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What's Hockey Got To Do With It, Anyway? Comparative Canadian-American Perspectives on Constitutional Law and Rights

DAVID FRASER* AND ALAN FREEMAN**

PROLOGUE

FROM the date of its independence from Britain in 1867, until 1982 when a new constitution was adopted, Canadian government, law, and rights were chartered under Canada's original constitution. This original Constitution was composed of the British North American Act¹ as amended from time to time, and the unwritten rules of British constitutionalism. The Constitution established parliamentary democracy as the mode of government, and divided governmental powers between the federal government and the provinces. Notably absent from the first 116 years of Canada's existence were written and entrenched guarantees of rights and freedoms, similar, in form at least, to the American Bill of Rights.

After several unsuccessful attempts to bring control of the entire Canadian Constitution into Canadian hands, a concerted effort by then Prime Minister Pierre Elliott Trudeau led to the adoption of the Constitution of 1982,² which included the Charter of Rights and Freedoms.³ In 1987, after many years of struggle, the government of Quebec finally agreed to sign the Constitutional Accord, making the "Canadianization" of the constitution apparently complete.

The Charter is in many ways a typically Canadian document. While it contains provisions protecting the most familiar civil liberties, such as

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1. Constitution Act, 1867 (U.K.) 30 & 31 Vict., c.3 (formerly the British North America Act, 1867).

2. CAN. CONST. (1982), enacted by Canada Act 1982 (U.K.), c.11 (or Constitution Act, 1982, enacted by Canada Act 1982 (U.K.), c.11).

3. Constitution Act, 1982, Part I, enacted by Canada Act 1982, (U.K.), c.11 [hereinafter the Charter].

*freedom of expression and freedom of religion, it also contains provisions for affirmative action programs, minority language rights, and established religious rights. However, it also recognizes that freedoms are subject to "reasonable limits" in a "free and democratic society."*⁴

Thus, the Charter is a compromise. It seeks to protect individual liberties while protecting the rights of various groups which have played such an important role in Canadian history. It is a constitution, the supreme law of the land, which must give way to traditional notions of parliamentary supremacy. It is at once a bridge to the past and a leap into the future. The American doctrines of judicial review and separation of powers, which the Charter adopts, find themselves in an uneasy juxtaposition with the British traditions of the rule of law and parliamentary supremacy.

Reaction to the Charter by lawyers and judges has been mixed. Those who seek to maintain the mythical world view of British parliamentarism downplay the importance of the Charter and emphasize the continuing importance of parliamentary supremacy, even in the Charter itself. Others are excited about the "constitutionalization" of civil liberties, and proudly proclaim a new judicial activism and an increasingly important role for lawyers. Such reactions are typically Canadian. They include reference to British heritage on the one hand, and a recognition of the importance and influence of the United States on the other. Canadian lawyers, judges, and academics are trying to forge a uniquely Canadian perspective on what it means to "constitute" a country.

This dialogue grows out of these historical circumstances and a common interest between us, in each other's country, its traditions, myths, and legal systems. In the year of the bicentennial of the United States Constitution and the infancy of the Canadian, it seems appropriate for us to examine, explore, and discuss the political, cultural and ideological differences which make us so similar, yet so different. These interests, combined with a critical spirit, give rise to the following discussion between an American citizen, Alan Freeman, and a Canadian citizen, David Fraser.

Alan: It is sort of odd that most Americans have no genealogical connection to the people who were involved in the Constitution. Only a very small percentage of the American population can boast of ancestors who had anything to do with it. Yet, the national ideology is to celebrate the American Revolution, the founding fathers, the sacred text, the sacred moment, the Constitution, our rights. It is a whole kind of superim-

4. Charter, *supra* note 3, § 1.

posed illusory community that being American is supposed to elicit in one. Do Canadians have a similar ideology?

David: We have holidays but that's about it.

Alan: So there really isn't even a formal national identity that everyone can get behind.

David: We did not come into being as a nation by something as cathartic and dramatic as a revolution. We came into being as a result of a series of polite negotiations between colonial administrators about what kind of limited self-government should take place. The sacred text, if there ever was one, would be the British North American Act.⁵ This was an act of the British Parliament, not something that was composed by a group of men sitting around in a closed room on a hot summer day in Philadelphia.

Alan: No framers to attribute intent to.

David: Right. That never happened for us. We just sort of passed the statute on the same day they passed some municipal act for rural Britain. Canada was not that big of a deal for them and it was not that big of a deal for us. And it was passed mainly for the convenience of the railways. So we didn't come into being as a result of a dramatic event with which any kind of ideological imagery could be associated.

Alan: What about the Charter?

David: There are all sorts of explanations for why the Charter came to be and what it means.

Alan: Like who is behind it?

David: I think that describing the Charter as Pierre Trudeau's monument is perfectly valid. The Charter actually can be explained by the complex psychology of Pierre Trudeau.

Alan: He is clearly one of the most interesting North American politicians ever.

David: Yes, fascinating, an intellectual who was also a great practical politician. However, he never wanted to be a great practical politician, except for the pursuit of his own intellectual curiosities.

Alan: It is often said about American presidents that one of the dilemmas of American politics is that the people who are best skilled at getting power are the ones you least want to have it when they reach office. That seems to be replicating itself with Canadian politicians. You say Trudeau does not fit that model exactly?

David: No, not exactly. As a politician he was unique in that he

5. See *supra* note 1.

came to politics not because he wanted power, but because he wanted some greater intellectual challenge. He had a real intellectual agenda which he wanted to make into a political reality. One of his great visions as an internationalist was to give Canada a national identity which would be recognized by the international community. The way he envisioned it was to have some type of document which would give Canadians that national identity—to repatriate the constitution and take it back from Britain, to make it an authentically Canadian document recognizing the rights of the dominant historical cultures of English and French Canadians, and to recognize the multicultural diversity of Canada today.

