

THE SOCIAL CONTRACT

THE UNIVERSITY OF WESTERN ONTARIO'S
POLITICAL SCIENCE ACADEMIC JOURNAL



THE SOCIAL CONTRACT

*The University of Western Ontario's Political Science
Undergraduate Academic Journal*

Editor-in-Chief

Daniel John (D.J.) Lynde

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PREFACE

In the Fall of 2005, Daniel Lynde asked me if the Department of Political Science would be willing to support the publication of an annual undergraduate journal that would showcase the best papers submitted by Western students. It was a simple request and one that our Department was only too willing to grant. After all, in Political Science, as in other academic disciplines, we constantly encourage our students to examine, explore and critique the many complex issues that provoke debate among policy-makers and the public. And what better way to promote critical thinking than to help provide them with a suitable academic outlet.

When Daniel left my office that day full of confidence and determination, I had no doubt that the soon to be Editor-In-Chief and his colleagues would produce a first rate journal. As you read through the many interesting and diverse articles in the inaugural issue of The Social Contract, you will get a sense of how much time and effort both the authors and their editors have invested in preparing this volume. Their hard work has paid off and we should all celebrate this wonderful accomplishment.

Given the success of the first volume, I am confident that our students will continue to look to this journal to submit their finest work. On behalf of the Department of Political Science, I would like to wish the staff at The Social Contract every success as they continue to pursue this great initiative. By creating this important forum, they and the many contributors to the journal have reminded us that ideas - and the people who are prepared to share them - do matter.

Many thanks for allowing us to participate in this important and timely project.

Best wishes,
Donald Abelson
Professor and Chair,
Department of Political Science

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FROM THE EDITOR'S DESK

The Social Contract is a student run political science academic journal at the University of Western Ontario (UWO) that was established in the fall of 2005. I had been fascinated with the idea of an undergraduate journal since first hearing of *The Mirror*, which is the highly regarded annual journal of the history department. I first heard about this journal by Professor Craig Simpson in a first year history class in the fall of 2003. In the summer of 2005 I had the privilege to work in a Toronto law firm's library. During my summer days, I pulled several cases for lawyers among other tasks and shelved the numerous books in the library. The library's collection had a vast amount of law school journals that included Western's law school. In one of these law journals, their mission statement was for students to get involved with the journal and be able to spread their ideas to fellow law students. The idea for an undergraduate political science journal stemmed from these experiences and I am proud of what has been accomplished for this journal over the past few months. Following this vision, I began to seek guidance from my professors and peers.

I spoke with Professor Simpson about *The Mirror*. He supplied me with names of people that I should contact to gain guidance for this project; these included *The Mirror's* Editor Julia Rady. She has been very helpful with my questions throughout the entire process. Furthermore, I sought advice from Professors Kiera Ladner, Nigmendra Narain, and Martin Westmacott in early September about my idea for a political science journal. They were all very insightful and suggested that I speak with Dr. Donald Abelson (Chair of the Main Campus Political Science Department). He was very supportive and he approached the department on my behalf to see if professors would support this idea. As co-chair for the Centre for American Studies with Dr. Andrew Johnston., Dr. Abelson recommended that I speak with Dr. Johnston of his initiatives for the newly founded journal the *NeoAmericanist*. Meeting with Dr. Johnston furthered the progress of the journal and I am grateful to all professors that provided me with their time. The political science department was very supportive and this was the springboard for my efforts to speak with other students and professors about the idea. A goal of *The Social Contract* is to be a Western journal, thus it needs to include all the affiliated colleges: King's, Huron, and Brescia College. We received essays from many affiliated college students this year and we hope that we receive even more next year.

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I began to formulate a plan for the journal in early October and at that time I was a team of one. I visited political science classes to target second year students, as well as third and fourth year students. My pitch was: "if you would like to volunteer for the journal, I have a job for you." I received an overwhelming response from over forty students that followed through to the completion of the journal. The volunteers were organized into six editing sections (Canadian politics, American politics, International Relations, Political Theory, Business and Government, and Selected Topics that includes a vast number of subfields of political science), a layout team, a promotions team, a communications officer, two financial officers, and a position responsible for club editorials.

In November the promotions team began visiting classes, distributing posters across campus, and sending e-mails to fellow students to inform them that *The Social Contract* was accepting submissions. The promotions team success can be measured from the number of papers that we received: 56 papers. It was terrific to see that so many students were interested in this publication. The reviewed essays were submitted electronically and a hard copy was required to be dropped off. The electronic copy was revised to exclude the student's name, student number, and the class to ensure that there was no conflict of interest by reviewers. These papers were then circulated to the various sections and reviewed. Comments from the volunteers were sent to the section editorial heads and the top three papers of each section were reviewed by graduate students and me. This was a very difficult process as there were many exceptional papers, and on behalf of all the volunteers from the journal, I would like to thank all the students that submitted essays. Without any submission papers this journal would not be able to exist. We encourage students to submit their essays again next year.

We would like to thank all the professors that have provided advice and encouraged the journal, graduate students who reviewed papers (especially Barbara Holcman), as well as all the political science faculties and students across campus. These are the fundamental actors for the study of political science at Western. We have received funding from a number of different sources and we would like to thank all those sponsors at this time. These include the King's University College Students' Council, King's University College Political Science Department, main campus Department of Political Science, the Faculty of Social Science, the Social Science Student's Council (SSSC), and the University Student's Council (USC). All of these sponsors have been very supportive throughout the production process of the journal. We encourage other groups on campus to donate to the journal in the

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coming years. I would like to thank all of the volunteers that contributed to the journal. It has been terrific to work with every single one of you and I hope that many of you volunteer again next year. For those of you graduating, good luck with all of your future endeavors.

Being Editor-in-Chief of *The Social Contract* has been demanding on my schedule over the past year, but I have found every moment valuable in its own way. It has provided me with priceless skills from my experiences with fellow students, graduate students, professors, faculties, and financial committees. At times, it was difficult to stop working on the journal to focus on my personal academics as everyday with the journal was never the same. This experience was very rewarding and I am grateful for my time producing this journal. I hope that the editor-in-chief for the years to come will continue to feel the same way and take as much care as I have done over the past few months. Furthermore, I hope that this journal will be a success at Western for many years. Thank you to everyone that has contributed to the journal.

Cheers,

D.J. Lynde

Editor-in-Chief

Honors Double Major, History & Political Science, Year III

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- King's University College Students' Council



-King's University College Political Science Department



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- The Faculty of Social Science
- Social Science Student's Council (SSSC)



- University Student's Council (USC)



CANADIAN POLITICS

*"There will be no silence from Canada. Our friendship has no limit.
Generation after generation we have traveled many difficult miles
together side by side." - Jean Chrétien*

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WESTERN LIBERALS

It has been an exciting year for the Western Liberals with numerous events and opportunities to get involved with the party at the campus and riding level and many more opportunities to attend conferences, conventions and special events.

Each person has their own personal reasons for choosing a party to support. For many of our members, all it took was attending one conference out of town, or hearing a guest speaker on campus. Yet it is not these events alone that lead people to get involved; rather it is the friendships they develop with people who have shared interests and common beliefs. Many of these friendships will last well beyond your university days.

The most rewarding thing about getting involved is the satisfaction in knowing that you have made a difference. Promoting a policy position or campaigning door to door during an election, irrespective of the weather conditions, fosters a sense of pride that is invaluable. Each contribution you make contributes to the success of the party and ultimately the country. If your values, beliefs and views are similar to the Liberal cause – dedication to the principles of individual freedom, responsibility and human dignity in the framework of a just society – then I invite you to join us. Even if you are unsure about your beliefs, talk to us. At the end of the day, regardless of what your political leanings are, or what party you may have supported in the past, I do hope you get involved and engage yourself in Canadian politics. There are too few of us that decide to, and there is so much that we could accomplish if more of us did.

Andrew Block

President

Western Liberal, 2005-2006

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WESTERN NEW DEMOCRATS

Dear friends,

As anyone who has worked in a political club or campaign can tell you, once you start working in and around politics it's hard to stop. Luckily I've had the honour of working with some of the most outstanding political minds in the province, the Western New Democrats.

As a club we're relatively new to Western. But in our short three years we've managed to energize the campus. We've lead student protests against runaway tuition costs and made sure that student voices were heard. We've promoted renewable energy sources. We've challenged Canada's deplorable Security Certificate system. We've gone to Toronto and Ottawa, opposing deeper integration with the US. And every step of the way we've made sure that when our representatives come through this campus, they're held accountable. Without a doubt, the Western New Democrats are the most visible political club on campus today.

The central theme of the club is social justice. It's easy for us to simply read about changing the world for the better; it's harder to roll up your sleeves to get it done. Luckily we're committed to that dream with you. The only thing is, once you start into it, you won't want to stop. Here's to not stopping.

Nathan King

President

Western New Democrats 2005-2006

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Preservation of Canadian Democracy: *The Charter and Parliamentary Supremacy*

By D.J. Lynde

Since the implementation of the *Charter of Rights and Freedoms* in 1982, academics have debated whether or not the *Charter* has given the judiciary too much legislative power that could undermine parliamentary supremacy. "Who legislates whom?" is the central question.¹ This debate has come to the fore once again due to the recent decision regarding the same-sex marriage reference case. Justice Antonio Lamer argues that since the *Charter's* implementation, "the courts must determine whether the laws conform to the *Charter*."² As evidenced by the past, legislatures have acted in ways that may not reflect society as a whole, but rather the majority of society. This excludes minorities and other interest groups who want their concerns voiced. Furthermore, there has been legislation in the past that has not been able to become law due to its controversial nature, which has been seen most recently when Prime Minister Mulroney attempted to pass abortion laws; each round of debates failed and no legislation was passed. However, due to the *Morgentaler* decision, women have the choice to have abortion as it is not unconstitutional.³ Finally, legislatures are elected representatives of the Canadian society, thus they have the power for the final decision and can respond in a variety of ways to any judicial precedent. For these reasons, I intend to argue in this paper that the judiciary is upholding the constitution, while not infringing on the Canadian tradition of parliamentary supremacy.

There are two sections of the *Charter* that are particularly useful in understanding this debate. Christopher Manfredi points out that "section 52 of the act declares the principle of constitutional supremacy and authorizes courts to nullify unconstitutional statutes."⁴ The *Charter* placed a new pillar in the Canadian state's framework alongside federalism and parliamentary supremacy. The court's powers

1 - This question was posed by Philip Kaye, "Parliament and the courts: who's legislating whom? (Vriend decision)," *Canadian parliamentary Review* 21.3 (1998): 28.

2 - Antonio Lamer, "*Charter of Rights and Freedoms: Challenges and prospects*," *Canadian Speeches* 7.4 (1993): 28.

3 - See F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter, and the Courts*, (Toronto: McClelland & Stewart Inc., 1992) for more information about the debate of abortion rights through the courts.

4 - Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001), 4.

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have changed drastically as the judiciary is more involved in the government's affairs. This new role is not to block legislation, but rather "to influence the design of implementing legislation."⁵ Legislatures still have the final word and can respond to any judiciary decision in a number of ways, which will be discussed in-depth later in this paper.

Section 24 of the *Charter* has also given the courts more influence and an active responsibility. This section allows individuals

whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied the right to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.⁶

This gives individuals a mode of voicing their concerns with legislation and injustices that exist within the Canadian society. However, it also gives the judiciary the role to adjudicate the dispute of the denied freedoms and to see if these claims are deemed appropriate and whether or not compensation should be required. This means that the judiciary exercises full judicial review. Thus, the judiciary's enforcement of the *Charter* means that "they are fulfilling their assigned democratic duty to prevent legislative trespass on constitutional rights" and to uphold the supremacy of the *Canadian Constitution*.⁷

Legislatures do not always have the interests of the whole populous in mind when crafting legislation. This can be referred to as the tyranny of the majority, wherein elected officials appease the majority rather than the whole and without the new active role of the judiciary, citizens could face an infringement on their rights. Philip Kaye cites Justice Iacobucci's explanation in *Vriend v. Alberta*: "the concept of democracy was broader than the notion of majority rule," but democracy "required legislators to take into account the interests of majorities and minorities alike."⁸ Governments are elected in Canada in a system called first-past the post, which means that they were elected by the majority; however parliament in Ottawa governs Canada as a whole. Thus, if a government acts discriminately towards a certain

5 - Peter Hogg and Allison Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights and Freedoms* Isn't Such a Bad Thing After All)," *Osgoode Law Journal* 35.1 (1997): 75.

6 - Christopher Manfredi, 4.

7 - Rosalie Abella, "Why protecting rights depends on courts, not Parliament nor public," *Canadian Speeches* 14.2 (2000): 14.

8 - Philip Kaye, 28.

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group, then an intermediary such as the judiciary should be able to intervene and this should not be perceived as an infringement on the authority of parliament, but that the courts uphold their duty to ensure that laws conform to the *Charter*. Before the implementation of the *Charter*, the only remedy for undesirable legislation available to Canadians was casting their vote for a different party or candidate.

Pierre Coulombe agrees that governments usually craft legislation that reflects the electorate, and "in the process sometimes neglect—because of political expediency or sheer incompetence—to consider the costs of these policies in terms of human rights and freedoms."⁹ Coulombe gives a thorough analysis of the court decision regarding Bill 101 in *Ford v. Quebec*. The National Assembly of Quebec's tradition of language laws to promote and protect the distinct society of the province started in the 1960s, but at the time citizens had few ways to remedy this controversial legislation. Debate continued and due to the implementation of the *Charter*, it prompted action by Montreal business owners in 1984 as it did not seem like a legitimate means to the Quebec National Assembly's ends.¹⁰ The issue of language laws, not surprisingly, was brought before the Supreme Court of Canada. The court ruled that it agreed the objective underlying Quebec's sign law was legitimate, however, the Supreme Court did not "see the necessity of prohibiting languages other than French."¹¹

The government of Robert Bourassa needed to respond to this Supreme Court ruling as it was during the debates surrounding the Meech Lake Accord. The government passed Bill 178, which upheld the law of unilingualism for outside signs, but inside signs had to be predominately French, Bill 178 was protected by section 33 (the notwithstanding clause) for a period of five years meaning the judiciary could not read in on Bill 178 for this period.¹² The "sunset clause" was designed with the intention that another government could be in power within five years as an election would have been called and Bill 178 needed either to be renewed or it would become invalid.

The *Charter* has arguably given rise to more constitutional litigation and refocusing of interest groups attentions towards the

9 - Pierre Coulombe, "Ford v. Quebec: The Language of Public Signs," in *Political Disputes and Judicial Review: Assessing the Work of the Supreme Court of Canada*, ed. Hugh Mellon and Martin Westmacott (Scarborough: Nelson-Thomas Learning, 2000), 155.

10 - Pierre Coulombe, 154.

11 - Pierre Coulombe, 157.

12 - Pierre Coulombe, 158.

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Supreme Court.¹³ Interest groups lobby institutions that wield political power, and since the Supreme Court has a new and important position within the framework of Canadian democracy, it is not surprising that interest groups lobby the Supreme Court. Government policy goals have become legal doctrine through litigation precedents made by the judiciary, which establishes the judiciary's authority over particular social problems and to legitimate the implementation of a particular remedy.¹⁴ This is not new to Canadian society. Kent Roach argues that in the earlier half of the twentieth century that "racial minorities engaged in litigation to challenge discrimination," however "they rarely obtained relief from courts, but [his] point is that they were forced to try the courts because of their exclusion from the legislative process."¹⁵ Legislatures have evolved along with society and have funded interest group litigation that has been seen in the recent decades.¹⁶

Ian Brodie argues that some interest groups have short-term goals, while others have long-term goals.¹⁷ The short-term goal advocates lobbying the court to strike down a certain piece of legislation as unconstitutional, affecting the interpretation of a certain piece of legislation, or expanding a current policy to include a particular group.¹⁸ The long-term goal activists want to affect court decisions for a number of years to come. Another reason why interest groups may focus their attentions on the court rather than parliament is due to the long process that some have come to perceive as inefficient, as legislation requires three readings and parliamentary debate. Advocates for both pro-choice and pro-life regarding abortion rights illustrate how difficult it is to pass laws concerning controversial social issues through parliament. Legal precedents allow citizens to enjoy rights, which could otherwise be negated. Furthermore, Didi Herman

13 - Charles Epp argues that the Supreme Court's agenda has changed in the past few decades, rather than simply with the implementation of the *Charter of Rights and Freedoms* in 1982.

14 - Christopher Manfredi, 152.

15 - Kent Roach, "The Role of Litigation and the Charter in Interest Advocacy," in *Equity and Community: the Charter, interest advocacy and representation*, ed. F. Leslie Seidle (Montreal: Renouf Publishing Co. Ltd., 1993), 163.

16 - See Ian Brodie, "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program," *Canadian Journal of Political Science* 24.2 (2001): 357-376 for more information about the initiatives of the CCP.

17 - Ian Brodie, "Lobbying the Supreme Court," in *Political Disputes and Judicial Review: Assessing the Work of the Supreme Court of Canada*, ed. Hugh Mellon and Martin Westmacott (Scarborough: Nelson-Thomas Learning, 2000), 195.

18 - Ian Brodie, "Lobbying the Supreme Court," 195.

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argues that the *Charter* can be viewed as a potential short cut as some people are "fed up with the slow pace and unfulfilled promise of 'democratic process.'"¹⁹

Morton and Knopff point out that: "[a] victory in a courtroom rights battle carries the implication of permanence."²⁰ Issues in the legislation that may lead to amendments to the constitution are very hard to pass and implement. The permanence of a precedent decided by the judiciary may seem problematic, but legislatures face larger problems of constitutional reform, which leads to overcoming the rigid amending formula of the *Canadian Constitution*. When an issue is allowed to be raised within the judicial system, the debate and discussion for reform allows the government to respond and craft new legislation surrounding a particular debate. Peter Hogg and Allison Bushell's research shows that legislatures responded in thirty-nine out of fifty-two constitutional litigation cases (seventy-five percent) within two years with corrective legislation.²¹ It should be noted that this legal process can be very expensive for the plaintiff, thus interest groups or even individuals may have trouble engaging in this process.²²

The reference case is a luxury in Canada that does not exist within a number of other countries' legal systems.²³ The use of the reference case allows "a governing executive to shape a set of questions in self-serving ways."²⁴ The ruling executive push questions on the courts, with the intent of gaining guidance on a certain subject matter, however the courts may be placed under pressure to give "an immediate answer."²⁵ In the past few decades, the possibility of Quebec separation has been front and centre in Canadian politics. Prime Minister Trudeau wanted to repatriate the *Canadian Constitution*, and the Supreme Court ruled that Trudeau could have acted unilaterally

19 - Didi Herman, "The Good, the Bad, and the Smugly: Sexual Orientation and Perspectives on the Charter," in *Charting the Consequences: the Impact of Charter Rights on Canadian Law and Politics*, ed. David Schneiderman and Katie Sutherland (Toronto: University of Toronto Press, 1997), 209.

20 - F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 160.

21 - Peter Hogg and Allison Bushell, 99.

22 - Kent Roach, 171, outlines how expensive it is for individuals and interest groups to engage in constitutional litigation.

23 - Kent Roach, 174.

24 - Hugh Mellon, "Introduction: Appreciating the Supreme Courts National Significance," in *Political Disputes and Judicial Review: Assessing the Work of the Supreme Court of Canada*, ed. Hugh Mellon and Martin Westmacott (Scarborough: Nelson-Thomas Learning, 2000), 5. In Australia and the United States reference cases are deemed to be unconstitutional.

25 - Hugh Mellon, 5.

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without the provinces' consent to do so; however his government was warned by the Supreme Court of Canada against such a route.²⁶ Reference cases allow politicians to remove "constitutional doubts before implementing major changes in legislation or the constitution."²⁷ In this instance, the courts are useful to parliament because they prevent a political disaster from evolving due to implementation of any change that would easily become unpopular with the electorate. Furthermore, the Supreme Court of Canada does not have to answer questions from parliament that are deemed to be "too vague and indeterminate."²⁸ This indicates that the proposed legislation would be too controversial. Reference cases are a useful tool to examine an issue and legislatures then have the choice of whether or not to respond.

Another action of the judiciary that needs to be clarified is that it only reacts once a violation claim has been brought before the legal process. Janet Hiebert explains that the judiciary "enters the policy dispute later and its role comes at the behest of citizens or others with standings who allege that legislation violates their rights."²⁹ Courts only intervene and read in on legislation once a dispute and claim has been made. Remedies are offered by the court; however the legislature does not have to comply with these remedies.³⁰ The judiciary's view is to help influence parliament, however this must be viewed as a suggestion, not a demand.

Numerous academics argue that a dialogue exists between the judiciary and parliament; however the representative government officials have more power because they have numerous ways to respond to judicial decisions.³¹ This means that parliamentary supremacy still exists, but with a constitutional check to ensure that the

26 - Hugh Mellon, 5.

27 - Peter Russell, 215.

28 - Peter Russell, 213.

29 - Janet Hiebert, "A relational approach to constitutional interpretation: Shared legislative and judicial responsibilities," *Journal of Canadian Studies* 35.4 (2001): 165.

30 - See Barbara Billingsley, "The Charter: Changing Canadian Law for the New Century," *Law Now* 27.2 (2002):10-13 for the four remedies that the judiciary offers to legislatures.

31 - The idea of a dialogue and a shared responsibility between the courts and the legislatures is supported by Mark Rush, Miriam Smith, Philip Kaye, and most notably by Peter Hogg and Allison Bushell. However, numerous critics such as Janet Hiebert, Jeffrey Simpson, F.L. Morton, and Rainer Knopff argue that no dialogue exists; it is rather a monologue or a discussion that is one sided and fueled by the judiciary. Hiebert argues that the dialogue is diluted by the media, lawyers, and other external elements from the government, which prevent a dialogue to occur.

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elected officials craft laws that conform to the *Charter*. Furthermore, there are several actions that provide grounds that the judiciary is simply upholding the constitution of Canada.

According to Hogg and Bushell, there are four items that allow there to be a dialogue between the courts and the legislatures: (1) section 33, known as the "notwithstanding clause; (2) section 1, known as "reasonable limits" on guaranteed *Charter* rights; (3) the "qualified rights," in sections 7, 8, 9, and 12; and (4) the guarantee of equality rights under section 15.³² The first two of these shall be discussed in length due to the limited space of this paper.

The federal government has never used section 33 because critics argue that it is "an unseemly moral stain on the constitution and defended as an appropriate safeguard against judicial decisions that might be hostile to a desirable public purpose."³³ However, theoretically the legislatures can use section 33 to prevent a judicial decision to read in to the legislation and furthermore strike down the law, but in practice the government rarely uses this protection. It has been argued that this mechanism is not politically acceptable and based on its use by Quebec and Saskatchewan legislatures, people have voiced concerns to put together a constitutional amendment to lessen its impact on the *Charter*.³⁴ Furthermore, Manfredi argues that section 33 is inconsistent with section 52 (constitutional supremacy) and is an infringement of parliamentary supremacy.³⁵ Morton and Knopff argue that this makes it "too easy for governments to override *Charter* decisions."³⁶ However, this is only one of the virtues bestowed upon the legislature to ensure that the officially elected members of parliament have the final action (or inaction) in the public policy process. Janet Hiebert agrees with Morton and Knopff and argues: "it is difficult for me to accept that the override could be justified to restrict a core right" such as social benefits and legal status for lesbians and gays.³⁷ Hiebert's concern is very realistic, but the reasonable limits used by the legislatures are scrutinized and must be legitimate.

The reasonable limits (section 1) of the *Charter* allows in principle for all guaranteed rights, and most of all those that may be

32 - Peter Hogg and Allison Bushell, 82.

33 - Alan Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas Williams (Toronto: McClelland & Stewart Inc., 1995), 195-196.

34 - Christopher Manfredi, 185.

35 - Christopher Manfredi, 188.

36 - F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 308.

37 - Janet Hiebert, 176.

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limited by a law that meets the standards judicially prescribed for section 1 justification.³⁸ The government can find alternate means to overcome *Charter* decisions through the justification of certain limitations on particular laws. For example, in *RJR-MacDonald Inc. v. Canada (A.G.)* (1995), "the Supreme Court of Canada struck down a federal law that prohibited the advertising of tobacco products" regarding "lifestyle advertising" or relating directly to children.³⁹ This meant that the parliament had the opportunity to modify the law. Within two years, the federal government enacted a comprehensive new *Tobacco Act*, which upheld the judicial decision, but modified the law to allow tobacco manufacturers to advertise to adult smokers.⁴⁰

The active role of the judiciary is an easy scapegoat for critics to use to blame for the ever-changing face of the Canadian state, but it is evident from this analysis that the legislatures remain the dominant decision maker, thus parliamentary supremacy continues.⁴¹ However, academics such as F. L. Morton and Rainer Knopff, along with Christopher Manfredi argue that "a long tradition of parliamentary supremacy has been replaced by a regime of constitutional supremacy verging on judicial supremacy."⁴² These statements are supported with an argument that the judiciary no longer tells the legislatures what they cannot do, but what they must do.⁴³ Although, as already discussed, parliament does not have to act on the remedies that are diagnosed from the courts. These are recommendations that do not need to be followed, but, if parliament does not react, then the precedent is in place as law. This is similar to the same-sex marriage reference case. If the current federal government votes against the proposed legislation for same-sex marriage, then nothing happens, but if a government passes legislation against same-sex marriage using section 33, then same-sex marriage would be illegal and the courts would not be able to act if a violation emerges regarding this particular legislation for five years from its implementation.

38 - Peter Hogg and Allison Bushell, 84.

39 - Peter Hogg and Allison Bushell, 86.

40 - Peter Hogg and Allison Bushell, 86-87.

41 - Miriam Smith, "Ghosts of the Judicial Committee of the Privy Council: Group Politics and Charter Litigation in Canadian Political Science," *Canadian Journal of Political Science* 35.1 (2002): 3-5.

42 - F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Toronto: Broadview Press, 2000), 13 and see Christopher Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd ed. (Toronto: Oxford University Press, 2001), 169-195.

43 - F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 15.

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Morton argued in an earlier work that: "the *Charter* has created a new forum: courts; a new set of decision-makers: judges; and a new resource: not voters or money but the 'rights argument'."⁴⁴ This view of the impact made by the *Charter* towards the Canadian state is very pessimistic and makes it seem as though Canadians live without democracy. The "*Charter* Revolution" has not been undemocratic and has not removed one of the founding pillars of the Canadian confederacy: parliamentary supremacy. Canadians now enjoy another way to voice their concerns about how the government acts when drafting legislation. If legislation violates Canadians' rights, then it will most likely make its way before the Canadian judicial system. Constitutional law and policy divisions have been created by governments to be able to justify their legislation within the reasonable limits (section 1) of the *Charter*, which furthers the argument of continued parliamentary supremacy.⁴⁵

The Canadian *Charter of Rights and Freedoms* has created a vital and active role for the judiciary within our legal system, while preserving the Canadian tradition of parliamentary supremacy. The *Charter* has redefined the Canadian state with the check of constitutional supremacy, which does not infringe on Canada's parliamentary system. In the past, governments have been known to act discriminately, however the judiciary now has an active role to ensure that legislation being passed conforms to that of the *Charter*. Canadians have seen the problems of the rigorous parliamentary system, most recently with Prime Minister Mulroney's abortion initiatives that failed. Constitutional amendments are even more difficult to draft as the amending formula is very meticulous. The precedent made in the *Morgentaler* case has allowed females to have the choice of whether or not to have an abortion; without this, abortion would still be a criminal offence. Through the use of functions such as the reference case, section 33 and justifications for section 1, governments are still able to function with influence from the judiciary, while upholding parliamentary supremacy. The same-sex marriage reference case grants citizens the choice of whom they wish to marry, as well as the government the choice to legislate or not. Legislatures begin the reference case mechanism by drafting the questions, but are not bound to respond to the judiciary's decision. The "*Charter* Revolution" has been democratic and supports the two founding pillars of the Canadian

44 - F.L. Morton, *Morgentaler v. Borowski: Abortion, the Charter, and the Courts* (Toronto: McClelland & Stewart Inc., 1992), 300.

45 - Kent Roach, 174.

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democratic system: federalism, parliamentary supremacy and now the *Charter of Rights and Freedoms*.

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Political Adaptation and Evolution:

How a Marrying Direct and Representative Governments will ensure the Survival of Liberal Democracy In a Changing Political Climate

By Jason Strittmatter

Change is inevitable; to survive one must adapt. Liberal democracy is not the first link in the chain of political evolution, nor is it the last. A “democratic deficit” threatens the survival of a subspecies of liberal democracy, which is prevalent in many Western societies: representative government.¹ To survive a changing political climate where a critically thinking electorate resides, representative democracy must adapt and evolve to a higher form—one more in touch with the people and therefore more legitimate. Many scholars look to “Athens and...other city-states of ancient mediæval [sic] times” for a model of a rich democracy.² Resurrected from these ancient times is an idea with the potential to overhaul representative government and transform it into a system of governance that cannot only survive, but thrive in an increasingly hostile climate—direct democracy. Direct democracy should not replace representative government; rather, a marriage between the two would enable the best aspects of both to survive in their hybrid child. Permanently integrating referendums into the current system of representative government will revitalize, legitimize, and thereby strengthen the government, taking society one step closer to pure democracy.

When the impartiality of the process is guaranteed, referendums serve “as a [purely democratic] weapon against the unlimited sovereignty of a potentially tyrannical” government body.³ Each polity retrofits the supporting framework of rules governing referendums to suit their particular political system.⁴ The most important precaution in a referendum ensuring a “real expression of popular thinking” is a clear question.⁵ There is a positive correlation between clarity of the question and clarity of the answer. Ballot

1 - Simon Hug, *Voices of Europe: Citizens, Referendums, and European Integration* (Lanham: Rowman & Littlefield Publishers, Inc., 2002), 6.

2 - Delos F. Wilcox, *Government By All The People* (New York: The Macmillan Company, 1912), 3.

3 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 112-113.

4 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 3.

5 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 57.

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questions must be as clear as possible, allowing voters to convey their true wishes to the legislatures. An ambiguously worded question confuses the voter as well as the results.⁶ For a referendum to have true legitimacy, it must "be cleaned of legal terminology" and contain a single issue.^{7, 8} Legislatures must utilize the high art of statecraft to construct a legitimate question, preventing a confusion of choices, and thus ensuring an accurate response. A slanted question makes a mockery of a referendum by producing questionable results, as exemplified with California's vote on rent control, in which eighty-two per cent voted in error due to the complex nature of the ballot.⁹ A multiplicity of choices is just as problematic, and can lead to protracted multigenerational confusion, as illustrated with Saskatchewan's time zone issue.¹⁰ Similarly, in 1992, the myriad of issues in the Charlottetown Accord overburdened the amendment, leading to voter rejection.¹¹ Referendums, if conducted responsibly, are not plagued with the confusion of issues characteristic of multi-faceted election campaigns.

Every representative election is a "multi-dimensional political campaign."¹² Even the "single-issue"¹³ elections of 1911 and 1988 were not limited to one issue. The dominant issue in Québec in 1911 was not reciprocity, but "the contentious Naval Bill."¹⁴ Outside of free trade, the 1988 federal election dealt with many issues such as:

...tax reform (including the GST), childcare, nuclear propelled submarines, abortion, the deficit, patronage and conflict-of-interest questions, newly authorized spending programs, western Canadian alienation, forestry programs, unemployment insurance abuse,

6 - Ibid, 70.

7 - Ibid, 112.

8 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 16.

9 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 70.

10 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 71.

11 - Shawn Bowler and Todd Donovan, *Demanding Choices: Opinion, Voting, and Direct Democracy* (Ann Arbor: The University of Michigan Press, 1998), 109.

12 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 30.

13 - Ibid.

14 - Ibid, 130.

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housing, fishing quotas, young offenders, capital punishment, parole and the criminal justice system, pensions, the disabled, and a vast range of serious environmental concerns.¹⁵

These smaller issues, "moving in the political sub terrain," attempt to gain the votes necessary to push through controversial legislation.¹⁶ Election-time politics have become "a numbers game, and not an issues teach-in or policy colloquium."¹⁷ Political parties want electors focusing on an issue they support, so the parties make platforms a wide "grab-bag of issues."¹⁸ The problem is these wide political platforms contain many issues voters do not support. This forces the people to settle for merely choosing "the political colour of government."¹⁹ Electors may be forced to choose between a platform representing increased health care spending, lower car insurance premiums, and capital punishment for young offenders or a platform proposing more money for education, and the decriminalization of prostitution. A voter must choose one or the other, even if (s)he does not support the entire package.²⁰ The elected majority then claims "a mandate to implement every item in the party's lengthy and variegated platform" based on voter support.²¹ This is an exaggerated mandate since, in "an election victory, that party...could never be justified in claiming they won the election *because of*, rather than *in spite of* the contentious legislation in question."²² This is equivalent to an individual ordering a twelve-course meal merely because (s)he fancies the desert in the last course.

Referendums differentiate themselves by allowing discerning political connoisseurs to choose each course of action for its own merit, not as a political meal-deal. Rather than dealing with a wide party package involving a vast array of issues, referendums show priority and preference in ways elections cannot. By separating the issues, a referendum allows voters to express their views on each issue, as opposed to one general election policy bundle. This distinction of

15 - Ibid, 131.

16 - Ibid, 129.

17 - Ibid, 95.

18 - Ibid, 88.

19 - Ibid, 94.

20 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 15.

21 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 225.

22 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 114.

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issues gives government a "clear and specific mandate," rather than a vague directional nod every three to five years.²³ With referendums "[p]arties...[may] have more difficulty getting popular majorities for their policy, but not insuperable"²⁴ difficulties. Referendums "distinguish [(wo)]men from measures" by deciding issues on their weight, not on the combined substance of a package nor the merits of a local candidate or political leader.²⁵ This segregation would leave politicians to be elected on "competence in managing government, candidate appeal, etc.," while leaving referendums to provide a clear, rather than confused, mandate.²⁶

Elected representatives confuse an electoral mandate with a "term of office," assuming a "license to govern" that legitimizes all decisions within their elected term.^{27, 28} "Responsible government...in some aspects [has] become a farce."²⁹ Governments use the excuse of mandate to deal with issues or crises that surface—both those foreseeable and those hidden from public knowledge.³⁰ The public is suspicious of these "unheralded major policies,"³¹ which contribute to the "disaffection and alienation" of the electorate.³² Voter discontent finds its root in "the elective dictatorship of majority parties" breaking the campaign promises that brought them to power and pursuing unpopular policies the public has never sanctioned.³³ In past decades, examples of such behavior have multiplied, reaching epidemic proportions. In the 1980 federal election, Pierre Trudeau's intentional lack of campaign promises allowed the prime minister to define the national mandate "in his own fashion."³⁴ In 1974, Trudeau, ignoring the mandate he campaigned for, reneged on his promise "to 'double track"

23 - Ibid, 101.

24 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 70.

25 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 123.

26 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 183.

27 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 123.

28 - Ibid, 92.

29 - Ibid, 93.

30 - Ibid, 90.

31 - Ibid.

32 - Ibid, 92.

33 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 192.

34 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 91.

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the railroads from the prairies to the west coast."³⁵ After the 1988 federal election, the Mulroney government cancelled its mandated policy to acquire nuclear-propelled submarines for the Canadian Forces.³⁶ Jean Chrétien broke his promise to get rid of GST tax, even though this promise greatly contributed to his Liberals winning the federal election in 1993. This perversion of mandates creates suspicion of all government activity. People expect betrayal by elected representatives—regardless of their political stripe.³⁷ This lack of confidence threatens to destroy representative government because of perceived unresponsiveness and lack of accountability.

