WAITING FOR DEMOCRACY— ALLAN HUTCHINSON'S PROGRAMME FOR PROGRESSIVE POLITICS: A REVIEW ESSAY

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WAITING FOR CORAF: A CRITIQUE OF LAW AND RIGHTS. By Allan C. Hutchinson. Toronto: University of Toronto Press, 1995. Pp. 269. ($55.00)

I. INTRODUCTION

Allan Hutchinson is the pre-eminent voice of Critical Legal Studies in Canada. In his recent book *Waiting for Coraf: A Critique of Law and Rights*[1] he sets out his programme for a reinvigorated progressive politics freed of the confining delusions of the law. Critical Legal Studies has been singularly unsuccessful in convincing Canadians of a progressive bent to abandon rights litigation and the law as a site for progressive political change in favour of an unfettered democratic majoritarian politics. This failure is evident in the way that the most influential progressive movements such as the union movement, the feminist movement, gay, lesbian and bisexual activists, anti-racism groups as well as environmentalists, welfare rights activists and native peoples continue to make strategic use of the courts to advance their causes. They do not do this out of stupidity or ignorance. Sometimes they have no choice because they are dragged into court by those opposed to their cause.[2] At other times, cases are brought to force the recognition of the claims of traditionally excluded groups to equal treatment and status as human beings. There is considerable debate over the appropriateness of such strategies within movements because activists are very sensitive to the tension between the need for a progressive *mass* politics and the obvious elitism of institutions such as courts. Very few progressives seeking to build a more egalitarian society believe that the courts can substitute for politics although judicial intervention can at times and in specific conditions either shield against regressive measures by governements controlled by anti-egalitarian majorities or act as a prod to move governments in a slightly more progressive direction even if it is against their will. The success of such litigation strategies can only ever be partial and ephemeral because conditions and contexts change. An apparent victory in any specific case can be transformed into a defeat precisely because the law cannot insulate politics from the shifts in the political coalitions which control our legislatures.

In the current political climate, progressive Canadians find themselves marginalized in the political debate whose terms are more and more defined by distinctly anti-egalitarian forces such as the business community, the Reform Party and provincial governments whose sole agenda is reducing the deficit. The decimation of the New Democratic Party in the last federal and Ontario elections accentuates this sense of loss of direction and hope.

Given the current state of progressive politics in Canada, there is an urgent need for a clear and compelling basis for collective and individual intervention in democratic debate.[3] A multitude of national and international issues — the environment, economic

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[1] (Toronto: University of Toronto Press, 1995) [hereinafter page references to this book will be put in square brackets directly in the text].

[2] The case of Chantal Daigle (see *infra* notes 35 & 36) discussed in Chapter Four is a good example of the need to mount a swift and effective legal opposition to a claim for rights which would seriously limit the control of women over their bodies: Chantal Daigle never asked to be in court and feminists did not start this case.

[3] See *e.g.* A. Giddens, *Beyond Left and Right: The Future of Radical Politics* (Stanford: Stanford University Press, 1994) for a useful discussion of the future of progressive politics in these times of radical conservatism and crisis in public finance.

growth, wealth distribution, deficit reduction, the financing of social services, the very structure of government as well as its continued existence, war and epidemic — call out for a cogent and compelling view from the left. If current trends continue, the basic premises of the Canadian polity will have been permanently altered in ways designed to reduce the role of the state and to prevent the reconstruction of any form of the welfare state. The growth of well-organized secular (and not so secular) right-wing movements which reject traditional Canadian conservatism in favour of the American right-wing ideology of unfettered individuals and unfettered markets with minimal redistribution requires a response.

Waiting for Coraf is not the programme we need. It does not address the urgent issues of our times, adds little to popular debate, and provides little practical guidance on the mobilization of opposition to regressive social policies. Allan Hutchinson argues both that law is politics and that law is the primary obstacle to democratic politics. Given this view of law, it would be logical to focus on politics, to write about politics, to take positions on issues of pressing concern so that the democratic debate could be enriched with new and stimulating proposals. Yet, this particular manifesto focuses on law for an audience of lawyers.

Professor Hutchinson concentrates on critique rather than transformation. He mocks lawyers and legal scholars for their 'fetishizing' of the *Canadian Charter of Rights and Freedoms*[4] and of law in general. They are poor naïve and deluded fools, "the best kind of fools" [96] but fools nonetheless. This disdain for those who believe in the potential of law as a site for emancipatory politics would suggest that the focus should be elsewhere, but this book stays resolutely in exactly the same place. It tries to exorcise the liberal demons which possess lawyers and legal academics through ritualistic sarcasm and irony and a cold shower of contempt designed to make those lawyers and academics acknowledge their own foolishness and seek salvation in the postmodern creed.

Professor Hutchinson concentrates on primarily judge-made law.[5] The book

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

[5] See footnote 42 to text on p. 22 where the author states:

> Also by 'law' I do not mean all phenomena that can be considered legal; my focus is more restricted. While I encompass law as an analytical category and practical activity, my enquiry is largely about the work of courts and lawyers, whether they are dealing with the common law, statutes or constitutional norms. This essay makes no claims about the work of legislatures or constitutional conferences. Accordingly, my concern is with the relation between the larger world of politics and the smaller sphere of doctrinal development.

Note 42 reproduces a large chunk of footnote 15 to text on p. 27 of "Crits and Cricket: A Deconstructive Spin (or Was It A Googly?)" in R. Devlin, ed., *Critical Legal Studies*, (Toronto: Emond Montgomery Publishing Ltd., 1991) 7. This suggests that Hutchinson's desire to make a sharp distinction between judge-made law and statutory law is fundamental to his entire critique of law. Given critical legal theory's rejection of dichotomies, his attempt to confine and discipline his critique seems surprising and implausible. If text-based law suffers from irremediable indeterminism, the source of the text in cases or statute cannot save it from its own lack of grounding. Indeterminism results from the very nature of language and democratic warrant does not solve this problem. For example, s. 15 of the *Sales of Goods Act*, R.S.O. 1990, c. S-1 which uses the expression "merchantable quality" is no less indeterminate than either the *Charter* or common law doctrine. Canadian human rights legislation is based on the premise that rights-talk provides a coherent frame for regulating discrimination. Hutchinson can provide no objective and determinate basis for his own dichotomy and his critique

dissects court decisions and academic constitutional commentaries in making the argument that litigation strategies premised on using the *Charter* as a means of achieving progressive social change are inevitably destined to failure. He mocks the elitism of litigation strategies which exclude ordinary Canadians from full participation in the re-imagining of the Canadian community. This theme — the counter-majoritarian critique — will be familiar to all readers.

In doing so, Allan Hutchinson has written a book which is as much a part of the problem as a part of the solution. He is so deeply involved in the very debate which he purports to scorn and reject that the subtext of his book contradicts and undermines his argument. This book is about elite thought and destined to convince the very same elite of the folly of its own ways. He argues that law is vitally, but malevolently, important as a field of human interaction through which we define ourselves individually and collectively. For this reason, progressive Canadians should acknowledge the failure of liberal legalism and move to the realm of pure politics free of the taint of rights and liberalism.

It is unclear whether the proposal is to organize for the repeal of the *Canadian Charter of Rights and Freedoms* or simply to ignore the legal system, abandon *Charter* litigation and organize politically for social change. If his is the second, more modest, proposal, he is merely reiterating the point that litigation is a risky strategy unlikely to result in widespread social change. Progressive lawyers and politicians know this already and debate the merits of any particular case before deciding to proceed with litigation or to beat a strategic retreat from the courts.[6] The discussion in Chapter Six of progressive lawyering proposes a "political form of lawyering" [174] in which the goal will be transformative action. Hutchinson argues that lawyers must adopt a posture of "strategic scepticism" [175 & 178]. It is not at all clear where lawyers would get the democratic warrant for such lawyering but Hutchinson argues:

> The core idea is act in a guerilla-like way – within a broad set of progressive objectives – to seize the possibilities of any contingent moment in order to achieve judicial decisions that heighten the status quo's contradiction and open up space for lasting political action. [178]

Setting aside the rhetorical excess (lawyers as guerillas!), this argument suggests that Allan Hutchinson's message may be the moderate and obvious point that litigation as a strategy for advancing progressive causes has its risks.

Given the claim that his critique shows that liberal legalism, rights-talk and the *Charter* are positive evils, it would appear that the first proposal — organizing for the repeal of the *Charter* — constitutes the heart of Allan Hutchinson's programme for progressive politics in Canada. Its abolition is a necessary condition for the building of an effective egalitarian democratic politics. If this understanding is correct, Allan Hutchinson is asking us to give up our rights: Dialogic Democrats of the world unite; you have nothing to lose but your rights!

Given that rights-talk has been at the forefront of every progressive political

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exceeds his intention. The very possibility of law is at stake in his critique.

[6] For example, I encountered Philip MacAdam, an Ottawa lawyer who has represented many gay and lesbian clients, on the street one day and he recounted a debate within the group supporting litigation challenging the ban on same-sex marriage. Apparently, after reflection, the decision was taken not to proceed because of the risk of failure. My impression is that groups have such discussions all the time and regularly make strategic decisions about the use of litigation.

movement in Canada, from the union movement to the feminist movement to the social democratic movement, this proposal is definitely radical. But is it persuasive? Can progressive Canadians argue effectively in favour of social change and mobilize the necessary support without resort to claims based on equality and human dignity? In my opinion, Allan Hutchinson does not offer a plausible vision of a renewed progressive politics. Advocating the abolition of rights as the first step in a transformed progressive politics would be a dangerous move in times of right-wing triumphalism. Minorities would find themselves vulnerable to increasingly discriminatory government regulation of their lives and their ability to organize resistance would be weakened. However important, this book does not address and grapple with the concrete experience of women, minorities, traditionally excluded groups or activists who work in the various movements for social change. It acts as if law and lawyers are the only concern and all other experience is irrelevent. And this purports to be democracy?