Alan: Wasn't it obvious that creating the Charter would amount to adopting an American mode? Do you think he was sensitive to that? Was anyone in the process sensitive to it?

David: I think everyone in the process was sensitive to it. The Charter, which is reflective of the dominant American version of a constitution, was always perceived as influenced by the American Constitution and as being some kind of replication or reflection of the Bill of Rights. That led to a great deal of objection just because it was similar to the American Bill of Rights.

Alan: Was there a sense that that was an unCanadian way to deal with things?

David: Absolutely. The major objection was "you are trying to be like the United States, we're Canadians, we're different. Let's not have this."

Alan: Did that come from the left, or the right, or both?

David: That came primarily, interestingly enough, from the right. A lot of the Canadian politically elected left was embracing rights consciousness, in part for good reason. The Canadian judiciary has historically been conservative and protective of individualism and private rights. The left saw the Charter as a way of at least extending those protections to members of classes which had never received real judicial recognition. On the other hand, the right was perfectly happy with the system as it existed because they were winning at a pragmatic level.

Nevertheless, the left still believed in the ideology of British parliamentary democracy—the ideology of doing things through elections and through legislation. The New Democratic Party was a third party of the left with something valid to say and with candidates who could win elections. This was much more consistent with democracy, as many Canadian leftists envisioned it, than was the American mode of judicial activism. Most progressive legislation, such as Medicare, came about be-

cause the New Democratic Party was capable of forming governments. There was, and is, on the left, a legitimate fear that judicial activism could mean conservative activism. Both the left and the right have been schizophrenic about rights, and pro- or anti-Charter positions can be found all along the political spectrum.

Alan: So how did the Charter happen? Is it just a tribute to Trudeau's magnetic personality? And was he really that good?

David: He was great. He was an incredibly powerful politician. He managed to finesse Quebec into appearing to accept a Canadianized constitution through a series of conferences with the provincial premiers. He played on the historical development of the desire to create a Canadian identity. He is of joint English and French extraction, and comfortable with both languages. He was educated at Harvard, the Sorbonne, and the London School of Economics. The perfect bicultural Canadian. He could speak perfect English, perfect French; he was at home in both cultures, and he had an international vision.

Alan: And he will never be replicated.

David: Exactly. He successfully played on what has always been a desire in Canada to create a Canadian identity. At the same time, he also gave the provinces a participatory right in the process of amending the Constitution, a power which until then was retained by the British Parliament. As a tradeoff for that provincial power, he got the Charter, which he saw as essential to a progressive democracy in the twentieth century. Because, despite his Canadian nationalism, his internationalism, and his public anti-Americanism, he believed the American Bill of Rights was the epitome of a democratic government document. Trudeau really believed that Canada could not be a nation unless and until it had enshrined constitutional protections for all Canadians. At the same time, the provinces wanted a domesticated constitution through which they could participate in amendments, especially in those concerning fiscal matters. Trudeau's interest in the Charter was traded off against the provinces' interest in more control over constitutional matters and voilà—a constitution!

Alan: What other Canadian constituencies accepted that same notion?

David: Canadian lawyers, because they saw a sort of homegrown litigation industry.

Alan: Let's return to why, exactly, people on the left thought that they might be politically better off under a regime of rights.

David: The left in Canada is still split on the question, but I think

certain powerful political forces in the New Democratic Party, which was the dominant national political representative of the left when the Charter and the Constitution were being debated, had been impressed by the American progressive rights tradition.

Alan: Based on what? What in the American legal tradition elicited so much admiration?

David: I think they believed, for example, in *Brown v. Board of Education*⁶ as a great civil rights victory.

Alan: When was this going on?

David: In the late seventies.

Alan: After the Detroit desegregation case⁷ defeated any promise of integrated schools in metropolitan areas by constitutionally immunizing suburbs from participation in school desegregation plans?

David: Right. But that was never an important issue for Canadians. What was important was *Brown. Milliken v. Bradley* is hardly known.

Alan: It is hardly known here. Celebration of what rights has accomplished in the United States is based on the flimsiest and most ideological of information.

David: Like *Brown*, like *Roe v. Wade*.⁸

Alan: Isn't it also true that that all of you would-be aspiring Canadian law academics troop off to elite American universities to get your LL.M. degrees and return with what you are taught. Doesn't that fact have something to do with liberal rights consciousness in Canada?

David: That is true. It's symptomatic of the Canadian inferiority complex vis-à-vis the United States that Canadian academics, especially in law, cannot get jobs in Canada unless they get LL.M.s from Harvard or Yale, the two East Coast, old-line, Protestant, Ivy League law schools. Canadian academics go off and become imbued with American cases like *Brown*, or *Roe v. Wade*, and they come back and they say, "My God look at this, this is great, look what they can do with constitutional rights." And that creates generations of lawyers and generations of politicians who actually do not know anything about the reality of America, except through popular culture and through what their American law professors told them.

Alan: Television and law teachers?

David: Right. With of course the counter hegemony of Canadian

6. 347 U.S. 483 (1954).

7. *Milliken v. Bradley*, 418 U.S. 717 (1974).