Referendums can restore representative government to a more responsive, accountable system. When situations changed in 1942, Prime Minister Mackenzie King held a referendum to see if "the government could be released by the electorate from its previous pledge" to cease conscription of men for military service.^{38, 39} This kind of accountability re-establishes the integrity modern politics have lost within the last fifty years. As a party's political term progresses, new information often arises or unforeseen consequences of one issue affect another issue. The popular will then shifts—just as government policy shifts—requiring governments to re-consult the public.⁴⁰ The government has no right to initiate any legislation the public has not consented to, nor where public support is questionable.⁴¹ By allowing electors to vote directly on major policies as they occur, governments show responsiveness to the changing will of the people, resulting in better relationships with the public.⁴²

Critical thinking has changed the way people view the government.⁴³ Electors see their representatives as torn between loyalty to their constituents and to the legislature.⁴⁴ Theoretically, Members of Parliament "are supposed to represent the individuals, while the cabinet is supposed to cut across all regions, and the prime minister is supposed

35 - Ibid, 125.

36 - Ibid.

37 - Delos F. Wilcox, *Government By All The People* (New York: The Macmillan Company, 1912), 250-251.

38 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 119.

39 - Ibid.

40 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 66.

41 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 112.

42 - Ibid, 136.

43 - Ibid, 229.

44 - Ibid, 41.

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to be a national figure," however, strict party politics have subverted the nature of representation.⁴⁵ Due to this disaffection of democratic principle, the public perceives the government as a "flimsy façade [sic], poorly masking" the exploitation of political process—furthering only goals of their party and the special-interest groups they represent.⁴⁶ With their wishes largely ignored, the voters have become "impotent onlookers."⁴⁷ "Every regime, from the most tyrannical dictatorship to the most saintly democracy, claims 'the will of the people' as its license to rule."⁴⁸ This claim to legitimacy only holds true when the people believe the government truly represents their interests. Governments need citizens to believe legislators represent public interests to ensure "compliance with the governmental decisions."⁴⁹

Whether based on fact or fiction, when the electorate perceives the government as genuinely representative of the public interest, it strengthens governmental legitimacy and ensures public compliance. Just as successive enfranchisements have in the past, referendums broaden support bases by including alienated groups in the decision-making process.⁵⁰ The public currently refers "to 'the system' or 'the government' as if it were some autonomous entity, separate and far away," illustrating the lack of any perceived communal ownership.⁵¹ By allowing the public to decide their own fate, legislatures share the responsibility of governmental action. This creates a communal bond based on mutual responsibility and "shared understanding" of partners in the democratic process.^{52, 53} Such a

45 - Ibid, 115.

46 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 32.

47 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 174.

48 - Lawrence T Farley, *Plebiscites and Sovereignty: The Crisis of Political Illegitimacy* (Boulder: Westview Press, Inc., 1986), 3.

49 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 25.

50 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 192.

51 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 3.

52 - Steven A. Rosell, "Changing Maps: Scenarios for Canada in an Information Age". *International Affairs* (Royal Institute of International Affairs 1944-) 72.4 (1996): 680.

53 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 17.

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partnership takes the mystery out of the process, allowing citizens to feel as if they are a part of the system.⁵⁴ As lobbying politicians does not affect voters' decisions, the image of secret "deals made in smoke-filled rooms" will no longer haunt the public.⁵⁵ With citizens "feel[ing] as if they are standing, deliberating, and deciding...in assembly," they will grow to trust legislators, cabinets, and the prime ministers because the government took a leap of faith in trusting them.⁵⁶ Mutual respect between the people and the government creates a strong, united political system that is perceived as legitimate within and without the state.

Representative governments currently err in perceiving their actions as a legitimate and accurate representation of public views, as a variety of intermediary organizations distorts public will.

By virtue of an 'iron triangle' involving politicians, bureaucrats, and special interest groups, ...political parties no longer serve as neutral brokers of all legitimate interests. Instead, they 'arrange compromises among long-established elite groups'...neglecting the interests of the masses.⁵⁷

"[R]igid party discipline" decides the vote of the politicians, while pollsters, "media pundits," and numerous "self-serving special interests" decide the vote of the party—because these intermediary organizations are accredited with being the true voice of the people.^{58, 59, 60} Therefore, "the argument for democracy seems essentially an interest based one"—whose interests can best claim to be those of the people? ⁶¹ James Mill argued, "the individual's expressed preferences

54 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 19-30.

55 - Ibid, 30.

56 - Nadia Urbinati, "Representation as Advocacy: A Study of Democratic Deliberation," *Political Theory* 28.6 (2000): 766.

57 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 98.

58 - Ibid, 6.

59 - Ibid, 21.

60 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 32.

61 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 7.

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are the only legitimate indicator of his/her interests."⁶² When the electorate expresses its will directly, without intermediation, it is expressed accurately. "But when it is filtered through a political party or a legislature or any other intermediary organization, it is bound to be distorted to some degree."⁶³ This process is akin to the children's game, Telephone: as a message circulates through a number of individuals it alters—intentionally or unintentionally—until the message is distorted beyond recognition when it reaches its final destination.

Referendums circumvent this game of political telephone by providing a throughway to the undistorted interests of the people. By moving the method of identifying the interests of the people away from intermediary organizations and directly to the people, referendums allow citizens to "achieve an energizing degree of self-government."⁶⁴ Rather than "imposing predetermined goals" upon the electorate, referendums give legislatures the precise and decisive views of the public.⁶⁵ This accurate depiction allows the government to pass legislation that is more legitimate than any survey speculation or interest-group assertion. Dependence on representatives for expression of popular interests encourages "passive citizenry" unnecessarily, as a modern electorate is capable of not only protecting the interests of the majority but able and inclined to protect the interests of minorities where merited.⁶⁶ Thomas Cronin finds no evidence from the United States that legislative decisions are any better than those made by voters.⁶⁷ In fact, modern crises of governance such as Watergate, Vietnam, and the scandal over the lack of weapons of mass destruction in Iraq have "more to do with the ineptness of...rulers than...[the ineptness of] the people."⁶⁸ Legislatures no longer house the most educated portion of the population; most find employment in private industries or universities. Therefore, excluding the public from the

62 - Ibid, 9.

63 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 31.

64 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 21.

65 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 7.

66 - Nadia Urbinati, "Representation as Advocacy: A Study of Democratic Deliberation," *Political Theory* 28.6 (2000): 759.

67 - Thomas E Cronin, *Direct Democracy: The Politics of Initiative, Referendum, and Recall* (Cambridge: Harvard University Press, 1989), 210-211.

68 - Peter Euben, "Democracy Ancient and Modern," *PS: Political Science and Politics* 26.3 (1993): 478-481.

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decision-making process rejects the most educated perspectives.⁶⁹ Referendum results illustrate how the public, while inclined to maintain the status quo when consequences are uncertain, is not adverse to progressive measures when warranted.⁷⁰ Evidence in Switzerland shows a trend to protect minority rights, as proven in how the electorate "supported rather than suppressed minority rights" in eighty percent of all votes.^{71, 72} Economically disadvantaged groups benefit from referendums, as demonstrated "in Norway's EEC referendum and Andalusia's autonomy referendums."⁷³ Even with inconclusive results, referendums serve a purpose—to show "an issue is not yet ripe for resolution" and an alternative solution is either necessary or the issue should be abandoned for the time being.⁷⁴ Governments must realize opinion polls are not enough to placate an electorate with the capacity for critical thinking. In order to achieve the legitimacy necessary to govern, legislatures must maximize the legitimacy of their actions by accessing the undistorted expression of public will.

By educating the electorate on all alternate viewpoints of an issue, referendums maximize the potential of citizens—ensuring the triumph of the soundest course of action and the consensus required to employ it.⁷⁵ The open, educative nature of referendums draws any hidden agendas of special-interest groups into the light, where "proposals [can be] considered more fully on the hard anvil of public scrutiny and debate."⁷⁶ Special-interest groups must have a legitimate argument for their cases, since they must face the harder task of convincing the whole electorate, rather than a relatively small legislature.⁷⁷ Referendum debates provide minorities with expanded opportunities to persuade the majority "with the force of their ideas," allowing people to "weigh arguments and balance [various]

69 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 75.

70 - Ibid, 108.

71 - Bruno S. Frey and Lorenz Goette, "Does the Popular Vote Destroy Civil Rights?" *American Journal of Political Science* 42.4 (1998): 1345.

72 - Ibid, 1344-1345.

73 - Richard P. Hiskes and John T. Rourke and Cyrus Ernesto Zirakzadeh, *Direct Democracy and International Politics: Deciding International Issues Through Referendums* (Boulder: Lynne Rienner Publishers Inc., 1992), 176.

74 - Patrick Boyer, *The People's Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 52.

75 - Ibid, 2.

76 - Ibid, 149.

77 - Delos F. Wilcox, *Government By All The People* (New York: The Macmillan Company, 1912), 96.

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interests.”^{78, 79} If “the people will not respond to [the] reason [of those seeking electoral support], [it may]...be suspect[ed] that there is something wrong with that reason.”⁸⁰ Overcoming the scrutiny of a critically thinking electorate in an open forum endows bills with legitimacy, ensuring compliance from the public.

Referendums stimulate the active critical thinking process providing the public with knowledge on a given issue, while widening “sympathies with other groups and with society as a whole.”⁸¹ As observed with the drive to obtain information about free trade before the 1988 federal election, the intensity of a political campaign where a major issue is at stake is “a catalyst for education.”^{82, 83} When people realize how an issue affects them and how their voice will decide that issue, they will inform themselves about that issue, defend their viewpoints, and engage others to do likewise.⁸⁴ Through sharing a multiplicity of viewpoints, debate constructs shared values. These shared values bring citizens together—strengthening the state rather than dividing it.⁸⁵

The strongest argument against direct democracy has always been the feasibility; however, due to the explosion of the “communication revolution,” this argument is drastically weakened.⁸⁶ Overlooked and underrated, vast arrays of electronic devices have the capacity to connect people with their government. In past referendums, print and television presented information to the electorate; today’s modern technology allows governments to take this one step further

78 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 160.

79 - Ibid, 10.

80 - Delos F. Wilcox, *Government By All The People* (New York: The Macmillan Company, 1912), 96.

81 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 10.

82 - Patrick Boyer, *The People’s Mandate: Referendums and a More Democratic Canada* (Toronto: Dundurn Press Ltd., 1992), 82.

83 - Ibid.

84 - David Butler and Austin Ranney, *Referendums: A Comparative Study of Practice and Theory* (Washington: American Enterprise Institute for Public Policy Research, 1978), 33.

85 - Steven A. Rosell, “Changing Maps: Scenarios for Canada in an Information Age”. *International Affairs* (Royal Institute of International Affairs 1944-) 72.4 (1996): 687.

86 - Richard P. Hiskes and John T. Rourke and Cyrus Ernesto Zirakzadeh, *Direct Democracy and International Politics: Deciding International Issues Through Referendums* (Boulder: Lynne Rienner Publishers Inc., 1992), 6.

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with computers.⁸⁷ Computers offer fully interactive means to involve citizens in politics. Individuals can reach out across vast distances, access information, and engage fellow citizens in open debate. With government appointed moderators guiding balanced discussion, chat rooms and message boards make nationwide debate feasible. By utilizing all available media in the referendum process, voters would no longer spend an exorbitant amount of time searching for issue-related information, but would have “to take positive action to avoid information.”⁸⁸ Therefore, self-education on referendum issues would be no more of a time constraint than keeping up with current affairs. As “[p]eople...enjoy current affairs...as a way of passing time agreeably,” it follows they would find informing themselves on referendum issues and participating in votes equally enjoyable.⁸⁹ To ensure socially and economically disadvantaged people are not disadvantaged politically, the state must take steps to make relevant communication networks accessible. States could install publicly accessible terminals in government buildings such as libraries, unemployment offices, local political party offices, and city halls or even in highly frequented areas such as malls. Making these interactive systems available to every citizen insures the accurate expression of the voice of the people. Technology makes the dream of a more interactive system of representation not just possible, but easily accessible and cost efficient.⁹⁰

By creating a more direct system of representation through the incorporation of procedures for referendums on major issues, governments could end “civic lethargy” while strengthening the state with the power of legitimacy.⁹¹ When held responsibly, referendums bring the democratic spirit of the Athenian polis to the modern world. Referendums draw citizens in, “changing who...[they] are by educating...[them] to think and speak as a citizen rather than as a private person with private, narrowly partisan interests.”⁹² Referendums provide a process to confront issues one at a time in order to ensure legislation is as legitimate as possible. This in turn strengthens the government by ensuring the happiness—and thus the compliance—of

87 - Ian Budge, *The New Challenge of Direct Democracy*, (Cambridge: Polity Press, 1996), 27.

88 - Ibid, 187.

89 - Ibid, 64.

90 - Ibid, 28.

91 - Delos F. Wilcox, *Government By All The People* (New York: The Macmillan Company, 1912), 248.

92 - Peter Euben, “Democracy Ancient and Modern,” *PS: Political Science and Politics* 26.3 (1993): 479.

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its electorate. Referendums breathe new life into democracy by creating an equitable partnership between the government and its people, thereby creating a sense of trust and respect that will make such a system of governance "last a thousand years."⁹³

AMERICAN POLITICS

"There is no longer a clear, bright line dividing America's domestic concerns and America's foreign policy concerns...If we want America to stay on the right track, if we want other people to be on that track and have the chance to enjoy peace and prosperity, we have no choice but to try to lead the train." – William Clinton

93 - Peter H. Russell, "The End of Mega Constitutional Politics in Canada?"
PS: Political Science and Politics 26.1 (1993): 34.

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The American Reformation:

Electoral College Reform

By Brendan Holness.

The citizens of the United States take pride in their free and democratic elections. After the results of the 2000 Presidential election, the Electoral College was labeled as an old and outdated institution that was in need of reform. Electoral College reform is a topic that has been discussed in Congress after elections in 1968 and again in 1992. The debates in Congress discussed the political issues caused by the Electoral College, and potential reforms to the system. The issues addressed included the role of third parties in American elections, the focus of candidates on states with more electoral votes, and the possibility of a minority elected President. To address the issues of the Electoral College, three proposals were put forth in Congress, a direct national election, a district distribution of electoral votes, and the proportional distribution of electoral votes. If the proposal of a direct election was adopted it would call for the abolishing of the Electoral College, the other proposals would only require a reform of the existing establishment. In light of the results of the 2000 Presidential election the Electoral College should not be abolished, but reformed to prevent the possibility of similar results in future elections.

To critically analyze whether the Electoral College should be reformed, there must be an understanding of the vision of the Framers of the Constitution, and the operation of the College itself. With the original creation of the Electoral College the Framers wanted to bring out "the passion of the citizens of the United States of America while maintaining the power of choice within the states."¹ The power of choice within the states is an important aspect, as it would decentralize the power of the election to all states in the union. As well, by giving the power of choice to the states, candidates have to worry about winning a state's electoral votes. This power gives states a greater influence on the national level in regards to the election and policy when the President enters office. It was believed that with this style under the Electoral College that the most qualified candidate would be elected as President since he would have to run on a platform of broad ideals that appealed to the American masses to win the most electoral votes. The Electoral College consists of 538 total electoral votes, distributed among the 50 states. A candidate must win 270 or more

1 - Jack C. Plano and Milton Greenberg. *The American Political Dictionary* (Belmont: Thomas Wadsworth, 2002), 83.

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electoral votes to win the Presidency. The number of electors in a state is determined by its number of representatives in the House of Representatives plus its two Senators. For example, California holds 55 electoral votes based on its 2 Senators and 53 Representatives. Therefore, the minimum number of electors a state can have is three, two Senators and one Representative. Since the Electoral College is the system of choice in the United States, when voters go to cast their ballot they do not vote for a specific candidate to become President. Instead, the vote for a slate of electors who will carry out the will of the majority of the state to elect the candidate they represent in the December meeting of the Electoral College. In the case that neither candidate achieves a majority of the Electoral College the President is decided in the House of Representatives with each state holding one vote, which is decided in state legislature, and the Vice-President is decided in the Senate with each Senator holding one vote. Aside from the rare occasion that the President is elected by a minority, the system of election adopted by the Framers 200 years ago has provided the choice of the majority in most cases, but that is not to say that reformation is not needed.

As the Electoral College runs its course in American politics, three political effects emerge to the forefront. Those three effects are: the limits on the success of a third party, the focus on larger states, and the President-elect not receiving a majority in the popular vote. First, under the Electoral College system a third party struggles to find sustainable success and influence on the national level. The struggle is caused by the difficulty to obtain electoral votes. Under the current system, in order to gain electoral votes the third party must win the support of a state and gain its votes. However, because of the nature of the strong two party system the likelihood of a victorious third party is very slim. The last time a third party won electoral votes was in 1968 when George Wallace's Independent party won 46 electoral votes.² Although third parties do take votes away from the other two parties and could play a pivotal role in battleground states, they are seen as a wasted vote since they are unable to garner the power to win the election. However, there is fear that if a sustainable third party were to emerge in the American political spectrum there would be many consequences. The most concerning is the bargaining of electoral votes.³ A third party and one of the major parties in theory could strike

2 - CRS Report to Congress. "The Electoral College: An Overview and Analysis of Reform Proposal," (Nov. 2004), 18
<http://www.usembassy.it/pdf/other/RL30804.pdf> (July 2, 2005).

3 - James Wilson. *American Government: Brief Version* (Boston: Houghton Mifflin, 2003) 222

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a deal that would secure one party the Presidency, while making generous political concessions to the third party. Concessions to another party would alter the platform of the President-elect and in some cases alienate the people who voted for him. A third party could expand voter interest offering an alternative to the big two, or on the other hand supply a launching pad from strong extreme interest groups. The inability to sustain a third party is just one of the political effects of the Electoral College, but should not be the lone judge if the College should undergo reform.

In the Electoral College, power lies with the large states of the union rather than equal representation among all states. At the same time as larger states hold the power, smaller states are over represented in the College. When the eleven largest states, which all have fifteen or more electoral votes, are added together they total 271 electoral votes.⁴ Any candidate winning a majority of those states has an advantage over his opponent. Such an advantage encourages the candidates to campaign heavily in those big electoral states, and shape a platform around the needs of the big states, and pay little to no attention to the states with less influence. When the larger states are split such as the case was in the 2000 and 2004 elections the smaller states play a pivotal role in the Electoral College. In the past two elections by gaining a majority of the smaller states President George W. Bush's victory was decided by a single large state, Florida in 2000 and Ohio in 2004. Despite the power of the Electoral College belonging to the large states, the smaller states have an unequal distribution of electoral votes. Compared to the larger states the percentage of votes attributed to the Electoral College by the small states is greater than the percentage of votes the state contributes to the total popular vote of the United States. For example, South Dakota holds 3 electoral votes which is 0.5 percent of the Electoral College total, even though it only has 0.3 percent of the popular vote.⁵ While the inequality isn't substantial in enough of the small states it can cause a skewed enough result to have a President-elect with a lower popular vote total than the runner up in the Electoral College.

Lastly, as was the case between candidates Al Gore, and George W. Bush, a President can be declared without holding a majority of the popular vote. By not carrying a majority of the popular vote brings the Electoral College, and the mandate of the President into question. The Electoral College is questioned as the method of choice

4 - CRS Report for Congress. "The Electoral College: Reform Proposals in the 107th Congress," (Feb, 2003) <http://www.thememoryhole.org/crs/RL30844.pdf> (July 2, 2005)

5 - James Wilson, 222.

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in deciding the Presidency. Perhaps its major flaw is the fact that a majority of the popular vote does not decide the victor. Since the President is elected by a minority of the population, the question arises of whether or not he has a clear mandate. As well, when a minority President is elected there exists the possibility of recounts in the closest states. This was the case in the 2000 Presidential election as Al Gore and the Democrats requested recounts in Florida due to the narrow margin of victory, and the same was almost the case in 2004 with the state of Ohio. The prolonging of the Presidential election through recounts due to a minority election causes the true victor to be unknown for some time, which can throw the nation into short term political and economic uncertainty. In the past two elections the United States has seen a distinct divide between Democratic and Republican voters. This divide has resulted in the past two elections being decided by a single state's electoral votes, and slim margins in the popular vote. Although a minority President under the Electoral College has been a rare occurrence, the trend of conflicting political opinions in the nation has moved the topic to the forefront and quite possibly could happen again without Electoral College reform.

As problems arise in the Electoral College talk of reform or abolishing the system of election comes to the foreground of national debate. Proposals to change the Electoral College system fall into two categories, abolishing the system, or reforming the system based on the perceived problems. There are four options that legislators could follow with regards to the Electoral College: maintain the status quo, direct national election, the district plan, and the proportion plan. With the current system in would be in the best interests of the United States to choose an option to reform the Electoral College.

Despite having defects the Electoral College as it stands has worked relatively smoothly over the past 200 years. The results of the 2000 Presidential election are not a common occurrence with the Electoral College even though they do raise an understandable amount of concern. Proponents of staying the course with the Electoral College believe that the Electoral College fosters political stability as candidates are forced to adopt ideologically broad based campaigns.⁶ A broad campaign benefits the citizens of the United States as the two parties are forced towards the centre of the political spectrum and more moderate election platforms. Such campaign styles crowd out politically extreme parties that may work in some parts of the country. The system also promotes political stability in most elections as the

6 - CRS Report for Congress. "The Electoral College: Reform Proposals in the 108th Congress," (July 5 2005) <http://www.thememoryhole.org/crs/more-reports/RS21496.pdf>

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President-elect is known with certainty within hours of polls closing across the country. It is possible in the case of a direct vote that a President-elect would not be known for many weeks like the case in 2000 between Al Gore, and George W. Bush. In the 2004 Presidential election between John Kerry, and President George W. Bush the final results of the election were known just days after the election once again over a disputed state. However, with a population that is politically divided between the two major parties, keeping the status quo in regardless to the Electoral College would be inviting the controversial results of the 2000 Presidential mistake to happen again.

One of the most popular options for reform of the American Presidential election system is to adopt a direct national vote, the adoption of a direct national vote would mean abolishing the current Electoral College system. Under a direct vote system every vote has an equal value towards the tally of a candidate, and the candidate with the most votes becomes President. The proposal is embraced because of its simplicity and undeniable democratic method of election. Under such a simple system it is easy to initially declare a winner since it is a simple comparison of votes. The downside of a direct election is the disputes that could arise if the margin between the two front running candidates is very narrow. A dispute over the margin of victory could boil over and the events that happened in Florida in 2000 could be experienced throughout the entire country.⁷ Disputes over votes could put the country into dire straights with political instability which in turn would weaken the economy giving the incoming President an uphill battle in his early years of the Presidency. Under a system of direct election there is incentive to third parties to join the race since they can affect the outcome of the election. To win a Presidential election, the candidate must have a majority of the Electoral College, but if the leading candidate has less than 40 percent of the vote, the decision of the Presidency moves to the House of Representatives. In that case Independent parties across the country would need to garner at least 20 percent of the popular vote.⁸ Regional specific parties across the country combined with a moderately popular third party across the nation could siphon enough votes from the two major parties to set up a chain of events to lead the election into the House of Representatives. Because of the nature of a direct voting system the issues of dominant states, and the possibility of a minority president are eliminated since all votes are equal and the victorious candidate is the one with the most

7 - CRS 108th Congress

8 - Nelson W. Polsby and Aaron Wildavsky. *Presidential Elections: Contemporary Strategies Of American Electoral Politics* (Toronto: The Free Press, 1991), 313

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votes. However, the magnitude of the possible problems of a direct national vote outweigh the simple and democratic values of the system forcing legislators to look to other options for a solution.

If the Electoral College simply needs a facelift, there are three reform proposals, the first one being the district plan. The district plan is already used in two states, Maine and Nebraska, for distributing its electoral votes during an election. Under the proposal votes would be distributed on both a district and state wide basis.⁹ The votes attributed to the states electors would be awards to candidates in two ways: a vote for each district a candidate won, and two votes representing the Senatorial electors awarded to the candidate winning the state's popular vote. Under the district plan electoral votes are able to account for varying demographics and political opinion in a state based upon geographical constraints. If the plan was adopted every vote would have a voice in an electoral vote. In traditionally Republican states like Texas, Democrats would be able to steal a few electoral votes. Likewise, the Republicans could gain valuable electoral votes from California which was awarded to Al Gore in the 2000 election. The voices of citizens are more accurately represented through a district system when compared to the traditional Electoral College since some districts do not follow the trend of the majority of the state. The proposal does not take away the overrepresentation of the smaller states, so they would maintain the same number of electoral votes in a reformed electoral college. Since the smaller states do not lose any representation in the College the reform is more acceptable to them than a direct national vote. Since senatorial votes are still awarded based on the popular vote smaller states still have two votes decided by popular vote which is equal voting power across all 50 states. Since the two votes per state are decided by the popular vote in a winner take all fashion, candidates still have incentive to campaign in all states to attempt to secure some of those 100 votes.

Clearly no election system is perfect, and the district plan is not an exception. Opponents claim that the district system does not go far enough in reforming the Electoral College because of redistricting, the effect of third parties, and weighted voting.¹⁰ As votes are distributed by district there is potential for the abuse of redistricting to maximize or minimize the votes of a party. Based on population data, the boundaries of districts in some states could be affected by partisan redrawing. Based on voting patterns in past elections the redistricting in states could benefit both parties as districts were drawn grouping together voters who traditionally follow party lines. Thus depending on

9 - CRS 107th Congress, 6

10 - CRS Overview, 22

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who is in power in the state, a party would be able to increase the number of districts they carry in an election through gerrymandering. Secondly, as votes are awarded based on districts there is the possibility of more extremist or regional parties entering the fold, which would appeal to specific interest groups, or issues that concern different parts of the country, like the Green Party. Since there is a chance for extremists to gain electoral votes, there is a possibility that the results of the election would have to be decided within the House of Representatives and Senate instead of directly through the Electoral College. Lastly, while electoral votes are distributed differently, states still hold the same number of votes as they would under the current system. The result of small states holding the same number of electoral votes is those smaller states have a vote per capita advantage over the larger states. The vote per capita advantage is one of the reasons for the skewed popular vote since a single electoral vote in a smaller state like Alaska would not require as many votes as the same vote in a state like California. The problem that arises with different per capita figures among states is that while a candidate can win more individual votes in a larger districts they are equal to a single district with significantly less votes. While the district plan is by no means a perfect system it does offer some improvement on the current Electoral College but would need improvements in regards to districting before it became a viable reform option for the current Electoral College.

While the district plan attributes votes based on the districts won, it does not address the issue of votes for the opposition in a party stronghold where a single party would sweep the state under both the current system and a district system. The problem is however addressed in the proportional plan. In the proportional plan the electoral votes attributed to a candidate by the state are based on the percentage of the popular vote each party received in the state. According to the proportional plan the Electoral College becomes a better representation of the popular vote. Under the proportional system it is believed that elections would become more national in scope, and that a viable third party would emerge.¹¹ Since candidates have a greater chance to gain valuable electoral votes in every state there is increased incentive to have a broader campaign that appeals and address' the concerns of all states, and not only the states which are viewed as battleground states. By having to appeal to the whole country the ideologies of the parties shift slightly center to maximize their possible votes. However, candidates will still focus on traditional party strongholds as a greater number of votes in those states would not only increase the strong candidate's electoral votes, but hinder the

11 - CRS 107th Congress, 23

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weaker candidate's ability to make inroads in the opposition state. Secondly, under a proportional system third parties are able to obtain Electoral College votes, which is a rare circumstance under the current system. In the long run the gaining of Electoral votes could push a once fringe third party onto the national stage, with a greater influence in Washington. However, there is fear of a third party as it could create electoral gridlock by taking crucial votes away from the two major parties. The electoral gridlock would result in the decision going to the House of Representatives because neither of the two major candidates claimed more than 40 percent of the Electoral vote. Like all the other proposals the proportional distribution of electoral votes has its flaws, however, relative to the other proposals the problems faced in the proportional plan are manageable and would be an ideal reform to the current Electoral College.

In order to see the effectiveness of the proposals that have been laid out in Congress they were applied to the results of the 2000 Presidential election. Under a direct national vote Al Gore would have won the Presidency as he took a majority of the popular vote 50,996,116 votes to President George W. Bush's 50,456,169.¹² This discrepancy between the popular vote and the Electoral College led to the reopening of the debate to reform Electoral College. In the 2000 election President Bush received 271 electoral votes compared to Al Gore's 266 electoral votes. Under the district plan the results of the election would have turned out as Bush receiving 288 electoral votes to Al Gore receiving 250.¹³ The magnified difference shows the inaccuracy of the district system because of weighed voting in the smaller states which were mostly won by President Bush. In a proportion distribution plan the final result would be Bush 259 electoral votes, Gore 258 electoral votes, and Independents 21 electoral votes.¹⁴ There is still a discrepancy between the popular vote and the Electoral College, however, the gap is so minute that it could be attributed to the distribution of votes through the electoral college.

When looking at all of the options available to legislators it is easy to identify the flaws associated with each proposal and with the current system. However, no election system is perfect, so it is in the best interest of the nation to adopt a system that would minimize the number of problems relative to the current Electoral College. Based on the 2000 election results the direct national vote is the only system that accurately reflects the outcome of the popular vote, but the problems

12 - CNN. "Election 2000 - Results," (2000)

<http://edition.cnn.com/ELECTION/2000/results/> (July 6 2005)

13 - CRS Overview, 21

14 - CRS 2004, 23

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associated with the system greatly outweigh the positives. As well, a direct national vote would never be accepted by the smaller states in the Union as it diminishes their role in the Electoral College which could leave them virtually ignored on the campaign trail. As for the district plan, although it appears to work in theory to voice the opinions of the citizens in every state; the result of the Presidential election in 2000 would be even more outrageous than the result of the current Electoral College. Unless every district had roughly an equal amount of people the results will be greatly skewed because of rural districts compared to urban districts, and the power held by the smaller states. The last option is the proportional plan which did result in a minority President but most likely due to the power of the smaller states, and the fact that Bush took many of those smaller states in the 2000 election. Under both the current Electoral College and a Proportional College there is a chance for a minority President, however, in the 2004 Presidential election there was the possibility of another minority President as John Kerry narrowly lost the state of Ohio. Had Kerry carried Ohio he would have won the Presidency while losing the popular vote by nearly three million votes.¹⁵ In the past two elections flaws have shown in the Electoral College, and if the current trend continues, then it is in the best interest of the United States to look towards a proportional Electoral College.

In the light of the results of the 2000 Presidential election, it would be in the best interest of the nation to reform the Electoral College to distribute votes proportional to the popular vote. While all problems would not be addressed by using a proportional system, the process would rely heavier on a popular vote, and allow the influence of third parties while not diminishing the role of smaller states. In a reformed proportional Electoral College the American public can once again take pride in their democratic system.

15 - CNN. "Election 2004," (2004)

<http://us.cnn.com/ELECTION/2004/pages/results/> (July 6 2005)

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The War In Iraq:

Can Insecurity Be Justified?

By Jeff Rochweg

Any action that a nation undertakes must be executed with the security of its citizens in mind. This is an idea entrenched in the annals of political theory and made famous by the English philosopher Thomas Hobbes. In his tome, *Leviathan*, Hobbes postulated that the state of nature was nasty, brutish, and short – in other words, a threat to the existence of each human life. His answer to this dilemma was to create a single sovereign authority whose tenure on power depended on how well he kept his subjects guarded. Hobbes wrote, “for by this authority, given him by every particular man in the commonwealth, he hath the use of so much power and strength conferred on him, that by terror thereof, he is enabled to form the wills of them all, to peace at home, and mutual aid against their enemies abroad.”¹ The purpose of this social contract between ruler and citizen, he wrote, “is the peace and defense of them all.”²

It would appear by analyzing documents written by the Bush administration that they subscribe to Hobbes’ belief that a government’s primary concern must be the protection of its citizens from harm. Its document, *The National Security Strategy of the United States of America*, emulates his more sacred ideas. In the preamble, President Bush writes, “defending our Nation against its enemies is the first and fundamental commitment of the Federal Government.”³ He makes reference to the events of September 11, 2001 that shook the American psyche and created feelings of insecurity by writing, “weak states, like Afghanistan, can pose as great a danger to our national interests as any strong state.”⁴ The document also makes broad claims including “the aim of this strategy is to help make the world not just safer but better.”⁵

As political scientists can attest, ideas usually sound better in

1 - Thomas Hobbes, “Leviathan”. in *Modern Political Thought: Readings from Machiavelli to Nietzsche*, Ed. David Wootton. (Indianapolis: Hackett Publishing Company., 1996.) 189.

2 - Thomas Hobbes, 191

3 - United States. “The White House, Office of the President”. *The National Security Strategy of the United States of America*. (Washington: GPO, 2002.) i

4 - United States. “The White House, Office of the President”. *The National Security Strategy of the United States of America*. (Washington: GPO, 2002.) ii

5 - United States. “The White House, Office of the President”. *The National Security Strategy of the United States of America*. (Washington: GPO, 2002.) i

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theory than in practice. After reading a document such as the *National Security Strategy*, questions will surely arise as to how well the United States government executed their theory, specifically in the context of the war in Iraq. Is America more secure as a result of said war? Has the White House violated Hobbes' social contract? This paper will assess how the Bush administration politicized the intelligence process and misled their citizens into believing the pretences for war. As a result of these deceitful actions, I will argue that contrary to speeches coming from the White House, the war in Iraq has created a situation whereby America is less secure and more vulnerable to attack. Due to this manipulated pre-war intelligence process and the resulting insecurity, I will conclude that the Bush administration breached the sacred trust of keeping its citizens secure, the very security this war was supposed to protect. It will only follow from these points that the war in Iraq was a mistake and cannot be deemed justifiable.

The terrorist attacks of September 11, 2001 created a climate of fear in the United States. Since that infamous day, the Bush administration has done little to alleviate the concerns of its nationals. Gwynne Dyer writes, "ever since 9/11, the Bush administration has been doing exactly what [Islamist radicals] want, invading Muslim countries and serving as an unpaid but highly effective recruiting agent for the extremists across the whole of the Muslim world."⁶ Instead of working to make the United States more secure, the White House capitalized on this great tragedy and exploited America's fears by suggesting Iraq was an imminent threat to the stability of the country. No man had a better vantage point of the pernicious motivations of the Bush administration than Richard Clarke, the former counter-terrorism czar. Clarke was in the White House in control of the situation room on September 11 and has a first hand view of the Bush administration's fixation to dismiss the al Qaeda threat and focus on Iraq. Clarke uses the analogy that, "having been attacked by al Qaeda, for us to go bombing Iraq in response would be like our invading Mexico after the Japanese attacked us at Pearl Harbor."⁷ While the administration knew that after September 11 the American public would demand action, "the compromise consensus... was that the struggle against al Qaeda and the Taliban would be the first stage in the broader war on terrorism. It was

6 - Gwynne Dyer, *Future Tense*. (Toronto: McLelland & Stewart Ltd., 2004.) 29

7 - Richard A. Clarke, *Against All Enemies: Inside America's War on Terror*. (New York: Free Press, 2004.) 30-1

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also clear there would be a second stage."⁸

The mission in Afghanistan was not yet finished when the administration began to publicly build support for a war in Iraq. In his 2002 State of the Union address, Bush said, "Iraq continues to flaunt its hostility toward America and to support terror. The Iraqi regime has plotted to develop anthrax, and nerve gas, and nuclear weapons for over a decade."⁹ Bush continued this rhetoric in the 2003 State of the Union when he said, "a brutal dictator, with a history of reckless aggression, with ties to terrorism, with great potential for wealth, will not be permitted to dominate a vital region and threaten the United States."¹⁰ In the same address, Bush implied Saddam Hussein was an imminent threat. He said,

year after year, Saddam Hussein has gone to elaborate lengths, spent enormous sums, taken great risks to build and keep weapons of mass destruction. But why? The only possible explanation, the only possible use he could have for those weapons is to dominate, intimidate, or attack."¹¹

Finally, Bush presented a link between Iraq and al Qaeda when he said, "Saddam Hussein aids and protects terrorists, including members of al Qaeda."¹² By playing on the fears of the nation, such claims, which were later proven to be dubious, helped build domestic support for the war.

James Pfiffner is one scholar who has tried to refute Bush's claims. He writes, "the careful phrasing of administration statements implying a link between Saddam and 9/11 suggests they knew there was no compelling evidence. If there was, they would have made an outright claim for the link, and the argument for war would have been much easier to make."¹³ In the case of tying Iraq to a nuclear program, Pfiffner writes,

8 - Richard A. Clarke, *Against All Enemies: Inside America's War on Terror*. (New York:

Free Press, 2004.) 31

9 - George W. Bush, State of the Union Address. (United States Capitol, Washington D.C.