I will focus on three points in making this criticism. Firstly, I will address the tone of the book through a discussion of the framing metaphor — legal scholars as Vladimir and Estragon in Becket's *Waiting for Godot.* I will then examine the structure of the argument to illustrate the strengths and weaknesses of the analysis. Finally, I will ask whether the vision of dialogical democracy meets the concerns of progressive Canadians. I conclude by suggesting that Hutchinson does not provide a persuasive argument in support of his proposal for the abandoning of rights-talk in favour of unadulterated politics. The point is not that he is wrong but rather that his analysis leaves too many questions unanswered to be convincing in its present form.

II. Who Is Waiting and for What?

Allan Hutchinson begins and ends his critique of rights with a riff off the Samuel Beckett play *Waiting for Godot.*[7] Like all good literary creations, Beckett's text is open to the infinite play of imagination. Allan Hutchinson's reading of *Waiting for Godot* is as legitimate as any other. His reading of the play places lawyers and legal academics in the main roles as Vladimir and Estragon who are waiting patiently, impotently, and absurdly for the impossible arrival of Godot.[8] The *Canadian Charter of Rights and Freedoms* plays the role of Godot, the always absent external agent who will miraculously set things right...if only he or she would show up. Like Godot, the *Charter* can only offer the illusory hope of progressive social change through waiting. Lawyers and academics then are deluded and naïve fools who "gallingly"[9] refuse to see the truth that the *Charter* can only perpetuate injustice and not solve it.

This use of Beckett's text is too unidimensional and self-flattering[10] to truly

[7] S. Beckett, *Waiting for Godot* (New York: Grove, Weidenfeld, 1954).

[8] I had the good fortune of seeing a production of the play at the Théâtre du nouveau-monde in Montréal. It was a brilliantly comic and bleak production with the reknowned Québec actor Jean-Louis Millette in the role of Pozzo. Never once during the play did I think of the *Charter.*

[9] Throughout this book Hutchinson uses words like "galling" [83] to describe the "almost willful refusal" [93] of others to agree with him. They are "blind to or refuse to see the full implications of their critique."[139] His tone is that of someone certain of the rightness of his position who sees disagreement as either a personal affront to him or a character flaw in his opponents. He never quite seems to grasp that people could disagree with him because of flaws in his own argument.

[10] It is self-flattering because Hutchinson claims rather arrogantly to have transcended the

resonate with either the play or with life. Rooted in existentialism, this play celebrates the resilience of the human spirit in face of the absurdity of existence. We live for a few short years on a planet in a vast and indifferent universe.[11] Our greatest creations, whether material or intellectual, are comically ephemeral against the mysteries of the universe. Meaning is difficult to find or to create in a world uninhabited or forsaken by God, gods or goddesses. *Waiting for Godot* is a play about despair and the courage to go on in spite of it.

Beckett does not scorn or condescend to his brilliant, comic creations, Vladimir and Estragon. He sees them as Everyman caught in existential dilemmas from which none of us can escape. Their courage in choosing not to commit suicide is like Beckett's in choosing to write despite his dark message few want to hear.[12] So too, seeking to create a just society may be foolish and absurd but we have no choice in the matter. Our comically optimistic struggles to eliminate cruelty and injustice are our efforts to write the text that abolishes the inevitable darkness and wards off death.[13]

Hutchinson suggests that Godot stands for God, a now dead illusion.[14] Beckett may have taken the name from a Balzac play, *Mercadet*, at the end of which a character, Godeau, arrives to distribute money and solve all the problems of the characters.[15] Thus, Godot may stand for any *deus ex machina*, arriving in the nick of time to resolve the plot and ensure the characters' happiness. Beckett, anticipating postmodern self referential practices, may have been referring obliquely to this theatrical convention in which, through some improbable event or intervention, all problems and dilemmas are solved.[16] Indeed, the comic interlude created by the arrival of Pozzo and Lucky is a comment on the role of theatre in life. Life is messy, difficult and often tragic. Problems are seldom solved and we do not live happily ever after. We are only ever distracted momentarily from our tragicomic existence just as Vladimir and Estragon go on waiting after the diversion of Pozzo and Lucky.

The context in which this play was written suggests richer, more evocative possibilities which make Godot a more intriguing literary invention. Beckett and

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illusions of his colleagues and the majority of the population. He never explains how he achieves such privileged insight into the truth.

[11] See *supra* note 7 at 57: "They give birth astride of a grave, the light gleams an instant, then it's night once more."

[12] As Eric Bentley points out, if Beckett truly embraced the despair of his own work he would not have produced the substantial body of literature which he left us: E. Bentley, *The Life of the Drama* (New York: Applause Theatre Book Publishers, 1964) at 349-50.

[13] Peter Brook in *The Empty Space* (Middlesex: Penguin Books, 1968) at 65 says:

> ...Beckett's dark plays are plays of light, where the desperate object created is witness to the ferocity of the wish to bear witness to the truth. Beckett does not say 'no' with satisfaction; he forges his merciless 'no' out of a longing for 'yes' and so his despair is the negative from which the contour of its opposite can be drawn.

[14] Beckett himself said that Godot is not God and does not represent him. See H. Bloom, *The Western Canon* (New York: Riverhead Books, 1994) at 465 and M. Worton, "*Waiting for Godot* and *Endgame*: theatre as text" in J. Pilling, ed., *The Cambridge Companion to Beckett* (Cambridge: Cambridge University Press, 1994) 67 at 76 where he says that "[i]t is well known that Beckett refused Christian interpretations of his work, as indeed he refused all reductive readings..."

[15] See Bentley, *supra* note 12 at 348, n. 10. On the other hand, Beckett apparently detested Balzac so the name may come from somewhere else. See Bloom, *supra* note 14 at 465.

[16] See Worton, *supra* note 14 at 74 where he states: "We may consequently describe Beckett's plays as being metatheatrical, in that they simultaneously *are* and *comment upon* theatre."

Suzanne Deschevaux-Dumesnil, his future wife,[17] were members of the French Resistance. They walked about 150 miles through the south of France to Rousillon in flight from the Gestapo in 1942.[18] Beckett stated many times during his life that Vladimir and Estragon were he and Ms. Deschevaux-Dumesnil.

Waiting is always a demoralizing exercice, but the reasons for waiting are diverse and sometimes waiting is the only action possible. When resistance fighters or refugees flee, their flight inevitably involves waiting. Thus, Godot may be the person adept at smuggling people from Nazi-occupied France to the relative freedom of Vichy but does not come through on the promise.[19] Or those in flight may anticipate with dread their capture by the forces they are fleeing. In this light, Godot is not the illusion of a benign deity offering redemption in exchange for passivity but the rogue state bent on genocide and death. Vladimir and Estragon no longer are foolish but await the perhaps inevitable arrival of their destruction.

With this reading, the play turns back on Hutchinson and suggests that giving up rights may be as much a source of our dilemmas as their solution:

> Estragon: (*anxious*). And we?
> Vladimir: I beg your pardon?
> Estragon: I said, And we?
> Vladimir: I don't understand.
> Estragon: Where do we come in?
> Vladimir: Come in?
> Estragon: Take your time.
> Vladimir: Come in? On our hands and knees.
> Estragon: As bad as that?
> Vladimir: Your Worship wishes to assert his prerogatives?
> Estragon: We've no rights any more?
> *Laugh of Vladimir, stifled as before, less the smile.*
> Vladimir: You'd make me laugh if it wasn't prohibited.
> Estragon: We've lost our rights?
> Vladimir: (*distinctly*) We got rid of them.
> *Silence. They remain motionless, arms dangling, heads sunk, sagging at the knees.*
> Estragon: (*feebly*) We're not tied? (*Pause*) We're not -
> Vladimir: Listen!
> *They listen, grotesquely rigid.*[20]

The lament of the two main characters of the play for their lost rights echoes Thomas Mann's words in a radio broadcast on the BBC during the Second World War:

> It must not be forgotten that at the outset of this war, which began not in 1939 but in 1933, there was the abolition of the rights of man. "The Rights of Man are abolished." proclaimed

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[17] *Ibid.* at 67, Beckett is quoted as having said "You must realise that Hamm and Clov are Didi and Gogo at a later date, at the end of their lives (...) Actually they are Suzanne and me."

[18] See Bloom, *supra* note 14 at 468. See also D. Bair, *Samuel Beckett* (New York: Harcourt, Brace, Jovanovich, 1978) at 317-20 where she describes their flight from Paris after the Gestapo infiltrated the underground group of which they were a part. Beckett was resolutely apolitical throughout his life. His involvement in the Resistance came about as much because of the murder of Jewish friends by the Germans as from his political opposition to fascism.

[19] See Bair, *ibid.* at 318.

[20] *Waiting for Godot*, *supra* note 7 at 13.

> Dr Goebels at this time in the Sportpalast of Berlin, and 10,000 poor idiots applauded enthusiastically, absurdly, lamentably.[21]

Given the times and the political context in which the play was written, Godot can be read as symbolizing the promise of millennial politics which offers redemption through orthodoxy and submission. It is as illusory as the promise of any other solution to the tragedy of human existence.

The use of Godot as a metaphor for the *Charter* is unpersuasive for other reasons. According to Hutchinson's own argument, law is neither non-existent nor ineffectual. The critique of law is premised on the view that law is the field of human interaction through which we define ourselves individually and collectively. We must reject the *Charter* and liberal legalism because they constitute us as citizens and legal subjects in ways which prevent the realization of our true potential as social beings. The word of the law is omnipresent and omnipotent. There is no waiting for the law. It has already arrived and with a vengeance; "law constitutes a particular social and normative reality." [200] The difficulty is not that law is illusory but that it is too much a reality. As a matter of positive law, the *Charter of Rights and Freedoms* is very much at centre stage and saying it does not exist will not make it go away. If, as Hutchinson argues, law is very much with us then it seems contradictory to condemn lawyers and academics on the basis that they are waiting for it to arrive.