8. 410 U.S. 113 (1973).

tradition epitomized by Section 1 of the Charter where the Parliament can exercise reasonable limits, Section 33 where the legislature can actually override specific provisions of the Charter, and by other provisions on things like affirmative action and group, especially linguistic, rights. Here the rights model has somehow been translated into Canadian political reality. Rights are seen as inhering in groups like French- or English-speaking minorities, as opposed to the individualistic model of American law. In the same way, the American individualistic rights model of judicial review finds itself juxtaposed with the British-Canadian tradition of the rule of law, parliamentary supremacy, and overtly political or legislative responses to the problems of minorities.

Alan: There have been a few tentative experiments by American liberals with group rights. The Voting Rights Act⁹ recognized the existence of American "language minorities," with special needs in the realm of voting procedures, and also contemplated that "groups," as such, could be discriminated against with respect to electoral practices, and even outcomes. Minority dilution and representation, and issues of racial proportionality crept into the law in a limited and tentative way. Yet it was all perceived as alien to normal American culture—done for emergency reasons. It never quite got beyond that.

David: The assumption was that when the system worked correctly you could get rid of group notions and go back to individualism.

Alan: Yes, like the individualist notion of equal opportunity. Do Canadians believe in equality of opportunity, in your experience?

David: In Canada there is the competing hegemony of the old model, which is "of course we don't believe in equality of opportunity because we know there is such a thing as a working class and we know that not everyone has equal access to everything in society." At the same time, there is the new competing hegemonic force of American ideology and popular culture, which is "pull yourself up by your boot straps, look at the immigrant cultures." There is now, especially with the Mulroney government, an attempt to translate the American individualistic belief in equality of opportunity into the Canadian political and legal universe.

Alan: To what extent are there Canadians who really believe that?

David: Insofar as any culture is based on the tenets of capitalism, it is inevitable that the mythology of equality of opportunity will be a strong driving force. That is essential to the perpetuation of any kind of capitalistic economy. At the same time, the actual lived experience of

9. 42 U.S.C. §§ 1971, 1973 (1965).

Canadians is such that the equality of opportunity mythology is still a minority mythology that has not gained any kind of dominant status, even though there are those forces in society who want it to be dominant and who are working very hard to achieve this. The Mulroney government, like the Reagan government, sees its mandate as the implementation of that mythology in government policy, even if that is not why people voted for them. They have translated their mandate into that political program.

Alan: There is also a question of judicial power. Judges, as Charter interpreters, may become more important all of a sudden.

David: All judges, I think, now perceive themselves as occupying an elevated position. Some are uncomfortable with that because they are still imbued with the traditional, conservative, politics-law dichotomy. But the Canadian Supreme Court has clearly adopted the positive view that "we get to do what we are really suited to do, and at last we are really as important as we should always have been."

Alan: So will today's young law professors become the judges? Is that likely?

David: Absolutely. As the Charter becomes more important as a legal instrument, it will become much more important that people who obviously know what they are doing with the Charter become judges. This will be necessary for the maintenance and continuation of this ideology of rights and Charterism. So the people who will become judges will be the bright young people who have been to Yale, or Harvard, and have learned the series of three-part tests under Lawrence Tribe, and are familiar with the liberal worldviews of Bruce Ackerman, Ronald Dworkin, and John Rawls. These people will become judges because they will be best able to fulfill the role of judge which is the perpetuation of this new ideology. In the past, Canadian constitutional law has been limited to the incredibly dull federalism issue—provincial versus central power.

Alan: What would be a typical case?

David: A typical case would be a provincial statute or practice which allegedly violates the separation of powers between the federal and provincial governments. We are not talking about something you would see on *Hill Street Blues* or *L.A. Law*. Seeing Miranda warnings on American television—that's exciting stuff, stuff people can get their teeth into. Stuff that's trendy, that's sexy, that's exciting.

Alan: What was the source of law or custom on Canadian police practices prior to the Charter? Who controlled things like abusive police practices?

David: Traditionally abusive police practices have been controlled by administrative agencies called Provincial Police Commissions. But because of the weird contractual status of the Mountie as a provincial police officer, that too has become a federalism issue—how much power over the Mounties do Provincial Police Commissions have? When, for example, the Royal Canadian Mounted Police was engaged in activities like subverting the independence movement in Quebec, the issue was how much power does a Quebec provincial inquiry into those illegal activities have over the Royal Canadian Mounted Police, which is a federal police agency. The Canadian Supreme Court has basically said the province does not have any power to investigate illegalities by the Royal Canadian Mounted Police. So you must have a federal inquiry and no one really cares what happens. All of the problems get reduced, if that is the right word, to problems of federal versus provincial jurisdiction.

Alan: What will the superimposition of a rights model do? What do you think the substantive political and social contextual impact of the Charter is going to have on Canadian life, if anything?

David: There will be the occasional case on police practices that will hold that a search and seizure was illegal and that the evidence will be excluded under Section 24.¹⁰ But more importantly, it will mean that Canadians will at last know that when they are arrested, the police officer will have to give them a warning: “You have a right to an attorney, if you cannot afford an attorney, an attorney will be appointed for you, do you understand these rights?” And that will make Canadians happy because finally they will be able to live out what they have seen on television.

Alan: It strikes me as odd that law in twentieth century American culture is perceived as simultaneously being the whip of the powerful and as holding out the promise of utopianism in rights. The whole birth and growth of the American Civil Liberties Union is representative of that, as is the glorification of the Miranda warnings. Does this ideology of utopianism in rights exist in Canadian culture?

David: Historically, that ideology was totally foreign to the Canadian mentality. I think that what law has done for Canadian left movements like trade unions and minorities has not been achieved through court-enforced rights but through the political process, through the attempt to gain power in democratic elections, and by direct action in politics.

10. “Where . . . a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded” Charter, *supra* note 3, § 24(2).

Alan: Is there more trust in the possibility of securing justice through the legislative process in Canada?