29 Jan. 2002.)

10 - George W. Bush, State of the Union Address. (United States Capitol, Washington D.C. 28 Jan. 2003.)

11 - George Bush 2003

12 - George Bush 2003

13 - James, Pfiffner "Did President Bush Mislead the Country in His Arguments for War with Iraq?" *Presidential Studies Quarterly*, 34 (2004): 29

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two claims of evidence for Saddam's nuclear capacity that the administration relied upon were of dubious authenticity: the claim that Iraq sought uranium oxide...from Niger and that aluminum tubes shipped to Iraq were intended to be used as centrifuge to create the fissile material necessary for a nuclear bomb.¹⁴

He continues, "if the administration had compelling evidence that Saddam was reconstituting his nuclear capacity, why did it rely on the two dubious claims?"¹⁵ By suggesting that there was no link between Iraq and 9/11 and that Saddam Hussein's nuclear arsenal was non-existent, Pfiffner is able to show how the president misled the public in his State of the Union comments meant to build support for the war.

The weapons of mass destruction question and inspection process is the central theme of Hans Blix's memoir, *Disarming Iraq*. Blix, the executive chairman of the United National Monitoring, Verification and Inspection Commission for Iraq (UNMOVIC), writes "although the inspection organization was now operating at full strength and Iraq seemed determined to give it prompt access everywhere, the United States appeared as determined to replace our inspection force with an invasion army."¹⁶ He is able to refute Bush's claim that Iraq was non-compliant with regards to weapons inspectors in the past by noting, "...how, in July 1991, after confrontations, the Iraqis had sent the IAEA a note admitting that they had tried several methods of enriching uranium."¹⁷

Blix also discredits the point made by members of the Bush administration that the inspection process was not working, and that Iraq posed an impending threat to the security of both Americans and the international community. In his conclusion, he writes

after the war, it is becoming clear that inspection and monitoring by the IAEA, UNMOVIC...backed by military, political and economic pressure, had worked for years, achieving Iraqi disarmament and deterring Saddam from rearming. Containment had worked, in other words.¹⁸

These words are echoed by former Secretary of State Colin Powell who on February 24, 2001 stated, "frankly, [sanctions] have worked.

14 - James Pfiffner, 31

15 - James Pfiffner, 36

16 - Hans Blix, *Disarming Iraq*. (New York: Pantheon Books, 2004.) 3

17 - Hans Blix, 5

18 - Hans Blix, 272

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[Saddam] has not developed any significant capability with respect to weapons of mass destruction. He is unable to project conventional power against his neighbours."¹⁹ Is it any coincidence that Powell's views were silenced by the more hawkish members of the administration during the build up to war? This doublespeak from the Bush administration never made an impact on the pre-war intelligence process. Instead, the agencies seemed to be influenced by Bush's resolute comments. Blix writes that "the rock-solid conviction at the governmental level is the U.S. and UK that weapons existed, and the expectation at that level that they would be provided evidence proving this conviction correct probably had an influence on the intelligence communities."²⁰

Pfiffner also highlights how the intelligence process that built the case for a war in Iraq was highly politicized. He notes, "CIA analysis was...treated with suspicion in the Department of Defense because the CIA was not coming to the same conclusions about Iraq's WMD capabilities that the secretary and deputy secretary of defense expected. A number of CIA analysts perceived this as pressure."²¹ He continues, "insofar as the Bush administration put pressure on U.S. intelligence agencies to suit their analysis to its policy goals, it jeopardized its own best sources of intelligence."²² A war built on manipulated intelligence cannot be deemed justified, especially when it has increased security concerns.

The most deeply contested debate in the aftermath of the invasion of Iraq is whether the war has increased American stability, as President Bush promised in his National Security Strategy. Bruce Hoffman argues that while the initial stages of the war were well implemented, "a critical window of opportunity was lost because of the failure to anticipate the widespread civil disorder and looting that followed the capture of Baghdad."²³ "These initial missteps," he writes, "seriously undermined the U.S. effort in Iraq and led to the uncertain situation in that country today."²⁴ Hoffman argues that these miscues in planning created a climate where insurgents could flourish, and that the U.S. troops and other coalition forces were ill prepared to fight these combatants. This realization is in sharp opposition to what Bush warned against in the National Security Strategy when he implied

19 - Gwynne Dyer, 174

20 - Hans Blix, 262-3

21 - James Pfiffner, 42

22 - James Pfiffner, 43

23 - Bruce Hoffman, *Insurgency and Counterinsurgency in Iraq*. (Santa Monica: Rand National Security Division, 2004.) 2

24 - Bruce Hoffman

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that weak states are a massive threat to security. By underestimating the power of the insurgency, the United States has assisted in making Iraq a weak state.

The insurgency, which has assisted in creating an anarchic situation in Iraq, has the potential to spread to other regions of the world and could threaten the defense of the United States and its allies. Even CIA chief Porter Goss, a staunch ally of the Bush administration said, "those jihadists who survive will leave Iraq experienced in and focused on acts of urban terrorism. They represent a potential pool of contacts to build transnational terrorist cells, groups and networks."²⁵ Hoffman writes, "the main insurgent threat is not from [Former Regime Elements] but from foreign jihadists."²⁶ These foreigners are able to take their training learned from notorious terrorists in Iraq back to their home countries where they could become a threat, thus leading to a horizontal proliferation of insecurity. Hoffman said at the World Economic Forum, "the foreign jihadists who come to Iraq, when this ends, are going to go back to their own countries...these people are going to have been trained in urban terrorism."²⁷ It should be remembered that the September 11 hijackers were of Saudi descent and were also trained in a weak state, Afghanistan. Hoffman also states that "the success of the insurgency has shown potential terrorists everywhere how best to defeat a superpower. That...will come back to haunt the West."²⁸

The bombing in Madrid is sufficient proof of how the Iraq war has undermined international defense. On March 11, 2004, Islamic rebel groups with ties to al Qaeda carried out the bombing of rush hour commuter trains in Madrid²⁹. In a videotaped message, the terrorists

25 - Katherine Shrader, "Officials Warn of Future Terror Attacks." Yahoo News. The Associated Press. (16 Feb. 2005.)
http://story.news.yahoo.com/news?tmpl=story&u=/ap/20050217/ap_on_go_ca_st_pe/terror_threat&e=3

26 - Bruce Hoffman, 13

27 - Paul Haven, "World Forum Focuses on Terrorism in Iraq." Yahoo News. 29 Jan. 2005. The Associated Press.

<http://news.yahoo.com/news?tmpl=story&cid=540&u=/ap>. (Assessed 30 Jan 2005)

28 - Paul Haven, "World Forum Focuses on Terrorism in Iraq." Yahoo News 29 Jan. 2005. The Associated Press.

<http://news.yahoo.com/news?tmpl=story&cid=540&u=/ap>. (Assessed 30 Jan 2005)

29 - Wikipedia. "Aftermath of the 11 March 2004 Madrid attacks." Wikipedia: The Free Encyclopedia. 8 February 2005

http://en.wikipedia.org/wiki/Aftermath_of_the_11_March_2004_Madrid_attacks

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claimed that "This is a response to the crimes that you have caused in the world, and specifically in Iraq and Afghanistan."³⁰ The fallout from these attacks was the defeat of the pro-war Jose Maria Anzar's government in an election three days after the attacks, and the subsequent pullout of Spanish troops from Iraq. Were the Spanish merely giving in to terrorist demands, or was this a collective response demanding that their countrymen no longer be collateral damage in a war sabotaging the international security situation?

While rhetoric from the White House might imply that coalition forces are effectively combating the insurgents, Hoffman offers a starkly different view:

The highest imperative of the insurgent is to deprive the population of that sense of security. Through violence and bloodshed, the insurgent seeks to foment a climate of fear by demonstrating the authorities' inability to maintain order and thus highlight its weakness. Spectacular acts of violence, such as suicide bombings that have rocked Iraq since August, are meant to demoralize the population and undermine trust and confidence in the authorities' ability to protect and defend them. Here, the fundamentalist asymmetry of the insurgency/counterinsurgency dynamic comes into play: The guerillas do not have to defeat their opponents militarily; they just have to avoid losing.³¹

As long as the rebels are able to contribute to the climate of insecurity and continue recruiting foreigners to aid in their fight, the prospect of a safer world as a result of the Iraq war will remain dire.

Even realists, people with the same conservative beliefs of the Bush administration, are skeptical about the prospects of security in the wake of the war in Iraq and resulting insurgency. Anthony Lott writes, "U.S. policy to 'liberate' Iraq provides an instance of state practice that unintentionally creates insecurity while attempting to manage national security concerns."³² He reflects the comments of other realists by stating,³³

30 - Wikipedia. "Aftermath of the 11 March 2004 Madrid attacks." Wikipedia: The Free Encyclopedia. 8 February 2005

http://en.wikipedia.org/wiki/Aftermath_of_the_11_March_2004_Madrid_attacks

31 - Bruce Hoffman, 13

32 - Anthony D. Lott, *Creating Insecurity: Realism, Constructivism, US Security Policy*. (Aldershot: Ashgate Publishing Limited, 2004.)

33 - Anthony Lott, 142

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The United States...appear[s] to be a rogue superpower bent on global hegemony. This perception could have deleterious consequences for the medium and long-term interests of the United States and prompt terrorists to engage in violent acts within the U.S. in a form of blowback.³⁴

While the White House may not be concerned with their standing in the international community, and especially with how their actions are perceived by the terrorists, Lott believes that this is an example of arrogance and short-sightedness. He writes, "by appearing unrestrained, the United States offers the best recruiting tool available to terrorist groups."³⁵

Lott is not the only scholar who believes that the U.S.' war on terror, especially in the context of Iraq, is proving to be counter-productive. It is important to consider Richard Clarke's argument, as he worked as a counter-terrorism expert for seven U.S. presidents of both political stripes. He writes,

nothing America could have done would have provided al Qaeda and its new generation of cloned groups a better recruitment device that our unprovoked invasion of an oil-rich Arab country...It was as if Usama Bin Laden, hidden in some high mountain redoubt, were engaging in a long-range mind control of George Bush, chanting 'invade Iraq, you must invade Iraq.'³⁶

Clarke addresses the argument made by many conservative groups that the war in Iraq was justified, as it removed a brutal dictator from power. He notes,

I know that in one sense the world is better off without [Saddam Hussein] in power, but not the way it was done, not at the cost we have paid and will pay for it; not by diverting us from eliminating al Qaeda and its clones; not by using the funds we need to eliminate our vulnerabilities to terrorism at home; not at the incredibly high price of increasing Muslim hatred of America and strengthening al Qaeda.³⁷

34 - Anthony Lott, 142.

35 - Anthony Lott, 149.

36 - Richard Clarke, 246.

37 - Richard Clarke, 264.

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Finally, Clarke weighs in on the question of whether the Iraq war increased America's security. He writes,

with our army stretched to the breaking point, our international credibility at an all time low, Muslims further radicalized against us, our relations with our allies damaged, our soldiers in a shooting gallery, it is as hard to believe that America is safer for the invasion as it is to believe that President Bush had good intelligence on weapons of mass destruction or that 'this country was threatened with Saddam Hussein in power.'³⁸

There is no question that in Clarke's mind the war in Iraq must be deemed unjust as it has worsened, and not destroyed, the terrorist threat.

Clarke's assessment of the consequences of the Iraq war is echoed by another expert in international security, weapons inspector Hans Blix. He writes, "the Iraq war cannot be undone. The costs of the war and the occupation - in terms of loss of lives and property, billions of dollars spent, damage to the UN and NATO, credibility of political leaders, the fostering of hatred, and so on - are written in red."³⁹ These mounting costs, both in terms of economics and casualties, continue to deteriorate the security situation in Iraq. In response to the \$75 billion budget proposal to pay for the costs of keeping U.S. troops in Iraq, David Chu, the Pentagon's undersecretary for personnel and readiness said, "the amounts have gotten to the point where they are hurtful, they are taking away from the nation's ability to defend itself."⁴⁰ Money spent on the Iraq mess is being diverted from measures that could truly increase security, such as international weapons disarmament, multi-lateral counter-terrorism facilities, or democracy education programs in the Middle East - all concrete steps that will make America safer.

Any war must be undertaken with the assumption that its results will improve security. Iraq has created the opposite effect whereby the United States is seeing its security undermined, and their war on terror is taking a giant step backwards. This action has created a bloody quagmire that serves as a terrorist breeding ground of zealots with anti-Western and anti-American ideologies. Iraq has not made

38 - Richard Clarke, 267.

39 - Hans Blix, 267.

40 - Koring, Paul. "Bush seeks \$75-billion for Iraq." The Globe and Mail, 26 January 2005, A12.

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America safer, it has made the United States and its allies more vulnerable to terrorist attacks, as evidenced by the bombing in Madrid in March 2004. A war cannot be deemed justifiable when its results have created a more dangerous situation for those whose freedom, liberty and interests it was supposed to protect. The question posed by John Kerry upon his return from Vietnam to the Senate Foreign Relations Committee has once again become pertinent: "how do you ask someone to be the last man to die for a mistake?"⁴¹

41 - Kerry, John. "Vietnam War Veteran John Kerry's Testimony Before The Senate Foreign Relations Committee." Senate Foreign Relations Committee, (Washington D.C. 22 April 1971.)

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Miranda v. Arizona

By Suzanne Szasz

The word *Miranda* has become a staple of the law enforcement community; no single procedure is more vividly known, for good or bad, than the police administration of the *Miranda* warning.¹ *Miranda v. Arizona* 384 U.S. 436 (1966) is one of the Supreme Court's most controversial rulings; even today it remains a symbol of the activist Warren's Court expansion of the rights of criminal suspects.² The case was an analysis of basic rights enshrined in the Constitution "No person...shall be compelled in any criminal case to be a witness against himself," and that "the accused shall have the Assistance of Counsel."³ The specific issue addressed in *Miranda* concerned the admissibility of statements of confessions obtained during police interrogations. The Court focused on the Fifth Amendments self-incrimination clause as the doctrine governing custodial interrogation and confessions.⁴ *Miranda* provided a set of rules for police officers to follow in interrogations, which assure that the individual is accorded the privilege not to be compelled to incriminate himself.⁵

Before *Miranda*, the rule from common law was that a confession had only to be voluntary to be admissible.⁶ In *Brown v. Mississippi* (1936), the Court held that the Due Process Clause prohibited the admission of forced confessions as evidence in criminal procedures. In *Brown*, the police threatened to torture a black man if he did not confess to killing a white victim.⁷ To admit unreliable evidence as proof of guilt was to deny defendants the right to life, liberty and property without due process of law.⁸ This case extended the Constitution to police interrogations. The voluntariness principle meant that physically compelled confessions were inadmissible. In *Ashcraft v. Tennessee* (1944), the Court threw out the confession after it was obtained from a thirty-six hour interrogation where the suspect was

1 - Joel Samaha, *Criminal Procedure* (St. Paul: West Publishing Company, 1993), 368.

2 - H.L. Pohlman, *Constitutional Debate in Action Criminal Justice* (Lanham: Rowman and Littlefield Publishers, 2005), 37.

3 - James Carl Foster, and Susan M. Leeson, *Constitutional Law: cases in context* (Upper Saddle River: Prentice Hall, 1992), 972.

4 - Joel Samaha, 369.

5 - James Carl Foster and Susan M. Leeson, 970.

6 - H.L. Pohlman, 37.

7 - Joel Samaha, 372.

8 - Joel Samaha, 372.

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denied sleep or rest; the "totality of circumstances" was considered to measure voluntariness.⁹ In *Escobedo v Illinois* the Sixth Amendment right-to counsel was considered by the Court, the question raised was whether the police needed to honor a suspect's request to council during interrogation. In a majority opinion Justice Goldberg reasoned "a suspect had to have the right to counsel with his attorney during questioning if his right to counsel at trial was to have any meaning."¹⁰ A refusal by police would mean any later remarks were inadmissible. Analyzing the relationship between cases and Court precedent is important in understanding the *Miranda* decision.

On March 13, 1963, Ernesto Miranda was arrested at his home on charges of kidnapping and the rape of Patricia Weir. He was identified by the witness and taken into "Interrogation Room No. 2" of the detective bureau.¹¹ After two hours the officers emerged with a signed confession. At trial the confession was admitted into evidence over the objection of defense counsel and Miranda was convicted. The Supreme Court of Arizona upheld the conviction. On appeal to the Supreme Court, the conviction was reversed. From the testimony of the officers and admission of the respondent, the Court found that Miranda was not advised of his right to counsel or to have one present during interrogation, nor was his right not to incriminate himself protected.¹² Without these warnings the statements were inadmissible. Throughout the 20th century the Court has relied on Amendments V, VI and XIV in developing the laws of police interrogations and confessions.¹³

The *Miranda* case was decided by a 5-4 margin; Mr. Chief Justice Warren delivered the opinion of the Court. The majority of the Justices held custodial interrogation to be inherently coercive, suspects are placed in strange surroundings, unable to go home and are subject to officers psychological pressure to "crack" the will of suspects, without the full warning of their rights, violated the Fifth Amendment.¹⁴ Interrogation exacts a toll on liberty and trades on the weakness of the individual.¹⁵ The Justices presented a new procedure for all interrogations to follow:

9 - H.L. Pohlman, 39.

10 - H.L. Pohlman, 39.

11 - James L. Maddex, Jr, *Constitutional Law Cases and Comments Second Edition* (St. Paul: West Publishing Company, 1978), 247.

12 - James L. Maddex Jr., 247.

13 - Joel Samaha, 371.

14 - Joel Samaha, 374.

15 - Joel Samaha, 375.

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1. The person in custody must, prior to interrogation, be informed of his right to remain silent, and that anything he says may be held against him in Court and that even if he begins to talk, he may stop the interrogation at anytime
2. He must be clearly informed that he has the right to counsel and to have counsel present during interrogation.
3. He must be told that if he is indigent, an attorney may be appointed to be present at his interrogation if so desired.
4. Any waiver of these rights on the part of the suspect must be clearly and intelligently done. A heavy burden falls on the state to prove that the waiver was done in the manner.¹⁶

These procedural safeguards outline the protections, which must be given to the privilege against self-incrimination. The majority intended to regulate the behavior of police officers and to place constraints on the use of interrogations.¹⁷ The *Miranda* decision was broad in its intent and wide in scope, otherwise "a constitutional straitjacket [would] handicap" efforts of reform.¹⁸

Justices Harlan, Stewart, and White were of the dissenting opinion. They claimed that the Fifth Amendment had never been thought to forbid *all* pressure to incriminate oneself in the situations covered by it.¹⁹ The Court's assumption that *any* pressure violates privilege is not supported by precedent and fails to show why the Fifth Amendment prohibits mild pressure, which the Due Process Clause allows.²⁰ The rules impair an instrument of law enforcement that has long been thought worth the price to pay. While the right to remain silent is a minor obstruction, the right to require a waiver and an end to questioning whenever demurred or provide counsel invites an end to interrogation, thus, ultimately discouraging any confessions at all.²¹ Some crimes cannot be solved without confessions, the Justices claim the court is taking a risk with society's welfare in imposing these new procedural rules, one in which the social costs are too high.²²

16 - Neal A. Milner, *The Court and Local Law Enforcement the Impact of Miranda*, (Beverly Hills: Sage Publications, 1971), 39.

17 - Neal A. Milner, 40.

1818 - Neal A. Milner, 40.

19 - Neal A. Milner, 63.

20 - James Carl Foster, and Susan M. Leeson, 975.

21 - James Carl Foster, and Susan M. Leeson, 975.

22 - James Carl Foster, and Susan M. Leeson, 975.

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Mr. Justice Clark was also part of the dissenting opinion, but he held a concurring opinion. "I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough."²³ Clark holds to the prior rule formulated in *Escobedo*, where the admission of guilt depended on the totality of circumstances.²⁴ Clark would consider in each case whether prior to interrogation the officer aided the warning to the suspect.²⁵ Rather than apply the arbitrary Fifth Amendment, he would follow the more concrete Due Process Clause incorporated in Amendments V and XIV, which are effective in protecting individuals in custody. In this view, the traditional rules of interrogation would not be changed in one fell swoop.

The Supreme Court appointments that followed Richard Nixon's victory of 1968, saw a retreat from the Warren's Court approach to the rights of defendants.²⁶ As part of a balancing attempt of the rights of the accused and the rights of society, a number of exceptions to the *Miranda* rule were codified; this marked a slow erosion of *Miranda's* status. Chief Justice Burger and newly appointed Blackmun joined the three remaining dissenters to form a majority that claimed; the state could use illegal confessions to impeach a suspect's credibility (*Harris v. New York*).²⁷ In *Oregon v. Hass*, the suspect asked to see a lawyer, but then incriminated himself after the police refused his request to consult with an attorney immediately. The Court ruled that the statements might be used to disfigure the defendant's credibility if made voluntarily.²⁸ In 1984, the Court created a "public safety" exception to the rule requiring *Miranda* warnings in *New York v. Quarles*.²⁹ Answers to police questions that were "reasonably prompted by a concern for public safety were admissible despite the fact that they were not preceded by *Miranda* warnings."³⁰ It is not surprising that the courts and police engage in balancing competing rights. The United States does have one of the highest crime rates, thus, from a societal point of view many citizens believe that the rights of the accused are being given too much weight as opposed to society, especially, when an accused is set free on a technicality. On the other

23 - H.L Pohlman, 61.

24 - H.L Pohlman, 61.

25 - H.L Pohlman, 61.

26 - H.L Pohlman, 64.

27 - H.L Pohlman, 64.

28 - James Carl Foster, and Susan M. Leeson, 977.

29 - H.L Pohlman, 65.

30 - H.L Pohlman, 65.

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hand, all criminal suspects have the right of due process and fair treatment under the law, to avoid convicting the innocent.

Miranda provoked intense controversy, defense attorneys supported it, while police, and a wide-segment of the public complained that it "handcuffed" the police.³¹ In 2000, the Court upheld the necessity of *Miranda* warnings as constitutional rule, relying in part on *stare decisis*, and the fact that the rules have become a part of national culture.³² Chief Justice Rehnquist's majority opinion rejected the claim that *Miranda* could be overruled by a Congressional Act.³³ The Court continues to apply *Miranda* rules flexibly and considers them a mechanism to guarantee rights, which deter police misconduct and ensure the reliability of evidence admitted at trial.³⁴ Currently law enforcement is experimenting with the use of digital cameras to record interrogations, these recordings would satisfy the Fifth Amendment prohibition against coercion.

In 1966, the Supreme Court balanced the rights of the accused against the interest of the state, when it answered the following question in the negative in *Miranda v. Arizona*.³⁵

Should the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without counsel, which was not requested, be admitted into evidence over specific objection based on the absence of counsel?

Today, almost four decades later, the *Miranda* decision still stands to symbolize a victory in the fight for defendant's rights and the admissibility of confessions obtained during police interrogations, it has helped enshrine the Fifth Amendment privilege into our system of constitutional rule.³⁶

31 - Joel Samaha, 381.

32 - Joel Samaha, 68.

33 - Joel Samaha, 68.

34 - Joel Samaha, 381.

35 - H.L Pohlman, 65.

36 - James L. Maddex, Jr, 240.

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INTERNATIONAL RELATIONS

“The world must learn to work together, or finally it will not work at all.” – Dwight Eisenhower

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UWO AMNESTY INTERNATIONAL

UWO Amnesty International offers students the chance to truly make a positive difference by becoming directly involved in preventing and exposing human rights abuses worldwide. As university students, we are the hope for the future, and as an Amnesty International member, one can ensure that there is always hope for a world where human rights are respected.

As a worldwide community of ordinary people, Amnesty International works to achieve progressive results by writing appeals and letters to release prisoners of conscience, by exposing human rights violations worldwide, and by comforting those who have experienced human rights violations. Amnesty International members help to change unfair laws or policies, to focus public attention on human rights issues, and to reduce the suffering of victims. The goal is to ensure that human rights are universally upheld.

Locally, there are a number of ways to speak out against human rights violations, including letter writing, petitions, protests, rallies, information booths and community awareness events. UWO Amnesty International has over 100 members and is both an avid awareness and a fundraising club. By working together with other like-minded clubs, UWO Amnesty International is able to spread awareness across campus to students and to also make a difference worldwide. UWO Amnesty International events for 2005-2006 include:

- *Crisis in Darfur*, a genocide conference
- International Children's Day, a campus-wide awareness campaign
- *A Night of Awareness for the Children of Northern Uganda*
- *Make Poverty History*, a fundraising campaign
- *Write for Rights*, a campus-wide letter writing day
- *Keeping the Light on Human Rights*, a panel of speakers addressing human rights issues in Canada and abroad
- *AIDS, The Pandemic of Our Generation*, a guest lecture
- *Stop Violence Against Women*, a candlelight vigil for International Women's Day

Members can also attend general meetings during which they are updated about urgent action cases worldwide and receive briefings from the VP Education about important topics such as children's rights, refugee rights, women's rights, and genocide.

For more information please visit: <http://www.usc.uwo.ca/clubs/amnesty/>

Katie Omstead
Co-President

UWO Amnesty International 2005-06

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WESTERN MODEL UNITED NATIONS SOCIETY

The Western Model United Nations Society brings together a diverse group of like-minded individuals who have a strong interest in international affairs and humanitarian concerns. Made up of students in faculties as broad as nursing, medicine, business, chemistry, health sciences, and political science, the club meets weekly to debate and discuss the various issues present at the forefront of the UN Security Council agenda.

This past year, our focus has been on a wide range of topics including international aid for natural disasters, genocide (with particular emphasis on Darfur), peacekeeping reform, the disputed state of Kashmir, US involvement in others' domestic affairs, and events in the Middle East. The Society has been active in presenting guest speakers at our meetings, promoting fundraising initiatives (selling "Make Poverty History" bracelets), and being involved in events such as "Crisis in Darfur" and "Keeping the Light on Human Rights".

In addition to weekly meetings, the Society holds two in-house conferences per year, in November and April, where students select a country to represent and debate issues in a formal UN Security Council session for an entire day. In January 2006, 40 UWO delegates were represented in Montreal, Quebec for the annual McGill Model UN Conference, McMUN. There, students were able to liaise with over 4,000 students from around the globe in debating and resolving international problems in committees including the General Assembly, World Food Program, Human Rights Commission, Committee on Counter-Terrorism, and more.

Shaleen Somji

Vice President – Communications

*Western Model United Nations Society
2005-2006*

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DO WE NEED AN INTERNATIONAL CRIMINAL COURT:

International Criminal Court: Hindrance in the name of progress

By Abhishek Joshi

Throughout history man has tried to formulate laws that would transform the world that we know today to a Utopia; a land where there is no war, no crimes, no hatred and all that prevails is the love and respect for the fellow man. During the course of documented human history there have been many individuals who have considered themselves to be above the law and have committed numerous acts of atrocities towards their fellow brothers and sisters. The likes of Genghis Khan, Adolph Hitler, Benito Mussolini, Pol Pot and many others have killed numerous innocent citizens of their country. Therefore, to ensure that such crimes do not take place, the world community has coalesced together and decided to form the International Criminal Court (ICC), which will try individuals for crimes that they have committed against their fellow human beings. Although the notion of the ICC is a noble one and theoretically a practical one as well, in reality it contains many flaws within itself that can, and will hamper the progress of the justice. Thus the sacrosanct values of the ICC like justice and equality are void. The Rome Statute of the ICC is diplomatic in the sense that it does not violate the sovereignty of the states and fulfills its purpose of preventing future atrocities. The flaws in the Rome Statute outweigh the positives and it is for this reason I intended to argue that we, as an international community, do not need an international criminal court as it is not yet ratified by all the countries of the world, gives veto powers of the security council and criminals legal and political leeway due to the ambiguity and flaws in the laws.

The very notion of an international criminal court gained favor after the Nuremberg and the Tokyo trials. In an article entitled "Proposal for an International Criminal Court" Quincy Wright argues:

The recent movement for an international criminal court has the object of assuring the punishment of individuals for acts which the world opinion regards as peculiarly destructive of international peace and order, peculiarly shocking to the conscience of mankind, and peculiarly likely to escape punishment by national authority. This idea was indicated by the proposal of the advisory committee of jurists of 1920 for a "high court of international justice for the purpose of trying crimes against international public order, and against the universal law of nations," and also by the competence of

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the Nuremberg and Tokyo tribunals to punish offences against peace and against humanity as well as against the law of war.¹

In 1989, Trinidad and Tobago pleaded to the United Nations to tackle the problems of international drug trafficking and prosecute drug lords. The international law commission set up a statute forming the ICC, but it was meant to deal with only core crimes like war crimes, crimes against humanity and genocide. The purpose of the ICC, as outlined in the Rome Statute is to achieve justice, end impunity, help end conflicts, and to take over when national criminal justice systems are unwilling or unable to act and as well deter future war criminals.² The creation of the ICC sends out a strong message to any individual(s) who commit, or plan to commit crimes against humanity that there is not only a fear of punishment, but a certainty of it. The world has suffered enough and millions of innocent civilians have died at the hands of madmen like, Pol Pot, Mussolini, Hitler, and many others who have not been held accountable for their crimes and have not even spent a single day behind bars. The ethnic cleansing in the former Yugoslavia, the genocide in Rwanda are but two of the many acts which have occurred within the past decades. In the words of Hans Corell, Under Secretary for legal affairs, "From now on, all potential warlords must know that, depending on how a conflict develops, there might be established an international tribunal before which those will be brought who violate the laws of war and humanitarian law. . . . Everyone must now be presumed to know the contents of the most basic provisions of international criminal law; the defense that the suspects were not aware of the law will not be permissible."

Although the ICC has a noble thought to bring to end the genocide and the violence that has been plaguing our world for decades, the problem lies in the fact that not all countries of the world have ratified the treaty and thus are not bound by the jurisprudence of the court. Only 4 countries out of 144 have not signed the treaty for the formation of an International Criminal Court, while only 51 countries out of 144 have not even ratified it.³ Countries like United States of America, which have signed it enjoy the privilege of being able to influence the treaty but are not bound by the rulings as they have not

1 - Quincy Wright, *Proposal for an International Criminal Court* (Westport: Praeger Publishers, 2000), 63.

2 - Establishment of an International Criminal Court: An Overview; Available from <<http://www.un.org/law/icc/general/overview.htm>>

3 - Multilateral Treaties; Available from <<http://www.untreaty.un.org>>

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ratified it. Under the Clinton administration the United States of America signed the treaty to be in a position to influence the evolution of the court.⁴ The major problem is that only a few countries have ratified the treaty and the jurisdiction of the ICC only applies to them. As a result if a dictator opts not to include his country, he can never be tried by the ICC, which defeats its purpose. The dictator can still commit crimes against humanity, war crimes, and genocide, but the flip side of it for the dictator is the fact that neither he/she will not spend a day behind bars nor will be accountable for their actions. To further exemplify the problems related to the refusal of a nation towards ratification of the treaty, the United States of America is useful as they are the one super power of the world.

As mentioned, the United States along with a number of nations has signed the treaty but not ratified it, thereby giving it the power to enforce change but not bound to follow the rules of the treaty. The American Service Members Protection Act (ASPA) allows the US to participate in peacekeeping missions and provide aid to nations with whom bilateral treaties are present and those states agree not to hand over US citizens to the International Criminal Court for prosecution.⁵ This is perfectly legal pursuant to Article 98(2) of the Rome Statute.⁶ This undermines the authority of the ICC and places US citizens above the law. As of 2003 the US had bilateral agreements with 17 of the 87 states. Since the US citizens are not going to be tried for any amount of crimes that they commit on foreign soil in an international criminal court, the ICC takes on more of a symbolic role rather than an active one. An article in which works against the premise of the ICC voids its purpose and thus it would be wise to consider that the court is no longer required.

The friendly-fire incident, where a US plane bombed and killed Canadian soldiers in Afghanistan is a good example. The pilots were not tried in the ICC due to the US and the presence of a bilateral treaty with Afghanistan as well as the fact that the US has not ratified the Rome Statute. The pilots upon their trial in the US received nominal sentences and the incident was rubbed off as an accident. Justice was not served in any way at all as loving father and mother lost their sons, families were destroyed and the guilty party got a slap on the wrist. The

4 - "U.S. signing of the statute of the International Criminal Court," *The American Journal of International Law* 95.2(2001): 309.

5 - "U.S. Bilateral Agreements Relating to the ICC," *The American Journal of International Law* 97.1 (2003): 200-203.

6 - The Rome Statute of the International Criminal Court; Available from <<http://www.un.org/law/icc/statute/english.pdf>>

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ICC became an audience rather than having an active involvement with the case and the sad part of it all is the fact that this would have happened, regardless of whether or not the ICC existed. The irony of the situation is that the US is supporting the court in principal by signing the treaty but not in practice as the notion of US a citizen being prosecuted does not please the brass.

With limited jurisdiction limited to states who have ratified the treaty the question that arises is can the International Criminal Court be called an 'International Criminal Court'. Since, it is limited in power and jurisdiction there is no need for it as the crimes would still be ongoing. One diplomatic option to the problems of ratification and the jurisdiction of ICC only over member states could have been solved, if the members of the UN would automatically be under the jurisdiction of the ICC, without requiring their consent. This would ensure equality and would place no one above the law.

Since, the United States of America has not ratified the treaty it has been given immunity from prosecution of its citizens/soldiers participating in UN peacekeeping missions, as the US threatened to veto all peacekeeping missions if immunity was not granted.⁷ The UN finally caved and thus, all US soldiers have immunity from prosecution in the ICC. This is a classic example of the United States, using the UN for its own personal agenda and showing complete disregard for the international community. In the words of one of America's oldest allies, "America always preaches rule of law, but in the end it always places itself above the law."⁸ The question that arises is on the role of the ICC. The US soldiers are completely above the law and can kill anyone in the middle of Mardi - Gras and no one can touch them. The ICC has already failed in its infancy and set a dangerous precedent. In the words of James Warburg, Council on foreign relation, "We are willing to become citizens of the world, but only if the world becomes an extension of the United States."

What if, the major nations involved in peacekeeping like, India, Pakistan, Canada and so forth demand that their soldiers receive immunity as well, or else they stop taking part in the missions, or what if nations like UK, France, China and Russia threaten to veto any of the security council, unless they too are given a special status in the eyes of the ICC. The real victim in all this are the innocent men, women, and kids who loose their lives because the superpowers are more engrossed with playing political games, rather than saving lives, thus, the need for

7 - Clyde Prestowitz, *Rogue Nation: American Unilateralism and the Failure of Good Intention* (Basic Books, 2003)

8 - Ibid.

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an International Criminal Court is no longer required as it is already ineffective. One way that this problem could have been solved, would be through the fact that the ICC should have been a separate body of its own, like the UN, rather than a body of the UN and should have had complete autonomy and be free from the working of the UN.

Overall, one can look at this and see that with the option of voluntarily ratifying the Rome treaty has created a loophole thereby allowing nations to take advantage of it. For example, a brutal dictator like Saddam Hussein can stay in power and commit as many crimes against humanity, acts of war, genocide and other atrocious crimes and he can neither be touched nor be prosecuted as long as the crimes he commit are within the boundaries of Iraq and do not cross over to another nation. Thus, the ICC is once again helpless and pretty much ineffective and it would be better had it not exist because either way it can do nothing to save the lives of innocent individuals. Therefore it is openly stating that as long as a country refuses to ratify the treaty the criminals are free to do as they please and cannot be held accountable for their actions.

The international legal commission draft, which was responsible for the formation of the ICC, recognized that the Security Council should determine whether cases that pertain to its functions under Chapter VII of the UN charter should be considered by the ICC, and that the security council must act before any alleged crime of aggression that could be prosecuted against an individual, and that the prosecutor should act only in cases referred either by a state party to the treaty or by the Council.⁹ This limits the autonomy of the ICC and ultimately places power in the hands of the Security Council, and places the Security Council above the law, as well creates a conflict of interest. The whole purpose of the ICC was to establish the fact that no one is above the law and this is exemplified by a statement made by Kofi Annan:

In the prospect of an international criminal court lies the promise of universal justice. That is the simple and soaring hope of this vision. We are close to its realization. We will do our part to see it through till the end. We ask you . . . to do yours in our struggle to ensure that no ruler, no State, no junta and no army anywhere can abuse human rights with impunity. Only then will the innocents of distant wars and conflicts know that they, too, may

9 - "The United States and the International Criminal Court," *The American Journal of International Law* 93.1 (1999): 12-22.