The use of Godot as the framing metaphor of the book is ironic in at least two ways. Firstly, given the elitist appeal of the play,[22] it defines Hutchinson as another elite intellectual operating in a world of theory to which only elite academics have access and which gives him privileged knowledge of what is best for everyone. Secondly, Beckett's works are starkly modern and stripped of detail.[23] There are no riotous crowds in Beckett's play. This play is as much about the absence of meaning, communication and community and the absurdity of our attempts to find meaning as anything else.[24]

Using Beckett to frame a hymn to community and interpretative politics seems strangely dissonant, as if Allan Hutchinson is expressing a belief in the futility of his own project. Hutchinson's belief in social transformation and dialogic democracy has exactly the same function in his thought as Godot in the lives of Vladimir and Estragon and the progressive potential of the *Charter* for the targeted legal academics. It is what represents hope for Hutchinson and justifies his life-in-waiting. His belief is no less futile and absurd than those of any other human being trying to get through the day. Indeed,

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[21] This quotation appears in A. Renaut & L. Sosoe, *Philosophie du droit* (Paris: Presses universitaires de France, 1991) at 31, n. 1. Translation by the author.

[22] This needs qualification. Peter Brook refers to a production of *Waiting for Godot* in San Quentin prison, *supra* note 13 at 75. Apparently, the prisoners had no difficulty in following the play even though for many it was the first play they had seen. Meaning depends on context and experience. But Brook also states (at 67) that Beckett is "theatre for an élite" [emphasis in original] and notes that Beckett and others working in the same vein are "unable to be both esoteric and popular at one and the same time" (at 68). The plays are definitely a minority taste but the make-up of that minority may be diverse and democratically self-selected. The irony of the use of Beckett in this text comes perhaps from the fact that Hutchinson wants the minority's pleasures in this vision to occupy all the space when it is clear that most people do not share in the pleasure — an undemocratic approach to arguing for democracy.

[23] Bentley calls him a "modernist", *supra* note 12 at 351.

[24] If Beckett was thinking of his flight with his future wife from the Nazis, it may be that the clowns' survival depends on escaping the notice of society at every moment that they wait for its arrival.

recent failures at social transformation suggest that his belief may require more blindness to reality than most.

This inability of Hutchinson to understand and confront the ironies of his own position permeates the book. He argues: "Lawyers and judges, as an elite class, embody a particular vision of society: they are predominantly white, European, male, heterosexual and middle class." Allan Hutchinson is a white, European, heterosexual and middle class male trained as a lawyer and teaching at an elite institution. Yet he can transcend his own social location, experience, and interests to see clearly where our Vladimirs and Estragons stumble blindly and remain inevitably in the tight grip of identity determinism. But if he is able to escape such determinism, cannot other legal academics and judges share the same capability? It is too easy to dismiss judges and lawyers on the basis that "identity is more important than argument" [171] without acknowledging that one's own position is equally determined by identity.

III. The Argument

Waiting for Coraf stands or falls on the persuasiveness of its argument about the role of rights in a democratic society. Allan Hutchinson proposes that we dispense with rights-talk in favour of politics in the form of what he calls "dialogic democracy". His argument is made up of two parts: a critique of *Charter* jurisprudence and exegeses and a proposal for a new type of politics which eschews rights-talk in favour of dialogue. Allan Hutchinson believes that the Canadian *Constitution*[25] delegates legislative power to the judiciary in giving them jurisdiction to determine if government action meets *Charter* standards. *Charter* standards are too vague to provide any guidance to the exercise of judicial discretion. So judges govern while government by judges is profoundly anti-democratic. In order to avoid the charge of illegitimacy, he argues that the courts and their apologists have to develop a theory of judicial decision-making which meets three criteria:

> *It must be determinate* (i.e., a general enumeration of rights and their informing values can be made so that they are capable of being applied directly and distinctively to the concrete resolution of particular disputes). [6]
>
> *It must be objective* (i.e., the enumeration and application of those pertinent rights and values must not be reducible to the opinions of sitting judges or academic commentators, but must be governable by principles and values which inhere in the law itself, Canadian constitutional traditions, or some other independent source). [6-7]
>
> *It must be progressive* (i.e., the rights articulated and the results achieved do not uphold the status quo for its own sake, but are based upon a commitment to improving the lot of the least advantaged in society and allow for the serious possibility of social change). [7]

Allan Hutchinson spends much of the book demonstrating through analyses of judgments that liberal legalism is a failure according to its own criteria. Chapter Two argues that "rights-talk fails to provide the determinate guidance and operational efficacy necessary to resolve the self-defined dilemma of a liberal society."[29] He

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[25] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

identifies and elaborates on five issues which rights-talk cannot resolve without resort to controversial choices. His conclusions are identical to the assumptions of his own argument [29]:

- *There is no neutral standpoint from which to identify who are to be the recipients of such rights...*
- *There is no non-political way of arriving at what particular groups of rights are to be recognized and enforced...*
- *There is no uncontroversial means of determining the scope and nature of each particular right...*
- *There is no method internal to the theory of rights that can be used to adjudicate upon the clash of competing rights...*
- *The recognition that rights are fundamental, but not absolute, gives rise to the difficulty of balancing the public interest against the individuals' claims...*

This chapter focuses exclusively on the cases and the theories of rights underlying the decisions. The argument can be illustrated by using the example of equality rights. The *Charter* includes equality rights but provides little guidance for their interpretation and application. For example, the text itself does not expressly mention gays and lesbians but rather concludes with wording which requires the expansion of the enumerated categories through analogical reasoning.[26] The extension of section 15 of the *Charter* to gay men and lesbians must be decided on the basis of criteria from outside of the section. Any decision will inevitably be controversial, especially given the vociferous anti-homosexual lobby which includes the Reform Party and various Liberal backbenchers.

As well, the meaning of equality is itself contested and the courts have to choose a theory from among formal equality, substantive equality, and sameness and difference theories. Again, the constitutional text provides no guidance and there are no criteria which will allow the courts to make the choice without recourse to political preference. Hutchinson argues that the *Charter* provides little or no guidance on controversial issues and concludes that rights-talk is necessarily and inevitably indeterminate. The necessity of balancing competing rights brings the indeterminacy to the forefront of the judicial and theoretical discussion. There exists no metric which would anchor such balancing in any precise calculation. Any balancing is speculative and uncertain and the pretense that it is anything else is hypocritical.

Chapter Three focuses on the criterion of objectivity in arguing that analysis of both judicial decisions and attempts to revive the formalist project demonstrates that "the claimed objectivity of Charter adjudication is revealed as entirely spurious and its practice as lacking democratic warrant." [66] In a sense, this chapter simply repeats the previous argument because, having shown that legal reasoning is indeterminate, he has

[26] There is a growing case law dealing with the impact of the *Charter* in the context of challenges to legislation based on sexual orientation discrimination including: *Vriend* v. *Alberta*, [1996] A.J. No. 182 (QL), Appeal No. 9403-0380-AC (provincial human rights legislation does not violate *Charter* by excluding sexual orientation); *M.* v. *H.*, [1996] O.J. No. 365 (QL) (Ont. C.J. (Gen. Div.)), Epstein, J. (Family law violates *Charter* in refusing spousal support rights to same-sex partners); and *Egan* v. *Canada*, [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609, 12 R.F.L. (4th) 201 (sexual orientation is covered by s. 15 of the *Charter* but impugned legislation saved under s. 1). For commentary on these cases which illustrates the inevitably controversial nature of the issue of equality for gay men and lesbians see *e.g.* R. Martin, "Hey Justice Epstein, you can't just rewrite Ontario's Family Law Act" *Law Times* (26 February-3 March 1996) 9.

already demonstrated that it is not objective. In this chapter, Hutchinson turns his attention to recent theoretical attempts to provide a theoretical framework for liberal constitutionalism. He discusses once again the work of David Beatty and argues that Beatty does not succeed in his attempt to "identify one definitive and normative explanation" of our constitutional regime because his claim to have discovered the one true reading of the *Charter* flounders on the necessary argument that the rejection of his theory by the courts means that the judges are incompetent, irresponsible and dishonest.[73]

Hutchinson also rejects William Conklin's "Espousal of Visionary Formalism"[78] which he characterizes as a positivist theory which grounds constitutional adjudication in an existing social consensus. The courts cannot claim to speak in the name of a consensus of Canadian society because the judiciary has no mechanisms for testing any hypothetical or postulated consensus empirically. Any claimed consensus is merely a surrogate for judicial opinion. Indeed the existence of the dispute over the ambit of the right in question is itself proof that there is no existing consensus.[50] Conklin resorts to constitutional visions to ground *Charter* adjudication but rather than an escape from politics this just romanticizes "a particular form of political insight."[76] Conklin is unable to show that particular visions drive the outcome of the cases decided by the judges.[78] Indeed judges seem to move from vision to vision in accordance with the demands of the cases rather than use a particular vision to build a coherent jurisprudence. Again the choice of vision appears to be indeterminate and contextual rather than determinate and objective.

If adjudication is merely another word for legislation, how can the judiciary justify or legitimate its role given the lack of any democratic mandate? Indeterminacy is fatal to rights-talk not because the answers it generates are necessarily wrong but because it cannot legitimate those answers by grounding them in such a way that they are independent of the will of the decision-maker. Courts are legislating but they lack any privileged location or insight which would make their legislative choices better or more reliable than those of the legislature.

There is a positivist answer to the charge of illegitimacy and usurpation with which Hutchinson does not deal explicitly in any detail. It is possible to concede the point that judicial decision-making is essentially legislative and still argue that this practice is nonetheless legitimate because judicial powers have democratic warrant. This legitimacy derives from the *Constitution* itself and legislation creating the court system and defining its powers as well as the general legislation and common law defining the rights and obligations of citizens. Both the *Constitution* and legislation are subject to democratic legislative revision. The enactment of the *Charter of Rights and Freedoms* as part of the repatriation of the *Constitution* was a legislative act involving all levels of government. While it is difficult to amend the *Constitution*, it is not impossible. All ordinary legislation is easily amended or abrogated by legislative majorities. If the role of the courts is democratically sanctioned and supported by democratic majorities elected to duly constituted legislative bodies, judicial legislation is legitimate and the anti-democratic critique is thereby refuted.