David: No, I don't think that it's trust. I just think Canadians are very pragmatic about things like justice. It is not so much a question of trusting elected politicians, as it is a knowledge that if you are strong enough you can get whatever you want. So the question then becomes how to devise strategies so that things like trade union movements can become strong enough. I don't think there is any ideological belief that politicians are trustworthy.

Alan: One of the unique and despicable features of American history and culture is the treatment of minorities. It is central to American experience that you pick on the weaker ones, the nonconformists, the deviants, and this seems to lead inevitably to rights-consciousness as a way out, as has been the experience with civil rights. However flawed and terrible the results, there was no real alternative other than a massive left political movement, which for other reasons was not available. I think that is an important difference that tilts one toward the rights model. Whereas in Canada, at least the French have territory. The one difference is having their own place.

David: The French in Quebec have territory. The French outside Quebec are similarly oppressed minorities.

Alan: If American blacks had control of the old confederate states, for example, the American political situation and the situation of American blacks would be very, very different from what it is now. That probably could have been a solution to American racism. The French in Quebec have a version of that. Am I right?

David: That would be correct.

Alan: So we are talking about the equivalent of American blacks controlling all ten states of the confederacy.

David: Right.

Alan: That obviously makes a huge political difference I would think, or does it? Does that tilt away from constitutional rights as the preferred way of achieving justice?

David: I think it does because historically the Quebecois population was able to exercise some kind of control over local matters, and to exercise a form of autonomous self-government in the political realm. At the same time, there was the problem of the divorce between politics and economic power. While it is true that the Quebec government was dominated by French-speaking Quebecois, economic power was dominated either by English-Canadian capitalists from Montreal and Toronto, or by

American capital. So that economically, Quebec was a province of hewers of wood and drawers of water. They produced raw materials and resources for foreign capital.

Alan: From a national perspective then, rather than try to acquire rights at the national Canadian level, the sensible strategy, if you have political power, is to create a charismatic movement that is powerful enough to drive the foreign capitalists out, or at least provide space for the creation of an autonomous French capitalist class. Isn't that what happened?

David: That is exactly what is happening in Quebec. From the days of the Quiet Revolution¹¹ in the early nineteen sixties, to the formation of the Parti Quebecois government, to what's going on today—that's exactly what has happened. From the creation of Quebec Hydro, which was the first big step under the Quiet Revolution, all the way through to the actual practical effects of Bill 101,¹² the strategy in Quebec has been to create a home-grown capitalist class.

Alan: Why is that not possible under American conditions? Obviously the black capitalism movement has never gotten very far.

David: I think the Quebec capitalist movement was possible because it was seen at the ideological level as "we the people of Quebec are now gaining what we desire." I am not sure that that's ever occurred on a broad basis in things like the black capitalism movement. And it might well be because there has never been a central geographical focus for American blacks. It's different when you are in New York, Tuscaloosa, or Los Angeles.

Alan: The only American geographical counterpart that suggests itself is the city. If there were some way that the largest urban areas could connect with each other or the black populations could connect with each other, such a focus would exist. Obviously, that has a lot to do with why Washington, D.C. has not become a state. D.C. would be such a territory.

David: It is also true, I think, that the "we" in Canada are less threatening to "the other" than the "we" in the United States, both polit-

11. During the first half of the nineteen sixties, Quebec attempted to establish itself as the vital center of French culture in the eyes of both French and English Canadians. The period known as "le révolution tranquille" or "the quiet revolution" marked the emergence of a Quebecois political and cultural identity. See BASHAM, CRISIS IN BLANC AND WHITE: URBANIZATION AND ETHIC IDENTITY IN FRENCH CANADA 138-47 (1978).

12. Bill 101 as enacted created the Charter of the French Language, 1977 (Que.), c.5, which established French as the official language of Quebec.

ically and ideologically. You can talk about French rights in Canada as being limited solely to Quebec, so if you are from British Columbia it really doesn't matter to you all that much. Whereas blacks in the United States are a much more pervasive entity.

Alan: Although a smaller percentage of the population.

David: Right. But although you can experience black America every day if you walk down the street, you can't experience French Canadians in Canada that way outside Quebec.

Alan: There must be at least a third of the population of Canada who is French.

David: Yes, but they are not a visible minority so they are less obviously threatening.

Alan: So what happens in Manitoba, where they are a visible minority? Do you have to turn to rights at that point?

David: You have to go to rights because what happened in Manitoba was that the New Democratic Party government, when it was in power, tried to give some kind of equality in legislation to Franco-Manitobans, but was forced to back down because of Anglo backlash. The backlash took the form of civil disobedience and disruption of parliamentary committee hearings, and was voiced in comments such as, "the French are trying to take us over, French is on the corn flakes boxes, next they will be forcing all of us to speak French." So the Franco-Manitobans had to go the rights mode. They had to argue about the Manitoba Act of 1870¹³ and the British North America Act and all of that and they went to the Supreme Court and our Supreme Court did what yours did in *Brown*. They said that yes, you are right, and they did the Canadian equivalent of "all deliberate speed." So that when it becomes a real political issue somewhere for real people as opposed to just people in Quebec, where it is manageable, the Canadian rights mode kicks in with exactly the same combination of excessive promise and cumbersome delay as the American rights model.

Alan: How do Canadians experience publicness and privateness differently from Americans? Hearing the Canadian perspective for the first time is something that is alien to Americans.