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sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished.

If cases are not referred to the prosecutor by the Security Council, the crimes still remain and thousands of innocent people are losing their lives on a daily basis and all the ICC is doing is watching from the sidelines, or if the case is vetoed by the Security Council members perhaps due to a conflict of interest the same result can happen. It would make more sense to try the members of the Security Council who by vetoing are indirectly participating in the death of many. Also, if the case is referred from a state not party to the treaty, the ICC is under no obligation to act and is indirectly supporting crimes like genocide, war crimes and so forth. This contradicts the basic principles of the ICC. The autonomy that it is supposed to possess is no longer present, ergo, the purpose of the ICC is defeated and it would not matter whether it exists or not.

Also, one of the other major problems associated with chapter VII of the UN is the fact that the Security Council could delay prosecution for a renewable period of twelve months.¹⁰ Since there is no limit stated on how many times the delay of prosecution can be renewed, it poses a grave problem. This gives the Security Council tremendous amounts of power as a whole and as well as gives the same amount of power to the permanent members as veto is required by one member and not all. In an issue of a conflict of interest, any one member of the permanent five can use the veto powers until either the issue is quashed or the case is no longer being processed by the ICC. Therefore the ICC, once again is no longer in the picture as it is not completely autonomous. The office of the prosecutor of the ICC is being used as a puppet for purely political reasons rather than allowing the prosecutor to fulfill the purpose for which it was created. The end result of all this is that innocent people are still susceptible to genocide, torture and other crimes, while the rest of the world plays politics. The ICC is not fulfilling its duties and it would be better that it not exist rather than it existing and giving false hope to many of a just future and the hope that the guilty be accountable for their acts.

The purpose of the ICC is to prosecute criminals whom the states are unwilling or incapable to prosecute and the concurrent

10 - Naomi Roht-Arriaza, *Amnesty and the International Criminal Court* (New York: Transnational Publishers, 2000)

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jurisdiction of the court is secondary to that of the states involved.¹¹ This positive aspect of the ICC ensures that the sovereignty of the states are not infringed and International Criminal Court is there as a secondary body to step in when the state fails to act and fulfill its duties to its citizens, Article 17 of the Rome treaty.¹² Although this is a very diplomatic approach, it does create problems and has numerous negative facts associated with it. History has shown that domestic legal systems are often inept and unwilling to prosecute their own citizens who have committed vicious acts of genocide, war crimes and so forth; case in point Augusto Pinochet. After he left the reins of Chile, he elected himself senator for life and him and his fellow men who terrorized Chile have immunity from prosecution.¹³

Article 17(2) states that ICC can only prosecute if the state is "unwilling" or "incapable" of prosecuting, but unfortunately it does not define the meaning of the words "unwilling" or "incapable".¹⁴ Thus, theoretically if the state shows that there is some progress in the investigation, it can break away and the ICC cannot do anything other than believe the state and watch the drama unfold along with the rest of the world. The ICC relinquishes its jurisdiction if the investigation is started by a national court, and if the individual is convicted the ICC cannot try him/her again. This is once again problematic if the national court imposes a minor sentence like community service or a suspended sentence, thereby rendering the ICC useless. The purpose of the court is once again defeated and the results would once again be the same if it existed or not.

The ambiguity of words does not end with Article 17; rather it starts there and continues all throughout the treaty. The definition of torture is adopted verbatim from the Genocide convention but the problem arises because it includes "intent to destroy, in whole or in part, a national, ethnic, racial or religious group" but has not mention of political groups and along with that what constitutes as a national, ethnic, religious or racial group is a matter of debate.¹⁵ Thus the acts of

11 - Roger Clark, *The International Criminal Court Statute* (New York: Transnational Publishers, 2000)

12 - *Supra*, vi.

13 - Christine Chinkin, "United Kingdom House of Lord: R. v. Bow Street Stendipary Magistrate ex parte Pinochet Ugarte," *The American Journal of International Law* 93.3 (1999): 703-711.

14 - *Supra*, vi.

15 - David Wippman, *Can an International Criminal Court Prevent and Punish Genocide? Protection Against Genocide: Mission Impossible* (Westport: Praeger Publishers, 2000)

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Pol Pot and Khmer Rouge cannot be considered in the definition of Genocide as it was done for political reasons and he (if alive) cannot be charged with any illegal acts. The mistake on the part of ICC, in not updating the definition has given individuals loop holes to work with and take advantage of. If the acts of Pol Pot and the Khmer Rouge are ever replicated, the perpetrators cannot be charged with the crime, as according to the Rome treaty it is not a crime. Once again, if the court did not exist the individuals would be free and never be brought to justice, and even upon the subsistence of the court these individuals would still be free to roam the earth. Thus, it is clearly evident that the court is helping the criminals rather than bringing them to justice.

Although the prosecutor has the power to initiate investigations and indict persons if there is sufficient evidence, to protect the right of the state, the prosecutor's power is circumscribed to ensure that he/she does not come to a quick and arbitrary decision.¹⁶ This protects the sovereignty of the states but has negative impacts, namely the abuse or misuse of power. This gives the prosecutor the autonomy to try cases which he/she pleases and ignore the others. The prosecutor in an attempt to gain fame might decide to try only high profile cases and ignore the low profile or not so famous ones. The only parallel drawn between the high and low profile cases is that numerous innocent individuals have lost their life but justice is served to only those individuals where the perpetrator of the crimes was a well known individual. Thus, it is possible that a warlord in a small part of Lesotho might go unnoticed although he/she has killed innocent individuals because the prosecutor can choose not to pick him, as he would not bring any fame to the prosecutor. This autonomy of selectively choosing cases sows the seeds of corruption and encourages personal achievement over international justice, and it is for this reason that the ICC should not exist.

Another major fundamental flaw in the Rome treaty is Article 11 which states that any crimes committed previous to the formation of the International Criminal Court would be null and void, with the notion that every nation gets a free chance (Gallon, 100). By doing this the ICC is stating that they are willing to turn a blind eye towards the crimes that occurred in the past and would give everybody a fresh start. The question that should be posed is; are the families of the victims willing to forget the loved ones they lost due to the actions of one or many individuals? By refusing to acknowledge the crimes of the past

16 - Patrick Zahnd, *How the International Criminal Court Should Help Implement International Humanitarian Law* (New York: Transnational Publishers, 2000)

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the ICC would consider Pinochet, Pol Pot, Hitler, Idi Amin and numerous others as upstanding leaders with an unblemished past. The purpose of the ICC in the words of Kofi Anan is to let the people "know that they, too, may sleep under the cover of justice; that they, too, have rights, and that those who violate those rights will be punished." By ignoring the past, justice is neither served, nor those guilty of crimes ever made to pay for their actions. It's the innocent who have lost their lives and have become dispensable pawns in a game of human chess. The very nature of the ICC is contradicting and rather than helping the innocent, it is trying to forget it and make others forget about it. Such a court which does not value basic human rights should neither exist nor be allowed to.

The refusal of countries to ratify the Rome treaty, the veto powers of the Security Council, ambiguous wording of the treaty, as well as the flaws in the laws gives the criminals more rights than the victims. As a result of these flaws it is not viable to have an international criminal court. The negative aspects of the court outweigh the positive ones. What had started out as a noble intention to uphold the principles of justice has been completely transformed into something that can actually threaten global peace and allow abuse of power by the officials. The court is working under the pretense that they should be able to stop future atrocities but it has not dealt with the atrocities of the past. Instead, it has given numerous loop holes to criminals and madmen alike, which has helped them commit the same crime they were committing before the formation of the ICC and not be accountable to neither the international community nor to the citizens of their own country. All the ICC has done is give hope to many individuals, but that's all they have done. Many of the people guilty of crimes during the genocide in Rwanda, the former Yugoslavia, members of Khmer Rouge are who killed over two million people and many others are still free and have not been brought to justice. The ICC is a waste of resources like money, time and so forth, resources which, if given to a third world nation might just feed some hungry family, clothe someone who has no clothes, put a child in school rather than him working as a slave in a sweat shop, or provide medical care to individuals where the very notion of medicine is still a myth and considered a luxury rather than a necessity of life, and prevent individuals from playing politics with the lives of innocent.

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Sudan:

What Accounts for the Protracted Civil War in Sudan?

By Robin Vockeroth

Since the country gained independence in 1956, Sudan has been plagued by prolonged civil war which, with an 11 year period of decreased hostilities between 1972-1983, has resumed and still continues today.¹ Since the country's inception, the people of Sudan have literally never experienced peace. The conflict in Sudan "has long been dubbed 'the forgotten war' and is quite possibly the world's longest-term humanitarian catastrophe."²

Sudan's population totals nearly thirty million³ and the country's "diversity makes it difficult to explain the current north-south conflict in simple cultural, ethnic or racial terms."⁴ African peoples total 52 percent in the country and Arab peoples total 40 percent.⁵ The Arab peoples live largely in the north along with 25 percent of the African peoples. The south contains the remaining 27 percent of the African peoples.⁶ The ethnic and religious makeup of Sudan is, however, more complex than it appears as it contains over 50 ethnic groups comprising of at least 570 distinct peoples. The religious makeup of the country is 70 percent Sunni Muslim, 25 percent indigenous beliefs and 5 percent Christian.⁷ The north is largely Muslim while the south is largely African and non-Muslim.⁸ The official language of Sudan is Arabic, but there are approximately 400

1 - SPLMtoday.com: Official New Sudan Website. *Sudan*. [Online]. August 28, 2005. [cited 10 Nov 2005]; available from <http://splmtoday.com/index.php?option=com_content&task=view&id=17&Itemid=37>

2 - The Carter Center. *Activities by Country: Sudan*. [Online]. 2005. [cited 10 Nov 2005]; available from <<http://www.cartercenter.org/activities/country69.htm>>

3 - Johnson, Douglas H. (2004). *African Issues: The Root Causes of Sudan's Civil Wars*. (Bloomington, Indiana: Indiana University Press.).

4 - Ibid.

5 - CIA world Factbook. *Sudan*. [Online]. November 1, 2005. [cited 10 Nov 2005]; available from <<http://www.cia.gov/cia/publications/factbook/geos/su.html>>

6 - Lesch, Ann Mosely. (2003). *Sudan: Ethnic Conflict in the Sudan*. In Joseph R. Rudolph Jr. (ed.) *Encyclopaedia of Modern Ethnic Conflicts*. (Westport, Connecticut: Greenwood Press.)

7 - Ibid.

8 - Ibid.

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languages spoken in the country.⁹ The following excerpt outlines the complexity and diversity of language within Sudan:

One language profile which categorized languages according to the number of speakers, identified Arabic and Dinka as the two major languages, followed by fourteen minor languages, divided into some 100 dialects. Of these nearly half are found within the southern Sudan, representing one third of the country's population, residing within a quarter of its territory; while more than half are found spread throughout the remaining northern three quarters of the country.¹⁰

Since it is clear that the diversity within the country renders it difficult to explain the conflict in simply cultural, ethnic or racial terms,¹¹ historical and political factors must be considered in order to determine the factors contributing to the prolonged civil war in Sudan.

What Accounts for the Protracted Civil War?

There are a number of historical and political factors and events which can be pinpointed as grounds for the onset and persistence of the civil war in Sudan. Such factors can be identified in the examination of the country's history from the time before its independence to the present.

The Role of the British Prior to Independence

The situation created by British colonial rule can be noted as one factor which has contributed to the civil war in Sudan. Prior to independence for Sudan, the British government attempted to keep the north and south entirely separate from one another. It did so due to its belief that "any colonial territory where there was a variety of indigenous power structures, based on different types of customary law, no uniformity could be achieved and in fact was not even desired."¹² As a result, such measures as the Closed District Order of 1922 were designed to protect southerners from the northern culture.¹³ This measure regulated the movement of non-native persons into the south,¹⁴

9 - All Refer.com. *Sudan*. [Online]. 2005. [cited 10 Nov 2005]; available from <<http://reference.allrefer.com/country-guide-study/sudan/>>

10 - OP.CIT., Johnson, 1.

11 - Ibid.

12 - OP.CIT., Johnson, 11.

13 - OP.CIT., Lesch.

14 - OP.CIT., Johnson, 12.

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and forbid the teaching of Arabic in the south,¹⁵ among other things. Further, the "'Southern Policy' in 1930 declared that the administration of the south was to be developed along 'African', rather than 'Arab' lines."¹⁶ As such, the administration in the south encouraged indigenous religious diversity, while the administration in the north encouraged "the tendency towards a greater uniformity of practice among Muslims."¹⁷ The British government attempted to keep the north and south separated from one another to the extent that it even "banned Arab-style dress and the use of the Arabic language in government offices and schools"¹⁸ in the south. Such measures exacerbated the differences between the peoples of the north and south and also contributed to the gulf of misunderstanding between them.¹⁹ The colonialism-based "dichotomy of an African Christian/animist south and Arab Arabicized Moslem north has added to more diversity and mistrust among all Sudanese and added to the complex situation in the Sudan."²⁰ Policies such as these continued until Sudan was granted independence in 1956. Until independence, as a result of British policies, "the administration of the north and the south, already based on different foundations, continued to diverge in practice."²¹

The decision to grant independence to the whole of Sudan arose following the Second World War. It did so as a product of the fact that Egypt, who had been under British occupation until 1924, asserted their claim to sovereignty over Sudan. Egypt's claim to sovereignty over Sudan, which held legal credence, threatened the position of the British administration in Sudan. It was this threat which lead the British to grant independence to the whole of Sudan as opposed to nationalist mobilization from within the country.²² This decision by the British "based on political expediency, to grant independence in 1956 to the whole of Sudan before disparities in development could be addressed, and without obtaining adequate guarantees for safeguarding the interests and representation of southern Sudanese"²³ is arguably a contributing factor which lead to the onset of civil war in Sudan. How are two regions which have been run separately, very differently, and have been segregated from one another

15 - Gurdon, Charles. (1984). *Sudan at the Crossroads*. (Cambridgeshire, England: Middle East & North African Studies Press.), 12.

16 - OP.CIT., Johnson, 11.

17 - Ibid., 13.

18 - OP.CIT., Lesch.

19 - OP.CIT., Johnson, 25.

20 - OP.CIT., SPLMtoday

21 - OP.CIT., Johnson, 12.

22 - Ibid., 21-22.

23 - Ibid., xvi.

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for nearly twenty years, resulting in innumerable differences between the peoples living within each region, to be expected to come together as one unified country?

Post-Independence:

Sudanese Government's Reaction to Revolt & Instability of Political Power

Following independence, the northern dominated Sudanese government's approach to governing the new country was made evident in its response to the minor revolt following independence by *some* southerners. The south, at this point was itself divided on whether they should be independent or whether they should be a part of Sudan along with their northern counterparts.²⁴ In response to the revolt, the government, "placing petty jealousy and rivalry above national interests... failed to take effective measures to end the dispute. Favouring a military solution, they sought to bring the growing southern rebellion to an end by force rather than negotiation."²⁵ The government's approach to dealing with the minor revolt led to the onset of the civil war and also set the tone for future dealings of this sort.

Historically the political power within the country has been unstable and there has been constant shifting from civil to military to civil rule in Sudan. For instance, "between 1956 and May 1969 there were eight governments, none of which succeeded in resolving the most important problem that the country faced: the relationship between the north and the south."²⁶ Such frequent changes in the form of military coups, popular uprisings and parliamentary expulsions²⁷ have undeniably contributed to the instability within the country and consequently, the persistence of the civil war.

As a result of the government's approach to revolt and the fact that the political system was characterized by such instability, "the period from independence in 1956 until 1972... was almost entirely wasted by political rivalry, economic stagnation, and war."²⁸ Such features of the Sudanese political system and method of governance are factors which contributed to the continuation of the civil war.

24 - OP.CIT., Gurdon, 12.

25 - Ibid., 12.

26 - Ibid., 13.

27 - Lata, Leenco. (2004). *The Horn of Africa as Common Homeland: The State and Self-Determination in the Era of Heightened Globalization.*

(Waterloo, Ontario: Wilfrid Laurier University Press.), 146.

28 - OP.CIT., Gurdon, 13.

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Broken Agreement: The Addis Ababa Accord

Conflict in Sudan was soothed for a period between 1972-1983. This was as a result of the Addis Ababa Accord signed by Colonel Ja'far Numairi who took power in 1969. In 1972, led by Numairi "the government and south guerrillas negotiated [the Accord] to grant the south political autonomy as one large region within a united Sudan"²⁹ The Accord "also provided for the south to control its economy and educational system and have freedom of religious expression."³⁰ Following this agreement, and abruptly ending the decade of relative peace, in 1983 Numairi unilaterally cancelled the accord. He did so due to internal pressures from northern parties who did not support the agreement and also in response to the discovery of southern Sudan's abundance of resources, oil in particular. As such, Numairi "re-divided the south into three provinces and then imposed Islamic public and criminal law on the whole country."³¹ Such abrogation of agreements which has been characteristic of the government in Sudan has contributed to the persistence of the civil war.

The Struggle Concerning the Control of Resources in Southern Sudan:

Primarily Oil, and also Water

The discovery of oil in the south of Sudan, which was found only after the establishment of the Addis Ababa Accord, was a contributing factor in what stimulated Numairi to abrogate the Accord in 1983 and the consequent reinvigoration of the civil war. The key resources that provided a prospect for the revitalization of Sudan's economy are oil and water, as well as fertile, soil and various minerals, and are largely located in the south. During the period of relative peace, "new initiatives taken by the region for the exploitation of its own resources raised for the first time the prospect of an independently prosperous south which could, in future, take a commanding role in the affairs of the nation."³² President Numairi's position, unable to tolerate such a notion or the idea that revenue from the oil fields discovered in the south would benefit primarily the south,³³ contributed to his abrogation of the Addis Ababa Accord.

The abundance of water in the south also played a role in the conflict between the north and south. In this regard, as with oil, the northern government "proved itself to be more concerned with the

29 - OP.CIT., Lesch.

30 - Ibid.

31 - Ibid.

32 - OP.CIT., Johnson, 46.

33 - OP.CIT., Lesch.

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extraction of the south's resources with the minimum return for the region itself, an attitude more in keeping with the old Sudanic states' exploitation of their hinterlands than with modern nation-building."³⁴ Such tension, due to the presence of abundant resources in the south, has hastened political instability within the country.³⁵ In addition, The Carter Center has noted that such resource-related tensions have "intensified the struggle between warring factions north and south, leaving many parts of the south inaccessible and preventing humanitarian aid from reaching those most in need."³⁶

Since the abrogation of the Addis Ababa Accord in 1983, and the consequent reinvigoration of the civil war, the oil in Sudan has played a key role in the continuation of the conflict. Author Douglas Johnson has argued that "the interest of foreign governments and foreign investors in the Sudan's natural resources, especially water and oil"³⁷ are a factor in the prolongation of the civil war. In support of this argument, many groups, including human rights and church groups, have argued that by funneling revenues to the government in Sudan, oil firms have essentially been funding the civil war.³⁸ Appointed by the Geneva-based U.N. Commission on Human Rights, Gerhart Baum reinforced this argument revealing that the "exploitation of Sudan's oil reserves has led to a worsening of the conflict, which has also turned into a war for oil."³⁹ In light of such findings, it is evident that the presence of oil and water in southern Sudan and the disputes over the presence and desire for control over such lucrative, vital, and exploitable resources have contributed to the continuation of the civil war in Sudan.

Islamization and Arabization: Biased, Discriminatory, and Unrepresentative Approach to Policy in the Sudan

Following the termination of the Addis Ababa Accord, the government of Sudan has largely approached policies in terms of suppressing the differences between the northern and southern peoples

34 - OP.CIT., Johnson, 48.

35 - Ibid., xvii.

36 - OP.CIT., Carter

37 - OP.CIT., Johnson, xvii.

38 - Global Policy Forum. *Sudan Civil War Becoming War Over Oil - UN Report*. [Online]. October 10, 2001. [cited 10 Nov 2005]; available from <<http://www.globalpolicy.org/security/natres/oil/sudan/2001/1010sanc.htm>>

39 - Ibid.

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of Sudan which has been a decisive factor in the continuation of the civil war. The actions of the government have been characterized by:

A narrowly-based nationalist movement among the northern elite in the Sudan which confronted the issues of the Sudan's diversity and unequal development by attempting to build a national identity based on the principles of Arab culture and the religion of Islam.⁴⁰

Such an approach is evident in the introduction of Islamic Sharia Law in 1983. Elements of the new penal code included the "introduction of the 'hadd' or sanction punishment system, which meant the amputation of a hand for convicted thieves, stoning for adulterers, the banning of alcohol and other equally drastic changes."⁴¹ This approach to policy in Sudan has led to claims of Islamization and Arabization as the government's policies:

Successive Sudanese governments have provided few opportunities for social and economic developments in southern Sudan. Most colonial and post-colonial social and economic infrastructure developments were concentrated in the north. Northern merchants dominated trade and financial services in the south. Profits and wealth extracted from such a monopoly were invested in the north. Northern ruling elites made relentless effort to create a national identity based on Islam and Arab race, language, and culture. This legacy of systematic economic depredation, political power imbalance, and state-spurred religious and cultural discrimination is the principal cause of the north-south conflict in Sudan.⁴²

Such policies have ultimately resulted in the politicization of ethnic divisions by the government. Undeniably, this "politicization of ethnic divisions embitters relations among the Sudanese people and plays a crucial role in the civil wars that have engulfed the country for most of its existence as an independent state."⁴³ As a result of such governmental pitfalls, "the Sudanese state is essentially an alien

40 - OP.CIT., Johnson, xvii.

41 - OP.CIT., Gurdon, 71.

42 - Kebede, Girma. (1999.) *The Challenges of Peace*. In Girma Kebede (ed.) *Sudan's Predicament: Civil War, Displacement, and Ecological Degradation*. (Brookfield, Vermont: Ashgate Publishing Company.), 128.

43 - OP.CIT., Lesch

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political system with an institutional framework that excludes the vast majority of its citizens."⁴⁴ The system not only marginalizes those in the south, but has also left some people in the north to feel unrepresented.⁴⁵ Such a discriminatory, biased, and unrepresentative system, which has resulted in the politicization of ethnic divisions, is undoubtedly a large contributing factor to the continuation of the civil war in Sudan.

Conflict Exacerbated by Divisions Within the North and the South

What complicates the situation in Sudan is that there exist disagreements within the parties which claim to represent both the north and the south respectively in addition to the more prominent north-south conflict. In the north, the Umma Party and the Democratic Unionist Party (DUP) disagree "over the role of Islam in Sudan and the prosecution of war against the south."⁴⁶ Similarly, in the south, factionalism has split the Sudanese People's Liberation Army (SPLA) into two factions which have "launched military attacks against each other, thereby... destroying their common front against the government."⁴⁷ Furthermore, "tribalism is also a major problem in Sudan and particularly in the south. Throughout the civil war... divisions within the south reduced the effectiveness of its supposedly united cause."⁴⁸ Such divisions within the parties/factions within the north and south respectively, no doubt inhibit the effectiveness and resolution capabilities of both sides.

Lack of National Unity

The lack of national unity within Sudan has been an ongoing factor in the exacerbation of the civil war. The aforementioned historic factors have aggravated tensions within the country and made national unity difficult to achieve.⁴⁹ For instance, "most people in the rural areas will identify themselves first by tribe, then as an Arab or African, and only finally as Sudanese."⁵⁰ This fact alone is indicative of the country's traditional problems of national unity and can be seen as a

44 - OP.CIT., SPMLtoday

45 - OP.CIT., Carter

46 - United States Institute of Peace. *Special Report 7, Sudan: Ending the War, Moving Talks Forward*. [Online]. May, 1994. [cited 10 Nov 2005]; available from <<http://www.usip.org/pubs/specialreports/early/sudan.html>>

47 - OP.CIT., AllRefer

48 - OP.CIT., Gurdon, 10.

49 - Ibid., 11.

50 - Ibid., 11.

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factor which has inhibited the kind of cohesive nation that would be more likely to produce an environment of peace.

Hope for the future?

Ultimately, it is evident that features including the role of the British prior to independence, the government's approach to revolt and the instability of the political system, the abrogation of the Addis Ababa Accord, the struggle for control over the south's exploitable resources, the Islamization and Arabization of Sudan through biased and discriminatory policies, the divisions within both the north and south themselves, and the lack of national unity within the country are all factors which account for the protracted civil war in Sudan.

In terms of hope for the future of Sudan, the Comprehensive Peace Agreement (CPA) signed on January 9th, 2005 provides *some* hope. The CPA was signed between the government of Sudan (in Khartoum) and the Sudan People's Liberation Movement/Army (SPLM/SPLA)⁵¹ and was designed to bring an end to "Africa's longest-running civil war."⁵² The CPA is a reconfirmation of a number of Protocols and Agreements.⁵³ One such major Protocols is the Machakos Protocol signed July 20, 2002 in which the Parties agreed to a six-month Pre-Interim Period, to be followed by a six-year Interim Period at the end of which an internationally monitored referendum will take place to either confirm the unity of Sudan or to vote for secession.⁵⁴ The success of the CPA will depend on its implementation as well as the cooperation of all the parties involved in the peace process.

51 - International Crisis Group: Working to Prevent Conflict Worldwide. *The Khartoum-SPLM Agreement: Sudan's Uncertain Peace*. Africa Report N°96, 25 July 2005

52 - OP.CIT., Carter.

53 - These Agreements and Protocols include: the Machakos Protocol (July 20, 2002), the Agreement on Security Arrangements (September 25, 2003), the Agreement on Wealth Sharing (January 7, 2004), the Protocol on Power Sharing (May 26, 2004), the Protocol on the Resolution of the Conflict in Southern Kordofan and Blue Nile States (May 26, 2004), and the Protocol on the Resolution of the Conflict in Abyei Area (May 26, 2004) – Cited from: United States Institute of Peace. Peace Agreements Digital Collection: Sudan. *Comprehensive Peace Agreement*. [Online]. Dec, 2004. signed Jan 2005. [cited 10 Nov 2005]; available from <http://www.usip.org/library/pa/sudan/cpa01092005/cpa_toc.html>

54 - United States Institute of Peace. Peace Agreements Digital Collection: Sudan. *Machakos Protocol, July 20, 2002*. [Online]. July, 2002. [cited 10 Nov 2005]; available from <http://www.usip.org/library/pa/sudan/sudan_machakos_07202002.html#1>

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In terms of whether the conflict in the Sudan will finally come to an end as a result of the CPA, there is scepticism over both the Pre-Interim period and the technicalities of the Interim period leading to a referendum for the south. Author Douglas Johnson draws on a vital point in stating that "underlying this scepticism is the conviction of many Sudanese, northern and southern, that neither of the two parties is serious about peace, and that the negotiations have focused more on the power relations between them than on the root causes of the conflicts devastating the country."⁵⁵ Ultimately, in regards to whether Sudan will find peace with the signing of the CPA, only time will tell. It has been said of the prospect, "we live in hope, but hope tempered by experience."⁵⁶

55 - OP.CIT., Johnson, xviii.

56 - Ibid., xx.

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KING'S COLLEGE POLITICAL SCIENCE CLUB

The King's Poli-Sci Club is a students' club that works in coordination with the Department of Political Science. The driving objective behind the club is the engagement of youth and students in politics. The Club hosts social events that deal with specific issues relating to both "big-P" Politics (municipal, provincial, federal) and "small-p" politics (NGOs, community organizations, general civic engagement). One of the most noteworthy activities of the Club is the annual Reading Week trip to Ottawa. With help from the Department of Political Science and the KUCSC, the Poli-Sci Club organizes a 5-day 4-night trip to the country's capital that is a very affordable and fun opportunity for students to familiarize themselves with Ottawa, meet many players in the Ottawa political scene, and get to know other politically-interested students. It's a tremendous opportunity for students to expand their education outside of the classroom.

Rob Trewartha and Robert Hepburn

Co-Presidents

King's College Political Science Club, 2005-2006

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KING'S COLLEGE SOCIAL JUSTICE CLUB

The Social Justice Club was founded at King's University College and is dedicated to challenging injustice and raising awareness. The club organizes many events for members to take part in such as lectures about social justice initiatives, "buy nothing day," an inner-city walk through the streets of Toronto and discussions on justice and injustice within London. Members are encouraged to take part in the Social Justice Club in any way that is comfortable, as a participant, observer or an organizer. The agenda for the Social Justice Club is created under the direction of the members, we are a student led club and we are committed to using our education to bring about positive social change. The Mission of the Social Justice Club is to raise consciousness about social justice issues, encourage positive social change and celebrate diversity and community. All are welcome to join us! Please contact the current SJ club president at jvorster@uwo.ca for more information.

Jessica Vorstermans

President

King's Social Justice Club, 2005-2006

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**WESTERN UNDERGRADUATE POLITICAL SCIENCE
ASSOCIATION**

The Undergraduate Political Science Association (UPSA) at Western strives to serve as a general forum under which all political views, academic avenues and ranging enthusiasts of political science may come together. In the past the club has served as a liaison between the department of political science and the students, but a new mandate hopes to push the club in a more creative and productive direction. With several new projects geared towards actively engaging political science students at Western, we hope to broaden the awareness of politics and its importance at Western and throughout the London community. Our success greatly depends on the active, creative and resourceful members which make up this club and encourages all interested political science students to become active members and help expand the services of this club.

UPSA also would like to congratulate the innovative students of our faculty in the creation of "The Social Contract," which no doubt will serve as an important avenue for political science students not only to showcase their hard work, but also to foster a dynamic discussion of politics on all levels, available to all students.

For more information on how to become involved in UPSA please contact westernupsa@yahoo.ca!

Michela McClelland

UPSA President

Undergraduate Political Science Association, 2005-2006

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POLITICAL THEORY

"Politics are a labyrinth without a clue." – John Adams

From the Kitchen to the Kallipolis:
The Role of Women in Plato's Republic
By Shanya Frawley

INTRODUCTION

Soren Kierkegaard once said that labels are reductionist, and in doing so helpfully addressed one of the problems with the question "was Plato a feminist?". Any analysis that attempts to pin a modern label to the ideas of a man who lived well over two thousand years ago, even if that man happens to be Plato, is going to be more elegant than accurate. A characterization is useless without context, and with this in mind I will argue that modern readers should praise Plato's claims about women for what they are – extremely forward thinking for their time – and not condemn them for not being subversive enough.

Plato believed that the ruling class of the ideal state, the Kallipolis, would include both sexes. Human nature, he says, has more to do with the balance of competing parts of the soul than gender. While it would be unfair to prevent capable women from ruling, at no point does Plato argue women deserve to rule because they are equal to men (he appears to largely think the opposite) or because equality is 'fair'. To the modern feminist reader this, coupled with the fact that Plato's 'guardian' class seems to be made up of men and women who *act* like men, are the argument's main shortcomings.

They are to be expected, however, in light of some of Plato's other ideas and the time when he lived. Maintaining that everyone is equal and deserves the same treatment regardless of their nature would seem less fair to Plato than ensuring people are given the tasks to which they are most suited. While the women Plato would have known personally had very few options open to them, one can find examples of 'strong' women in masculine heroines like Lysistrata and Athena in the literature Plato would have been familiar with. Although they are fettered by certain phallogocentric biases, Plato's claims regarding the role of women in the Kallipolis are quite progressive when one considers the context in which they were written.

WOMEN IN THE REPUBLIC

The argument regarding the role of women in the Kallipolis is neatly summarized with Socrates' statement "it's true that one sex is much superior to the other in almost everything... many women are better than many men in many things."¹ The second claim, which

1 - Plato. *The Republic*. Trans. G.M.A. Grube, Revised by C.D.C. Reeve (Indianapolis, IN: Hackett Publishing Company, Inc., 1992), 455 d-e.

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alludes to an earlier discussion regarding the composition of the human soul, seems like the best place to begin. Plato argues that a person's nature is determined by the balance between warring rational, spiritual and appetitive sides.² Although women are physically weaker than men, human souls consist of the same elements.³ This means that the nature of some women must be dominated by the rational side – and as such these women would make capable rulers. He supports this with an analogy: even though female watchdogs are not as strong as their male counterparts (and go on sabbatical if an owner wants puppies) they still make good watchdogs.⁴ To take this argument to its logical conclusion, the breeds and natures of some female canines make them better watchdogs than the breeds and natures of some male dogs.

As such, Plato argues that the best girls should be educated with the future guardians.⁵ He goes on to say that all future guardians should live in common, and that the only difference in the treatment should be that women are given lighter tasks because they are not as strong.⁶ This appears to also be true of doctors, musicians and, it seems, all professions that require intelligence instead of physical strength.⁷

Although Plato see women as something of an untapped resource and argues that including the right ones in the state would make for a stronger Kallipolis, inherent problems with gender inequality have not influenced his argument.⁸ As Julia Annas says, “even if women are inferior to men, it will still be to the advantage of the state to have women do what men do if it is for public benefit. The argument in the Republic does not need, or claim, more than this.”⁹ All other things being equal, Plato believes that a male will necessarily be stronger and smarter than a female. The men present at the discussion, in fact, cannot think of a single thing worth doing that women are more suited towards.¹⁰

At no point in *The Republic* does Plato argue that women are equal to men. He does, on the other hand, make several rather disparaging comments about women along the way. Among other

2 - Ibid., 435 b-c.

3 - Ibid., 455 d-e.

4 - Ibid., 451 d-e.

5 - Ibid., 451 e.

6 - Ibid., 457 a-b.

7 - Ibid., 455 e.

8 - Annas, Julia. “Plato’s Republic and Feminism,” in *Ethics: Classical Western Texts*, edited by James P. Sterba (New York: Oxford University Press, 2000), 41.

9 - Ibid., 43.

10 - Plato, *The Republic*, 455 c-d.

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things, he says it is ‘small minded and womanish’ to rob a corpse,¹¹ appears to view the gender as largely appetitive (at 557c-d he talks about how easily enamoured women are with superficial things, so long as they are colourful) and one of the distasteful things he lists about democratic states is “the extent of the legal equality of men and women and of the freedom in the relations between them.”¹²

A character in C.D. Reeve’s dialogue points out that Plato has created an “entirely masculinized world and then gave them [women] permission to be ‘men’ in it.”¹³ The contributions of women in Athens, which at the time would have mainly involved getting married and raising children, are *not* valued by Plato; indeed, children are raised by the state and parents would not be able to identify their offspring in the Kallipolis.¹⁴ What women do, it seems, does not strike him as being particularly impressive or important.

Plato makes several references to his guard dog analogy throughout *The Republic*, arguing that although males make better watchdogs, female watchdogs do a good job as well. That female dogs might have value in other (non-reproductive) areas is not brought up. To use an anecdote, when my frugal parents were looking to buy a dog they consistently found that female dogs were more expensive. They assumed this was because they could have puppies, and this was part of the reason. But the fact that female dogs are generally calmer and less aggressive, and therefore easier to train, also plays a part. Plato includes women in the Kallipolis because he believes some of them are “adequate for the task and akin to men in nature”, or, in other words, they are ‘equal’ to men, but only because the can do the same things as men: that women would bring something unique to the table is not considered.¹⁵

Of course, one could say that female guardians in the Kallipolis would be in a situation that resembles the one Canadian women were in following World War One. Women took over many manufacturing jobs out of necessity, turned out to be capable workers, and began to challenge assumptions about women only being suited for home life. In the same vein, the female guardians would most likely exceed expectations, begin to demand that women be given more opportunities and make various reforms.

11 - Ibid., 469 e.

12 - Ibid., 563 b-c.

13 - Reeve, C.D.C. “The Naked Old Women in the Palaestra,” in *Plato’s Republic: Critical Essays*, edited by Richard Kraut (Lanham: Rowman and Littlefield Publishers, 1997), 136.