This argument would not fully meet and refute Hutchinson's argument. He is also convinced that existing democracy is fundamentally flawed. There are enormous inequalities and injustices which make it impossible for all citizens to participate fully and equally. The media turn electoral politics into a spectator sport or a visual spectacle

[211] in which form triumphs over substance and real issues are ignored or distorted through the prism of private interest and private gain. The glib win out over the good [199] and only the photogenic need participate. In the "commercially saturated atmosphere" of contemporary society, democratic politics is trivialized and impoverished.[211] Existing democratic politics cannot confer legitimacy because it is a spectacle in which members of the elite compete for a majority with which to govern in the interests of the elite. Because liberal democracy is as flawed as liberal legal theory, the argument of legitimacy derived from legislative authority does not succeed in deflecting Hutchinson's critique.

In Chapters Two and Three, Hutchinson shows, convincingly in my opinion, that law cannot escape from politics. Having done so, however, he has not yet made his case because, as he states: "Like all ways of seeing and comprehending the world, rights-talk distorts as much as it illuminates; it tends to shape the world in its own image."[89] If this is true, it is equally valid to say that Hutchinson's theory "distorts as much as it illuminates" and "tends to shape the world in its own image." In other words, given the non-foundationalist premises of the argument, the demonstration that liberalism is not determinate and objective only shows that it is identical to all theory in its inability to ground itself outside of its own boundaries. Liberalism is, perhaps, a failure to the extent that it aspires to formal validity. Nonetheless, some version of liberalism may still offer a plausible account of law and adjudication if liberalism can survive independently of the claim to be above and beyond politics.

Hutchinson's account of liberalism is so thin that his claim to have refuted liberalism is not completely convincing. He constructs the liberalism necessary to achieve his critical triumph through reduction of liberal philosophy to liberal legalism as embodied in the Rule of Law. Many philosophers have rejected both foundationalism and formalism without rejecting liberalism. Jeremy Bentham, an obvious example and precursor to Hutchinson's rejection of rights, argued that there are no right answers independent of the subjectivist utilitarian calculus.[27] H.L.A. Hart pointed out many years ago that Austin, Bentham's conservative disciple, also did not believe that formalist reasoning could provide objective answers independently of the utilitarian calculus.[28] Both Bentham and Austin were nonetheless committed to a form of liberalism.

Contemporary authors also deny the necessary connection between liberalism, foundationalism and formalism. Richard Rorty's theory of bourgeois liberalism argues that liberalism can survive the move to non-foundationalism.[29] He cites authors such as Isaiah Berlin, John Dewey and John Rawls as examples of liberal theorists who dispense

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[27] See generally G. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) for a detailed analysis of Bentham's critique of law.

[28] See H.L.A. Hart, "Positivism and the Separation of Law and Morals" in *Essays on Jurisprudence and Philosophy* (New York: Clarendon Press, 1983) at 64-66. For an account of Austin's positivism see R. Cotterrell, *The Politics of Jurisprudence* (London: Butterworths, 1989), especially c. 3.

[29] See "Postmodernist Bourgeois Liberalism" in R. Hollinger, ed., *Hermeneutics and Praxis* (Notre Dame, Ind.: University of Notre Dame Press, 1985) and in R. Rorty, *Philosophic Papers Volume 1: Objectivity, Relativism and Truth* (Cambridge: Cambridge University Press, 1991). See also R. Rorty, *Contingency, Solidarity and Irony* (Cambridge: Cambridge University Press, 1989), and R. Rorty, "Human Rights, Rationality, and Sentimentality" in S. Shute & S. Hurley, eds., *On Human Rights* (New York: Basic Books, 1993).

with foundationalism.[30] He also argues that, for pragmatic reasons, we should conserve notions of rights and individual autonomy. A society constructed out of rights-talk is most likely to reduce suffering and create more space for the flourishing of self-imagination and self-creation.

A coherent non-foundational liberalism can be, and has been, constructed with more or less success. Hutchinson's own non-foundationalist premises tell us that we have no arguments for choosing between non-foundational liberalism and other forms of theory. Hutchinson clearly is not persuaded by the argument that a non-foundational liberalism is possible and he rejects non-foundational liberalism as an obstacle to progressive change.[205-6][31] The success of his argument requires that we accept his contention that a non-foundational liberalism is an impossibility. This contention is not adequately developed to support his conclusion.

Hutchinson quite properly chastised Brian Langille for criticizing his sceptical account of liberal legalism as based on a misunderstanding of Wittgenstein.[32] Hutchinson responded that he is not playing the game of getting Wittgenstein right but rather playing a different game whose moves or arguments do not depend for their persuasiveness on fidelity to Wittgenstein's thought. This argument can however be turned back on Hutchinson because he appears to be arguing that no one can legitimately take the task of developing a coherent account of rights seriously. He claims to have proven that law is a futile and retrogressive activity which should be rejected in favour of politics. His opponents can respond with equal appropriateness, that they are not persuaded that law should be abandoned and that they are not interested in playing Hutchinson's game.

To avoid leaving us with two equally meritorious possibilities, liberalism and dialogic democracy, for which the only arbiter would be popular choice, Hutchinson must provide reasons justifying the rejection of liberalism. He needs to convince us that politics is indeed the only game in town. He is convinced that liberalism is bad and must be rejected but personal conviction without more is not a compelling reason to agree. Hutchinson faces a dilemma. He has to avoid the trap of determinacy and objectivism and any claim of superior insight for his own theory. If it turns out that all he can offer is a new form of objectivism, his argument will be singularly unsuccessful. But if it turns out that he can provide no reason, his argument will also be unsuccessful. The difficulty he faces is amplified by his own methodological claims:

> Like the law, jurisprudence is not a intellectual pursuit autonomous to itself. The contending positions in contemporary jurisprudence track and often derive from those on the larger political scene. Legal scholars take the heurmeneutical stances they do because of prior and more fundamental political commitments: their point of entry (and exit) in the debate over legal reasoning is largely ideological in character and motivation.[33]

This suggests that commitments are prior to arguments in which case Hutchinson's own commitments cannot be justified through reasons: you either agree or disagree — end of discussion. Irrationalism may explain the hyperinflated rhetoric which Hutchinson

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[30] See *Contingency, Solidarity and Irony, ibid.* c. 3.

[31] See A. Hutchinson, "The Three 'Rs': Reading/Rorty/Radically" (1989) 103 Harv. L. Rev. 555.

[32] Langille's critique can be found in "Revolution Without Foundation: The Grammar of Scepticism and Law" (1988) 33 McGill L.J. 451; "The Jurisprudence of Despair" (1989) 23 U.B.C. L. Rev. 549 and "Political World" (1990) 3 Can. J. Law & Jur. 139. Hutchinson's response to Langille can be found in "That's Just the Way It Is: Langille on Law" (1989) 34 McGill L.J. 145.

[33] *Supra* note 31 at 573.

so dearly loves but it undermines any attempt to persuade.

Through Chapters Four to Six, Hutchinson argues that "rights-talk...stifles the possibility of truly progressive social change." [89] In these chapters he examines cases and theories developed by legal scholars to show that rights-talk is an obstacle to progressive social transformation defined as improving the lot of the least advantaged and allowing for the serious possibility for social change.[7] The judiciary and legal theorists have been spectacularly unsuccessful in providing a convincing account of legal reasoning which would sharply distinguish judicial decision-making from political decision-making. Their decisions are neither determinate, nor objective and least of all progressive. Time and again the courts decide in favour of the powerful at the expense of the weak. Statistics show that corporations have far greater chances of being successful *Charter* claimants while the most disadvantaged are least likely to succeed in their claims.

Chapter Four illustrates the strengths and weaknesses of Hutchinson's critique. It deals with three different situations in which rights arguments have been made. The first, developed in the United States, is an argument to the effect that freedom of speech includes the right to beg. This critique contends that the case for the right of the homeless to beg only ensures that they can continue to struggle in miserable conditions. It does not provide them with shelter. This is true but the valid point that rights-talk does not solve social problems and thereby replace politics does not lead inevitably to the conclusion that litigation should be rejected. At best, the recognition of a right to beg would protect the homeless against certain forms of state harassment. This would never be adequate as a solution to the problem of homelessness but it may be necessary in the face of the refusal of elected officials to deal with this problem. Hutchinson's argument is unconvincing because it criticizes short-term solutions on the grounds that they do not solve the underlying problem. This criticism denies the possibility of strategic engagement with the legal system in specific circumstances.

The second argument relates to the issue of abortion. There is considerable irony in this choice because Allan Hutchinson himself states that "the debate over abortion and its social practice must be resolved by and for women." [103] This does not, however, convince him to pass on to other topics. Rather he argues that rights-talk has been sorely inadequate in providing for the emancipation of women because rights-talk can only acknowledge the foetus as either a "full liberal individual or nothing". [105] He criticizes the courts for holding both that abortion is a private decision of the individual woman and that the regulation of later term abortions should be left to the legislature. The courts' framing of the issues surrounding abortion isolates the individual woman from the social context and "relieves public and private elites from any justified responsibility to take steps to ensure that women have actual and realizable choices in determining the conduct of their reproductive lives." [105] He argues that the most pressing challenge for progressive scholars and activists is to establish a social life in which the need to choose abortion would be greatly reduced because women and children would be equally and fully human. In making this argument, Hutchinson condemns the courts for their inability to use rights-talk to legislate the vast social programme of health services, universal education, job creation and wealth redistribution necessary to true equality. Given Hutchinson's argument for the priority of politics over law, the courts surely cannot be criticized without hypocrisy for not doing precisely what they should

not be doing. The real point is that we need radical social change but that has little or nothing to do with the merits of a right to an abortion at this time and in this context.

Hutchinson never acknowledges that feminists who use the courts to defend the right of women to a safe abortion know very well that such a right does not in itself change society. It may, however, prevent attempts by a regressive state to prohibit and criminalize abortions. This modest goal can be very urgent as the *Morgentaler*[34] and *Daigle*[35] cases illustrate. The need for long-term social change does not eliminate the need for immediate action.

The final argument in Chapter Four dealing with the *Daigle* case is the most peculiar of the entire book. It begins with a description of the facts of this case which purports to be Chantal Daigle herself speaking. It is intended as an alternative account to that crafted by the court. This description was apparently written by Hutchinson himself but he provides little information about the sources for his account except to state [110] that he draws on affidavits (written by lawyers?) and press clippings (written by journalists?) in order to present a "personal narrative through Chantal's...words", which then becomes "Chantal Daigle's own account" [120]. It is not clear why and to what extent Hutchinson is better able to empathize with Chantal Daigle than a judge but he claims such privileged insight.