David: Canadians tend not to identify themselves as isolated individuals but as members of particular groups—either as religious groups, cultural groups, or geographical groups such as Nova Scotians or Quebecois. And so the notion of the private is more a notion of group

13. The Manitoba Act of 1870, Can. Stat. 33 Vict, c.3 (1870).

privacy and community autonomy, as opposed to the isolated monadic alienated autonomy that is described so well in your and Betty's article on the public-private split in America.¹⁴

Alan: I wonder how much Americans ever really seek to achieve these group identities, especially ethnic ones. I think that all too often there is a sort of desperation about that, rather than a prideful celebration. Sure there are festivities like Dyngus day when you celebrate your Polishness in Buffalo, but there is a certain strangeness about Americans in search of their ethnicity that does not quite work. The Canadian ethnic experience must be different. First of all, there is more homogeneity.

David: Yes, but religions are different. In Nova Scotia, where I grew up, people of Scottish origin are the dominant group, both economically and culturally. At the same time, within the Scottish community there is the traditional division between Catholic and Protestant. The county where I grew up was a Protestant county. The neighboring county, separated by a mountain, was Catholic, and the two never met except with hostility and violence.

Alan: You played sports?

David: You played sports with the Nova Scotian equivalent of riots and brawls between Catholics and Protestants. But within the community there is this incredible solidarity of people who share religion, culture, background, and economic situations. That's the way one identifies oneself. If you are identified as being from Pictou County, people automatically know that you are Protestant, that you are Scottish, and that the economic situation is such and such. Even outsiders can define you because they know what being from Pictou County or Antigonish means. While there is the diversity between the two counties, there is the shared Scottish cultural origin, so music and language and all of those things are common. Yet there is the diversity between Protestant and Catholic.

Alan: It strikes me that Canada has been remarkable in its ability to provide all the services of the modern nation state (a task which Canada usually handles better than the United States—as with health care), yet it does so without resorting to excessive jingoism, and without wiping out other sources of community identity. Instead of state and individual, you have a multiplicity of local groups, with distinct cultures. Americans obsessively seek an illusory national community through patriotic fervor. The Reagan years intensified this, and now Bush is manipulating to hys-

14. Freeman & Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFFALO L. REV. 236 (1987).

teria our latent preoccupation with symbols like the flag and the Pledge of Allegiance. He can do this because there is no real community available. No politician could get away with that in Canada, because your Canadian enclaves offer something that approaches real community. Do you believe that?

David: I believe when it works at its best, community is what Canada offers to people who live there. It offers them an authentic unalienated form of connection with others based on shared history, culture, and language. At the same time, what it offers when it doesn't work is a lack of tolerance for difference. If you are not one who fits into this category you are completely disconnected, perhaps even more so than for any American. I think that in the case of the isolated individual, the ideology of America kicks in and an American here can identify oneself as an American. That is the move to get out of the isolation.

Alan: We talked about the alienated isolation of the American experience, and how we end up loading the whole thing on being American rather than identifying with something more immediate and concrete, such as religion. Religion occupies such a peculiar status in the American scheme. You have a right to do it, but others have a right not to have yours done to them. In addition, the state is supposed to be neutral, whatever that means. It basically reduces religion to a kind of trivialized individual whim which is at odds with a person's actual religious experience. Other than the most privatized form of Protestantism of the Roger Williams variety—we don't need anyone else, just God—all other religious experience is communitarian. Communitarian necessarily means the public realm, and the privatization of it makes it basically alienated unless you just drop out.

David: How then does the Pat Robertson, Jerry Falwell, new-right fundamentalist-as-politician fit into the American scheme?

Alan: It can be considered a dialectical stage that the trivialization of religion leads to through the rights model. A quest for trying to make it authentic, even if it is not, by seizing the public realm. A kind of living out what the internal logic of religious communitarianism is anyway. Which means coming right back in the public realm, yet in a way that is basically inappropriate. It is known that it is inappropriate according to prevailing eastern liberal American norms which are deeply resented by the people who are associated with these movements. I think the Falwell thing is very complicated. I do believe that there is some form of authentic community going on in Lynchburg that cannot be denied. Why that is happening is problematic. It shows the desperateness of the quest. I do

not think that Falwell is a phony, as Tammy and Jim Bakker are commonly perceived. It is not a rip-off artist, hustle-the-public, invoke-the-“ministry” scam. Falwell is much more complicated than that. I think Robertson is just a manipulative politician who will use whatever vehicle seems to work. He comes out of that tradition and has a sense of what is working at the moment. Obviously the promise of charismatic politics will always attract hustlers. But that should not denigrate or discard the authentic impulse that is there. Falwell perhaps understands that better than does anyone of the American political left.

David: It may well be what Jesse Jackson is trying to get at from the other end of the political spectrum.

Alan: Absolutely. He is a preacher, too. He is using the style and rhetoric of the charismatic black church leadership model, and he more than anyone on the liberal side is getting somewhere with it. The deep problem there is the extent to which white Americans have internalized racism and cannot possibly imagine themselves being led by a black person. I think that is the ultimate stumbling block for Jackson. In any other setting he would have been the natural next candidate for the Democrats. He was the best speaker they had, the most likely to attract disparate elements, but whites cannot accept a black being on top. So once again that is a fundamental, deep, deep problem in American culture. The same way I think that Americans are not quite ready to accept a woman as President.

David: A United States Supreme Court Justice is acceptable?

Alan: As long as they don't take over. Sprinkling is fine in current culture. But as President, I think Americans balk at that, probably more so than just about any other country in the Western club, many of which now have women in positions of authority. How do you think Canadians feel about that?

David: I think Canadians would not be as caught up in that.

Alan: Have there been provincial premiers who are women?