14 - Plato, *The Republic*, 460 c-d.

15 - Ibid., 456 b-c.

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I think that this is a bit too optimistic. Plato wants the best offspring to be produced, and as such the best women will often find themselves pregnant.¹⁶ This puts the women training to become guardians are at a disadvantage: pregnancy and recovering from childbirth are more arduous and more often fatal in Plato's time. It would seem, in other words, that women in the Republic would be familiar with the concept of a 'glass ceiling'.

That is not to say that Plato was not progressive when it comes to gender, or that we should think badly of him because he did not shake off certain biases we no longer have today. The conclusions he reaches regarding women in the state should be examined in light of their context, both in the historical sense and within Plato's other arguments. It is often said that Plato and John Stuart Mill were, until very recently, the only male philosophers who made 'feminist' claims. Annas, rightly I believe, says that this is true in the case of Mill but not Plato.¹⁷ For the sake of argument, let's assume that Mill was a closet misogynist and that "On the Subjection of Women" was written by somebody else. Regardless of what Mill secretly thought, the nature of his utilitarian philosophy is that society will progress if sane adults are equally free (regardless of whether or not they put this freedom to good use or even 'deserve' it), and as such he *must* necessarily believe that women should be given the same freedoms as men.

There is nothing in Plato's argument that would bring someone to a conclusion similar to Mill's, and this is part of the reason why Plato does not make the gender situation more egalitarian. As many scholars have pointed out, "Plato does not make his proposal in the interest of women, a class whom he supposes to be wronged, but in the interests of the community."¹⁸ The ideas that everyone should be as free as possible would seem preposterous to Plato; he believes that a person's role in the state should correspond with the nature of the individual; "excellence, not liberty, is his goal and he rejects liberty as the enemy."¹⁹ If the Bizarro World Mill agreed with Plato's premise it would not compel him to do anything more than allowing capable women to enter the ruling class of the Kallipolis.

To turn to the historical context of *The Republic*, Plato deserves a great deal of credit for turning from "the old age Greek

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dogma, never previously questioned in Greek prose or verse, that difference of sex must determine difference of work allocation."²⁰ In Plato's time, a woman could be a housewife, a prostitute in "varying degrees of elegance or squalor", an actress (an occupation considered more shameful than a prostitute's!) or a slave.²¹ It was generally believed that women were tempestuous by nature and needed to be controlled by their husbands (it's often pointed out in these sorts of arguments that the word 'hysteria' comes from the word 'womb'). Very few women were educated and if a family could afford slaves, wives only left the house on holidays.

At the same time, Plato could have picked up the idea that women are cunning and intelligent enough to be capable rulers from the literature he would have been exposed to. In Aristophanes' play *Lysistrata* the women of Athens withhold sex from their husbands until a truce is reached with Sparta. The deity in charge of wisdom, justice and war was Athena, a goddess. It is worth nothing that when one looks at Athena's likeness in ancient art, she does not come across as very feminine. In the same vein, the sex-crazed women in *Lysistrata* seem to resemble what men would like women to be more than what women actually are. In other words, the intelligent and strong women that Plato would have been familiar with behave in masculine ways. Picturing a calm and collected Athena or Lysistrata ruling a city is easier than a more 'feminine' character like Helen of Troy or Persephone.

CONCLUSION

That Plato was willing to challenge his society's assumptions about gender is commendable, even if the conclusions he made would not be acceptable to most modern feminists. After all, nobody in his own place and time would have objected if instead he decided to cage women in their traditional roles. While it may be disappointing to some that Plato does not argue that all human beings are equal or that the women he includes in his ideal state are "akin to men in nature", it is important to not lose sight of the context in which Plato wrote and to be mindful of the biases a contemporary author also necessarily brings along.²² Thomas Paine once noted "a long habit of not thinking a thing wrong gives it a superficial appearance of being *right*"²³, and Plato deserves credit for rising above this.

16 - Ibid., 459 a-b.

17 - Julia Annas, "Plato's Republic and Feminism," 42.

18 - Richard Lewis Nettlehip, *Lectures on the Republic of Plato* (London: Macmillan, 1901), 172.

19 - Gregory Vlastos, "Was Plato a Feminist?" in *Plato's Republic: Critical Essays*, edited by Richard Kraut. (Lanham: Rowman and Littlefield Publishers, 1997), 126.

20 - Ibid., 118.

21 - Ibid., 116.

22 - Plato, *The Republic*, 456 b-c.

23 - Thomas Paine, *Common Sense* (Toronto, ON: Dover Publications, 1992), 1.

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The Modern Regime Of Biopolitics: Agamben & Foucault By Nick Srnicek

Throughout his work, Michel Foucault strove to demonstrate the historical contingency of practices and knowledges that have otherwise traditionally been considered natural, universal, and inevitable. Accordingly, he developed a method of historical analysis that explicitly removed any sort of transcendent grounding (e.g. economic determination in Marx, Absolute Subject in Hegel, etc.) that could unconditionally guarantee the necessity of a given system. This 'genealogical' method, characterized in part by the absence of a universal *telos*, resists the traditional utopian ideal of an overarching, stable narrative structure for history, thereby disrupting the foundations of any discourse attempting to naturalize itself. Instead of constricting history to the organization of a unitary, linear form, Foucault, taking a cue from Nietzsche¹, regards history as constituted by a multiplicity of discourses and nondiscursive practices existing in unstable relations of force. In this sense then, it is more proper to speak of histories in the plural, than any single History. Genealogy, therefore, concerns itself with these particular histories, and the accidents, contingencies, and struggles that have structured their temporal development.

From this perspective, a technique, a morality, a rationality, or an institution is to be examined in its specific emergence from the otherwise incessant struggles between forces. Genealogy sets itself the task of uncovering the conditions of possibility for this emergence and its ensuing material effects. As Foucault reminds us though, "we should avoid thinking of emergence as the final term of a historical development; the eye was not always intended for contemplation, and punishment has had other purposes than setting an example"². Tracing the changing nature of a given technique then, does not entail articulating its "evolution" or "progressive" development, but rather its mutating role - its shifting interpretation - within a specific series of contextual forces. This approach highlights, rather than hides, the ceaseless conflicts that persist between forces, resulting from the absence of an underlying organizing principle. History here is no longer a clear cut dialectical progression that sublates contradictions into a higher rational unity (as in Hegel); instead, it is a violent, passionate

¹ - See, for example: Foucault, Michel. "Nietzsche, Genealogy, History." In *The Foucault Reader*. Edited by Paul Rabinow, 76-100. New York, NY: Pantheon Books, 1984.

² - *Ibid.*, 83.

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world that destroys and produces with equal vigor through the preservation of differences as differences (as with Gilles Deleuze).

As an example of this genealogical procedure, in a lecture given at the Collège de France³, Foucault analyzes the epistemic shift in political discourse that emerges between the middle of the sixteenth century and late eighteenth century in relation to the focus of power. By charting the decline of the classical theory of sovereignty along with the supplementary appearance of a new 'art of government' modeled upon the family institution, Foucault illustrates the gradual development of a new fundamental object and finality of politics: the population. As we will see, essential to the emergence of this novel object is not only the theoretical difficulties faced by political thinkers, but also the rapidly changing material world, specifically the economic and demographic situation of the eighteenth century.

Since antiquity, political treatises had been predominantly centered upon the problematic of the sovereign, "concerning his proper conduct, the exercise of power, the means of securing the acceptance and respect of his subjects, the love of God and obedience to him, the application of divine law to the cities of men, etc."⁴ Throughout Foucault's oeuvre (as much as he may resist that word, with its implicit author function), sovereignty was theorized as fundamentally connected with a juridico-discursive conception of power. The sovereign, simply put, functions as a command embodied in law. While later we will see that sovereignty cannot simply be reduced to the facts of positive law, in this particular lecture, Foucault focuses on the relocation away from sovereignty. He examines Machiavelli's *The Prince* as an exemplar of the sovereign discourse, and how it functions as a foil for subsequent theorists.

Fundamental to its characterization by supporters and detractors (Foucault shies away from pronouncing a 'true' interpretation) is the tenet that the prince exists in a transcendent, external relation to that of his principality (i.e. the objects he possesses, such as his established territory). What constitutes the relation between the prince and his principality may be founded by violence, royal blood or some other means, but in any event it is an artificial connection that unites the two. With the absence of any necessary, absolute relation, its contingent nature leaves the prince's position fraught with fragility and vulnerability to external threats. Machiavelli's theory is thus

³ - Foucault, Michel. "Governmentality." In *The Foucault Effect: Studies in Governmentality*. Edited by Graham Burchell, Colin Gordon and Peter Miller, 87-104. Chicago, IL: University of Chicago Press, 1991.

⁴ - Ibid., 87.

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systematically elaborated around this primary *telos* of retaining and strengthening the prince's relation to his territory and its inhabitants.

On the other hand, the post-Machiavellian literature⁵ intends on replacing this singular, transcendent form of sovereignty with a rationality of governing intrinsic to the art of government, thereby effectively bypassing the problematic of the ruler. Whereas for Machiavelli, true power existed solely in the external figure of the prince, the new themes organized around the art of government elaborate relations of power that exist immanently within society. These types of government range from the basic relations of self-government (the ethical), to the government of a family (the economical), and finally to the specific structures involved in the government of a state (the political). As insinuated by the terms 'art of government' and 'governmentality', an essential continuity underlies and unites the various forms of government. This directly opposes the traditional theories of sovereignty, including Machiavelli's, which had sought to establish a fundamental distinction between the prince's power and other modes of power.

Ultimately, this continuity between forms of power comes to be modeled ideally on the family institution and its economy (economy here understood to mean "the correct manner of managing individuals, goods and wealth within the family...and of making the family fortunes prosper"⁶). The family model's economical operations are disseminated throughout society, including government at the highest levels. With the implementation of this theoretically-derived continuity, all of society aims at becoming structured in accordance with the ideal (economical) organization of the family. Since the proper arrangement of the nation is essentially inclusive of everything from individuals in their daily activities up to the largest military activities of the country, the totality of society is progressively permeated with power relations intended to coordinate every element in the most economical fashion.

Together with this dispersal of power is the conspicuous absence, in the art of government literature, of an element central to Machiavelli's sovereignty. As briefly mentioned earlier, the object of power for the sovereign was constituted fundamentally by the territory he had acquired, in its pure spatiality (i.e. there was no concern for various elements within the space). The inhabitants of this area are

⁵ - Some of the reasons behind the shift away from sovereign structures of power are examined in Foucault's *Discipline and Punish*. For example, its corresponding mode of punishment operated too irregularly, and with the emergence of capitalism, property-based crimes were not adequately regulated by the sovereign system.

⁶ - Ibid., 92.

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subjects of the sovereign's power only insofar as they occupy the prince's designated land - in other words, the territory itself provides the foundations of sovereignty. Yet, in the art of government discourse, discussion of territoriality is noticeably sparse. The attention is instead turned towards the governing of men and "things", by which is meant men's relations to each other, their relations to resources (wealth, food, the arable-ness of territory, etc.), their relations to culture (traditions, habits, ways of thinking, etc.), and their relations to nature (disease, famines, droughts, etc.). This change in perspective results logically from the shift to the family's idealized form, since "governing a household, [...] does not essentially mean safeguarding the family property [the territory]; what concerns it is the individuals that compose the family, their wealth and prosperity"⁷.

Naturally, a focus on men and things invokes a plurality of distinct objectives, all of which must be ordered preferentially and balanced accordingly with an end that is "convenient" for all. For instance, the economic goals of a government must be strictly structured so as to accentuate (or at least not interfere with) any military intentions, religious goals, etc. that also traverse any given society. The various processes that government regulates are coordinated towards their most efficient performance, continually in pursuit of an ultimately unattainable perfection. This represents a seismic shift from the former systems of sovereignty which were primarily organized to reproduce the sovereign's relation over his principality. Whereas the sovereign could achieve his ends by the simple implementation and enforcement of laws, government required the entirely new method of tactics - that is to say, the proper dispersion of men and things in the service of various goals.

This new discourse of government was inseparably intertwined in the sixteenth century with the emergence of concrete governmental apparatuses in the service of various monarchies. Yet their development and propagation was hindered by two factors. On the one hand, the art of government, in its monarchical embodiment, was still confined within the limited ambitions of sovereignty. On the other hand, theoretically it was still reliant upon an idealized model that was incapable of providing a complete set of techniques necessary to analyze numerous phenomena implicated within the government of a nation.

It was to remain this way until "a number of general processes played their part: the demographic expansion of the eighteenth century, connected with an increasing abundance of money, which in turn was linked to the expansion of agricultural production through a series of

⁷ - Ibid., 94.

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circular processes"⁸. These occurrences made the problematic posed by the population more salient to perception. This initiated two movements: first, a heightened awareness of these processes led to a new discourse emerging, aimed at modeling the new phenomena. The irreducibility of the population problematic to the family model effectively led to the family's function being reinterpreted: from being the archetype of political thought, into being an element encompassed by the more general schema provided by the population. While the family retained certain specialized functions (such as in the religious and moral realms), for the most part it became a tool utilized in the service of the population. Thus, this paradigmatic change in discourses produced a new set of theoretical tools and domains with which to analyze the political realm. Simply put, governmentality overcame the limits imposed by the family model with the creation of the more appropriate population model.

Secondly, the population came to position itself as the ultimate *raison d'être* for government. To contrast it with classical sovereignty, government's functional end was no longer essentially the retention of power (which in the last instance, is nothing more than governing for governing's sake); rather, the population and its welfare (in the multifaceted sense of economic, medical, social, etc.) became the reason for governing. To the extent that an event can be traced to a single source, it can be stated that this eighteenth century shift in political objects was the essential point at which modern governmentality⁹ came to be inaugurated within the political consciousness. The privileged position afforded to the population would in time, as we will see, lead to life and politics becoming indissociable from each other through the appearance of 'biopolitics'.

For Foucault then, the history of power within the West can be roughly sketched as a transition from:

first of all, the state of justice, born in the feudal type of territorial regime which corresponds to a society of laws -

⁸ - Ibid., 98.

⁹ - A clarification should be made to avoid any possible confusion: while the focus here is on the government of the state, governmentality is not simply equivalent to the state institution. It is rather a more general technique used to establish many of the vast webs of power that constitute society. Thus, Foucault speaks of a 'governmentalization' of the state, and distances himself from any traditional Marxist importance laid simply upon the state. "The state can only be understood in its survival and its limits on the basis of the general tactics of governmentality." (Ibid., 103)

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either customs or written laws - involving a whole reciprocal play of obligation and litigation; second, the administrative state, born in the territoriality of national boundaries in the fifteenth and sixteenth centuries and corresponding to a society of regulation and discipline; and finally a governmental state, essentially defined no longer in terms of territoriality, of its surface area, but in terms of the mass of its population with its volume and density, and indeed also with the territory over which it is distributed, although this figures here only as one among its component elements.¹⁰

These temporal moments within the genealogy of power don't simply negate the previous regime, but in fact sustain their existence as structural components operating in tandem throughout society. The coexistence of these irreducibly heterogeneous forms of power necessitates their continual interweaving, potentially producing the frightening configurations witnessed by the twentieth century¹¹.

The prominence of the population within the new discourse of governmentality stimulated the creation of novel techniques, inconceivable within previous modes of power. With government now taking the welfare of society for its fundamental project, new fields of knowledge and new methods of power proper to the population were inevitably produced. Tracing not the line of political discourse, but the development of concrete techniques and mechanisms, certain preconditions to these specifically biopolitical techniques are already discernable within the seventeenth and eighteenth centuries. The analysis of Foucault's *Discipline and Punish* focuses precisely on these various tools as they were generated on the plane of social institutions, whether academic, penal, familial or otherwise. Without diverging into an explication of the entire disciplinary study, it suffices to say that these disciplinary techniques operated at the individual level, organizing and coercing the subject into the economical structure dictated by a particular institution's rationality. The precise spatial distribution of bodies, the continuous forms of surveillance, the

¹⁰ - Ibid., 104.

¹¹ - For example, Mitchell Dean, in "Four Theses on the Powers of Life and Death", argues that the rise of Nazism was not due solely to the increasingly rational control of life by a biopolitical regime, but also because of the supplement provided by a sovereign discourse declaring the superior blood of the Germans, the fatherland, and the inevitable triumph of the race. These intermingling modes of power generated a situation irreducible to any single form of power relations.

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emergence of bureaucratic documentation detailing increasingly minute activities - these, and other techniques, focused on a strict demarcation of the individual's position within a system designed to result in a precise product - whether a diligent student, a hard worker, or simply a "civilized" subject.

In the nineteenth century, something new emerges - not replacing these individualized forms of power, but supplementing them, integrating with them, and constituting an entire new realm within which power can function. While the disciplines focused on man-as-body, that is, as a docile object to be manipulated and controlled, the new technology of biopolitics¹² operates on man-as-living-being, which in the end, denotes man-as-species. The difference between the two is perceptible in the way each analyzes a given multiplicity of individuals: for disciplines, the mass is divided into its atomistic state and analyzed, trained, and punished accordingly; for biopolitics, on the other hand, the group of individuals is analyzed not to the extent that they are individual, but rather to the extent that they are "a global mass [...] affected by overall processes characteristic of birth, death, production, illness, and so on"¹³.

Essentially, it can be stated that biopolitics' innovation lies in it supplementing the territorial conception of society as a juridical body, and the disciplinary focus on individual bodies, with the establishment of a new theme: society as a living entity amenable to regulation. Whereas the disciplines focused on shaping singular bodies into individual-objects of power, biopolitics operates by subsuming individuals into a totalizing, manipulable species-object. The tripartite field of power, sovereignty-discipline-biopower, permits the great aim of governmentality - to organize society economically from its most individual components to its largest forms - to fulfill its necessary preconditions.

In service of the direction dictated by governmentality, biopolitics concerned itself not only with the general problematics of fertility and morbidity, but also the ineradicable elements of everything

¹² - In some texts, Foucault refers to two poles of biopolitics: the individual disciplinary level, and the totalizing population level. The rationale behind this seems to be that the totalizing level is supported by the existence of the individualizing level, and therefore is not strictly distinct from it - meaning biopolitics can rightly be described as operating between these two poles. For the purposes of this essay, however, biopower/biopolitics will refer exclusively to the totalizing level, in order to easily distinguish it from the disciplines.

¹³ - Foucault, Michel. *Society Must Be Defended* (New York, NY: Picador, 2003), 242-3.

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in between: old age, accidents, various health anomalies, etc. In response to these problems, new mechanisms of management were instituted that provided unprecedented means of rationalized control over them - for example, insurance, safety regulations, and individual and collective savings plans. The environment is also implicated as a component in need of regulation by biopower. Man and the effects brought upon him not only by the natural milieu, but also within specifically human (e.g. urban) surroundings, becomes the focus of a concentrated scrutiny. Sexuality occupies a privileged place within biopolitics due to it being situated at the point of intersection between the disciplinary control of individual bodies and the manipulation of society as a population, thereby requiring rigorous examination. All of these phenomena, when isolated on an individual level however, are highly chaotic, and extremely difficult to measure accurately. As essentially aleatory processes, they must be examined at a collective level to achieve any sort of predictable coherence. Thus, entirely new mechanisms, nonexistent to the disciplines or to sovereignty, are established to regulate the population. Statistical measures, forecasts, and other mathematical models are produced, demonstrating again the positive (in the sense of creative and productive) effects of power¹⁴.

This biopolitical concern for the life and welfare of a population seemingly presents an overwhelming benefit for the vast majority involved. Certainly the dramatic rise in health conditions throughout the past three hundred years is indebted to the increased control of such matters by the State. But, while not detracting from such obvious benefits, a focus solely on the positive effects of biopolitics seems naive in the face of an overtly symmetrical surge in negative consequences - namely, historically unprecedented events such as the Holocaust, along with the various genocides and ethnic cleansings that have dotted the 20th century political landscape. In order to understand why these atrocities became possible exclusively within a biopolitical regime, one again must turn to an analysis of the shift within power's functioning¹⁵.

¹⁴ - One of Foucault's themes throughout his work is that power is not simply a repressive and negative force; yet this negative image of power is an idea that even to this day holds sway in popular and academic opinion.

¹⁵ - It should be mentioned that of course a simple shift in power's operations was not a sufficient condition for genocide, but with that caveat, it can confidently be perceived as a necessary condition. Again, Foucault's historical analysis resists simple, unitary origins for any event, and undoubtedly a multitude of factors determined the eventual malevolent use made of biopolitics in the 20th century. The short

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For Foucault, the traditional sovereign mode of power was characterized in part by its right to decide life and death. In practice however, this right was almost exclusively manifested through the sovereign's power to take the lives of those who sought to oppose him or the law - sovereignty being inextricably linked with the law. Thus, the right to decide life or death was heavily biased towards death, and was therefore more precisely a right to take life or let live. To prevent the tyranny posed by an absolute power, limitations were placed upon this right of the sovereign. Importantly, the conditions in which the sovereign could exercise his right were solely ones in which his existence was in peril. This, united with the fundamental goal of sovereignty discussed earlier - to retain their power - strictly limited the potential for large-scale wars. The power to take life (and through proximity, the power to wage war) was stringently conditioned by the defense of the sovereign.

Biopolitics, on the other hand, radically transforms the political landscape in relation to the right to decide life or death. Whereas sovereignty was almost solely concerned with maintaining itself through the use of its right to take life, biopolitics instantiates a counter-balance in the form of the population's right to indefinitely ensure its own life. With the population's welfare taken to be the end of government, the constraints of sovereign power are reinscribed on a much larger scale. "Wars are no longer waged in the name of a sovereign who must be defended; they are waged on behalf of the existence of everyone; entire populations are mobilized for the purpose of wholesale slaughter in the name of life necessity: massacres have become vital"¹⁶. While this is all an admittedly very schematic representation of the relation between biopolitics and genocide, the essential points are nevertheless evident: by subordinating the powers of life and death to the maintenance of a population's existence, the entirety of a society can be implicated within the rationale for war.

In the case of Nazism, a form of what Foucault terms 'State racism' occurs. The State designates itself as a certain ideal population, while foreign contaminants are to be eliminated. The 'purity' of the superior race must be defended against these externalities, and logically taken to the extreme, necessitates that those differing from the ideal must be actively sought out and destroyed. In this specific sense, there

attention that will be given here to biopolitics and genocide merely provides the outlines of a relation between them, and should be taken merely as a potential starting point for a much more detailed discussion.

¹⁶ - Foucault, Michel. *The History of Sexuality: An Introduction (Volume 1)*, (New York: Vintage Books, 1990), 137.

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is an apparent structural parallel with the current situation involving the U.S. and its pre-emptive attack on Iraq: American-style secular-liberalism is posited as being the 'right' way, and 'intolerable' deviancy is a threat that must be eradicated. The terrorist attacks of 9/11 provided a useful tool with which to garner the support of the population. Through the influence of the media (e.g. continual coverage) and government (e.g. the terror warning system), the presumably natural fears that 9/11 invoked in American citizens were fueled to the point where they believed the very life of their population was continuously and unfailingly in jeopardy – irregardless of the fact that one is statistically more likely to die from lightning than terrorism¹⁷. In this type of atmosphere, a war on terror offered the only possible respite to appease the frightened public. In a sovereign-based system, the attacks on the WTC and Pentagon would be interpreted as attacks on the sovereign himself, thereby greatly diminishing the potential for large-scale wars. Within a biopolitical system, on the other hand, these attacks were affronts not only to Bush, but to the entire American population, effectively raising the stakes to heights unfathomable for sovereignty.

With the significance of biopolitics now apparent, the demand for a comprehensive theoretical elaboration of its operations and potentials for resistance becomes palpable. However, the importance and implications of such a theory leave one with some concern: Foucault's analysis of the biopolitical was fragmentary, sporadically integrated within larger projects. This suggests, not an invalid examination of biopolitics but, something less than a sustained and systematic study of its origins, its operation, and its effects. While the distinguishable domains of life and politics are undoubtedly becoming explicitly integrated within biopolitics, is it true that life has never before held a relation to politics prior to the eighteenth century? Is the emergence of biopolitics, as Foucault's analysis suggests, the inaugural event in which life becomes the concern of politics proper? Can it be said that these two spheres, of life and politics, have ever been essentially separated, as presupposed by Foucault? According to the work of Italian theorist, Giorgio Agamben, the answer has to be no - "the inclusion of bare life in the political realm constitutes the original - if concealed - nucleus of sovereign power"¹⁸. In other words, the

¹⁷ - Odds of dying from a terrorist attack: 1 in 88,000. Odds of dying from lightning: 1 in 55,928. Odds of dying from homicide: 1 in 197. From: "What Odds are You Comfortable With?" 2001. <http://www.anotherperspective.org/advoc530.html>

¹⁸ - Agamben, Giorgio. *Homo Sacer: Sovereign Power and Bare Life* (Stanford: Stanford University Press, 1998), 6.

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biopolitical, insofar as it is a political power over life, represents a mere continuation of the Western political tradition. Its novelty lies not in the construction of a nexus between life and politics, but in the changing nature of that association.

Prior to exploring the modern mutation termed biopolitics, an examination of the historical relationship between life and politics is necessary in order to ground and frame the discussion. Agamben traces this relation to the foundational thinkers of the Western political tradition, noting that linguistically, the Greeks possessed no single word for what we today call life. Rather, they perceived it within the context of two distinguishable components: "zōē, which expressed the simple fact of living common to all living beings (animals, men, or gods), and *bios*, which indicated the form or way of living proper to an individual or a group"¹⁹. On the basis of this conceptual distinction, Aristotle can rightly proclaim that man is a political animal by nature, thereby invoking both *bios* (political) and *zōē* (animal) as constituents of humanity. In doing so, Aristotle implicitly acknowledges the 'inclusive exclusion' by which life is originally subjected to political power, preceding Foucault's biopolitics by nearly two millennia.

To understand this essential point, of an inclusive exclusion, one must recognize how the 'logic of sovereignty' operates. To this end, Agamben appropriates Carl Schmitt's proclamation that the "sovereign is he who decides on the state of exception"²⁰, the state of exception meaning here the condition in which the normal validity of law is suspended (e.g. martial law or *coup d'état*). Within this edict, a number of intertwined themes are implicated, and a careful unpacking is necessary to adequately appraise them. First of all, the state of exception occupies an important position in juridical and political thought due to the fact that, while a juridical concept, a full understanding of it always opens onto something external to the juridical. Since the decision on the state of exception is always a pragmatic, politically oriented judgment, any theorization of it must emanate from a space in which the juridical becomes indistinguishable from the strictly political. Most importantly, the state of exception, as we will see, constitutes the original nexus between life and law, by virtue of the inclusive exclusion. Thus, in this indeterminable space, the political and juridical, life and law, enter a zone of indistinction, upsetting their normal categorizations.

Secondly, the sovereign must be the one who is paradoxically situated simultaneously inside (in being subject to the law) and outside (by virtue of his capacity to suspend the law) of the juridical order. The

¹⁹ - *Ibid.*, 1.

²⁰ - *Ibid.*, 11.

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juridically-dictated prerogative of the sovereign to invalidate that same juridical system enables his position to occupy a space both internal and external to the law. In Derridean terms then, the sovereign is an undecidable - neither simply inside nor outside, it disrupts the conceptual stability established by binary oppositions. This uniquely undecidable position of the sovereign places him at the limit of the juridical order, in a 'relation of exception' to it.

This relation of exception from the norm differs from how the concept of exception is traditionally understood, as the exclusion of a particular case from the authority of a general rule. If that were simply the case, sovereignty and the state of exception would be entirely outside of the law, devoid of any relation to it. However, the logic underlying the exception is more complex and subtle than this classical conception has noticed. The exception is excluded from the normal situation, but this does not entail the absence of any relation to it: "*the exception does not subtract itself from the rule; rather, the rule, suspending itself, gives rise to the exception and, maintaining itself in relation to the exception, first constitutes itself as a rule*"²¹ (emphasis added). The exception, therefore, is not simply excluded from the normal situation, but is simultaneously included by virtue of its exclusion - hence, an inclusive exclusion.

It is this structure of exception that lies at the origins of the political. The sovereign's (one sees here that sovereignty can refer not only to a leader, but also to someone like a philosopher) original activity consists of determining what is excluded as 'bare life' from political life. Just as the rule constitutes itself as rule only by holding itself in relation to the exception, the political establishes itself as political only by relating itself to what it excludes. In this sense, life has always been a concern of Western politics, as the Greek division between *zoē* and *bios* attests to the exclusion of bare life and the constitution of political life from even the earliest political theorists. It should be highlighted again, that the life which has been excluded from politics is not simply a life without any relation to the political. Rather it exists as the life that has been 'banned' or 'abandoned', alluding to the double sense of being excluded (banned *from* the law) and included (banned *by* the law) in the same movement. Whereas in the state of exception, the suspension of the juridical order leaves an entire society reduced to bare life, in the sovereign ban, a singular individual is placed outside of the law. Just as the sovereign exists neither simply inside nor outside of the law, the one who has been abandoned is also undecidable with respect to the law. Agamben names the bearer of this inclusively excluded position after an obscure figure of Roman law,

²¹ - Ibid., 18.

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that of *homo sacer*, the sacred man. In the juridical literature, this individual is defined as the one who may be killed, yet not sacrificed. This seemingly contradictory characterization conceals a double exclusion at work: *homo sacer* is the one who is inclusively excluded from both human law (its capacity to be killed) and divine law (inability to be sacrificed).

The figure of *homo sacer*, living in a permanent state of exception, represents the threshold in which life becomes indistinguishable from the law. The short story "Before the Law" by Franz Kafka illustrates this point through a man's attempt to enter a door to the law. The gatekeeper situated before the law refuses the man entry to the law on unspecified grounds, stating that he may eventually be permitted to enter. This man, inhabiting a space outside of the law is left with its "pure form in which law affirms itself with the greatest force precisely at the point in which it no longer prescribes anything"²². When the man is left with no suggestion as to how his actions will be received, the law is effectively in force without signifying. This zero point of law is void of any specific regulations, leaving the pure force of the law - what holds people to it - to pervasively spread throughout the space of exception. Historically, this pervasive nature is readily apparent throughout states of exception; with the law suspended, people are left fearful of every action, unable to apply content to the law and therefore unable to model their actions accordingly. In other words, life and law become indistinguishable precisely when the law has been suspended, generating a law that extends and operates everywhere by not stipulating anything. The constitution of a political life has as its corollary the exclusion of bare life devoid of any juridico-political guarantees - that is to say, entirely exposed to the threat of being killed.

In the state of exception, "the sovereign is the one with respect to whom all men are potentially *homines sacri*, and *homo sacer* is the one with respect to whom all men act as sovereigns"²³. As the inclusively extrapolitical foundation of political life, *homo sacer* represents the symmetrical figure of the sovereign who is situated outside of, in his capacity to determine, the juridical order's space of validity. This correlated relationship therefore denotes the situation existing outside of the normal political order, which returns internally in the form of the state of exception. While in normal circumstances, the law and politics act as mediators between the absolute power of the sovereign and the bare life that is inclusively excluded, in the state of exception this juridico-political cushion is suspended, subjecting

²² - Ibid., 49.

²³ - Ibid., 84.

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homo sacer to the unmitigated power of the sovereign (it should be noted, this does not preclude ethical mitigation on the part of any particular sovereign).

A contemporary example of this occurs in Abu Ghraib, the detention center holding various Iraqi prisoners. The problems with torture and abuse originate not simply from the psychology of the individual soldiers who committed the sadistic acts, but with the juridical structure of the prison itself (not to mention the military institution that creates subjects who have necessarily de-humanized the enemy). The prisoners exist not as criminals in the penal system or as enemy warriors in the military order, but as 'unlawful prisoners', in which the prefix 'un-' specifically references their removal from the normal juridical order. As an exception to the 'universal' rule of secular individualism, the Iraqis who resisted the foreign country's occupation are designated as being external to normal political life. Thus, Abu Ghraib is simply the material manifestation of the state of exception, within which prisoners are stripped of all legal and political status, turned into *homo sacer*, and exposed to sovereign power (in this case, taking the immediate form of soldiers). In such a situation, it is fundamentally impossible to determine the legality or illegality of any act committed towards them. This prison exemplifies what Agamben means when he speaks of the state of exception becoming the rule. Instead of a temporary, nonlocalizable space of exception, the prison is (paradoxically) the exception as rule; or in other words, the stable, determinate place of exception. The exception as rule, which Agamben represents in the figure of the camp, is one of the features unique to modern biopolitical regimes.

The concentration camp, while certainly the most visible and extreme form of the state of exception, seems a curious choice to declare as the paradigm of modern biopolitics. As we have already seen though, while the activities carried out within a space of exception vary widely, the fundamental juridical structure underlying them is one of unbound permissiveness. In this sense then, the statement of the camp as biopolitical paradigm serves as a reminder of its extreme potential. In Nazi Germany, those who were sent to the camps were the ones who had been deemed "unfit to live", measured against criteria established by an ideal biological body. A deviation too far from the center (such as Jews, elderly, mentally challenged, incurables) constituted a threat to the genetic structure of the Aryan race, and therefore, in the name of the population, had to be eradicated. Nazism reveals itself to be the explicit biopolitical archetype here, by making no distinction between biological life and political life - what constitutes a proper citizen is

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determined almost entirely²⁴ by one's biological makeup. A human designated as external to this would have all rights and laws effaced from their body, exposing them as bare life subjected to the Fuhrer's orders. Through the unity of biology and politics, the sovereign's power over the state of exception is emancipated from its traditional use, and applied to the decision on which life is politically relevant. The state of exception is here no longer limited to situations like martial law, but instead becomes permeated and enforced throughout everyday society by the continual definition and redefinition of political life and bare life. The Fuhrer, in determining biological deviancy to be external and hence a danger to the population, effectively excluded millions from entry into the law.

Thus far, we have seen that the state of exception exists not only in its traditional form (in martial law), but as a rule (in the camp), and as a biologically defined threshold of politics (such as in euthanasia). Yet all of these can seem to be distant concerns for the average citizen, especially living in the stable situation provided by North American politics. As a new paradigm of control, the state of exception seems to be lacking the quality that made Foucault's disciplinary analysis so exemplary, namely the ubiquity of it in everyday life. Perhaps, however, the state of exception is already saturating the social fabric of normal existence. The clearest example of this everyday space of exception occurs in the airport, beyond passport check. Functionally, the airport often operates as the region in which those external to a domestic political order make the transition into it, suggesting a unique juridical situation is needed to accommodate this transition, not to mention the increasing fear of what is outside the native political system. Within the airport, is an assigned area in which what the law signifies is fundamentally unclear - "identification is required, planned and random searches can be expected"²⁵. In the name of security, the fundamental rights of individuals are subject to suspension at the slightest hint of suspicious activity.

Control over bare life is also becoming prevalent as new technologies are developed, capable of monitoring the movement of bodies throughout any social space (e.g. retinal scanning, subcutaneous tattooing, and networked databases of personal information). As Agamben argues in a letter to *Le Monde*, "by applying these techniques and these devices invented for the dangerous classes to a citizen, or

²⁴ - Almost entirely, because the Nazis also reserved the right to denationalize any biologically "correct" citizen and dispatch them to the camps.

²⁵ - "Welcome to the Airport." 2005. *The Wrong Side of Capitalism*. <http://huh.34sp.com/wrong/2005/03/09/welcome-to-the-airport/>

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rather to a human being as such, states, which should constitute the precise space of political life, have made the person the ideal suspect, to the point that it's humanity itself that has become the dangerous class."²⁶ In this unabated fear of life itself, states increasingly move towards the paradigm of the camp, negating the rights of citizens for the sake of security.