Hutchinson dissects the Court of Appeal judgments favouring the rights of the father.[36] This focus is strange for two reasons. Firstly, he seems unaware of the values of Québec society and never speculates on the relationship between Roman Catholicism, with its non-liberal view of the role of women and of issues relating to the control over their bodies including their reproductive capacity,[37] and the judicial reasoning in the case. This is important because the values in these judgments may contradict the liberal veneer in which they were dressed. The tension between rights and religion may reaffirm the plasticity of rights and thus support Hutchinson's argument. Clearly, the relationship between non-liberal values and rights is relevant here.

Secondly, this case was reversed by the Supreme Court of Canada.[38] The father did not succeed. The fact that the Court of Appeal justices were able to generate

[34] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385, 37 C.C.C. (3d) 449.

[35] *Tremblay* v. *Daigle*, [1989] 2 S.C.R. 530, 62 D.L.R. (4th) 634, 102 N.R. 81.

[36] *Tremblay* v. *Daigle*, [1989] R.J.Q. 1735, 59 D.L.R. (4th) 609, 23 Q.A.C. 241 (Qué. C.A.).

[37] For a discussion of the Catholic Church's opposition to liberal values, see E. Hobsbawm, *Age of Extremes: The Short Twentieth Century 1914-1991* (London: Abacus, 1995), c. 4 "The Fall of Liberalism". See also C.C. O'Brien, *On the Eve of the Millennium*, (Toronto: Anansi, 1994) in which he discusses at 11-28, among other topics, the role of the Catholic Church in opposing Enlightenment values and the alliance between official Catholicism and fundamentalist Islam in opposing women's rights to reproductive autonomy at the Cairo Conference on Population and Development held in September 1994. I. Abella & H. Troper, *None Is Too Many: Canada and the Jews of Europe 1933-1948* (Toronto: Lester & Orpen Dennys, 1983) documents the opposition of the Catholic Church, especially in Québec, to Jewish immigration to Canada in the inter-war period. Canadian Catholicism is not liberal although many individual Catholics hold liberal beliefs. The point here is not that Catholic dogma explain the Court of Appeal's decision but that any analysis of it must at least consider the extent to which a judiciary dominated by judges of Catholic background might be influenced by Church dogma regarding the supreme law which must override mere positive law. Québec society is increasingly secular but the Church remains a powerful and influential elite institution. For a discussion of Catholicism and abortion, see E. Mensch & A. Freeman, *The Politics of Virtue: Is Abortion Debatable?* (Durham: Duke University Press, 1993) at c. 2. Commentary on the *Daigle* case includes M. Shaffer, "Foetal Rights and the Regulation of Abortion" (1994) 39 McGill L.J. 58 and J. Rhéaume, "*Daigle*: Un Oubli des Questions de Droit Civil et Constitutionnel" (1990) 21 R.G.D. 151.

[38] *Supra* note 35.

arguments does not show that rights-talk inevitably results in reactionary decisions. In this case, the Supreme Court acted quickly to ensure that the rights of the woman were not defeated. While it may be true that women would be better off if fathers were not granted standing, it is hard to believe that Chantal Daigle would have been better off in a legal system without any rights. This case suggests that rights-talk is sometimes essential for the protection of important interests in exceptional and urgent situations.

Chapters Five and Six continue with the critique of theory and case law. Hutchinson reprises his arguments against Brian Langille and criticizes Leon Trakman and Jennifer Nedelsky. He argues that the private/public split is both incoherent and politically biased. This division favours corporate rights over union rights and allows corporations to insulate themselves from effective regulation of their economic power. Commercial speech is protected but unions cannot picket without fear of injunctions. The media are controlled by corporate owners who impose their agenda on the subservient journalists using freedoms of expression and of the press to frustrate all attempts to democratize access to media outlets. The *Charter* is necessarily and inevitably an obstacle to the democratization of Canadian society. Law *is* politics and these politics are bad.

IV. What Does the Claim that Law Is Politics Mean?

At several points in this book Hutchinson asserts very baldly that law is politics. At page 22 he states: "In short, law is politics."; at page 73, "In sum, law is politics."; and at page 173 "law is always and inescapably political." What does this claim about the nature of law mean? At first glance it seems to be a claim of identity — law is the same social phenomenon as politics. Stated this way, it appears easy to refute. In our society, law is very different than politics. To equate the two distorts the reality of the social institutions in which we live. It is only necessary to spend time listening to Parliament and then spend an afternoon at the Supreme Court to realize that the differences of form, procedure and substance are so evident that the claim as a sociological statement seems silly.

But the claim of identity can be made in a more subtle way. It can be interpreted as subsuming two different claims about the interconnection of law and politics. Firstly, law is political and secondly that law has a politics. The more subtle claims argue that the institutional, procedural and substantive differences, which are obvious to any observer, are questions of form. When we look more closely, we see that the distinction between law and politics is illusory and deceiving.

A. *Law is political.*

Law results from debate in the duly constituted legislative bodies and thus is the product of partisan political process. In this sense, law is clearly political because, as legislation, it represents the contingent decisions of a temporary coalition of interests which has the power to impose its will on society because it controls the majority of votes in the legislative body as a result of an electoral process. Legislation adopted through this process embodies the political vision of its authors. The adoption of the *Labour Relations Act of 1995*[39] by the recently elected Conservative government in Ontario

[39] S.O. 1995, c. 1.

illustrates the highly partisan nature of the legislative process. Everything from the title to the preamble to the newly adopted certification procedure reflect a particular vision of the priorities and needs of society. This legislation is political in the most self-evident sense of this word.

In becoming law, legislation does not lose its political character. Indeed it can only be fully understood and justified with reference to the specific political programme which led to its adoption. Legislation can be criticized because it does not meet the objectives for which it was adopted. It can also be condemned for ideological and partisan reasons. The current Ontario government, in rescinding all of the amendments to the *Labour Relations Act*[40] by the previous NDP government regardless of their merits and effects in practice, adopted the latter approach. Thus, enacted legislation continues to be the site of political debate.

The claim that legislation embodies the political vision of a contingent majority in the legislative body shows that legislation has a necessarily political character. In a common law system, many parts of the law are not legislative in origin.[41] They come to us through the courts which have created and refined the rules of areas such as contract and tort. Legislators have obviously intervened in these areas but the legislation has not yet codified and replaced the common law we have inherited from the past.

It is hard to claim that judge-made law is partisan in the same way that legislation is. It can be argued that, because legislation has priority over the common law, legislative bodies approve the common law by default. This theory enables us to reconcile legislative supremacy and the common law but it does not demonstrate that the common law is partisan as is legislation. However, the common law is political in that it also reflects choices of rules which are controversial and can be challenged and criticized. Unless one accepts the fiction of the common law as a brooding presence in the sky, it is clear that the common law is the result of a process in which decisions are reached which determine the kind of society in which we live.

Constitutional law is also political in that it clearly represents a choice about the type of society in which we will live. The debate leading to the drafting, adoption and implementation of a constitution will involve competing visions of the relationship of individuals, collectivities and the state making up the society to which it will apply. Constitutions must necessarily involve negotiation and compromise between competing interests. As such, they are clearly and obviously part of "the activity by which decisions are arrived at and implemented in and for a community."[42] Thus, the claim that law *is* politics may aptly refer to the origins of rights, rules and statutes in the political process.

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[40] R.S.O. 1990, c. L.2 as am. by *Legislative Assembly Amendment Act*, S.O. 1991, c. 56 and *Labour Relations and Employment Statute Law Amendment Act*, S.O. 1992, c. 21, ss. 2-57.

[41] For an assessment of the extent to which the common law continues to define Canadian law in a statutory age see H.P. Glenn, "The Common Law in Canada" (1995) 74 Can. Bar Rev. 261.

[42] V. Bogdanor, ed., *The Blackwell Encyclopedia of Political Science* (Oxford: Blackwell Publishers, 1987) at 482.

B. *Law Has a Politics.*

The statement that law results from a political process clarifies the sociological truth that law is intimately connected with politics but this claim in itself tells us nothing about the politics of law. So the assertion of the identity of law and politics involves another claim: law is political in that it constitutes the society in which we live. Unlike the classic Marxist analysis of law which understands law as an epiphenomenon of the economic base and therefore a mere reflection of more basic social institutions, the claim that law is political entails a view of law as creative and constitutive of the society.[43] It does not just interact with social phenomenon outside of law but, rather, law creates the society by defining or originating the concepts through which the institutions come into existence. Our society would not be the society it is without the law within which it comes into being. Thus, law is at the heart of the struggles to reinterpret and redefine social relations. Legal categories are themselves the sites of a contest of meanings.

This second claim about the relationship of law and politics holds that because law is constitutive of society through the embodiment of contested meanings, it can no longer maintain the fiction of its own objectivity. Legal categories create the legal subjects — the individuals — which law needs to embody itself in the world. These categories have no claim to objective, universal meaning and cannot transcend their time and location. The choice of which legal category to use is not neutral. In working within a category and using its vocabulary, a person adopts a way of life whether this is conscious or not. The use of the categories of liberal rights requires that those who walk within their boundaries become liberal rights bearers. In other words, they cannot escape the trap of the language they use. Because the categories are controversial and contested, the decision to use a category necessarily entails the acceptance of the particular and controversial vision which the category embodies. By describing an isolated, alienated, desiccated individual, the language of the law creates that individual in all of us and condemns us all to live as that individual. The language we use determines the world within which we live. Only by throwing off that language can we free ourselves from the chains that bind us.

C. *In Sum, "Law Is Politics" May Not Add up to Enough.*

In my opinion, these arguments about the inevitably political character of the law accurately describe the relationship of law and politics. Law is not in any simplistic sense about partisan politics but it clearly is part of the activity by which decisions are arrived at and implemented in and for a community. However, the claim that "law is politics", on its own, proves far less that its proponents appear to believe. The fact that law is politics tells us nothing about what kind of politics law should be.