David: There has never been a female premier, but the leader of the Liberal Party in Manitoba and the leader of the National Democratic Party in Nova Scotia are both women; and their gender has never been a serious political issue. There are several female cabinet members at the federal and provincial levels throughout Canada. There are now two Canadian Supreme Court Justices who are women. And even their nominations did not create a big splash. It's not a big deal. I don't think, however, and I would never pretend that Canada is not a sexist society.

Alan: My sense is that Canadian feminists have a different sort of political culture than American feminists.

David: I think that is true. Because of the Canadian cultural-political difference, Canadian feminists are more progressive, more left, more political in the sense of being less rights-oriented. Not that that does not exist in the United States, but the dominant trend seems to be rights-focused.

Alan: Is there any Canadian counterpart of the rights-seeking branch of American feminism—that branch that led to litigating *Roe v. Wade* or the pregnancy disability cases?

David: There is now the Legal Education and Action Fund (LEAF) which came into existence because of the Charter and which is dedicated primarily to litigation. But it is also "education and action," so that even while it may be primarily dedicated to litigating equality issues, especially under the Charter, it still sees itself as having an educational role. Even historically when you look at *Roe v. Wade* in the United States—which was a rights model litigation example—the Canadian equivalent, the Morgentaler trials,¹⁵ have always been trials which took place where the jury, as an embodiment of local community values and democratic sensibilities, has been used to negate the force of an oppressive abortion law. Morgentaler has been tried at least four times and is now facing other trials. However, he has always been acquitted by juries but always had jury verdicts overturned on appeal. So that even law is used as a form of democratic consciousness. It is used in an overt political appeal to democratic mass values. So I think the difference between the Morgentaler strategy and the *Roe v. Wade* strategy encapsulates the difference between American rights consciousness and Canadian rights consciousness.

Alan: And accordingly, it once again represents the difference in public perceptions of the relationship between public and private.

David: Exactly. And the fact that you can almost inevitably go to a

15. *Regina v. College of Physicians and Surgeons of Manitoba*, 22 D.L.R.4th 256 (Man. Q.B. 1985); *Regina v. Morgentaler*, 14 C.C.C.3d 258 (Ont. H.C. 1984), *appeal denied*, 16 C.C.C.3d 1 (Ont. Ct. App. 1984); *Regina v. Morgentaler*, 150 D.L.R.3d 59 (Ont. H.C. 1983); *Regina v. Morgentaler*, 14 C.C.C.2d 435 (Queb. Ct. Q.B. 1973), *rev'd*, 17 C.C.C.2d 289 (Queb. Ct. App. 1974), *aff'd*, 1 S.C.R. 30 (1975) (Dr. Morgentaler performed abortions in contravention of the Criminal Code, CAN. REV. STAT. ch. C-34, §§ (251)(1) (1970) (Martin 1975), which states: "Every one who, with intent to procure the miscarriage of a female person, whether or not she is pregnant, uses any means for the purpose of carrying out his intention is guilty of an indictable offense and is liable to imprisonment for life." In each case, despite his clear violation of the statute, Dr. Morgentaler was acquitted at the trial level only to have the acquittal reversed on appeal).

jury in Canada and present something like the defense of necessity. While there may be a statutory prohibition in the Criminal Code against abortion, poor women need abortions and they can't get them in the normally regulated fashion, and so the jury should do something about that. The fact is that time after time you can go to a Canadian jury and get an acquittal if you make an appeal to those sensibilities. I think it is somehow different from what you would do or could do with a jury in America. The fact that Morgentaler was acquitted both in Quebec, a Roman Catholic province, and in Ontario, the epitome of Wasp establishment Canadian conservatism, points to the fact that there is a fundamental difference in the role of law and the role of politics.

Alan: What, then, is the Canadian sense, legally or culturally, of privateness?

David: I don't think we have ever experienced privateness the same as Americans have. While we may use the same word, I don't think the experience is seen as any kind of threat. The public hegemony in Canada is so broad and so accepted by people that the idea of a few people or an individual withdrawing into a sphere of privacy in no way threatens the dominant culture.

Alan: What about property?

David: One of the big debates surrounding the Charter, both in its drafting and now in its application, is whether property rights should be protected. Property rights are now specifically excluded from the Charter. They were included in an original draft but later excluded because the New Democratic Party—the social democratic left in the Canadian parliamentary system—said we will not go along with this unless property is excluded, and so property was excluded.

Alan: Does that mean that the Canadian reality is similar to what was the left of the American progressive era agenda? That is to take property protection away from the courts and make it a legislative matter—like the Brandeis dissent in the Pennsylvania Coal Case?¹⁶

David: That is a Canadian reality but it is not *the* Canadian reality, because now some courts are trying to bring property under other provisions of the Charter such as "liberty and security of the person."

Alan: So prior to the Charter there was no judicial protection of property rights as such in Canadian law?

David: Property rights were protected under the Diefenbaker Bill of

16. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) (Brandeis, J., dissenting).

Rights of 1960¹⁷ and in *Harrison v. Carswell*,¹⁸ the Canadian Supreme Court decision on the right to picket in shopping centers. The prosecution was brought against a picketer under the Petty Trespassers Act.¹⁹ The Court held that private property protection was more important than the picketer's rights. But the Court also said that it was not its function to overturn the protection of private property. It was purely a legislative matter.

Alan: If the provincial legislature had established the right to picket, would this have taken care of the problem?

David: That would have taken care of it. The problem in *Harrison v. Carswell* was not, according to the Court, a free speech versus property problem. It was a functional problem—the Court versus the legislature.

Alan: So what about expropriation? What is the Canadian position, or does that vary provincially?

David: It varies provincially because it is subject to provincial jurisdiction under the provisions of the Constitution Act. But it is basically taking, with compensation, for public purposes. The kind of public purpose questioning that might take place in the United States would never take place in Canada.