What sorts of potentials exist then for resistance? As Foucault showed, successful techniques of control developed for one purpose are often quickly adopted by other institutions, diminishing freedom throughout life and heightening the need for techniques of resistance. According to his theorization of power, resistance is primarily effective at a local level, at the site of power's initial grasp over the individual. Agamben, on the other hand, sees resistance as involving not only local action, but also a re-thinking of politics originary structure. If his thesis is correct, that the Western political tradition has always included life as its original inclusive exclusion, then only a complete renovation of politics' foundations will be able to present a true escape from biopolitics and its control over life. Both thinkers, Foucault and Agamben, hesitate to provide clear cut modes of resistance within their writings, acutely aware of the potential for their writing to establish a new system of domination. But, within their personal lives each is/was actively engaged in political struggles, thereby providing not an explicit articulation of their position, but an example by which others can use to determine their own particular conflicts. And outside of these concrete contributions, both have imparted a theoretical system conceptualizing our current situation, enabling new discussions and new problematics to arise. While for neither theorist is escape from negative biopolitics a simple matter, the urgency with which the American political system is instituting new methods of control make resistance an increasingly significant imperative for our times.

²⁶ - Agamben, Giorgio. 2004. "No to Biopolitical Tattooing." *Le Monde*. <http://www.truthout.org/cgi-bin/artman/exec/view.cgi/4/3249>

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Locke and Rousseau:
Individual v. Collective Freedom
By Melissa Won

Freedom is an ambiguous term often incorporated into political theory. Locke in his *Second Treatise of Government* and Rousseau in his *Social Contract*, construct political systems that emphasize the importance of this democratic ideal. Both philosophers use a similar method to create their political system, acknowledging the freedom that man experienced in the state of nature and extending it to political society. Although Locke and Rousseau would agree that man is naturally free and that the government must protect this freedom within political society, the rationale of each differs greatly. While Locke advocates an individualistic freedom that ensures the protection of one's life, liberty and estate, Rousseau defends a collective freedom that may only be achieved through public participation in law making. Both political systems undeniably embody elements of freedom, but due to the limited nature of each, only an amalgamation of the two would provide complete freedom.

Locke's argument begins with his account of man's natural state, one of perfect freedom in which men can order their actions and dispose of their possessions and persons as they think fit, according to the law of nature. This law is based exclusively on reason and restricts all individuals from harming each other's life, health, liberty, or possessions.¹ Because man's natural state is one of perfect equality, every man is executor of the law and shares the responsibility of punishing transgressors for the purpose of reparation or restraint.² However, in the absence of a common authority it is possible that men will abuse their executive power by becoming partial to themselves or by allowing passion and revenge to direct their actions. In response to these inconveniences all men divest their natural liberty and "unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that are not of it".³ This forms the basis of political society.

The fundamental purpose for uniting into a commonwealth is the protection of property. In the state of nature, every man is

1 - John Locke, *Second Treatise of Government* (United States of America: Hackett Publishing Company, 1980), 9.

2 - John Locke, 11.

3 - John Locke, 52.

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“constantly exposed to the invasion of others”⁴ with no strict observers of equity and justice to ensure his security. For this reason, every man transfers the power he retained in the state of nature to a common authority known as lawful government.⁵ Government satisfies three concerns. It establishes known law to decide all controversies, it provides an indifferent judge, and it ensures execution of punishment.⁶ Freedom within political society is not complete liberty of action; rather it is a man’s “liberty to dispose, and order as he lists, his person, actions, possessions, and his whole property, within the allowance of those laws under which he is, and therein not to be subject to the arbitrary will of another, but freely follow his own.”⁷ Law is the ultimate guarantor of freedom in Locke’s state. It is not a means to restrain the individual, but rather a way of directing a free and intelligent agent to his proper interest.⁸ It is precisely this form of freedom around which Locke constructs his political system.

Political society preserves the “peace, safety, and public good of the people,”⁹ which is achieved by the legislative power. To ensure that individual freedom is retained, the legislature’s freedom is regulated by four restrictions. First, the legislature must govern by promulgated laws that will be applied to individuals of all classes. Secondly, laws must be designed exclusively for the good of the people. Thirdly, the legislature may not raise taxes or confiscate property without consent of the people. Fourthly, law-making power may not be transferred to another body.¹⁰ These limitations guarantee that individuals retain their original freedom even after entering political society.

In Locke’s political system, individuals may always reclaim their natural freedom. Should the government abuse the people’s trust, “whoever introduces new laws, not being thereunto authorized by the fundamental appointment of the society, [...] disowns and overturns the power by which they were made.”¹¹ This natural law authorizes revolt against the government, an essential guarantor of freedom. Revolution does not return men to the state of nature, but rather allows them to reclaim their natural freedom and “act as a supreme, and continue the

4 - John Locke, 66.

5 - John Locke, 53.

6 - John Locke, 66.

7 - John Locke, 32.

8 - Jean-Jacques Rousseau, *The Basic Political Writings* (United States of America: Hackett Publishing Company, 1987), 9.

9 - John Locke, 68.

10 - John Locke, 75.

11 - John Locke, 109.

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legislative in themselves; or erect a new form, or under the old form place it in new hands, as they think good.”¹² This suggests that Locke interprets freedom as the eternal individual right to protect one’s life, liberty, and estate against the threat and violence of others.

Rousseau’s political system shares common elements with that of Locke, particularly the extension of freedom from the state of nature to political society. Rousseau describes a state in which “common liberty is one consequence of the nature of man. Its first law is to see to his maintenance; its first concerns are those he earns himself; and, as soon as he reaches the age of reason, since he alone is judge of the proper means of taking care of himself, he thereby becomes his own master.”¹³ In this state every individual is concerned exclusively with his own preservation. However, after individuals form social relationships through the appropriation of goods and self-comparison, moral inequalities emerge. This illegitimate inequality requires a “form of association which defends and protects with all common forces the person and goods of each associate, and by means of which each one, while uniting with all, nevertheless obeys only himself and remains as free as before.”¹⁴ This association forms the basis of the social compact that underwrites Rousseau’s political system.

The social compact is based on one general clause, “the total alienation of each associate, together with all of his rights, to the entire community.”¹⁵ When every individual offers himself to the commonality, nothing is sacrificed because every associate gains the equivalent of what he loses, in addition to a greater amount of force to protect what he has.¹⁶ Every man may be confident that the sovereign will protect his freedom because it “is formed entirely from the private individuals who make it up, it neither has nor could have an interest contrary to theirs.”¹⁷ However, individual interests will persist and any man who allows them to take priority over common interests “will be forced to be free”¹⁸ by the sovereign. In this case force is not an act of aggression, but rather a way of making individuals conform to the general will for their own benefit.¹⁹

12 - John Locke, 124.

13 - Rousseau, 142.

14 - Rousseau, 148.

15 - Rousseau, 148.

16 - Rousseau, 148.

17 - Rousseau, 150.

18 - Rousseau, 150.

19 - Rousseau, 151.

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The general will is the general interest common to all members of society and always tends towards public utility.²⁰ Individuals renounce all possessions that might be of use to the community, forming a common, indivisible identity. Although the citizen loses his natural right to everything that tempts him, he gains a more secure and hence, free existence. Natural independence is exchanged for liberty, the power to harm others is exchanged for security, and physical force is exchanged for rights, which take the form of laws and are rendered invincible by the social compact.²¹

Law is the most essential element of freedom in Rousseau's political state because it is a direct representation of the general will. Because laws are merely the conditions of civil association, those subjected to their consequences must authorize them. This implies that no individual is above the law because every author is a member of the state, nor is any law unjust because no rational person is unjust toward themselves.²² While the general will prescribes all law, a body is required to facilitate communication between the sovereign and state, execute laws, and preserve liberty.²³ This body takes the form of government and may exercise power only so long as its will coincides with the general will. As soon as the two become distinct, "the social compact is broken, and all ordinary citizens, on recovering by right their natural liberty, are forced but not obliged to obey."²⁴ Hence, Rousseau's depiction of freedom is based on communal self-governance through participatory law making and the right to dissociate from the sovereign when it no longer reflects the general will.

Both Locke and Rousseau describe political systems that appear to embody freedom. However, because each philosopher makes various false assumptions throughout his argument, the degree to which freedom exists in their respective states is debatable.

Locke's overall argument is persuasive. However, logical inconsistencies may be found in three key premises. The first inconsistency is Locke's emphasis on the importance of reason in relation to freedom. He explains that man's freedom "is grounded on his having reason, which is able to instruct him in that law he is to govern himself by, and make him know how far he is left to the freedom of his own will."²⁵ Therefore, any individual that does not develop the capacity for reason is explicitly denied freedom. The

20 - Rousseau, 155.

21 - Rousseau, 158.

22 - Rousseau, 162.

23 - Rousseau, 173.

24 - Rousseau, 193.

25 - Rousseau, 35.

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irrationality of this proposition may be illustrated through a counterexample regarding the Canadian legal system. All Canadian citizens are protected by and subjected to the same constitution regardless of whether they have adequate knowledge of it. Ignorance of the law does not justify criminal acts, nor does it disallow individuals from employing it for protection. The purpose of established law is to protect individual freedom in general, not to discriminate between those who embody a particular attribute and those who do not. In making reason the sole requirement for freedom, Locke is actually limiting individual freedom within his political state.

The second inconsistency concerns Locke's account of the state of nature, which he bases on the inaccurate assumption that natural law directs human action.²⁶ The assumption presupposes a universal morality that does not exist. This point is clearly supported by the contemporary political issue regarding female circumcision. Inhabitants of the western world view the practice as immoral, a human rights abuse, which can result in the loss of a young girl's life if performed improperly. Conversely, individuals living in regions where the procedure is performed, view it as a moral custom necessary to the sanctity of their culture. Female circumcision is a political dilemma precisely because it cannot be negotiated in terms of universal moral standards. This suggests that morality is a social construct rather than a natural law, which renders Locke's state of nature inaccurate. Because individuals are naturally antisocial, they would be unable to construct a conception of morality. By implication, individuals could not possibly be free from "the injuries and attempts of other men"²⁷ because there would be no moral standard to facilitate their peaceful interaction. Therefore, the existence of freedom in the state of nature is an inadequate explanation for its place in political society.

The final inconsistency is the causal link that Locke establishes between the desire to protect one's property and the formation of political society. Locke explains that, "the great and chief end, [...] of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property."²⁸ This reasoning is detrimental to Locke's overall argument because it explicitly ignores that portion of the commonwealth who do not own property. If Locke's second premise is accepted to be true, there is no logical explanation for those without property to "give up all the power, necessary to the ends for which they unite into society, to the majority

26 - Rousseau, 8.

27 - Rousseau, 46.

28 - Rousseau, 66.

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of the community."²⁹ The fundamental problem in the state of nature is man's inability to protect his property from others.³⁰ However, those men without property are not subject to this insecurity and therefore have no need to join the commonwealth. Based on this premise, Locke's political system actually lacks freedom because individuals without property are subject to its laws but explicitly excluded from its privileges.

Much like Locke's argument, that of Rousseau appears sound. However, two logical inconsistencies may be found. The first and most significant problem with Rousseau's argument is his description of freedom in political society. He explains that freedom is retained for three reasons; because conditions of the social contract apply equally to all, no individual will want to make it burdensome, because people surrender themselves unconditionally, individual rights no longer stand in opposition to the state, and because no individual has authority over another, nothing is lost by entering the social compact.³¹ While Rousseau's first and second premises are true, the third premise can be proved false, thereby rendering the entire argument invalid. Rousseau is correct in assuming that no individual would intentionally worsen his own social condition. An attempt of this sort would be completely irrational and contradict the purpose of the social compact. He is also qualified in assuming that state opposition cannot exist because the state emerges only after individuals have completely renounced their natural rights. Based on this succession of events, individual and common rights could not exist simultaneously. Invalidity occurs as a result of Locke's third premise, in which he states, "what man loses through the social contract is his natural liberty and right to everything that tempts him and that he can acquire. What he gains is civil liberty and the proprietary ownership of all he possesses."³² However, he also affirms, "liberty can be acquired, but it can never be reclaimed."³³ Natural liberty is undeniably lost as a result of the social compact and based on Locke's logic, can never be reclaimed. Therefore, even if the individual gains a different form of freedom, something is permanently lost upon entering political society. A loss of freedom is a loss of freedom, regardless of what the state offers in return.

Rousseau's second problematic claim concerns the notion of the general will, those common interests that unite members of the social compact. It expressly states that because "every man is born free

29 - Rousseau, 53.

30 - Rousseau, 66.

31 - Rousseau, 148.

32 - Rousseau, 151.

33 - Rousseau, 166.

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and master of himself, no one can, under any pretext whatever, place another under subjection without his consent."³⁴ The claim that individuals who deviate from the general will may be "forced to be free"³⁵ therefore contradicts the fundamental law of the social compact. Rousseau explains that any opinion, which does not coincide with the general will is merely an error that must be corrected by the sovereign. However, if "the general will tends toward equality"³⁶ as Rousseau suggests, certain opinions should not be favoured simply because they are those of the majority. Every opinion must be given equal acknowledgement by the sovereign. Rousseau's political system places more value on the sovereign and general will than the subjects and individual interests that authorize its existence. Although Rousseau's objective is clearly to acknowledge the most common interests of the citizenry, any state that forces the minority into conformity can hardly be said to embody freedom.

Both Locke and Rousseau acknowledge the importance of freedom in political society and construct systems that are specifically designed to protect it. However, in limiting their interpretation of freedom to either the individual or the commonality, both political systems ignore important elements of the ideal. While Locke favours an individualistic freedom that continuously protects the right to protect one's life, liberty, and estate, Rousseau advocates a collective freedom that is only possible through self-prescribed law. Slight variations of each system would correct these limitations and provide increased freedom for political society. Lockean freedom should be altered in three ways. First, laws must be promulgated by the state rather than depend on reason so that an individual faculty does not dictate whether one is free. Secondly, human action must be regulated through a common conception of right and wrong rather than a single universal moral standard. Thirdly, the commonwealth must establish a common standard of protection that does not distinguish between those with property and those without so that equal freedom will be extended to all. Rousseauian freedom would also benefit from slight modifications. First, the sovereign must attempt to be a regulator rather than a dictator of human behaviour so that individual liberty is never lost. Secondly, the interests of minority individuals must be respected and allowed to provide opposition to the general will. Existing alone, both Locke and Rousseau's political systems fail to incorporate come essential elements of freedom. However, if they were modified and then

34 - Rousseau, 205.

35 - Rousseau, 150.

36 - Rousseau, 154.

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combined, the citizen body would undeniably experience a form of freedom close to perfection.

BUSINESS AND GOVERNMENT

"There's an old saying that the government is your partner from birth, but they don't get to come to all the meetings." - John Malone

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Canada's Power Holders:

The Bureaucratic Regime of the 21st Century

By Wiktorja Ksiazek

During the sixteenth and seventeenth century, Max Weber defined state systems as "the rational-legal form of authority."¹ He observed how institutions that surfaced in many countries of Europe had delegated and limited powers, yet were mechanisms to providing the monarch and his court with rational advice and direction. Historically considered to have a weak function in Canada's governing body, the bureaucracy is now predominant in the administration of the country. Power has shifted and has been cogently derived from the Prime Minister to the bureaucrats. Thus, the Canadian bureaucracy primarily governs Canada as: (1) they are integrated into the dominant policy-making process, (2) have highly influential Deputy Ministers and (3) are integral to the function of Crown Corporations and their respective departments.

The bureaucracy is essentially involved in every step of the policy-making process. Bureaucrats are non-partisan, permanent experts in their fields. Accordingly, the required procedures for creating new laws, making amendments to statutes or simply examining potential policies, necessitates bureaucratic adherence. This is exemplified when civil servants partake in the "initiation, priority-setting, policy formulation, legitimation [and] implementation" of government initiatives.² The policy-making procedure may not always be a complex process, but it requires the assistance of bureaucrats nonetheless. For example, in the initiation process, the Prime Ministers Office (PMO) often delivers an agenda to the cabinet-maker who presents the initiatives to his ministers. Likewise, the Privy Council Office (PCO) also plays a key role in shaping policies and to effectively do so, it is comprised of bureaucrats who coordinate with other departments and their respective Deputy Ministers, as well as the PMO, Department of Finance and the Treasury Board.³ In the past, the Trudeau and Mulroney governments greatly expanded the PMO and PCO. Chrétien also heavily relied on the PCO for advice.⁴ Further, the

1 - Leslie Pal, "New Public Management in Canada: New White in Old Battles?" in *Canadian Politics*, James Bickerton and Alain Gagnon, eds. (Toronto: Broadview Press, 2004), 187.

2 - Rand Dyck, *Canadian Politics: Critical Approaches* (Toronto: Nelson, 2004), 479.

3 - Rand Dyck, 518.

4 - Rand Dyck, 506.

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head of the Privy Council Office, the Clerk, serves as a link between Deputy Ministers and the Prime Minister and this role has been enhanced significantly in recent years.⁵ Finally, because Parliamentarians and Ministers lack time and the technical capacity, most bills are presented in skeletal form and require bureaucrats to put flesh on bills.⁶ Thus it is apparent that bureaucrats partake in the policy making process through various means, such as being advisors to the political Executive and fashioning bills.

Further, strong Deputy Ministers (DM) are able to influence Cabinet Ministers in terms of policies and initiatives. Because bureaucrats are experts in their fields, they are more knowledgeable than the ministers they operate for, thus are able to construe objectives more effectively. They can use this to their advantage and manipulate their initiatives with those of the minister. Being that bureaucrats typically hold their positions for a substantially longer period of time than the ministers they serve, they may develop institutionalized agendas which may conflict with particular administrations. If bureaucrats disapprove of a policy presented by the government of the day, they may seek to stonewall, or even actively undermine the government's agenda. Even though ministers possess the statutory responsibility for making decisions on behalf of their department, they can be potentially manipulated by their respective DM. In fact, this has occurred in the past when weak ministers were dominated by the pressure imposed on them by their DM.⁷ Further, there are limited means of controlling the bureaucracy and the checks placed on civil servants by Parliament and the Auditor General are often weakly executed.⁸ Essentially therefore, it is the strong bureaucrats who unduly influence the Cabinet Ministers.

Equally important, bureaucrats are involved with government departments, Crown Corporations and administration agencies. A large component of governmental responsibility is allocating money and structuring federal expenditure, as many interest groups and lobbyists seek a dispersal of money to pursue their own initiatives. It is under the recommendation of the Treasury Board, PCO and Department of Finance that the government's financial structure is developed.⁹ Because these important government faculties are spear-headed by bureaucrats, it is clear that the greater portion of the state's responsibility is directed by civil servants themselves. Even this

5 - Rand Dyck, 538.

6 - Rand Dyck, 482.

7 - Rand Dyck, 538.

8 - Rand Dyck, 577.

9 - Rand Dyck, 546.

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process is restrained from Cabinet, as many statutes automatically finance governmental programs; the very statutes that are designed by bureaucrats.¹⁰ Since the bureaucracy plays an integral role with in government departments, Crown Corporations and administration agencies, they are up-to-date with the information being processed and the initiatives being carried out. In effect, they have "quasi-legislative powers to make subordinate rules on their own."¹¹ More so, the complexity of the government structure hinders political relations between the federal and provincial level and requires bureaucratic agencies to facilitate and administer such relations.¹² For this reason, the government is largely dependent on the bureaucracy to help keep government actors united and share uniform, interdepartmental objectives. Without bureaucratic assistance, the government would cease to operate. Hence, the bureaucracy is instrumental to the smooth functioning of the central branches of government.

Interestingly, there may be some concerns as to what extent the bureaucracy governs Canada. One can argue that civil servants are being guided by large corporations, lobbyists and interest groups, who attempt to influence bureaucrats into formulating policies that serve institutionalized groups. But before bureaucrats are deemed less powerful, it is crucial to understand that the means to establish such relationships are commonly difficult and require a large sum of time and money. Thus, by the time effective relationships are honoured, pressure groups might have abandoned certain motives and corporations may have shifted their priorities. In contrast, the groups who are successfully interacting with the bureaucracy are a useful function on behalf of the citizens they represent, in terms of influencing policies, but it is still the bureaucrats who formulate the policies and present them to Cabinet. Further, in 1989, the Lobbyist Registration Act was passed and serves to restrict the employment of lobby groups.¹³ Therefore, the power of external pressure groups has weakened through the use of regulation. Another argument that can be presented is that the PMO is not impartial and that essentially, bureaucratic administration is less visible in that department. But the role of the PMO has greatly declined after 1988 as the ineffective counsel of partisan loyalists hindered the PMO's performance.¹⁴ In addition, since the PMO works with other government departments, the role of the bureaucrat is still necessary as to ensure objectives are being

10 - Rand Dyck, 547.

11 - Rand Dyck, 533.

12 - Rand Dyck, 547.

13 - Rand Dyck, 368.

14 - Rand Dyck, 519.

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formalized effectively. Finally, one can assert that due to the recent scandal by the former Chrétien government, there are now stronger commons committees that have the ability to call bureaucrats into questioning. This would appear to greatly constrain independent civil servants, but in fact, this only questions their accountability who are the bureaucrats responsible to? Their respective Minister? The House of Commons in the form of Commons committees? The lines of responsibility are getting disordered because there have been very few documented cases in the past with government corruption, there is little precedent to use in order to effectively maintain bureaucratic answerability.

It is evident that the bureaucracy plays a central role to the government as it encompasses the major steps to formulating policies, uses strong personnel to carousel the Prime Minister's agenda and acts as a resilient instrument to the function of governmental agencies and departments. Since ministers are assigned their portfolios by the Prime Minister and rarely possess expertise on their departments, they heavily rely on their respective deputy to create policies and provide sound judgment. Strong deputies are able to use weak ministers and have them in place to act as utilizing agents for bureaucracy. Since there are only a few sources that can restrain bureaucratic power, civil servants have the potential to act independently and ultimately, supercede government operations.

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The New Public Management a Weberian Ideal-Type?

A comparative analysis of NPM

By Jamie Virgin

For almost sixty years, the work of Max Weber has been used as a blueprint for the construction of administrative departments in both the public and private sectors. This development was based on Weber's belief that the most efficient organizations were those that best matched his "ideal-type" of bureaucracy.¹ "From 1960 to 1980, the architects of those reforms tried to equip public institutions with suitable structures, rational decision making processes, effective management tools, and mechanisms for ensuring greater political and administrative accountability."² However, beginning in the 1980s scholars, politicians, and constituents began to question Weber's ideas of efficient governance. As a result of these questions, a new government focus emerged, based on self imposed restraint in public sector spending, an effort to increase confidence in government and the hopes of mitigating the adverse effects of increased globalization.³ Consequently, governments began to introduce a new model for the management of the public sector "driven by the same values that underlie those of the private sector," which are efficiency, effectiveness, and economy.⁴ This new paradigm has become what Christopher Hood coins the "new public management" or NPM.⁵

There is a common belief that the reforms of the NPM are simply a restatement of Weber's ideal-type of bureaucracy. While it is true that both Weber and the proponents of NPM advocate more efficient government, it is this paper's contention that both paradigms seek similar goals through very different means. Weber's assertion that the most efficient organizations have four common elements is proof of the differences between the two paradigms. Weber believes that organizations that best match his definition of hierarchy, continuity, impersonality and expertise form the most efficient organizations.⁶ By

1 - Gregory J. Inwood, *Understanding Public Administration - An Introduction to Theory and Practice*, 2nd Edition, (Toronto: Prentice Hall, 2004): 33.

2 - Mohamed Charif and Arthur Daniels, *New Public Management and Public Administration in Canada*, (Canada: The Institute of Public Administration of Canada, 1997): 14.

3 - Peter Aucoin, *The New Public Management Canada in Comparative Perspective*, (Montreal: The Institute for Research on Public Policy, 1995): 2.

4 - Inwood, 70.

5 - Aucoin, 1.

6 - Inwood, 33.

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comparing NPM to the Weberian model, this paper will demonstrate that because Weber's thesis is based on strict assumptions and that NPM does not meet these assumptions, the two systems are inherently different. The architects of NPM propose a blueprint for government that in many instances purposely conflicts with Weber's ideal-type. This essay will demonstrate these innate differences first, by showing that NPM lacks a hierarchical structure and thus does not meet Weber's demand for hierarchy. It will then prove that through competition NPM does not fulfill Weber's definition of continuity. Third, it will demonstrate a disparity between the two models because NPM does not promote the Weberian demand for impersonality. And, finally it will demonstrate that because of different hiring practices NPM does not encourage Weber's requirement for expertise.

Before this paper pursues its principle argument it will clarify Weber's theory of bureaucracy. As noted, Weber believes that the ideal-type of organizational structure promotes his definitions of hierarchy, continuity, impersonality and expertise. Weber maintains that rational organizations are based on these goals and that through these goals the organization can achieve maximum efficiency.⁷ To Weber rationalization means "reorganizing a firm (or streamlining the organization) in such a way that every arrangement is made to serve the general goal," in this case that goal is efficiency.⁸ It is important to realize that Weber believes only the organizations that come closest to matching his four criteria will be efficient.

The first component of the Weberian model is based on a belief that the most efficient organizations have a well-defined hierarchy. In Weber's words: "The principles of office hierarchy and of levels of graded authority mean a firmly ordered system of super- and subordination in which there is a supervision of the lower offices by the higher ones".⁹ Weber maintains that a hierarchical organization is the most rational method for structuring an organization and it is this rationality that creates efficiency. He postulates that as society becomes increasingly modern there is a need for these super- and subordinate relationships to process information quickly and "without friction" throughout the system.¹⁰

Advocates of NPM disagree with Weber's assumption and propose a contradictory method for the construction of public

7 - Ibid, 33.

8 - Stanislaw Andreski, *Max Weber - On Capitalism, Bureaucracy, and Religion a Selection of Text*, (London: George Allen and Unwin Ltd, 1983): 8.

9 - H.H. Gerth and C. Wright Mills, *From Max Weber: Essays in Sociology*, (United States of America: Oxford University Press, 1953): 197.

10 - Gerth, 214.

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organizations. New public managers argue that the traditional hierarchical structure of bureaucracy is the "main cause of procedural rigidity and ineffectiveness."¹¹ Instead, NPM proposes a re-engineering of public organizations to create a "lightening of structures, flattening of organizations and simplification of processes."¹² Hierarchical organizations may have been efficient when Weber proposed his ideal-type of bureaucracy because communication technology was slow and civil servants were relatively uneducated. These conditions required centralization for "information to flow up the chain of command and decisions to flow back down."¹³ It appears that under these circumstances Weber was correct in assuming that without hierarchy government would not have functioned effectively. However, today the climate is very different, technology is faster, employees are better educated, and conditions are dynamic. This new environment requires more responsive governmental organizations and NPM addresses this need.¹⁴

The traditional reaction during times of economic, social, or political turmoil is to consolidate government agencies and centralize decision making. Unfortunately, this Weberian response generally leads to failure.¹⁵ Many New public managers believe that "[c]entralized controls and consolidated agencies generate *more* waste, not less" and that disorder actually necessitates decentralization [*Italics in Original*].¹⁶ Moving decision making to "the periphery" and eliminating middle managers allows organizations to be more flexible, effective, and innovative.¹⁷ By creating organizational teams and empowered employees NPM has brought management of the civil service to the frontline. This practice has flattened the hierarchy of organizations and in the process created more efficient organizations. By means of advocating employee decision making practices rather than deferral to superiors, NPM eliminates unneeded steps in the vertical structure of public organizations. NPM responds to an identified efficiency concern through the reduction of the hierarchy not an increase of it. This value directly conflicts with Weber's belief in

11 - Charih, 34.

12 - Ibid, 36.

13 - David Osborne and Ted Gaebler, *Reinventing Government - How the Entrepreneurial Spirit is Transforming the Public Sector*, (New York: Penguin Group, 1993): 250.

14 - Ibid, 250.

15 - Ibid, 251.

16 - Ibid, 251.

17 - Ibid, 251-52.

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efficiency through increased hierarchy and proves that the structural changes inherent in NPM are not congruent with Weber's ideal-type.

The second component of the Weberian model is the belief that the ideal-type of organization should promote continuity. According to Weber "[e]ntrance into an office, including one in the private economy, is considered an acceptance of a specific obligation of faithful management in return for a secure existence".¹⁸ Continuity then refers to his belief that the civil service should be treated as a life-long "vocation" and that employees should be granted tenure for their services. Weber's argument holds that continuity prevents exploitation of authority for "rents or emoluments" and thus promotes legitimacy and accountability.¹⁹ In a Weberian sense, continuity is a contributing criterion to his view of efficiency through rationality.

Advocates of NPM management agree with Weber in that paid positions of the public service should promote efficiency; however, they disagree in how this goal should be achieved. New public managers actively promote competition in government and they argue that it is competition that promotes efficiency. There are various methods to increase competition in government, including: load shedding, procurement and contracting out.²⁰ For comparison to Weber's model only one commonality is important, that is each of these NPM methods are based on contracts with finite timelines. These fixed contracts are instrumental in encouraging competition because they force service providers, whether public or private, to produce an effective, efficient, and economical product every time, lest face losing their contracts.²¹ The idea of finite contracts proves that NPM does not guarantee continuity in an organization because positions are only maintained if the job is performed well.

Furthermore, new public managers believe that competition in government institutions is essential for eliminating the inefficiencies that public monopolies create. Ironically, many people associate "competition within government as waste and duplication," when cuts are needed it is common to eliminate everything that resembles it in order to reduce costs. Instead what often happens is these cuts compound the problems associated with public monopolies.²² As Osborne and Gaebler put it - "we know that monopoly in the private sector protects inefficiency and inhibits change. It is one of the enduring paradoxes of American ideology that we attack private

18 - Gerth, 199.

19 - Ibid, 198-202.

20 - Osborne, 86-87.

21 - Ibid, 35.

22 - Ibid, 79.

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monopolies so fervently but embrace public monopolies so warmly."²³ The continuity that Weber's model recommends is not advantageous to change because it "inhibits change." By allowing policy managers to "shop around" for the best service providers, either internally or externally, it allows them to "squeeze more bang out of every buck."²⁴ "Contractors know they can be let go if quality sags; civil servants know they cannot."²⁵

Continuity undermines efficiency, the very goal that Weber sets out to attain in his ideal-type of organization. NPM addresses this problem through the use of finite contracts and through the promotion of internal and external competition. Weber's model guarantees continual vocation and inadvertently promotes inefficiency. NPM only guarantees vocation for a job well done.

The third component of the Weberian model is the belief that the ideal-type of organization should promote impersonality. In this case impersonality is the idea that the work of an organization should be "based on prescribed rules and a written record."²⁶ Weber believes that through written rules the employees of an organization can function with speed and impartiality in all administrative tasks. He states that impersonality "is the principle of fixed and official jurisdiction areas, which are generally ordered by rules, that is, by laws or administrative regulations."²⁷ Weber supports that fixed jurisdictions ordered by rules forces decisions to be made objectively and thus with rationality and efficiency.

NPM criticizes the traditional Weberian role of impersonality in public organizations for creating bureaucratic pathologies or a "distorted character."²⁸ These pathologies refer to the tendency of bureaucrats to be driven by the rules instead of the intended goal of those rules. An example of this is noted by Inwood in reference to the novel "One Flew Over the Cuckoo's Nest" by Ken Kesey. When the protagonist of that novel defies the established rules of the mental hospital, the head nurse uses those same rules to "beat him down," even though the protagonist's methods were having a positive effect on himself and the other mental patients.²⁹ This is a fictional example of exactly what new public managers intend to prevent by creating entrepreneurial governments. Entrepreneurial governments "define

23 - Ibid, 79.

24 - Ibid, 35.

25 - Ibid, 35.

26 - Ibid, 35.

27 - Gerth, 196.

28 - Inwood, 37.

29 - Ibid, 37.

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their fundamental missions, than develop budget systems and rules that free their employees to pursue those missions".³⁰ Advocates of NPM believe that when bureaucrats are taught to simply comply with the rules of the organization, any situation beyond the scope of the rules will be handled with "inflexibility and timidity."³¹ In Weber's model impersonal application of rules is meant to maximize efficiency, but in many cases the reverse occurs. "The rules become ends in themselves, rather than the means of achieving organizational goals. Officials acquire a *bureaucratic personality*, compulsively following procedural manuals to the last detail" [Italics in original].³² New public managers acknowledge that some rules are necessary for the legitimate function of an organization. However, they argue that instead of creating rule-driven organizations, as Weber prescribes, the creation of mission-driven organizations will meet the same goals without the inefficiencies.³³ Entrepreneurial governments find their mandate from an organizational mission statement. They allow discretion in the functioning of the organization and thus promote flexibility, innovation and efficiency.³⁴ NPM shifts the traditional focus of an organization from "communities" to "customers" and it is this shift that marks the most important difference between NPM and the Weberian model.³⁵ Weber's ideal-type promotes a universal application of the rules, while NPM advocates discretion in the application of minimal rules. Where Weber's model requires strict adherence of the rules to produce results, NPM turns employees "free to pursue the organization's mission with the most effective methods they can find."³⁶

Another difference with Weber's model and NPM is a belief that because the ideal-type of bureaucracy inherently includes objectivity it "inevitably accompanies *mass democracy*" [Italics in original].³⁷ This assumption is based on Weber's assertion that the patrons of both democracy and bureaucracy demand "equality before the law."³⁸ Although impersonality is consistent with the "democratic ideal of equality of everyone before the law," his assumption that there is a universal demand for equality in government poses a problem.³⁹

30 - Osborne, 110.

31 - Inwood, 38.

32 - Harvey J. Krahn and Graham S. Lowe, *Work, Industry and Canada*, (Scarborough, Canada: Thomson Nelson, 2002), 216.

33 - Osborne, 111-113.

34 - Ibid, 113-114.

35 - Charh, 32

36 - Osborne, 113.

37 - Gerth, 224.

38 - Ibid, 224.

39 - Inwood, 35.

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This problem originates in his definition of what a given society's actual goals may be. If the democratic society's goal is equality, meaning there is a general demand for the equal treatment of everyone, then Weber's assumption is correct, impersonality is congruent with democracy. However, if a democratic society's goal is equity, meaning there is a general demand for everyone in society to be brought to an equal level, than the NPM paradigm appears to be more appropriate. By treating everyone the same through the rigid application of impartial rules, the Weberian model promotes equality not equity. For example, certain government hiring practices could discriminate against an entire minority group because of standards based on rigid rules and regulations.⁴⁰ Certainly under these circumstances everyone would be treated the same, but that treatment would also discriminate against the minority group because of an inherent disadvantage. The customer driven response of NPM allows individuals in every social group to be treated more equitably because it promotes a more flexible application of the rules.

Weber's goal of efficiency through impersonality is generally recognized by new public managers to promote inefficiencies and rigidities. In response to this assessment, NPM advocates mission-driven organizations based on customer needs and flexible decision making practices. These NPM methods by design conflict with Weber's definition of impersonality. From this, it can be surmised that the two paradigms offer very different means towards producing similar goals.

The final aspect of Weber's model is his belief in efficiency through expertise. Under these circumstances expertise refers to the idea that the personnel of an organization should be "selected on the basis of what they know rather than who they know (that is, on the basis of merit)."⁴¹ This component of the model is closely related to Weber's views on authority. Weber believes that "bestowing authority on an individual for reasons of tradition or charisma was not logical in that it did not guarantee the best person for the job would exercise authority. As a result, efficiency could actually be impeded."⁴² By including expertise as an element of his model Weber intends to limit patronage and consequently increase efficiency.

NPM does not directly address Weber's idea of expertise. However it does advocate hiring based on specific goals. As mentioned earlier, the free market approach that NPM employs,

40 - Ibid, 35.

41 - Ibid, 33.

42 - Ibid, 34.

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promotes the goals of efficiency, effectiveness, and economy.⁴³ Where Weber advocates hiring based on the legitimization of authority, NPM hires based on the goals of the free market. In this sense the two paradigms offer different responses to hiring practices. Although, this diversion is not an explicit NPM attempt to contradict the methodologies of Weber's model. New public managers acknowledge that there are a number of problems with hiring and contracting based on the goals of the free market. They note that "low ball bids are a common problem. Companies bid low to get the first contract, assuming they can jack up the price later." They also concede that contracting out can be "the locus classicus of political pay off."⁴⁴ Based on Weber's desire to eliminate bureaucratic patronage it is likely that he would identify NPM hiring practices as being conducive to such concerns. Nevertheless, both NPM and the Weberian model advocate different goals for the hiring practices of an organization. As a result of this difference it should be apparent that both Weber and NPM offer different methods for the operation and construction of public organizations.