Hutchinson's argument that law is politics resonates with a form of argument used in many forms of critical theory: the personal is political; the family is political; education is political; literary studies are political; and the legal is political. Sometimes the assertions are framed in the language of social construction. Again, in my opinion, these assertions are accurate but they may also turn out to be banal. The claim that

[43] Duncan Kennedy distinguishes his version of this argument from Marxism in "The Stakes of Law, or Hale and Foucault!" in *Sexy Dressing etc.: Essays on the Power and Politics of Cultural Identity* (Cambridge, Mass.: Harvard University Press, 1993) 83.

everything is political runs the risk of emptying the category "politics" of any meaning. If everything is political, the adjective "political" does not distinguish anything particular in the realm of human activity from anything else.[44] It has no analytical bite. The statement that something is political does not tell us anything about that object of the statement (law, personal life, sex) because every aspect of human existence and interaction already shares that characteristic. It does not help us to understand what defines the different domains of social experience. It reduces a claim to a statement that all aspects of human existence and interaction are under human control and can be changed through the willed action of the human agent. It is the assertion of the omnipotent and omniscient human legislator.

In arguing that we can and should live differently by imagining new categories and visions, Hutchinson puts forward a different political vision. In order to convince the reader that he proposes a programme which progressive Canadians should actually support, he has to show us that this new world will be better. The claim that law is politics only argues that we can legislate a new way of being and living.

> Things can be different, and the fact that we made things what they are means that we can remake them differently. [164]

The recognition that law is a human construct which is the product of, and embodies, a politics may be an important realisation, but it tells us nothing about who we should be and how we should live.

V. Dialogic Democracy and Progressive Change

Of the three criteria for determining the success of liberal legalism defined by Hutchinson in Chapter Two, the third -- that the *Charter* must allow for progressive political change -- is most crucial. Hutchinson knows that determinacy and objectivity are impossible. No theory could provide answers to such controversial issues. Liberal theory abandoned the ambition to achieve objectivity and determinacy long ago. Hutchinson's own theoretical framework denies the possibility of achieving these goals. His vision of democratic politics celebrates indeterminacy and the absence of right answers.[45] The real problem with liberal legalism is that it does not "allow for the serious possibility of social change." [7]

> Liberal institutions and instincts neither promote equality nor engender respect for it. Furthermore they limit the process and agenda for politics to the furtherance of private self-interest. The challenge is to replace liberalism with a substantive vision of social justice that is capable of responding to the vast inequalities of economic and political power that liberalism and its disciples permit and, through their theoretical intransigence, condone. [207]

The criterion of progressiveness is not one that liberalism ever adopted for itself.

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[44] See S. Fish, *Professional Correctness: Literary Studies and Political Change* (Oxford: Clarendon Press, 1995) in his introduction at *ix* where he argues that:

> If *everything* is socially constructed, the fact of a particular thing being socially constructed is not a fact you can do anything with. It won't help you to distinguish that socially constructed thing from all the other socially constructed things.

[45] See generally Chapter Seven and more specifically, for example, p. 213.

Certainly seventeenth and eighteenth century liberalism was not a levelling, redistributive theory. Many liberals are progressive in the sense that they believe that history is a story of continual improvement in economic and social conditions but that (Pollyannish?) belief in historical progress does not entail a commitment to the redistribution of wealth and power. Some modern versions of liberalism do connect rights to progressive change. For example, John Rawls proposes what he calls the "difference principle" on the basis of "[t]he intuitive idea ... that the social order is not to establish and secure the more attractive prospects of those better off unless to do so is to the advantage of those less fortunate."[46] However, this principle is controversial and many liberals reject the argument that liberalism requires commitment to social democracy and the welfare state.

In formulating the criterion for promoting progressive social change, Hutchinson indicates that his argument is not addressed to the growing sector of public opinion which opposes redistribution of wealth in favour of less regulation and unfettered markets. Rather, he has chosen to address those who are already committed to progressive social change. His goal is to show that activists who use a litigation strategy as a means of achieving social change are falling into a liberal trap which is unlikely to provide anything more than the most temporary and illusory of victories. He denounces legal theorists who try to find a theory of *Charter* adjudication which will compel the courts to adopt progressive positions on controversial issues. Such efforts are naïve and deluded and will inevitably be recuperated by liberalism to reinforce the status quo. Only if we cleanse ourselves of the liberal contamination will activists, progressive lawyers and academics be able to engage in a truly radical democratic politics.

In the place of doomed and defeated liberalism, Hutchinson offers a proposal for a radical reform of Canadian society which would create the social and material conditions necessary for dialogic democracy. Although he never describes what institutional form such a democracy would take, how it would be organized, or who would participate in the conversation and on what terms, he is convinced that such a democracy would cure everything that ails Canadian society. Close to the end of Chapter Seven, Hutchinson experiences a moment of rapture:

> Where rights-talk is abstract, democratic conversation is engaged; where rights-talk is individualistic, democratic conversation is civic; where rights-talk is legalistic, democratic conversation is popular; where rights-talk is myopic, democracy is visionary; where rights-talk is anaemic, democratic conversation is full-blooded; where rights-talk is exclusionary, democratic conversation is inclusionary; where rights-talk is narrow, democratic conversation is expansive; and where rights-talk is blunt, democratic conversation is nuanced. Moreover, while indeterminacy is fatal to the operation and validity of rights-talk, democratic conversation places indeterminacy at the heart of its practice. In an important sense, democratic conversation's opportunity is found in right-talks failing. [217]

Like all panegyrics, this tribute to democratic conversation offers hope and inspiration to the converted but little to convince the sceptic. Those who want some detail in order to judge the merit of the claims will have to wait until Hutchinson writes the book he promises on page 220. He says that it is important that dialogue "not be treated as an abstract ideal from which a series of pat positions on the traditional range of hard cases can be logically extrapolated." [212] This appears disingenuous and leaves

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[46] J. Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971) at 75.

the reader awash in a sea of abstraction detached from any concrete situation or context. But it is consistent with the insistence on indeterminacy and the importance of the democratic process over any particular result. If indeed democratic dialogue may well include rights-talk, [216] substantive results may be very similar to what we have now. It is the process that will transform us from alienated, drab, anomic consumers into fully integrated, autonomous but deeply connected individuals living in respectful solidarity while acknowledging the legitimate and vital differences that mark us all as citizens of whatever state we choose to live in.

Hutchinson's discussion of dialogic democracy shows the symptoms of an important and unresolved tension. Because progressive change is the criterion on which the proclaimed failure of liberalism rests, it is clear that the necessity for such change has to be exempt from the democratic conversation. We will know that we have succeeded in creating dialogic democracy when we have transformed society so as to subject private and government power to popular sovereignty. "In working toward the social and material conditions for such conversation, much will have to be confronted and altered that is inimical to a truly just and egalitarian society." [220] If, for example, the need to subject private power to popular control is a material condition of democracy, this issue cannot be decided by popular debate because no truly democratic debate can take place unless private power has already been brought to heel. This is true in spite of the fact that, according to Hutchinson, there "are no final or right answers, but only different options...." [213] Thus, the rejection of rights-talk is not subject to democratic debate nor decided by the majoritarian principle. People must reject it in order to engage in democratic conversation. They must also agree to regulate the media because such regulation is the necessary condition of democratic debate. The exact nature and extent of this regulation can be debated but not the need for it.

Given the radical transformation of society necessary to create dialogic democracy such a democracy must exclude many questions from the realm of popular debate. Hutchinson never explains the process through which society could create the material conditions of dialogic democracy nor the criteria to be used to distinguish permissible and impermissible subjects for democratic decision-making. In making his argument, Hutchinson appears to reproduce a tension that is present in much radical thought. Fidelity to the majoritarian principle and fealty to the people are conditional on the appropriateness of the conclusions reached through democratic debate and the correctness of the people's beliefs. If the majority rejects the substantive programme, this rejection is, by definition, tainted by the virus of liberalism and should be rejected by those who seek progressive social change.

The abstract and, at times, platitudinous, nature of Hutchinson's discussion of dialogic democracy provides little guidance on issues confronting the Canadian polity at this time. The lack of discussion of actual issues weakens Hutchinson's argument. The claim that we should engage in democratic politics does not tell us how to do this. For example, what is the appropriate community within which to engage in politics? The choice of community will have important consequence for the outcomes of the politcal process. Thus, is the province of Québec the defining community within which the political choice to remain within the Canadian state or to leave should be made? Or should all Canadians have a say in the future of the existing Canadian state? How are we

to choose between these two options given their obvious impact on the outcome of the process? There can be no politics without a defining framework but that framework is itself a political choice.

Another example of the difficulties of democratic politics involves native land claims, of which the recent Nisga'a agreement is an example.[47] Native peoples argue that they have a right to self-government through which their community will define the frame within which it will evolve. This is essential to the recognition of their historic claims to the land and the injustice of their dispossessing at the hands of the European colonialists. Is this race-based definition of community consistent with principles of equality? Should such self-governing nations be subject to the same regulation of rights as the general population? Some native women argue that traditional tribal governments have discriminated against women. They argue that native women must be protected against patriarchal discrimination. Once again we have to make a choice in defining the community which will provide the frame within which democratic politics can take place.

It is fine and well to sing the praises of the body democratic but such a hymn will only persuade when it addresses the very complex and difficult issues involved in identifying the relevant communities which will become the basis for democratic politics. Hutchinson provides us with no way to begin to engage in the analysis of the structures within which democracy will occur. He discusses neither the issues at stake nor the processes whereby we would go about solving them as practical matters.

VI. Is It Convincing?

Allan Hutchinson has known since the repatriation of the *Constitution* in 1982 that the *Canadian Charter of Rights and Freedoms* was, and continues to be, a major mistake. In article after article, he has argued again and again that only a fool would believe that rights-talk offers any hope of progressive social change. But his words fall on deaf ears. The majority of constitutional scholars continue to propose theories and make arguments. Social activists, unionists, and ordinary folk insist on framing their claims in the language of rights and often use litigation strategies as a means of furthering their goals. Far too frequently, they have no choice because they are confronted by an adversary who uses as much law as is possible to achieve his or her goals but sometimes these militants try to wrest the *Charter* away from the dominance of the privileged. Why are they not convinced that politics purged of all rights-talk offers a better vision of the way forward?