Alan: It's gotten remote in the United States.

David: If there is a decision to expropriate and the owner gets fair market value then that is the end of the discussion.

Alan: Would that be true of the nationalization of an industry as well?

David: Yes, absolutely. Nationalization of an industry has never been a problem in Canada because it has always been politically acceptable for the government to run essential industries. So, for example, you have the Youngstown case in the United States where they said big steel is private and it can do what it wants to Youngstown, Ohio.²⁰ When the same thing happened in Sydney, Cape Breton, and the industry decided to move out, the government took them over. The government either expropriates them, buys them out, or sets up a crown corporation. But what happened in Youngstown could never happen in Sydney, Cape Breton.

Alan: Now is that out of authentic sympathy for the tragedy of the

17. The Bill of Rights of 1960, Can. Stat. 8-9 Eliz. II, c.44 (1960).

18. 2 S.C.R. 200 (1975).

19. The Petty Trespassers Act of 1970, 3 MAN. REV. STAT. c. P50 (1970).

20. Local 1330, United Steel Workers of Am. v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980).

local populace or is it a kind of knowledge that Ontario capital runs the country so you've got to buy off the economically deprived provinces to some extent to hold the country together?

David: It is a little bit of both. It is clearly true that while Nova Scotia and the Canadian government have pumped millions and millions of dollars into Sysco and Cape Breton to keep them functioning, Cape Breton is still economically disadvantaged and has unemployment rates approaching fifty percent among certain parts of the population. So it is not that nationalization and crown corporations are the complete solution to unemployment and chronic economic disabilities in a region. But it is also true that even among the right wing party, the Progressive Conservatives, there is still the idea that the government has a role to play in the economy and that one way among others that it can play that role is to nationalize or to run a Crown Corporation, out of the recognition that you cannot let people starve to death. Thus, long term cultural, regional, political values trump naked capitalist interest, an interest which has never achieved the cultural hegemony in Canada or Britain that it has in the United States.

Alan: So there is the niceness argument?

David: There is. The friendly Canadian government has to do something. There is not the notion of individual economic rights, or laissez-faire capitalism, as the only norm by which the economy is to be run. Because that ideology does not pervade Canadian society, government can step in. It doesn't have to fight the great battle between "Chrysler can do whatever it wants," versus "we have to bail out Chrysler," as a serious ideological debate. Of course you have to bail out Chrysler and of course you have to bail out Sydney Steel.

Alan: Suppose a more radically provincial government decided to expropriate and pay less than fair market value. How would that be experienced?

David: New Democratic Party governments in Saskatchewan and British Columbia have tried to do exactly that. In Saskatchewan with the potash industry, and in British Columbia with setting up a provincial automobile insurance scheme. The same kind of thing occurred with the Liberal government in Quebec with the Hydro Quebec nationalization in the early nineteen sixties. Expropriating and compensating at far less than fair market value would be experienced by the vast majority of Canadians as something that is permissible for governments to do, and indeed something governments should do in many cases. On the other hand, because provincial entities are so small and lack economic power

against foreign and Ontario-based capital, it would be experienced as an incredible power struggle between provincial autonomy—say the right for the people of British Columbia to control the insurance industry—and the economic reality of the domination of the insurance industry by Ontario companies. So there would be the economic reality of Ontario companies pulling out of British Columbia if they thought the socialists were taking over against a very strong sense of regional and provincial identity. This identity is experienced as “Ontario has been screwing us for all these years, here is another example of it. Ontario can’t do it again, we’ll fight it.”

Alan: Is the political reality of the threat of secession more credible in Canada as a brake on these political moves, or does everybody know that only Ontario and Quebec could survive on their own and the rest just couldn’t make a go of it?

David: I’m not even sure the people are willing to accept the notion that Ontario or Quebec could make a success of it on their own. The economic argument is always that they would be immediately swallowed up by the United States. I think that the threat of secession, however, is stronger because historically there have been attempts to secede. Nova Scotia voted to withdraw from confederation at least twice. Newfoundland didn’t join until 1949, and Quebec, with the nationalist movement, always is vaguely threatening to withdraw. I think secession has such a strong political pull in Canada because there isn’t really a sense of identification with Canada as a nation. One thing, though, that unites Canadians is a hatred of Toronto. What a person from Vancouver and a person from Halifax have in common is that they hate Toronto.

Alan: Is “Canadian culture” an oxymoron? There is the stereotypical Canadian who is boring, affable, polite, and deferential to authority.

David: I think “Canadian culture” is an inherent contradiction. In fact there are many Canadian cultures. There is a distinct Nova Scotian culture and within Nova Scotia there are distinct regional cultures. There is a distinct Pictou County culture and there is a distinct Quebecois culture. But the problem with trying to paint a broad Canadian national culture is that it can only be defined in purely negative terms. It is not British, it is not French, and it is not American. We don’t know quite what it is.

Alan: Do Canadians have a sense of being smothered by American culture, as Margaret Atwood describes so well in her novel *Surfacing*?²¹

21. M. ATWOOD, *SURFACING* (1982).

David: The feeling of being smothered is very powerful for Canadians because we are bombarded every day with popular cultural images of American life and politics. We know about Ronald Reagan, but you don't know about Brian Mulroney. I can tell you who the governor of New York is, but you could not, as an American, tell me who the premier of Nova Scotia is. And we get that every day. Constantly we are bombarded with that, and yet we do not want our primary identification to be with American culture. We want to feel like we are not part of that.