In summary, this paper has demonstrated that NPM and Weber's ideal-type of organization offer very different methods for the structuring of public organizations. It demonstrated this difference by first showing that NPM advocates the flattening of organizational hierarchies, a method conflicting with Weber's promotion of a strong hierarchical order. Second, it proved that through competition NPM does not meet Weber's requirement for continuity. Third, it showed that by promoting entrepreneurial practices new public managers do not fulfill the Weberian desire for impersonality. And, finally this paper explained that because NPM and Weber's model prescribe different hiring goals that NPM does not meet Weber's definition of expertise.

Max Weber proposes an organizational model with the goal of producing the most efficient organizations possible. New public managers propose a very different model in search of that same outcome. As the globalizing forces of neo-conservatism continue to shape the environment of public bureaucracies there will be a continued need for adaptation in order to retain efficiency. Dynamic organizations along with enterprising civil servants will remain the key ingredient in this process. As General George S. Patton once put it - "Never tell people how to do things. Tell them what you want them to achieve and they will surprise you with their ingenuity."⁴⁵

43 - Ibid, 70.

44 - Osborne, 88.

45 - Ibid, 108.

SELECTED TOPICS

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Looking Forward

By Julianna Khou

As the title "Looking Forward" provokes students to engage in a discussion of what lies ahead for Aboriginal nations in Canada, the intent of this paper is to aim for a similar objective. That is, to investigate prospects of reconciliation between Aboriginal nations and Canada. Major themes that will facilitate this discussion are the following: the mechanisms used to render Aboriginal self-determination and whether they are ideal, the creative capacity required to attempt solutions beyond the existing Canadian institutional design, and the necessity to advocate for meaningful compromises in attempt to mend grievances of Aboriginal communities. The analysis that this paper will engage is provoked by arguments presented by Monture-Angus, as she targets the issue of Aboriginal self-determination and the mechanisms currently employed by Aboriginal nations to achieve this particular objective.¹ For the context of this paper, Aboriginal self-determination could be defined as Aboriginal communities being autonomous to a degree that would allow such communities to become responsible for all decisions impacting their lives and self-determining of their future. Monture-Angus chooses to examine the issue of Aboriginal self-determination rather than Aboriginal self-government since the latter objective is likely to be more feasible and ideal for the collective well-being of Aboriginal communities. Thus, instead of focusing on the flaws of self-government which includes aspects that hinder Aboriginal nations in becoming self-determining—for example characteristics of self-administration and negotiated inferiority (a term is coined by Ladner) inherent within self-government—this paper chooses to investigate arguments of Aboriginal self-determination as proposed by Monture-Angus.

To begin, assuming that the ultimate goal for Aboriginal nations is to heal from colonial oppression, then one may note that what must be achieved is the collective well being of such nations. There are multiple mechanisms that could be used to realize this objective. Some mediums include rights claims (including land claims) presented before judiciary and legislative bodies, cultural solidarity in various Aboriginal associations, and grievances introduced around negotiation tables that include both representatives of Aboriginal nations and the Crown. Although it is without doubt that the above mediums could actualize Aboriginal self-determination, Monture-Angus stresses that

1 - See Patricia Monture-Angus, *Journeying Forward: Dreaming First Nations Independence* (Halifax: Fernwood Publishing, 1999).

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what is of grave concern is that most mechanisms employed presently by Aboriginal nations are elite driven. This is significant to note because elite driven mechanisms to heal and rid colonial oppression may not be necessarily ideal to achieve the collective well being of Aboriginal nations. In other words, if Aboriginal well-being encompasses the right for Aboriginal nations to become responsible and sufficiently self-determining of their future, then it must be asked whether it is possible for elite-driven mechanisms to accomplish such objectives. It is for this reason that this paper chooses to investigate prospects of reconciliation between Aboriginal nations and Canada based on Monture-Angus' works. This is done by identifying the strengths and weakness of her arguments in relation to ideas of self-determination presented by other Aboriginal activists.

The problems concerning the efficacy of elite driven mechanisms employed by Aboriginal nations, the adversarial nature of rights claims presented before the courts, and the divided jurisdictional authority of the federal government and the provinces further illustrates the complexity for meaningful reconciliation between Aboriginal nations and the Crown. For example, it could be said that prospects to mend grievances of Aboriginal nations and to reconcile its relationship with Canada on behalf of the Crown are still contingent on compromises and actions of both parties. The necessity to create a common ground between both parties (the Crown and Aboriginal nations) is yet to be achieved as pursuits of rights claims of the latter often surface before the judiciary. Reconciliation of any relationship is difficult if the mechanism employed to mend the grievances is considered to be of an adversarial nature. This is evident as Monture-Angus notes that when pursuits for Aboriginal titles and rights are presented before the courts, the adjudication process of such claims will not be as moderate or accommodating to both sides relative to claims dealt by non-binding adjudication bodies acting as mediators to both. This is because Aboriginal claims presented before the courts are considered "us vs. them", thus the process to adjudicate the majority of Aboriginal rights claims will only be considered victorious to one party as opposed to both. This however does not necessarily mean that the party that is adjudicated victorious will consider the concessions offered satisfactory. This is due to the adversary nature of Aboriginal claims against the Crown. For example, the divided jurisdictional power of the federal and provincial governments as derived from section 91, 92 of the Canadian Constitution will inevitably add to the complexity of settling Aboriginal rights claims since such claims will conflict with some of the entrenched provisions. Due to the division of jurisdictional power between the federal government and the provinces, a certain degree of reluctance is likely to be illustrated by judiciary

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bodies when they are required to adjudicate rights claims of Aboriginal nations in a radical manner. Thus this leads one to question, are rights claim pursuits of Aboriginal nations against the Crown via Canadian judiciary bodies ideal and accommodating to Aboriginal self-determination? Also, are there alternative revenues that Aboriginal nations could seek that would be better attuned to rectify Aboriginal and state relations (this is presuming that the intent of both parties is to reconcile the past and present grievances)?

Monture-Angus agrees that questions regarding Aboriginal self-determination must not be neglected and that the mechanism used to render Aboriginal nations sovereign is of worthy analysis. She stresses that if Aboriginal nations are to be successful, the imperfections inherent in the mechanisms employed to render justice to the former must be identified. Such identification is necessary due to the realization of flaws inherent in the mechanism employed—whether through the judiciary or legislative bodies—could empower those in pursuits of rights claims more leverage. Perhaps it is unfortunate that strategic planning is needed to render justice to Aboriginal nations. If this is the intent and considering that Aboriginal nations do not have the same dictatorial authority within the Canadian institutional design as compared to judiciary and legislative bodies, deliberate planning may be needed.

For instance, if one considers the adoption of authoritative power of the various jurisdictions of Canada, it is evident that the legitimacy of the courts is derived from the sovereignty of the Crown. This may work to the disadvantage of Aboriginal nations. If Aboriginal rights claims are perceived by the political elites to threaten the status quo of authoritative power in the Canadian institutional design, then this may explain the slow-progressing nature of Aboriginal rights claims. In other words, if a group attempts to question the sovereignty of the Crown and of Canada as many Aboriginal rights claims have attempted to do, it may place judiciary bodies in a predicament. It is due to this conflict that causes Monture-Angus to be suspicious of the stated impartiality of judiciary bodies as it is clear that the legitimacy of such bodies is derived from the Crown. Thus it must be asked if the fate of Aboriginal nations could be dependent on the judiciary, particularly if the judges presiding over Aboriginal rights claims are not adequately equipped with Aboriginal worldviews and jurisprudences.

If the above proposition does not trouble ones views concerning the complexity of Aboriginal and state relations and the prospects for reconciliation between both groups, then a discussion on the cultural differences inherent in the Aboriginal and Euro-centric paradigms must be engaged. First, it must be noted that the concern of judicial bodies being equipped with adequate knowledge of Aboriginal

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worldviews is one that has occupied the contributions of many Aboriginal activists such as Ladner, Henderson, and King. They note that it is the influence of stories that socializes and conditions ones mindset- whether these stories are transmitted through the household, the educational system, or society. Monture-Angus agrees as she notes that even the Canadian jurisprudence encompasses stories of values and norms that are deemed acceptable within Canadian society. King further solidifies this proposition as he notes that when a person adopts a certain version of a story, they will naturally reject any conflicting stories that they will be presented with in the future. For example, a person will either accept the Native American version of Charm and the twins as the theory of creation of the world, or they will acknowledge Christianity's Adam and Eve as true, but not both. King makes this explicit as he notes "If we believe one story to be sacred, we must see the other as secular."² This however is not to say that a recipient of conflicting stories will reject opposing views immediately after being introduced to it, but instead King emphasizes that since one would be logically conditioned by previous beliefs, they would be increasingly reluctant to embrace new perspectives. Thus if the courts are used as the mechanism to render justice to Aboriginal nations, it must be questioned who the judges are that preside over Aboriginal rights claims, and whether they are well versed with Aboriginal jurisprudence. Moreover, if the elites (those who dominate the Canadian institutional design) are not aware or educated adequately in Aboriginal worldviews, what could be done to ameliorate this situation? And, is education sufficiently adequate to render the elites with the capacity to reconcile Aboriginal and state relations, particularly if accounts of a side (the Euro-centric account in Canada) dominates and overshadows all alternative perspective?

Before one advocates for the benefits of education, it must be stressed that education alone is not sufficient particularly if it is selective. In other words what is most important for non-Aboriginals, especially those in power as emphasized by Henderson,³ is not only to be educated in Aboriginal affairs but also to be educated in a non-Euro-centric manner. Selectivity in education will inevitably perpetuate a vicious cycle of cultural misunderstandings between Aboriginal nations and non-Aboriginals. An example of this is illustrated by Ladner as she notes that it is agreed upon in Treaty Seven and many others that Aboriginal nations were given rights to coexist alongside Europeans.

2 - Thomas King, *The Truth About Stories* (Toronto: Anansi Press, 2003), 25.

3 - See James (sákéj) Youngblood, "Aboriginal Jurisprudence and Rights" in *Advancing Aboriginal Claims*, K. Wilkins, eds., (Saskatoon: Purich Publishing, 2004), 67-89.

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These Aboriginals are free from interference and given payments or other goods (translated into present day tax exemption) in exchange for land usage of Europeans.⁴ This view however, is not in concurrence with the perceptions of Aboriginal and state relations according to the majority of non-Aboriginals as they are not adequately educated on the provisions agreed upon in the various treaties during time of European contact. This indicates that there is indeed a discrepancy between the historical narratives of Aboriginal and non-Aboriginal accounts on what had occurred during the time of European contact.

Whether the historical discrepancies were intentional to render one party with more leverage over the other in order to justify Aboriginal or European land occupation, this may not be of great importance as the intent of this paper is not to impose blame on one party or the other. Rather, it is to examine prospects for reconciliation in Aboriginal and state relations. With that said, the discrepancy inherent in the historical narratives must be mended with agreement from both groups before reconciliation could be achieved in Aboriginal and state relations. This is because as implied earlier, reconciliation of any relationship is dependent on the establishment of a common ground between both parties. Thus if conflicting historical narratives act as a detriment to Aboriginal and state relations, then it is clear that a common ground between both parties is yet to be established. It is apparent that it is not only the masses who perpetuate cultural misunderstandings of what has occurred during the time of European contact in Canada, rather the same could be said for the elites in Academia (those who have capacity to publish historical narratives). For example in much of Flanagan's works, he would perpetuate the misconceptions of many non-Aboriginals by illustrating that North America was indeed an empty land because Aboriginals were not sedentary people but hunters and gathers.⁵ Thus it is without question that the issue at hand is not if non-Aboriginals are educated in Aboriginal affairs, but to question the source of the education rendered. It is for this reason that Monture-Angus is concerned about the capacity of judiciary bodies to render justice to Aboriginal nations, particularly if the judges presiding over Aboriginal rights claims have only been educated on Aboriginal affairs via a Euro-centric manner.

Similar to education, Henderson stresses that the acknowledgement of Aboriginal jurisprudence is also necessary if the

4 - Kiera Ladner, "Treaty Federalism: An Indigenous Vision of Canadian Federalism," in *New Trends*, M. Smith and F. Rocher, eds., (Peterborough: Broadview, 2003), 178.

5 - Thomas Flanagan, *First Nations, Second Thoughts* (Montreal-Kingston: McGill-Queens University Press, 2000), 37.

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intent of the Crown or of Canada is to reconcile the relationship with Aboriginal nations. This is because without the creative capacity -as emphasized by Henderson as crucial- to mend the grievances of Aboriginal nations, prospects for reconciliation of both parties may be unlikely or may cease to be meaningful. In other words, non-Aboriginals and Aboriginals alike must attempt solutions of reconciliation beyond the existing institutional design before exhausting all alternatives and turning to judicial bodies as the ideal mechanism to mend grievances. This is because as noted previously, prospects of reconciliation between both parties are more likely if the mechanism employed is not of adversarial nature.

Now that it is established that a common ground between Aboriginals and non-Aboriginals is crucial for any prospects of reconciliation between both parties, this leads one to question to what extent do both parties agree presently. And if agreements do exist, could such agreements be considered as a foundation or a stepping-stone to ameliorate Aboriginal and state relations. To investigate this matter, one must return to Monture-Angus' assertion, as she stresses that a common ground between both parties is yet to be established. She agrees with Henderson that a creative capacity amongst the elites is needed in order to address the barriers that prevent Aboriginal and non-Aboriginal reconciliation. She further advocates that solutions to reconcile Aboriginal and state relations need to reach beyond the boundaries of the current system and that Aboriginal communities collectively must also realize that laws and other practices within the Canadian institutional design have perpetuated their oppression. By realizing this objective, this returns to the above arguments which note that the identification of the inherent flaws of the current mechanisms used could assist Aboriginals to better articulate their rights claims. Thus Monture-Angus would advocate for all Aboriginal communities to acknowledge current practices that continued their oppression, and to question the motives behind the elites who choose to reconcile Aboriginal and state relations within the existing institutional design. In other words, she is skeptical that solutions could be derived within the existing system to render Aboriginal nations self-determining of their future, and to heal the colonial oppression imposed on them. This also leads one to question whether Aboriginal nations collectively acknowledge that practices within the existing institutional design (as it is a colonial construct) continue their colonial oppression, or rather that they are conditioned by the Euro-centric perspective to such an extent that they are oblivious to their oppression. Similarly, are current proposals of reconciliation such as Aboriginal self-government (those that are accompanied with self-administrating and negotiated inferiority aspects) presented because the elites lack creative capacity to draft

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solutions that exist beyond the system, or are they unwilling to engage in radical changes since they enjoy current benefits acquired from the status quo?

To investigate this matter, an analysis of the Canadian constitution and protected Aboriginal rights must be presented. This is because if laws and constitutional documents are representative of the values and norms deemed as acceptable in Canadian society, then this implies that the area that must be investigated is to determine whether or not the Canadian identity is envisioned by the elites encompassing Aboriginal nations. This is not to note that the Canadian identity must necessarily include Aboriginal nations, but it is useful to determine where the political elites envision Aboriginals to belong in relations to non-Aboriginals within the Canadian institutional design. If this could be done, then such examination of the Canadian identity is useful for Aboriginal nations to determine what lies ahead and whether or not it is worth reconciling the relationship with the Crown. This of course is not to note that Aboriginal and state relations is dependent on political elites (as the majority comprises of non-Aboriginals), but rather since the reconciliation of any relationship must inevitably involve both parties, the determination of sincerity of the representatives of the parties is necessary. Thus if the elites (those who dominate the political arena) are the ones who possess the capacity to mend Aboriginal and state relations, then Henderson's assertion that the elites must be adequately educated in Aboriginal affairs deserves merit. This also returns to previous arguments presented by Monture-Angus as she suggests that Aboriginal nations should diverge from elite driven mechanisms to achieve self-determination. However it must be stressed that if it is indeed difficult to diverge from elite-driven mechanisms, then it would seem as if the most optimal choice is to influence the elites. That being said does not mean that Aboriginal nations should be complacent with the current slow-progressing situation of rights claims, but instead that such nations should capitalize on the most profitable options available. Thus if this means that the elites must be adequately educated in Aboriginal affairs, then this must be lobbied for. If this alternative is feasible, then a dual process that could begin as a grassroots movement to mobilize awareness amongst the elites on Aboriginal affairs may be the most optimal option to reconcile Aboriginal and state relations. Moreover, by involving the masses and the elites, such action could mend grievances, as it would be representative to members of both parties, and thus be considered legitimate. In other words, although this paper agrees with Monture-Angus that mechanisms used to reconcile Aboriginal and state relations should return to grassroots movements, it asserts that this process cannot be achieved instantly. Thus as a move to the masses would be a

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process to achieve, Aboriginal nations should capitalize on the current mechanisms by identifying its inherent flaws and push for a grassroots movement simultaneously.

With that said, one must return to the Canadian constitution in attempt to seek for unanswered questions regarding the sincerity of reconciliation on the part of political elites. One could note that if the Canadian constitution must be examined, then perhaps the entrenchment of section 25 and 35 of the Charter illustrates that sufficient recognition of Aboriginal nations have been achieved. In other words, section 25 and 35 could act as indicators that the elites are genuinely interested in reconciling Aboriginal and state relations. On the other hand, it could also be argued that until there is adequate implementation of such provisions, to advocate this proposition may be considered hasty. This is because as Jhappan emphasizes, the role and influence of symbolism could be of great significance in Aboriginal and state relations.⁶ Thus one could note that if demonstrations of civil disobedience such as the Oka Crisis having such an impact on public sentiments in regards to Aboriginal and state affairs, then it is likely that Trudeau and the premiers of various provinces would have also realized the influence of symbolism and its implications that would accompany the repatriation of the Constitution in 1982. Thus it must be questioned if the entrenchment of section 25 and 35 as it affirms the rights of Aboriginal nations and ensures the protections of Aboriginal rights- were founded on the genuine intention to implement such provisions or if the imposition of such protections only symbolic. Moreover, is the slow progressing implementation of the constitutionally protected rights of Aboriginals due to the complications that arises such as the divided jurisdictional powers of section 91 and 92, or is it due to the symbolic nature of such rights that have led to the unwillingness of the political elites to realize such provisions? In other words, what must be asked is if symbolic acts of the government causes a certain degree of reluctance in implementing such acts due to the initial intent of the drafters.

It must be noted that the above propositions are not to imply that symbolic acts of the state intended to appease grievances of a group will only be provisions that will be uttered as hollow words by political elites. This is because certainly a symbolic act of the state could appear to appease and to mend grievances of a group with the implementation of such statutes. But what must be stressed is that it is necessary to distinguish prompt implementation of statutes of Parliament versus those that are slow progressing. It must be asked if

6 - See Radha Jhappan, "Indian Symbolic Politics: The Double-Edged Sword of Publicity," *Canadian Ethnic Studies* (1990): 19-39.

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the implementation of statutes of Parliament that are slow progressing or at times stagnant is due to the willingness of the political elites to realize such legislations. In other words the intent of political authorities at the time of legislating statutes as it reflects the political culture of the state is useful to note since this could determine the likelihood of compliance of its implementation. Thus it could be argued that despite section 25 and 35 of the Charter relates to Aboriginal rights and sovereignty and the possible realization of such provisions, the intent of those who ratified the statutes must not be ignored as it could have serious implication on the willingness of political elites to bring such statutes into effect.

Overall, one may note that this paper leaves many questions unanswered regarding Aboriginal-state relations and its prospects for reconciliation. However, it must be stressed that the intent of this paper is to expose the complexities of Aboriginal and state relations, and not simply to propose short term "solutions" to ameliorate the situation at hand. To do so would be to reduce the complexity and the issues that are important to both parties. For example, if one is to examine Henderson's emphasis on the creative capacity of the elites and Monture-Angus' assertion for mechanisms used by Aboriginal nations to revert to grassroots movements, then one could note that both claims are valid and ideal. Thus a call for continued ideas concerning methods to reconcile Aboriginal and state relations is greatly appreciated as well as to stress that Aboriginal nations must continue to have faith in what lies ahead thereby ceasing to become complacent. The strengths and flaws of the mechanisms used to render Aboriginal nation's self-determining their future must be realized, as well as the current oppression inherent in the existing Canadian institutional design. This is because the intent of both parties is to reconcile Aboriginal and state relations, and the mechanisms used must be chosen with care. It must be stressed that reconciliation of any relationship is a process to achieve and not one that could be maintained instantaneously. To believe otherwise is to be shortsighted of the historical complexities of the nature of Aboriginal and state relations. The adversarial nature of court claims, the discrepancies in historical narratives and its implications, the identification as to who possesses the capacity to mend the grievances inherent in the relationship are all factors which collectively challenge prospects of reconciliation in Aboriginal and state relations. This is to note that there are multiple layers inherent in the discussion of Aboriginal and state affairs. As Monture-Angus notes, a discussion regarding the barriers that prevent Aboriginal and state reconciliation is endless, as even an examination of connotations inherent in semantics could be used to expose the oppressive nature of colonial rule. Thus it must be stressed that if reconciliation is ideal, then both parties must

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work together in order to find a common ground to realize the intended goal of their ancestors, which is co-existence. Without sincerity on the part of those who possess the capacity to mend grievances, it is unfortunate to say that prospects of reconciliation of both parties may be unlikely.

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From Debate Without Change to Change Without Debate: *An International Perspective on the Challenges Facing Canadian Healthcare*

By Donald Murphy

Introduction

Of the issues facing Canadian politicians none are so vexing as healthcare. The evening news is replete with stories about long wait times, shortages of doctors, provincial demands for additional funding, and the trend towards greater privatization. These are alarming realities yet our political leaders approach them lugubriously.

The arithmetic challenges facing healthcare are quite basic. Despite this fact, Canadian politicians tend to obfuscate them for fear of alienating supporters. This constitutes not simply a betrayal of Tommy Douglas' vision, but also an inability to lead that is deeply saddening. This lack of direction at the federal level makes it unsurprising that the Supreme Court as well as the Alberta and Quebec governments are now dictating the future of our system.

Complicit in this situation, however, are Canadians themselves. For politicians to pander they need an audience that only wishes to see an issue from a single perspective. The Canadian people are quite right that healthcare is a moral enterprise, yet demanding that the status quo be frozen in time will eventually doom the public system. This reality was perhaps presented most clearly by a former Cabinet colleague of Mr. Douglas, who stated,

Tommy would be appalled to see what is happening to the costs of health care today. He didn't foresee all the new technology and new demands and what they would do to the costs of health care. He would be especially upset if he knew that health care costs were taking needed money away from education. That was never his plan.¹

Much of what is to be discussed in this inquiry is contained in this simple statement. It is sufficient to say, for the moment, that we need to realize that saving one of the institutions our society values most will require a radically more honest, thorough, and pragmatic debate.

1 - Janice MacKinnon, "The Arithmetic of Health Care," *Policy Matters* 5, no. 3 (2004): 26.

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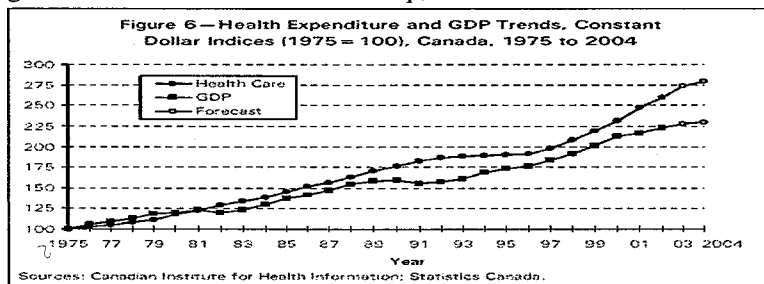
To preface this discussion the present inadequacies of healthcare in Canada will be presented. The outlook for the system if current trends continue will then be analyzed. After considering these realities the Canadian healthcare system will be placed in perspective through international comparisons. Finally, the options facing Canadians' will be presented and suggestions toward reinvigorating the system will be made.

It is lamentably rare that candid and non-ideological discussions of healthcare dynamics are presented. Nevertheless, the author hopes not to be taken as woefully self-serving in attempting to do just that. It is asked that this inquiry can be taken as a first, though certainly not a last, word on the future of healthcare in Canada.

Healthcare Today

Canada's healthcare system as it stands today is largely contained in the Canada Health Act of 1984. This document is critically important as it enshrines the notion of public administration which mandates our system will be administered on a not-for-profit basis. The key point of contention with this article is that administration is written to include only public funding of the system, but not the administration of services.²

It is a fact that our publicly funded system is consuming an ever-increasing share of budgets at all levels of government. This reality would be less troubling if the costs of the system were not also exceeding the rate at which the Canadian economy growing. The figure below illustrates this relationship,



While this is a grim picture, the assessment it offers is actually unduly optimistic. Key costs are omitted, specifically the debts of hospitals and health boards, as well as the expense associated with updating equipment. These factors alone account for an annual

2 - The Canada Health Act (1985), Section 8.

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expense of \$10 billion in Ontario.³ In addition, the above shows the rate at which the entire economy is growing, but this tells us little about patterns in government revenue. The Conference Board of Canada notes that, "the overall share of government revenues relative to GDP is expected to decline over the next 20 years."⁴ Reasons for this are multifaceted, and will be turned to presently.

As has already been stated, the rate at which healthcare spending is increasing is eroding governments' ability to finance other areas of concern. In Ontario from 1997-1998 and from 2002-2003 healthcare spending rose by 42 percent, while government revenue increased by just 31 percent. In this same time period healthcare spending grew 8 percent per annum, as compared with 4 percent per annum or less for all other areas.⁵ This reality is mirrored across the country where spending on education, the poor, cities and the environment are curtailed by the increasing costs of public healthcare. In addition, the current course is unresponsive of making needed investment in the infrastructure of a modern knowledge-based economy.

An additional point of concern that will be considered when examining the experience of Sweden and the United States, are the gross increases in healthcare professionals' salaries and benefits. These increases are due in large part to the imbalance of power between the provincial governments and the medical professional associations that negotiate wages and benefits. As healthcare is a matter of such political sensitivity in Canada any time the professional associations are dissatisfied with negotiations they can count on the support of the population. As a result, wage and benefit increases far outstrip other sectors of the economy. Particularly revealing of the costs of this arrangement was the B.C. government's increase of \$1.1 billion in healthcare spending, \$685 million of which went towards the labor costs of healthcare professionals.⁶

The financial challenge posed by rapidly expanding salaries is exacerbated by professional associations' refusal to discuss the prohibitive scope-of-practice rules that maintain exclusive roles for healthcare professionals. These standards are constructed in such a

3 - Janice MacKinnon, "The Arithmetic of Health Care", 9.

4 - Conference Board of Canada, *The Future Cost of Health Care in Canada 2000-2020: Balancing Affordability and Sustainability* (Ottawa: Author, 2001), p. 19.

5 - Ibid.

6 - Michael Kirby and Wilberly Keon, "Why Competition is Essential in the Delivery of Publicly Funded Health Care Services," *Policy Matters* 5, no. 8 (2004): 13.

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way as to prevent fully trained and accredited professionals, usually nurse-practitioners, from performing tasks which physicians have staved off.⁷ This has enormous ramifications in creating inefficiently operated hospitals and costs Canadian taxpayers billions of dollars per each year. Senator Michael Kirby describes the situation as, "... analogous to calling in an electrician to change a light bulb. Of course the job will be done well, but it will not be done in a cost-effective manner."⁸

When taken as a whole, these spending patterns are quite simply unsustainable today. Thus, the only options available are to enhance efficiency, reduce spending, or increase revenues to keep pace with the rising costs of maintaining the system. These themes will underwrite this inquiry and will be expressly returned to at various points of this examination.

Healthcare in the Years to Come

The previous section illustrated the unsustainable nature of healthcare under today's realities. Clearly, if these circumstances were extrapolated over the long-term then the burgeoning cost of healthcare would quickly lead to a financial crisis. Even the federal surpluses Canadians have come to expect would rapidly disappear. To prove this point one need only consider the increases in federal-provincial healthcare transfers that Quebec lobbied for in 2004-2005.⁹ If the Quebec plan were adopted then federal spending would evolve as follows,

Table 2
Impact of Quebec Proposals on Federal Budgetary Balances (\$ millions)

	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10
Provincial Equalization proposal	5,212	5,461	5,703	5,957	6,226	6,505
Provincial health/social transfer proposal	2,000	3,471	6,570	9,018	12,116	15,390
Total transfer increases	7,212	8,932	12,273	14,975	18,342	21,895
Cumulative Government of Canada surplus	10,065	9,791	8,574	7,910	9,620	12,854
Cumulative Federal surplus (deficit) left for other federal spending	2,853	859	(8,699)	(7,065)	(8,722)	(9,041)
Cumulative	2,853	3,712	13	(7,052)	(15,774)	(24,815)

SOURCE: GOVERNMENT OF QUEBEC, "Correct the Fiscal Imbalance," Budget 2004-2005 (Quebec City, 2004), p. 31; and THE CONFERENCE BOARD OF CANADA, *Fiscal Prospects for the Federal and Provincial/Territorial Governments* (Ottawa: March 2004), table 2B.

The key piece of information on this graph is found in the final two lines, which trace the shrinking of federal budgetary surpluses if the Quebec proposals were adopted. This depiction clarifies the lack of credibility to provincial claims that increasing transfer payments from the federal government will prove sufficient in addressing

7 - Michael Kirby et al, "Why Competition is Essential in the Delivery of Publicly Funded Health Care Services", 14.

8 - Ibid.

9 - Janice MacKinnon, "The Arithmetic of Health Care", 19.

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healthcare's fiscal woes. While transfer payments are important, the suggestion that a lack of federal commitment is the cause of the system's problems is utterly disingenuous.

An additional point of concern was raised in a recent OECD study, which said, "from a fiscal point of view, Canada's demographic profile is currently as favorable as it has been for a generation and more favorable than it will be for at least another fifty years."¹⁰ The key figure to consider with changing demographics is the dependency ratio, which tracks the number of active participants in the economy relative to the segment of the population that is either too young to work or has retired. Today, there is approximately one Canadian working for every one not participating in the economy. Thus, each Canadian is dependent on one other. However, due to the baby boom, by 2030 there will be two Canadians outside the economy for each one actively working.¹¹

As a result, to maintain government spending per person at today's level, personal income tax would need to rise as high as 85 percent.¹² The clear problems of such arrangement will be examined shortly and illustrate the quandary Canadians will face in the future. For the moment, however, it suffices to say that there is no reason to believe the next generation of taxpayers will be willing to pay the bill run up by their forbearers.

Funding Healthcare at the Expense of Education, a Politically Prudent yet Economically Short-Sighted Approach

Before presenting international comparisons and analyzing the choices available to Canadians, the issue of opportunity costs needs to be considered. The term "opportunity costs" refers to measuring the cost of a particular course of action by referencing the actual cost plus the cost of not being able to take an alternative course. This term has particular significance as healthcare costs in Canada are crowding out all other areas of social spending.

Most significantly, education is simply not receiving the funding it needs. In 1970 8.1 percent of the GDP was spent on education. By 2010, it is estimated that education will be receiving just 5 percent. This reality is particularly troubling as a knowledge economy requires an extremely skilled workforce to remain competitive;

10 - Ibid.

11 - Wayne Taylor, "2020 Healthcare Management in Canada: A New Model Home Next Door," *Healthcare Management Forum* 16, no. 1 (2003): 7-8.

12 - Ibid.

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yet, some 18 percent of Canadians do not graduate high school.¹³ For those that do go on to post-secondary institutions, high debt and limited financial aid is the norm.

Funding levels for education are critically related to the sustainability of public healthcare in Canada. In knowledge based economies significant investment in education is a prerequisite for positive economic conditions. The problem of chronically under-funding education is one of neglecting the key infrastructure for the future economic well-being of the country.¹⁴ Janice Mckinnon, former NDP Finance Minister of Saskatchewan, framed the issue in this way, "laboratories, synchotrons and other research facilities are the infrastructure of the twenty-first-century economy, just as railways and canals were the foundations for the economy of the nineteenth and early twentieth century."¹⁵

When one recognizes the role of education in underwriting Canada's economic future the folly of our course begins to become clear. Not only is spending on healthcare unsustainable, but by choosing to chronically under-fund education the challenges to be borne by the upcoming generation of taxpayers are being exacerbated.

While the notion of intergenerational equity is not often thought of in Canadian politics, it is important. To overlook the ramifications of systematically writing off future taxpayers for the benefit of those that have grown accustomed to ever increasing healthcare spending is grossly shortsighted. Beyond the serious questions of justice raised by this approach, there is also the simple fact that it makes for terrible economic policy.

Consider the overall picture being painted here. In the future there will be fewer working Canadians, who have received lower quality education and are expected to pay the bills run up by their forbearers. All this will occur in an environment where taxes must rise dramatically to pay burgeoning healthcare costs and where the option of relocation to the United States is always available to the well educated and technically skilled. Clearly, bills are being written today on the assumption that someone will be around to pay them. This is so presumptuous that it borders on wishful thinking.

Nevertheless, there is a political calculus involved in the decision to systematically under-fund education in favor in healthcare. To put it simply, there are far more individuals at a stage of their lives where healthcare is a more critical concern than education. Moreover, as individuals age the likelihood that they will vote also increases. As a

13 - Janice MacKinnon, "The Arithmetic of Health Care", 11.

14 - Janice MacKinnon, "The Arithmetic of Health Care", 10-13.

15 - Janice MacKinnon, "The Arithmetic of Health Care", 17.

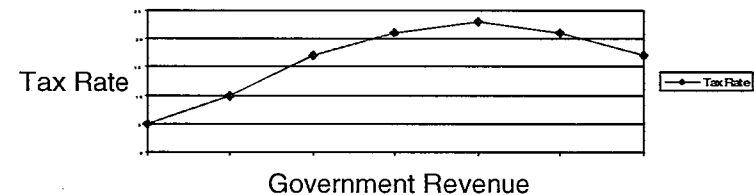
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result, the middle-aged and senior citizens that use the healthcare system more than anyone else also comprise the most significant pool of voters.¹⁶

The Great Canadian Tax Myth, or, Can't Someone Else (Namely Business) Pay?

These realities are not lost on Canadian politicians. Yet, not one of the major party leaders approaches the question of demographic shifts in a manner becoming of their responsibility. This is somewhat understandable from a political perspective as Canadian thinking on spending is underwritten by the great Canadian tax myth – namely that someone else will pay the bill.

Consider, for a moment, the notion of progressive taxation. A system under which the financially-able contribute more and those who are less fortunate contribute less. This is a perfectly logical basis for taxation and is one that most Canadians value as dearly as public healthcare. Just like healthcare, however, there are economic realities that undermine the applicability of progressive taxation in theory and in practice. Consider the following schematic;



The chart above depicts the impact of the law of diminishing marginal returns as it relates to taxation. This economic law postulates that as a factor increases, for example tax rates, the return per unit of measure will decrease. At a certain point diminishing returns set in and each additional increase will lower overall outcomes.

To clarify, consider how this applies to the Canadian case. Citizens are willing to bear the costs of taxation to a certain extent. The higher taxes are raised, however, the more likely individuals are to stop working, to begin working under the table, or to leave for a jurisdiction with less oppressive tax policies. With this reality in mind it becomes clear how charging high income earners more than other Canadians only works to a point, after which they will refuse to shoulder the

16 - Henry Millner, "Are young Canadians Becoming Political Dropouts? A Comparative Perspective," *Policy Matters* 11, no.3 (2005): 1-5.

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burden.¹⁷ Considering the tax challenges posed by the demographic shifts I have outlined, it should be becoming clear that our system is headed toward fiscal insolvency at an alarming rate.