The conditions which make Hutchinson's counter-majoritarian critique of the judiciary possible are precisely the conditions which make progressive Canadians sceptical of his argument. As Anthony Giddens has pointed out, society has evolved in ways which undermine traditional, status-based authority. Politics require the creation of what Giddens calls "active trust" which "does not necessarily imply equality, but it is not compatible with deference arising from traditional forms of status."[48] It is no longer possible to argue that judicial decisions are persuasive simply because they are rendered

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[47] See J. Simpson, "Nisga'a Negotiate an Exemplary Land Claim Agreement in Principle" *The* [Toronto] *Globe & Mail* (20 February 1996) A20 and G. Gibson, "The Trouble With the Nisga'a Deal" *The* [Toronto] *Globe & Mail* (20 February 1996) A21.

[48] See *supra* note 3 at 94.

by courts staffed by judges who, in the past, had high social status and traditional authority. There is no longer any presumption of competence and deference to authority. Trust must be earned or created. Thus, judicial decision-making comes under closer and closer scrutiny creating the ever present risk that conventional arguments previously acceptable to the judicial elite or the legal fraternity will now appear specious and unpersuasive to the general population. This critical engagement with the law is an important democratizing influence.

Like courts and judges, Hutchinson, too, has to earn our trust. He is an unelected law professor working in an elite institution. His arguments are no more compelling than any judicial claim to authority. He has to convince Canadians, progressive or otherwise, of the merits of his arguments. He must convince us that they do not simply advance the interests of one sector of a powerful academic elite. Traditionally professors were respected oracles of wisdom but this is no longer the case.

Hutchinson's proposed programme of social transformation is unconvincing for a number of reasons. Firstly, his claim that liberal legalism is illegitimate is inaccurate as an empirical claim. In fact, rights enjoy considerable legitimacy. Secondly, his argument that rights should be abandoned requires that he consistently underestimate the threat of the abuse of state power. He does this because he believes that the state should play a much larger role in regulating private, corporate power. However, experience in the past century shows that, while it may be true that private economic power has used rights to escape from regulation, state power is not a benign force. Finally, he never engages with the politics of recognition which calls for guarantees of the full rights of citizenship for the members of all traditionally excluded groups. As Patricia Williams has pointed out, the idea of dispensing with rights only makes sense if you have rights.[49]

A. *Legitimacy and Popular Support*

Hutchinson argues that "[l]iberalism is a failure; it cannot pass conceptual, social, legal, or political muster. A continued reliance on its intellectual assumptions and ideological prescriptions is indefensible."[206-07] This is a perplexing claim when approached as an empirical issue. Parliamentary democracy and the Rule of Law, apparently dying during the interwar period, experienced a post-war renaissance and have returned "as the predominant form of government across the globe in the early 1990s."[50] Clearly, the vast majority of intellectuals and ordinary citizens believe neither that liberalism is not a failure nor that it is indefensible. The assertion of liberalism's failure is prescriptive rather than descriptive.

The claim that *Charter* litigation is illegitimate is unconvincing because the majoritarian warrant for the process rather than specific results is well-established. Polls show that much of the Canadian public believes that Canadian citizens have and should have rights. The vast majority of Canadians support the *Charter* and express confidence in the judiciary.[65] Even in Québec, where *Charter* legitimacy is at its lowest, there no evidence that those who question Ottawa's political legitimacy, reject the concept of

[49] See *e.g.* "Alchemical Notes: Reconstructed Ideals From Deconstructed Rights" (1987) 22 Harv. C.R.-C.L. L. Rev. 401; and "On Being the Object of Property" (1988) 14 *Signs* 5.

[50] Hobsbawm, *supra* note 37 at 141.

fundamental rights as a defining frame for the relationship of individuals, the private sector and the state. The great majority of Québecois, including many committed separatists, are proud of Québec's *Charte des droits et libertés de la personne*.[51] One of the few potential sources of *Charter* opposition is the right wing Reform Party which wants to radically alter present political arrangements in Canada through decentralization. It seems reasonable to believe that, if a referendum was held today on the abolition of the *Charter*, the pro-abolitionists would go down in flames.

It is, of course, possible to dismiss the ample evidence of widespread popular support as the product of liberalism. Canadians are deluded because they become the impoverished, abstract individual postulated by liberalism. They are products and, as such, cannot see clearly or know their true interests. This type of "false consciousness" argument poses some trouble for Hutchinson because all such arguments assume privileged insight and objective truth which his non-foundationalist philosophy must reject. If there is truly no right answer, then Hutchinson's critique of *Charter* legitimacy lacks democratic warrant in precisely the same way as judicial decision-making.

B. *The Underestimating of the Dangers of State Power*

In a revealing preface to this book, Hutchinson writes of a visit to South Africa during which he preached of the evils of rights-talk. He is flabbergasted and outraged when an academic in the audience asks him if he is in favour of torture, arbitrary detention, surveillance and the like. He characterizes this as a ludicrous and malign interpretation of his remarks.

Of course any one who is familiar with Allan Hutchinson's work knows that he is not in favour of "torture, arbitrary detention, surveillance and the like." He sincerely aims to contribute to the creation of a more just and egalitarian society. There is no question about his sincerity or good faith. But good intentions do not an argument refute. It is unfortunate that the naïve and insulting questions about Professor Hutchinson's support for torture and other abuses do not lead him to question his belief in the evil of rights-talk. He returns from a brief visit to South Africa convinced that his position at Osgoode Hall Law School provides him a better position for the assessment of the virtues of constitutionalized rights than the prisons and political movements of South Africa.

> However, my exposure, admittedly brief and limited, to the South African experience and the inspiring example of a few like-minded sceptics – Denis Davis and Justice Potwas, to name but two – convinced me that such constitutional reforms were not the best way to achieve social justice: the short-term fix of liberal reform would not compensate for the long-term debilitation of the democratic cause. Rights-talk has had its day.[52]

It is not enough that ordinary Canadians, progressives and the ANC under Nelson Mandela reject the radical critique of liberal legalism. It must also be "galling" [83] that

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[51] L.R.Q., c. C-12. Lucien Bouchard has consistently countered the claim that Québec nationalism is ethnicity-based and reserved for "Québecois de pure laine" by pointing to the high level of protection of basic rights provided by the Québec Charter. No separatist politician has proposed that it be abolished.

[52] There is considerable irony in the invocation of the name of a judge in support of his anti-rights argument. Why would the agreement of a judge be of any value given the suspect status of all judicial pronouncements? It must be particularly galling that Nelson Mandela, a man of great integrity and

a growing majority of European academics reject the rights-free zone of the democratic utopia in the wake of the collapse of the Berlin wall and the disaster of communism in Eastern Europe and the Soviet Union. French intellectuals are increasingly interested in theories of the Rule of Law and the fundamental rights.[53] Jürgen Habermas has recently published a new work dealing with these very issues.[54] Increasingly the argument that such writings should be rejected because the authors are in the thralls of liberalism is unconvincing because it refuses to take seriously the concerns underlying the reassessment of the Rule of Law in pluralist societies. These authors are looking at historical evidence of torture, arbitrary detention, and surveillance when questioning the wisdom of getting rid of rights and the Rule of Law.

Hutchinson's protestations of shock and dismay at misinterpretations of his position do not really get at the important issue raised by that South African academic and the growing European literature regarding the Rule of Law. Oppressive and totalitarian regimes seldom adopt and more often move quickly to abolish constitutionally protected rights. Those rights which exist on paper lack any bite because the state simply ignores them and the courts lack any autonomous institutional authority to restrict the abuses of state power. The abandoning of rights-talk in favour of politics sounds creepily similar to the rhetoric of authoritarian regimes in which the individual is dissolved into the collective in order to ensure that there is no opposition to state action: any minority which those in power wish to scapegoat — the Jews, gays and lesbians, racial minorities, gypsies or whatever — can be rounded up and exterminated without any widespread democratic resistance.

We are living at the end of one of the most violent and bloody centuries. War, revolution, *coup d'état* and large-scale massacres have constituted a fundamental dimension of the human experience for most of the world for the last one hundred years.[55] The technologies of torture and genocide have reached high levels of sophistication. The ability of the state to spy on and control vast populations has increased exponentially. Disparities of wealth are greater than ever. The danger of the totalitarian state is real and ever present.

What is remarkable about reading this book is the way it blithely ignores most of the history of the Twentieth Century. On reading Allan Hutchinson's book you enter a world of the benign state. You would not know that concentration camps, Gulag, massacres and terrorism exist. The arena in downtown Santiago is a vague memory. Allan Hutchinson wants to end such dreadful abuses of power. For example, he criticizes the left for "a dangerous romance with state regulation" [202] and speaks of "unwarranted state interference" [204]. His lists of oppressions and exploitations are always complete but he talks about rights and politics as if the realities of state violence,

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intellect who struggled from his prison against torture, arbitrary detention and the denial of any human dignity to the people of South Africa, should be so foolish as to believe that a Bill of Rights enforced by an independent judiciary could play any useful role in the transition from apartheid to the new democratic constitutional state of South Africa. For an overview of the South African constitutional process see S. Kentridge, "Bills of Rights—The South African Experiment" (1996) 112 L.Q. Rev. 237.

[53] See *e.g.* Renaut & Sosoe, *supra* note 21, and B. Kriegel, *The State and the Rule of Law* (Princeton: Princeton University Press, 1995).

[54] See M. Rosenfeld, "Law as Discourse: Bridging the Gap Between Democracy and Rights" (1995) 108 Harv. L. Rev. 1163 which reviews J. Habermas, *Between Facts and Norm: Contributions to a Discourse Theory of Law and Democracy* (Cambridge, Mass.: MIT Press, 1995).

[55] See generally Hobsbawm, *supra* note 37.

oppression and exploitation have not penetrated into the hallowed halls of Osgoode Hall.

