the *Orpen* test and placed greater emphasis on the policy objectives underlying the BC *ESA* when examining the adequacy of the enforcement regime, including the mediation and settlement agreement process, his conclusion may have been different.

Incidentally, it is telling that, before the Court of Appeal overturned the decision of Wedge J., there was a uniform response to *Macaraeg* (BCSC) in the legal community in British Columbia. Law firms representing employers were quick to release commentaries that

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34. *Employment Standards Amendment Act*, S.B.C. 2002, c. 42.

35. *Macaraeg* (BCCA), *supra* note 1, at paras. 88, 93.

36. David Fairey, *Eroding Worker Protections BC's New 'Flexible Employment Standards* (Vancouver: Canadian Centre for Policy Alternatives, 2005) at 21. See BC *ESA*, *supra* note 2 at s. 76(1).

37. Fairey, *ibid*. at 7, 21, 32. See BC *ESA*, *ibid*., s. 78.

38. This is not to suggest that resolution of disputes between employers and employees by way of mediated settlement does not have its advantages. As Fairey observed from his discussions with Employment Standards Branch staff, the mediated settlements were particularly advantageous if (i) employees needed some of the money owed with a degree of urgency, (ii) the facts surrounding the complaint were unclear and dispute, or (iii) both the employer and employee were partly in the wrong. See Fairey, *ibid*. at 22.

39. *Ibid*.

40. *Ibid*.

warned employers to ensure that their policies and practices were in strict compliance with the BC *ESA*. This raises the question: if employees' interests and rights were being adequately protected under the current statutory enforcement regime, as Chiasson J.A.'s conclusion suggests, then why do so many employers fail to comply with the BC *ESA*?

In conclusion, the shortcomings of the Court of Appeal's analysis and ultimate decision are not merely significant from an academic perspective, but have real-life implications for employees in British Columbia. For example, by limiting the enforcement of statutory rights to the scheme set out in the BC *ESA*, particularly the six month limitation period on bringing a complaint and assessing damages, an onus is put on employees to know their statutory rights and take the initiative to either negotiate them into an agreement or be restricted to enforcing them under the BC *ESA*. Such an effect is entirely inconsistent with the object of employment standards legislation which is to protect the interests of employees, who are often unaware of their employment rights, while encouraging employers to comply with the minimum requirements of the BC *ESA*. Furthermore, an enforcement regime that, in some cases, perpetuates the power imbalance between employers and employees only hinders employees from securing the minimum rights that they were unable to effectively bargain for at the outset of the employment relationship.

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