This reality is drastically exacerbated by Canada's treatment of corporate taxation. As corporations are often depicted as an economic parasite by the political left, the very notion that high corporate tax rates have significant negative implications would sit uneasily with most Canadians. Nevertheless, the effective rate of corporate taxation in Canada is the second highest in the world, behind China (as shown by the chart on page 11). This reality helps explain why the federal NDP's insistence that tax cuts to large corporations be removed from the 2005 budget cost Canadians financially and drove away exactly the kind of jobs needed in a knowledge based economy.¹⁸ This illustrates how Canadians are not just sowing the seeds for future economic disaster, but are hurrying towards it by illogically alienating a critical source of revenue.¹⁹

Canada in an International Context – The Swedish Healthcare System

The truths discussed above are harsh ones. No one likes to consider the flaws with the Canadian healthcare system or economic trajectory. While economics is a dismal science the unpleasantness of these realities does not provide grounds to ignore them. Rather, what is needed is a clear articulation of the sort of system we wish to build and the setting of prudent policies to meet the expectations of Canadians. There is much to be learned from the international community about structuring an equitable, sensitive, and fiscally prudent system of healthcare and financing. Due to space limitations this study will focus only on the experiences of Sweden and the United States, as the study of these polar opposites produces extremely fruitful findings regarding the benefits of private for-profit service delivery within a system of universal public insurance.

17 - Wayne Taylor, "2020 Healthcare Management in Canada: A New Model Home Next Door", 104-105.

18 - Janice MacKinnon, "The Arithmetic of Health Care", 17-18.

19 - Yvan Guillemette and Jack Mintz. "If Taxes Fall, Does Health Care Suffer?," *C.D. Howe Institute: Tax Competitiveness Program* (2004): 1-3. http://www.cdhowe.org/pdf/ebrief_5.pdf

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Table 1: Effective Tax Rates on Capital for Large and Medium-Sized Corporations, by Country, 2005 (percentages)

	Statutory Corporate Income Tax Rate	Effective Tax Rates		
		Manufacturing	Services	Average
China	24.0	45.5	46.5	45.8
Canada	34.3	35.5	41.3	39.0
Brazil	34.0	40.1	37.2	38.5
U.S.	39.2	34.6	40.0	37.7
Germany	38.4	37.7	36.3	36.9
Italy	39.4	33.3	38.1	36.2
Russia	22.0	35.0	34.1	34.5
Japan	41.9	34.4	33.1	33.6
France	35.4	33.3	33.4	33.3
Korea	27.5	31.9	29.6	30.8
New Zealand	33.0	30.1	28.8	29.3
Greece	32.0	33.0	27.8	29.3
Spain	35.0	29.9	25.8	27.3
Norway	28.0	26.1	24.7	25.1
Netherlands	31.5	25.3	21.9	25.0
India	33.0	23.2	24.9	24.3
Australia	30.0	29.4	22.1	24.1
Finland	26.0	23.5	22.4	22.9
Luxembourg	33.4	21.4	22.1	21.9
U.K.	30.0	22.7	21.2	21.7
Belgium	34.0	21.4	21.3	21.4
Poland	19.0	20.6	20.0	20.2
Denmark	30.0	20.6	19.4	19.8
Austria	25.0	20.3	18.8	19.4
Hungary	16.0	18.8	17.7	18.2
Czech Republic	26.0	21.3	14.0	17.7
Switzerland	22.0	16.9	17.1	17.0
Mexico	30.0	17.2	16.4	16.7
Ireland	12.5	14.1	13.2	13.7
Portugal	27.5	11.7	14.6	13.5
Sweden	28.0	12.8	11.6	12.1
Iceland	18.0	13.1	11.6	12.1
Slovak Republic	19.0	9.6	8.7	9.1
Hong Kong SAR	17.5	6.1	8.3	8.1
Turkey	30.0	7.3	5.7	6.4
Singapore	20.0	5.8	6.6	6.2

Source: C.D. Howe Institute.

The transformation of Swedish healthcare over the past three decades has been dramatic. The circumstances motivating Swedish policies were enunciated by one expert as follows, "After three decades of rapid growth, the Swedish economy was slowing down. But the publicly funded systems were used to ever-increasing funding [...] but for every extra injection of tax money, waiting lists grew longer and longer."²⁰ This situation, which could easily have been taken from a Canadian newspaper, should give proponents of the status quo pause. Much has been made of Sweden as among the most progressive of welfare states and the lessons of how it addressed the problems of healthcare are revealing.²¹

20 - Johan Hjertqvist, *The Health Care Revolution in Stockholm: A Short Personal Introduction to Change* (2002), Timbro Health Care Unit, <http://health.timbro.se/>.

21 - Johan Hjertqvist, 9.

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Swedish healthcare prior to reform provided for public funding and provision of services. This differs markedly from the Canadian case, wherein only public financing is enshrined in the Canada Health Act of 1984. While the tone of our political leaders toward privately provided services oftentimes obfuscates this distinction, it is one that Swedish policy makers embraced when modernizing their healthcare system.

Changes began in Sweden in 1976-1982 when the first non-socialist government in 44 years was elected. Not surprisingly, new ideas for the provision of healthcare were tested and produced strikingly positive results. In 1983 a private group of doctors, the Praktikertjanst, became the first in the country to offer care within the publicly funded system. The socialist establishment was predictably infuriated, yet the population supported the move as the clinic remained fully publicly funded, was the most cost-effective in the country, and also had the shortest waiting times.²² The message this sent, that improved access was more important than the specious virtues of publicly delivered services, encouraged successive governments to continue on the road laid by the proponents of the market.

In 1990 the leftist Social Democratic Party adopted the system of evaluating costs for procedures used in the United States. Hospital budgets were then determined on the basis of the number and cost of services provided instead of by increasing funding to hospitals year after year with no consideration of efficiency. As a result, productivity grew by 19 percent in a single year and the mentality of hospital managers was forever altered.²³ Then Commissioner for Finance, Ralph Ledel, likened this development to "the fall of the Berlin wall." Competition, new ways of approaching cases, and a drastic increase in efficiency ensued.²⁴ This statement highlights the peculiarity of a socially progressive country embarking on the road to competitive delivery while Canadian politicians still treat private service providers like a cancer infecting our healthcare system.

The most compelling case in the move towards competitive delivery in Sweden was provided by the privatization of St. Goran hospital in Stockholm. One of the facets of this case that baffled many analysts was the overwhelming support for this change by healthcare professionals. Nevertheless, these groups utilized the administrative changes to trim the scope-of-practice rules that prevented trained professionals from carrying out certain tasks.²⁵ This contrasts clearly

22 - Ibid., 16.

23 - Ibid., 17.

24 - Ibid., 19.

25 - Ibid., 26-27.

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with the inefficient approach insisted upon by the CMA that was discussed earlier in this inquiry.

Amending these rules, along with many other innovations, increased the productivity of St. Goran's by some 40 percent in the first year after privatization. Since then, the hospital continues to innovate and reports suggest it is 10-15 percent more efficient annually than all its competitors.²⁶ The fact that St. Goran's and the increasing number of private clinics in Sweden are also rated far more favorably by patients than public hospitals is especially revealing.²⁷

What is important to take from the Swedish case is that publicly funded healthcare is not incongruent with the private provision of services. In Canada, many hospitals and physicians operate as private actors but lack the incentives of being for-profit. The statistical benefits in efficiency found in the Swedish case, which all include profit-margins factored into the calculations, are clear. Moreover, for-profit clinics in Sweden also have drastically lower waiting times than public facilities. At public hospitals it is common to wait a year for hearing aids (versus 4 weeks at St. Goran's), two years for knee surgery (two-ten weeks), and ten months to address a hernia (2-4 weeks).²⁸

The significance of these developments should not be lost on Canadian policy-makers. Critically, the benefits of privately delivered services are fully covered by the publicly funded system, cost the government less, and have overcome the challenges of wait times. That solutions of this nature are direly needed in Canada are clear yet our political leadership insists on clinging to outdated rhetoric.

The example provided by these facets of the Swedish case should give pause to those in Canada that still cling to the notion that our system of publicly funded healthcare is somehow incongruent with private delivery of services. In part this perspective has developed by associating healthcare with notions of justice, fairness, and egalitarianism while disparaging the world of business as incorrigibly greedy, socially destructive, and utterly soulless. While individuals are entitled to hold whatever perspective they wish, the harsh opinion of business presented by many politicians is lamentable. Canadians remain accustomed to conceiving public systems with just ones, and those that involve private facets are perceived as inherently unjust. That our political leadership panders to this perspective and fails to address the issues speaks to a troubling lack of vision. We should not be surprised then, that groups like the Supreme Court or the

26 - Ibid., 21-22.

27 - Ibid., 50-51.

28 - Ibid., 31.

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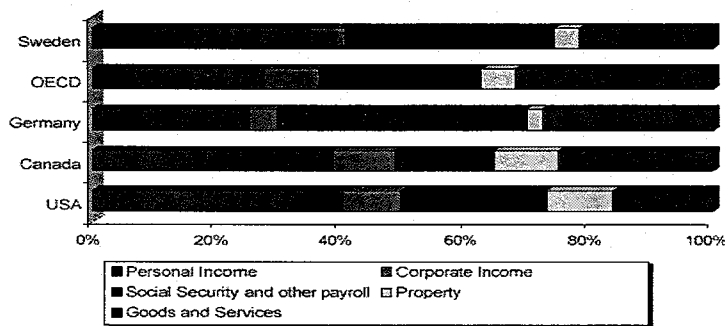
Conservative government of Ralph Klein are beginning to define the future of healthcare in this country.

Lessons in Economic Management and Healthcare Financing from Sweden

To suggest that the virtue of competitive service delivery is the only lesson to take from the Swedish system would be glib. This inquiry has attempted to situate healthcare within the complicated web that comprises societal organization and financing. Earlier, for example, the need to rethink many of our notions around progressive taxation was emphasized. Likewise, the central role of well-funded education for the success in a knowledge based economy was considered. The Swedish experience provides a just and astute compass by which to chart the needed course in Canada.

Readers that have reviewed this inquiry's chart of corporate taxation will have already compared the rates between Canada (number 2 on the list at an average rate of 39 percent) and Sweden (number 31 on the list at an average rate of 12.1 percent).²⁹ The fact that a socially progressive country like Sweden levies corporate taxes that are one third those of Canada says a great deal. Consider the following,

Figure 6: Tax Revenue of Major Taxes as a Percentage of Total Tax Revenues, 1998



Source Revenue Statistics 1965/2001. OECD. Paris. 2002.

This depiction gives readers a sense of how small a role corporate taxation plays in Sweden when compared to more regressive methods of taxation like personal income, payroll, and goods and services. It should also be noted that the progressive nature of the

29 - Duanjie Chen, Jack Mintz, and Finn Poschmann, "Attention G-7 Leaders: Investment Taxes Can Harm Your Nations' Health," *C.D. Howe Institute: Tax Competitiveness Program (2004)*: 3. http://www.cdhowe.org/pdf/ebrief_18.pdf

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Canadian system is perhaps underrepresented as the Swedish system makes no distinction between small and large corporations when leveling taxes.³⁰

The cost of the Swedish healthcare system is knowingly borne by individual taxpayers, not corporate entities. This insures that expectations are realistic and that the country remains among the most competitive for potential investors. Canada, in contrast, insists on leveling high rates of corporate taxation that drives out a key source of capital and drastically reduces the competitiveness of the economy. This helps illustrate that the great Canadian tax myth is precisely that – a uniquely Canadian illusion.

All of these realities play out in an environment where Sweden spends \$2 512, or 9.2 percent of GDP, on healthcare. Canada spends \$2 931, or 9.6 percent.³¹ Nevertheless, The Swedish system is continually rated higher by the World Health Organization. The fact that this is done in country with a markedly less progressive tax system may be surprising at first, but the sensitivity of the Swedish government to market realities helps explain the differences in approaches and outcomes.

Canada and Sweden: Differences in Coverage

Despite the funding dynamics discussed above, Sweden still maintains lower levels of private financing as a percentage of all healthcare spending (14.7 percent in Sweden versus 30.1 percent in Canada).³² The high levels of private financing in Canada will strike many as paradoxical considering the primary importance many Canadian commentators place on maintaining the supposedly public system. If nothing else, this statistic unmask the specious notion that private actors are not already a feature of the Canadian system. The ethical quandaries raised by private participation will be considered shortly.

Particularly significant is the phenomenon of passive privatization. Pharmaceuticals, as the fastest growing area of healthcare costs, make up a larger proportion of healthcare spending every year. As one expert put it,

30 - Duanjie Chen and Jack Mintz, "How Canada's Tax System Discourages Investment," *C.D. Howe Institute: Tax Competitiveness Program (2004)*: 6-9. http://www.cdhowe.org/pdf/backgrounder_68.pdf

31 - The World Health Organization, *The World Health Report 2000 – Health Systems: Improving Performance (2000)*, http://www.who.int/whr/2000/en/whr00_en.pdf; p. 151-155.

32 - The World Health Organization, *The World Health Report 2000 – Health Systems: Improving Performance (2000)*, 192-195.

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Canada's distinctive way of defining the boundary between public and private finance has had its' own particular vulnerability. As technological [most significantly pharmaceutical] changes have shifted services out of hospital [sic], care has migrated from the world of universal... coverage to a world in which private finance plays a much larger role. The shrinking of the public share in Canada, then, does not for the most part mean that the public share of expenditures on physician and hospital services has declined. Rather it means that those sectors in which private finance already played a significant role expanded their share of total expenditures.³³

Passive privatization helps explain how, despite increased investment in healthcare, the percentage of our system that is publicly funded shrank to 69.8 percent in 1997 from some 75 percent a decade prior.³⁴ Also hinted at is the need for policy-makers to be sensitive to the shift of costs to areas that are under-funded in Canada's existing healthcare framework.

Passive privatization is also increasing at an exponential rate, as seen in the 17 percent jump in drug prices experienced between 2000 and 2001. This development should be particularly troubling to the socially conscious as the ability to acquire pharmaceuticals is clearly variable dependent on income and private coverage.

The Swedish approach to global increases in pharmaceutical costs has been paradoxical. On the one hand, the use of less expensive generic medications is extremely low (10 percent of prescriptions) when compared to Canada (some 50 percent).³⁵ In addition, the use of co-payments for prescription drugs is increasing. Prior to 2000, for example, Sweden required citizens to bear the burden of drug costs to a point, after which a tiered payment scheme set in. As drug costs rose the government's share of the cost increased from a low of 50 percent to a full takeover of payment. Since 2000, however, a less significant coverage scheme has taken over. Now all Swedish citizens are

33 - Carolyn Tuohy et al, "How Does Private Finance Affect Public Health Care Systems? Marshallin Evidence from OECD Nations", *Journal of Health Politics, Policy and Law* 29, no. 3 (2004): 366-367.

34 - Ibid.

35 - Donald Willison et al, "International Trends in Managing Drug Plans: Lessons for Canada," *Institute for Research on Public Policy*. <http://www.irpp.org/events/archive/sep02/willison.pdf>; p. 7-10.

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responsible for an annual deductible after which a fixed co-payment provides limited assistance up to a maximum of 25 prescriptions.³⁶

That Sweden is grappling with the burgeoning cost of pharmaceuticals and its definition of itself as a progressive welfare state is clear. Most surprising of all, however, are the Canadian methods of pharmaceutical utilization management now being adopted to help curtail extreme increases in drug costs. The school of pharmacoeconomic thought pioneered in B.C. has enhanced our ability to measure the cost-effectiveness of pharmaceutical regimens in comparison to more traditional medical therapies. This method of analysis has subsequently been adopted by the Swedish agency studying ways to address drug costs. A system wherein the cost-effectiveness of a drug is used to determine the extent of reimbursement is now being developed.³⁷

Do These Trends Point to the Americanization of Canadian Healthcare?

The above analysis highlights that even socially progressive states find the private provision of services compatible with a publicly financed healthcare system. The dilemma facing countries when determining levels and areas of coverage are also illuminated with reference to demographic changes and the law of diminishing marginal returns. What it absolutely does not do, however, is endorse the privatization of healthcare.

In Canada, the mere discussion of these issues can lead to the criticism that the proponent is an advocate for the Americanization of healthcare. This suggestion is at best a lugubrious one and at worst borders on the ludicrous.

If the Swedish case illustrates some of the benefits to be derived from the public provision of services then the system in the United States clearly highlights the worst excesses. At first glance it is paradoxical that the U.S. spends an average of \$5 274 annually per person on healthcare, or 14.6 percent of GDP, yet places 37th in WHO rankings. The outcomes generated by this amount, which constitutes by far the highest in the world, is especially puzzling when compared with Sweden's spending \$2 512, or 9.2 percent of GDP and Canada's \$2 931, or 9.6 percent. That these countries placed 23rd and 30th in WHO rankings despite funding differentials is particularly noteworthy.³⁸

36 - Ibid.

37 - Ibid.

38 - The World Health Organization, *The World Health Report 2000 - Health Systems: Improving Performance* (2000), 151-155.

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The seeming disconnect between market mechanisms and efficiency this reveals is explained by the inefficiency of the private insurance industry in the U.S. This provides an especially valuable case study as it highlights the merits of maintaining, and indeed strengthening, Canada's publicly funded system.

The Pitfalls of Privately Funded Insurance Schemes

In the World Health Report, 2000, the issue of healthcare financing was a matter of crucial concern. A central premise of that study concerned the need to conceive healthcare funding as a multifaceted process involving revenue collection, the pooling of resources, and the purchase of services. At each stage the dynamics of public and private insurance schemes were explored and analyzed. This document remains one of rare clarity and quality.³⁹

In the United States funding for healthcare is derived from a broad array of sources, such as general taxation, the voluntary purchase of insurance, and out of pocket payments. Despite the myriad sources of funding, however, some 40 million Americans have no health insurance at all, and millions more are covered on only a seasonal basis.⁴⁰ The reasons for this are manifold, but the exorbitant overhead costs of the fragmented insurance market is a major one.

A 2004 study concluded that administrative costs in the United States accounted for 31 percent (\$1 059 per capita) of total healthcare spending, versus 16.7 percent (\$307 per capita) in Canada. Extrapolated for population, these differences constitute an annual loss of \$209 billion (US) which is more than enough to insure every single American lacking health insurance.⁴¹ The implications of these findings should not be underestimated.

As significant as these statistics are, to appreciate them the economic realities that produce them must be considered. The critical factor to consider, as articulated by the WHO Report 2000, is the pooling of resources that occurs in all insurance schemes. At the theoretical level a system's status as public or private makes no difference, both act as insurers that pool risk and resources. This "insurance function" guarantees a degree of financial protection to all participants and also safeguards participants against the unforeseeable

39 - The World Health Organization, The World Health Report 2000 – Health Systems: Improving Performance (2000).

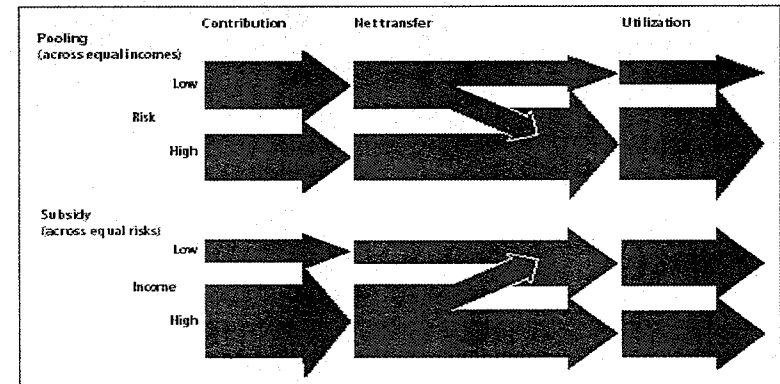
40 - Michael Kirby et al, "Why Competition is Essential in the Delivery of Publicly Funded Health Care Services", 11.

41 - Ibid.

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medical afflictions that will inevitably befall a small percentage of enrollees.⁴²

In a publicly funded healthcare system, such as Canada's, enrollment in the insurance program is universal and risk is pooled among all of society. Contributions are based on ability to pay which results in the rich paying more than the poor. Additionally, and oftentimes overlooked, the low risk contributors also subsidize high risk contributors. Thus, while many characterize the system as the rich subsidizing the poor, the low risk poor also subsidize the high risk rich. This dynamic is illustrated below,



While the equity behind this approach is evident, the economic benefits it creates are oftentimes overlooked. A system with universal enrollment utilizes vast economies of scale, which lowers the cost of administration per capita as discussed above. Critically, however, this arrangement also negates the inequity and inefficiency involved with adverse selection. This is a process whereby insurers exclude those that are seen as high risk or where everyone is charged inflated rates because high risk individuals will purchase more insurance than the standard enrollee, thus increasing their number as a percentage of all enrollees.⁴³

Adverse selection and market fragmentation are the principal drivers of inefficiency, not to mention inequity, in the American system of private insurance. The lack of a single insurer requires that all private enterprises in the market set up their own administrative

42 - The World Health Organization, The World Health Report 2000 – Health Systems: Improving Performance (2000), 99-104.

43 - Michael Kirby et al, "Why Competition is Essential in the Delivery of Publicly Funded Health Care Services", 11.

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processes, offices, and staffs. Economies of scale are thus neglected, which helps explain the discrepancy in overhead costs between Canada and the United States. In addition, the process of selectively choosing who may qualify for healthcare negatively affects efficiency and equity.⁴⁴

Another important dynamic to appreciate is that caused by insurers' role, in both public and private systems, as purchasers of services. To a very significant extent, the number of purchasers in any given situation has a reverse impact on how forcefully they may bargain for lower costs and higher quality care from suppliers. In the healthcare system of the United States, the proliferation of insurers reduces their ability to negotiate favorable prices and high quality care from healthcare providers.⁴⁵

Canada's publicly funded system, in contrast, insures there is only one major purchaser of services. Economists will refer to such a situation as a monopsony. While there can be negative implications of such an arrangement, it is sufficient to focus on the overwhelming benefits this creates in the context of Canadian healthcare. These include both low administrative costs and the capacity to strike long-term arrangements with providers that would be extremely difficult if the number of insurers proliferated.⁴⁶

The clear implications of these realities help explain, in part, the significant groundswell pushing for national healthcare in the United States. This movement, which failed to become a reality during the Clinton administration by a single vote in the Senate, is certain to be a major issue in the 2006 Congressional elections and an even larger one in 2008. The message sent by this reality is one that should not be lost on Canadians, that whatever the perceived benefits of the American system, a need for public administration is felt throughout the United States.

The Impact of the United States on the Canadian Economy and Healthcare System

A reality to which many Canadians are particularly sensitive is their economic relationship with the United States. Despite a fair degree of dependence, maintaining independent policy is certainly possible and in many cases advisable. What is impertinent, however, is

44 - The World Health Organization, The World Health Report 2000 – Health Systems: Improving Performance (2000), 99-104.

45 - Ibid.

46 - The World Health Organization, The World Health Report 2000 – Health Systems: Improving Performance (2000), 105.

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to ignore the way in which the United States impacts Canadian society, institutions, and economics. Thus, our examination of Canada in an international context will conclude by considering how the United States effects our healthcare system and economy today and how it will likely do so in the years ahead.

The process of demographic change already discussed will pose a significant challenge in the decades to come. Some have gone so far as to suggest it may sound the death knell for the welfare state. While the threat posed to public healthcare is significant, this statement seems premature for a number of reasons. Perhaps most significant is the ability to offset shifts in the dependency ratio through immigration. Immigration can help insure that a highly skilled workforce is available to fund the expenses of healthcare. This does not, however, obfuscate the reality that responsible fiscal management of the system will be required to prevent tax rates from inflating further.

What is important to bear in mind is that educated and skilled individuals are highly valuable. As was discussed in relation to the law of diminishing marginal tax returns, the mobility of these individuals is precisely what prevents them from settling in areas where they deem tax rates to be unfavorably high. Thus, while these individuals will be needed to fulfill the fiscal obligations of the future, it is imperative that competitive salaries and tax schemes be made a feature of Canadian society.

Critically, the competition for skilled individuals will play out in the context of comparisons between Canada and the United States. The implications of this reality are too extensive to articulate in this short examination, but offering some tentative thoughts will prove worthwhile. Already the difficulties of the brain drain are well documented. Although Canada experienced a net gain in physicians in 2004-2005, it is clear that the solving the existing shortfall of healthcare professionals will require innovative tax and educational management. Easing restrictions on foreign trained medical professionals will prove critical; especially with the critical role immigration will play in the years to come.

Perhaps more than any other group, the future place of healthcare professionals in Canada is an unknown. As was alluded to earlier, the drastic cost of wage and benefit increases is among the most significant costs to our healthcare system. The reticence of the CMA in maintaining harsh scope-of-practice rules clearly has a negative impact on the efficient running of our system, yet levers to change the present reality remain elusive. Cutting rates of salary and benefit increases, while potentially attractive to some, would simply exacerbate the transfer of needed healthcare professionals to the United States. Immediate solutions to this challenge have not been forthcoming, and

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while attempting the scale back scope-of-practice rules will prove critical, the presence of the United States on our border severely conditions the feasibility of addressing the rates of growth for medical professionals' salaries and benefits. More research on this area is clearly needed before definitive solutions can be proposed.

The posture of the United States on questions of corporate taxation will undoubtedly reverberate in Canada. As shown earlier in this inquiry (on page 10), the United States rate of corporate taxation is 37.3 percent while Canada's remains at 39 percent. While this difference is very significant, it is grossly understated due to the radically different rates of Canada's provinces. Thus, Alberta's effective rate of 16.3 percent, and the effect it has on investment compared to the rest of the country, is important to bear in mind.⁴⁷ These dynamics are partially explored in the depictions below,

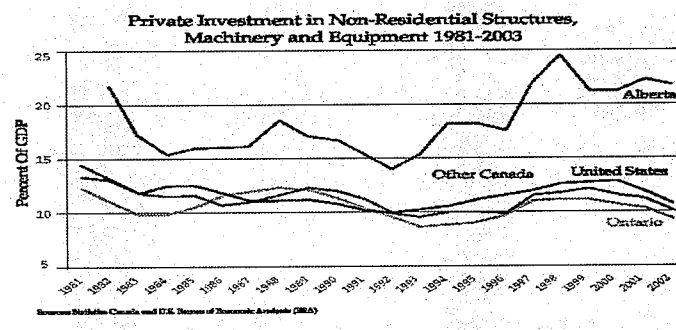
Table 3: *Effective Corporate Tax Rates on Capital for 2006 by Major Province*

	Alberta	British Columbia	Ontario	Quebec
Forestry	18.7	28.1	29.3	18.7
Manufacturing	12.5	13.3	17.8	16.2
Construction	19.8	24.6	25.2	22.1
Transport	12.6	19.7	22.5	16.5
Communications	13.6	17.2	19.4	17.1
Electrical Power	13.6	15.7	17.6	16.7
Wholesale Trade	18.5	25.1	26.1	20.9
Retail Trade	16.6	25.1	26.7	19.5
Other Services	27.4	26.1	27.1	22.0
Structures	16.1	17.2	18.5	18.9
Machinery	12.9	28.8	31.7	17.3
Inventory	33.6	35.5	34.3	35.0
Land	16.9	18.0	18.5	18.9
Aggregate	16.3	22.2	23.7	19.2

Source: International Tax Program, Institute for International Business, University of Toronto.

47 - Duajnie Chen and Jack Mintz, "The 2004 Business Tax Outlook: Lowering Business Taxes Would Spur Investment," *C.D. Howe Institute: Tax Competitiveness Program* (2004): 6.

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The correlation between taxation and investment illustrated above is one that is not lost on American policy-makers, even if their Canadian counterparts tend to ignore it. While it is difficult to predict how the economy will ebb and flow in the future, the clear emphasis placed on competitive taxation by many in the United States will have implications for Canadian policy. As American rates fluctuate, Canadian approaches must remain flexible. Appeals to the traditional party lines on economic matters will continue to become less relevant.

Changes Today to lay the Foundations for Tomorrow

While the challenges of the system that this inquiry has outlined are manifold and significant, it is important that some policy recommendations be made. Since it will not be possible to comment on all the issues outlined above, it is hoped that the dynamics at work in our system have at least been clarified.

The challenges of creating policy conducive to competitive taxation, attractive health human resource conditions and a climate conducive to a bright economic future are significant. Critical to the maintenance of public healthcare in Canada is the move from the traditional lines of political division drawn in the twentieth century to a system of greater responsiveness to international realities, specifically those in the United States. The political rhetoric around healthcare and the economy in Canada grew stale long ago. What is needed is a reinvigoration of the Canadian imagination towards the need to make our healthcare system and economy evolve to meet the realities of the new millennium.

Maintaining the system of publicly funded healthcare is worthwhile, but to do so radical improvements in efficiency need to be achieved. In a recent study of 24 OECD countries Canada was found to spend the third most on healthcare, yet was placed 13th in terms of

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the quality of care.⁴⁸ Competitive provision of services is an important step towards improving these statistics.

The benefits derived from privately delivered services within a publicly funded insurance system were demonstrated with reference to the Swedish approach to these issues. Seen in this light, the insistence that large not-for-profit hospitals continue to do work that smaller specialized clinics can do drastically better and at greatly reduced expense is revealed to be deeply flawed.⁴⁹ Hospitals remain by far the most costly form of healthcare delivery, yet the contracting of private clinics as done under Alberta's Bill 11 is still seen as a slight upon Canadian healthcare.⁵⁰

The July 2004 Economist discussed approaches to curtail healthcare costs adopted by OECD countries. They stated,

...attempts to contain health care costs have come in many forms including budget caps, usually in the hospital sector; wage controls; price limitations on medical fees and prescription drugs; restrictions on the flow of new medical students; and delays in the introduction of new technology [...] the underlying reason why these methods fail is that they do nothing to provide greater efficiency.⁵¹

There are a number of steps that have begun to be taken in Canada that help to address the concern for efficiency. Of primary merit is the shift towards distributing budgets on the basis of the number and quality of healthcare interventions provided by a given institution. Obviously, the institution that carries out the most knee replacements, for example, will do a higher quality job at a lower price than almost any other institution. Thus, by awarding budgets on this basis it will be possible to spur innovation and reduce inefficiencies in the delivery of care.⁵²

This system is most effective when private service providers are allowed to participate. If an inefficient public hospital must compete with a privately operated clinic over which will provide knee

48 - Conference Board of Canada, *Understanding Health Care Cost Drivers and Escalators* (Ottawa: Author, 2004), p. i.

49 - Michael Kirby et al, "Why Competition is Essential in the Delivery of Publicly Funded Health Care Services", 16.

50 - Ibid.

51 - Paul Wallace, "The Health of Nations: A Survey of Healthcare Finance," *The Economist*, July 2004, 15.

52 - The World Health Organization, *The World Health Report 2000 - Health Systems: Improving Performance* (2000), 91.

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replacements then the end result will be higher quality service at a lower cost than would otherwise be provided. The fact that a private for-profit business may be supported by this arrangement is not significant. The quality and cost of care is simply a far more important consideration.

Despite the appropriateness of private service providers in such a system, it is worth mentioning that this arrangement is not biased against traditional public institutions. The present reality, according to Senator Michael Kirby, is one where,

because hospitals and other providers do not have to compete on the basis of either quality and/or accessibility of their services, to contain or reduce costs or to improve their efficiency or effectiveness. In other words, there are very few incentives for them to improve their productivity.⁵³

This perspective highlights the need for competition but is not opposed to having public facilities. Rather, competition is only biased against the gross inefficiencies of the status quo and competition has a clear role to play in reducing these. Publicly operated hospitals will remain a feature of the system, especially in rural areas or to provide services centers dealing in complicated procedures for which the market is limited.⁵⁴

If the introduction of greater competition in service provision is a politically controversial issue, it is hoped that the need to restructure our system of taxation will be received more positively. As has been discussed, income tax rates affect a wide array of important areas. From the attraction of the next generation of taxpayers, to the retention of healthcare professionals, to the creation of an environment attractive to business, all of these are critical in the preservation of the publicly funded healthcare system.

A clear theme that underwrites this paper is to lower the crushingly high rates of income taxation found in Canada. As was shown, these are costing us tax dollars today and alienating precisely the kinds of jobs we need to operate as a knowledge-based economy. For too long Canadian policy-makers have ignored international standards and, even more relevantly, the levels of taxation seen in the United States. If Canada is to remain competitive, and it absolutely

53 - Michael Kirby et al, "Why Competition is Essential in the Delivery of Publicly Funded Health Care Services", 13.

54 - Kieke Okma, "What is the Best Public-Private Model for Canadian Health Care," *Policy Matters* 3, no. 6 (2002): 42.

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must if it wishes to avoid fiscal insolvency and economic disaster, then the clear need for action must be heeded.

The most appropriate method to address levels of income taxation is to provide alleviation for corporations in the immediate future. High income earners remain reasonably satisfied with their share of the tax burden, so no major restructuring of rates is needed. Nevertheless, remaining sensitive to the movement of this segment of society will always be important and incremental adjustments in tax rates will be needed in the years to come.

That lowering these tax rates will increase revenue is an important point, but to address longer term questions of healthcare financing it would be prudent to begin classifying care received as a taxable benefit. In this way, progressive taxation would be strengthened while providing greater flexibility to the income tax rates that are so critical to becoming more competitive. These rates could be set to fluctuate with the costs of healthcare and could include an escalator formula.

As an instrument of greater equity, defining healthcare as a taxable benefit is consistent with Canadian values and the working of our publicly funded insurance model. Resources would still be pooled precisely as before, and the healthy and rich would continue to subsidize the ill and poor. In addition, by placing a minimum floor on income before charging tax on healthcare it would be possible to insure that the less financially able would have no disincentive to seek care. Also, by placing a maximum ceiling on the amount able to be taxed it would be possible to avoid inequitable charges based on unforeseeable medical occurrences. Through these mechanisms a system of classifying healthcare as a taxable benefit could be made amendable to Canadian values while strengthening the system of publicly funded healthcare and creating critical flexibility in the setting of incomes tax rates.⁵⁵

Significantly, this administrative change would also create a link between individuals and the costs of the healthcare system. For the first time Canadians would see the cost of care for themselves without being subjected to user fees at the point of sale or the degrading practice of means testing. This would create an incentive towards healthier styles of living and would help rein in determinants of ill-health like smoking, over consumption of alcohol, and inactivity. If people know and see the costs of these choices, which the government could make clear through public announcements or information drives, then it is highly likely that many will make wiser choices concerning their health.

55 - Janice MacKinnon, "The Arithmetic of Health Care", 22-26.

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What About the Canada Health Act?

Having read the above proposals concerning enhancing efficiency and classifying healthcare as a taxable benefit some may wonder what role the Canada Health Act should play in all these proposals. Simply put, absolutely none.

The Canada Health Care Act and the values it enshrines are a lightning rod for interest groups and popular rhetoric. As Senator Kirby emphasized in his report to reopen it would be to invite these organizations to press through changes that could further restrain our ability to act.⁵⁶ Many in Canada, for example, would like to see the private provision of services banned if the CHA were reopened. It should be obvious to even a casual observer that political leaders oftentimes lack the will to resist such calls, even though the implications of heeding them would be dire.

None of the measures outlined above are inconsistent with the proscriptions of the CHA and this is a major reason why they are a practical set of first steps in insuring the future of public healthcare in Canada.

Conclusion

In the introduction the author outlined that this inquiry was a modest first step into the enormously complex future of healthcare in Canada. In the attempt to encapsulate so vast a subject it is inevitable that some topics will receive emphasis and others will not. It is hoped that, at the very least, the reader will emerge with a clearer and more holistic perspective of the Canadian healthcare systems' workings.

A consistent theme in this analysis was the need for more honest and thorough debate of issues rather than holding firm to outdated political preferences. While it is understandable why individuals rely on the ideological heuristics presented by Canada's major political parties, it is important to be open to new ways of thinking. This is, at times, a bewildering and trying ordeal, yet to remain stuck in outdated ways of conceptualizing healthcare will doom the publicly funded system in Canada. This would, quite obviously, be a lamentable occurrence.

By outlining some key recommendations within a holistic framework it is hoped that the need to address future challenges with dynamism and vigor is seen. Old ways and political clichés do the Canadian people disservice, and the responsibility to act is clear. While

56 - Michael Kirby, "Where do we go from here?", *Hospital Management Forum* 16, no. 1 (2003), 6-10.

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the vision presented by Tommy Douglas was a commendable one, to dwell upon the ideals of the past at the expense of setting new goals can no longer be seen as satisfactory.