The reasons for this perception lie in beliefs which found Hutchinson's positions. He wants to argue that judicial decisions which insulate economic entities from state regulation demonstrate liberalism's failure. In order to justify the regulation of corporations and other private organizations he argues that the private/public distinction is incoherent and untenable. He proposes a radically new definition of the state:

> ... the state is not an institution or set of organizations; it is a site and a structure for the creation or exercise of power. While power is a universal fact of social life, its location and constitution are contingent. Relying on coercive imposition and manufactured consent, it consists of all the practical activities and theoretical imagery that establish and sustain the whole institutional framework and experience of power. ... The state is as much an ethos as it is an establishment. To describe only the organizations and bodies that coalesce to constitute the state—government departments, Crown corporations, multinational corporations, trade unions, sporting clubs, churches, schools, Girl Guides, and the like – is to omit the crucial and invisible force field of power that animates and brings them into being; ... At the heart of power lies the productive medium of beliefs, truths, and knowledge. Accordingly, the state is not a universal pattern of fixed relations, but a dynamic regime of political struggle that encompasses and oppresses citizens as it constitutes and contains them. [208-9]

He goes on to add:

> The state is all institutions, processes, values, and truths that gel to deprive individual citizens of control over their own identity and destiny. [209]

Setting aside the mystical tone to this definition (state as state of mind and force field of power), its purpose is to persuade us that private power can, and should be, regulated because it is as much state action as the police arresting an individual who is involved in a picket line. The liberal demonizing of the state defined narrowly as the government [208] is greatly exaggerated while we are not sufficiently fearful of private power. Thus, Hutchinson wants to subject corporations to democratic regulation [198-202] and argues in favour of the regulation of privately-owned media in order to ensure that their impact on pubic debate is acceptable [211]. The democratically-controlled government Hutchinson imagines would intervene in all aspects of human activity defining the permissible zones of individual autonomy and market endeavour. If the state is everything from corporations to unions to churches to the Girl Guides then regulating the state through the concept of rights is impossible.

At issue here are not the merits of this expansive definition of the state. It does seem intuitively implausible to argue that the Girl Guides are a state organization in the same sense as the police or CSIS. By defining all social institutions as the state Hutchinson may simply have emptied the category of "state" of any meaning. We will have to find new concepts to make the relevant distinctions. Be that as it may, it is interesting to focus on what is lost through an expansive definition of the state. If the state is everything, we risk losing sight of the repressive effects of state power as we focus on the benign regulatory state.

Thus, in the brave new order of democratic conversation or dialogic democracy, questions about the prevention of torture, arbitrary detention, surveillance or majoritarian oppression of minorities, questions relating to the "imagined vicissitudes of majoritarian

politics"[11] are of secondary importance. The vital issues involve the right of corporations to free speech in commercial advertising, the constitutionalizing of labour relations and the legitimacy of state-imposed limits on private power, real issues in any functioning democracy but certainly not the only or central issues addressed by liberal rights-talk.

The curious absence of historical perspective lends an air of unreality to the proposal for the abolition of rights and the transferal of all discussion of social justice to the political realm. He states:

> Within such a democratic theory and practices of politics, the future role of the courts will be extremely limited.
>
> ...
>
> While there will still be a need to resolve disputes in even the most democratic of societies, the resort to an unaccountable tribunal of so-called professional experts inhibits the development of a truly democratic character that cherishes and exploits the possibilities for active participation. [153]

When Allan Hutchinson offers examples of how his new dialogic rights-talk-free democracy will work, it is not surprising that images of the abusive state spring to mind. Consider this passage:

> Instead of increasing efforts to make courts more democratic, it would be preferable to expend civic energy in proliferating the extracurial sites and situations for democratic practices of engaged deliberation and genuine participation of economic equals. In this way, people might better develop political sensibilities worthy of the truly democratic citizen: 'a sense of the contingency of their language of moral deliberation, and thus of their consciences, and thus of their community.' An institutional possibility that might meet this challenge is the establishment of a centrally funded, but locally based series of justice commissions that would combine the best of royal commissions, private corporations, human rights agencies, and jury-enhanced courts. With a rotating and activist board of citizens and community groups, it could have the power and resources to investigate civic abuses on its own motion, facilitate the articulation of diverse viewpoints, make decisions, implement them through structural remedies and monitor their efficacy. [172]

The reader of this passage will be forgiven for thinking of the Chinese Cultural Revolution and marauding bands of militants hauling people out of their homes, accusing them of various forms of error and evil and summarily executing them on the spot. Hutchinson proposes commissions staffed by activists coming from citizen and community groups who are free of the taint of professional training. They will identify civic abuses and initiate investigations of their own motion. They will decide what constitutes an abuse and what is worthy of investigation. They will decide what changes are necessary and then monitor the implementation of their decision to make sure that no one gets out of line.

This passage is obviously too sketchy to provide any real idea of how such commissions would work but, for that very reason, the fear of the authoritarian abuse of such invasive regulatory power is all the more plausible. There is no definition of civic abuse nor any sense of how these commissions would proceed without abusing everyone compelled to appear before them, provide evidence and then submit to their decisions. Legitimacy will apparently come from democracy. The proposal lacks credibility because there is no attempt to explain how abuse will be

prevented. He glibly states that "[t]here is no guarantee against tyranny — *nothing* can deliver us from that" [227]. This is obvious but no reason not to try. The totalitarian urge, whatever its sources, is omnipresent and even the best intentioned can use power in the most arbitrary and evil way. An argument that democracy is a panacea for all that ails Canadian society will only become convincing when presented in considerably more detail with concrete explanation of how it would work and how basic human dignity and, yes, basic rights would be protected against the vicissitudes of majoritarian will.

C. *Rights and the Politics of Recognition*

A great deal of contemporary politics consists of movements seeking recognition of the validity and integrity of individual and group identities.[56] The issue of Québec independence and the debate over the "distinct society" illustrate the crucial importance of these issues to Canadian politics. Women ask that the law reflect the fact that they are fully equal human beings who have a right to be free from abuse. They ask that the criminal law reflect their full worth by adequately punishing crimes involving misogynist violence. They also ask for protection from discrimination and for pay and employment equity designed to correct the effects of systemic bias. Racial minorities ask that their full integrity as human beings be reflected in laws which not only protect against overt and intentional discrimination but also reflect the fact that traditionally excluded groups have, historically, been the victims of systemic bias which defines and limits the very possibility of their full and equal participation in our society. Employment equity laws reflect these types of claims. Sexual minorities ask not only that they be protected against intentional discrimination but that the law be changed in order to reflect the full and equal worth of their lives and relationships. Thus, gay men and lesbians are seeking the rights to marriage, to spousal support, to adopt, to share employment benefits and to inherit property.

These many demands and others too numerous to mention are formulated in the language of rights. Traditionally excluded groups, especially those in minority positions, do not want to have to rely on the good faith of majorities for the possibility of living without the effects of majoritarian prejudice. Hutchinson argues that dialogic democracy offers a better hope for the resolution of the complex issues surrounding the recognition of all members of society as fully equal human beings. But he provides no reasons why women and minorities should have any confidence in the democratic process. Indeed, he never discusses the literature which explains and justifies these demands. He never explains why he rejects the critique of his position which argues that it is his position of privilege and power as a heterosexual white middle-class male fully endowed with rights which leads him to ignore the importance of rights to the politics of recognition.[57] This gap in his analysis means that he does not address the very real concerns underlying much of the impetus to organize politically around rights claims. This, of course, does not make his analysis wrong but it does seriously compromise its

[56] For a useful discussion of this type of politics see C. Taylor, "The Politics of Recognition" in A. Gutman, ed., *Multiculturalism: Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994).

[57] See *e.g.* P. Williams, "Alchemical Notes: Reconstructed Ideals From Deconstructed Rights", *supra* note 49.

ability to persuade those who do not trust majoritarian politics to avoid the abuse and oppression of traditionally excluded groups.

VII. Conclusion

Ultimately, the argument in this book dissolves into a series of platitudes about the joys of democracy. In his utopian mode, Hutchinson imagines a world of pure politics — a rights-free zone purged of law. He talks of the "unimpeded democratic gaze",[183] "unadulterated democratic practice"[188] and "opportunities for the continuous negotiation of the multiple interplay between the unique and the individual, and the common and the communal."[188] Trying to get a hold on what these phrases mean is like shovelling clouds.

The utopian vision of a world without courts, judges, lawyers and laws has a strong emotional appeal but the coherence of the vision disappears under analysis. Politics is a process which must produce a product. The product is law. If there is law, it must be interpreted and applied. The problem of indeterminacy will not disappear because democracy has been improved. Society will need rules in order to allow for the planning of production and distribution of goods and services. Individuals and organizations will have to know when contracts are binding and what types of actions are allowed and forbidden. Families will continue and children will need to be cared for and educated. Prejudice, whether familiar or novel, will not disappear. Violence will continue to exist. Law will not disappear and the dream of a self-applying law is a silly fantasy. The extensive regulatory framework which Hutchinson believes necessary to create dialogic democracy will require implementation through legislation, administration and adjudication.

The critique of indeterminacy purports to prove the impossibility of law but it never addresses the necessity of law. In the new, improved dialogic democracy, politics will have to reach decisions about the frames for collective and individual action and obligation. The frames may be very different from those we are familiar with but they will still require adjudication and application. Imagining a world in which "the judicial process might wither away"[182] offers utopian aspiration but such a vision tells us nothing about how to engage in the practical politics of social change in Canada with its faulty democratic political system.

Progressive Canadians in this era of disillusionment and reaction must grapple with the issue of how to create a viable mass politics capable of achieving egalitarian goals. Arguing that the abolition of rights is a necessary precondition to such a movement is destined to failure. Firstly, Canadians stubbornly persist in believing that they have rights. Secondly, the abuse of power by the state is not an imaginary or theoretical issue. Thirdly, rights provide the frame from which traditionally excluded groups argue for equality. When governments are moving to weaken rights, litigation may be a necessary strategy, not as a substitute for politics, but as a means for providing the space for politics; not because rights are grounded in objective reality but because we are better off with some protection for rights than exposed to arbitrary private and public actions. Hutchinson seems unwilling to acknowledge that we live in this world now and at this time. We cannot wish it away simply by clapping our hands and imagining another way of living. Rights have no objective grounding but it may be

prudent to hold on to them for the time being while we work to create the conditions in which a more effective democratic polity can become a reality.