Alan: But you are always defining yourself in reaction to the oppression of American culture. We talked about the group of people in the room and all the Canadians know which ones are Canadian and which ones are Americans, but most of the Americans haven't any idea. Which is a situation similar to whites and blacks in a room, where the whites don't stop and reflect on their whiteness. It doesn't occur to them. Whereas obviously for the blacks that is the central issue of who is who in the room.

David: Right. For you we are basically dull American people from some remote region in the Midwest. But while it is true that the dominant Canadian culture might seem conservative, dull, and Protestant, it is also a country of many diverse, local communities, as we have said already. For example, consider Cape Breton, with fifty percent unemployment and a depressed, downtrodden economy, where people have to flee to Toronto to find jobs. But if you go to Toronto you can find the Cape Breton community because they stick together and help each other, even when they are in Toronto. There are Cape Breton bars where people from Cape Breton go and hang out.

Alan: And listen to Rita McNeil songs?

David: And they listen to Rita McNeil and John Allan Cameron and they cry when they hear the fiddle music and the bagpipes and it is wonderful. Even in Cape Breton, where there is massive unemployment and you can read about new home construction falling precipitously, if someone's barn burns down, the next day all the neighbors from the surrounding community will gather and they will build a new barn. It won't find its way into any government statistics because it is totally unpaid labor. It has nothing to do with the "natural" market. It has to do with the sense of community that exists. People help each other. I think that's as Canadian as the Canadian National Tower or Niagara Falls, if not more Canadian. It is only natural to help out one of your own because you are probably related, or you go to the same church, or your father and the other person's father worked together. And I think that is true of

other regions. For example, in the west with the Ukrainian population and with the French Canadians in the east. I think that this is because Canada was settled by groups and not by individuals.

Alan: French Canadian culture is basically invisible to Americans because most Americans do not know how to speak French. So there is an invisibility problem and no routine access to French Canadians. But that is probably true for English Canadians as well.

David: Probably even more true. I think people in Quebec are more open to Americans rather than to other Canadians who do not speak French.

Alan: If Americans really try bumbling in French, they often get a positive response.

David: Whereas English Canadians who go to Quebec are experienced there as the oppressor, the primary historical dominant oppressor.

Alan: What's the Canadian version of typical Americans? Or is that a category that exists?

David: I think it exists all right. It is informed largely by popular culture, so we have the image of the Father Knows Best American, the Happy Days American, who is beamed to us on cable TV. And we also can experience Americans as the "ugly American tourist." That's the American who comes to Canada and knows nothing about the culture, who has the loud shirt and the Bermuda shorts, and the Nikon camera, who wants to have the wife and kids, in typical sexist American fashion, standing in front of the natives to show on slides to the relatives in the dark winters of upstate New York. And Americans are loud, and they are arrogant, and they are pushy, and they come to Canada with American money that they don't bother to change into Canadian currency, and they come into restaurants. . .

Alan: It means they get ripped off on the exchange rate whenever they do that.

David: As a bitter sort of subtle revenge and the only kind of terrorism which is open to us, they might get ripped off on the exchange rate. And they come into a store and they pull out an American dollar and they say "do you take real money here?"

Alan: How do you visually know when Americans are in the room?

David: I think a lot of it has to do with body language. Americans, especially men, tend to posture very aggressively and take up more space than their mere physical presence. They tend to have a kind of aura about them that says "I'm in charge here, I'm in control." Americans are

individualistic, pushy, bossy, and in control while Canadians tend to withdraw and sit back and not be pushy and wait for things to happen. I think that the air of aggression is common to Americans but not to Canadians, and it is a fundamental difference between the two cultures. You won't find that posturing in any other Western country.

Alan: So you think it is a function of world super power hegemony that trickles down to the American character, and that Russians might act the same way?

David: Russians might act the same way, although I think a large part of the American hegemony, which gets translated into individual body language when outside the country, is based on the individual rights property model.

Alan: Do you think the private property metaphor informs all of American cultural experience, or actually predominates?

David: I really think it predominates.

Alan: Territoriality is going on all the time.

David: Public/private, this is my space, you can't get close to me. There is a certain point at which you are too close to my face and I will either punch you or I will retreat depending upon what cultural images are informing me at the time. I think that dominates Americans' individual personal interactions as well as American political world interaction.

Alan: We're still back at whether Canadians have any sense of privateness. How do Canadians experience social norms about individual sexual practices?

David: I think we would rather just not talk about it. Americans, even when doing the public/private rap, are doing a public thing because you talk about it. You write law review articles, for example, about reproductive existence within the family and how that is a public versus private problem, which is in itself a manifestation of something very public even though you talk about it in terms of privacy. Whereas Canadians would just as soon not even write about something like reproduction.

Alan: Americans end up talking about these things because others try to suppress those who are doing things they perceive as immoral. How do Canadians deal with issues like homosexuality?

David: I think the practical reality is that Canadians generally recognize that homosexuality has nothing to do with job performance or one's ability to be a teacher or to hold government office, but it is not something that we want to talk about because we have a somewhat prudish morality about us. But this morality, unlike the American Evangelical-

cal or Fundamentalist morality, does not seek to impose itself on other people as individuals.

Alan: Part of what is going on in American culture today is the reaction—sometimes successful, sometimes not—to an American culture that I experienced in the fifties. To be either communist, whatever that meant, or homosexual, was equally reprehensible to the point of being read out of the social order. Is there no Canadian counterpart to that? Because that in turn leads to a militant assertion of insulating privacy.

David: I don't want to suggest that gays and lesbians and nonconformists are not subject to certain forms of oppression in Canadian culture.

Alan: Is it the flip side of the prudishness that gay and lesbian Canadians stay in the closet, for example?

David: No, I just think that if you are not aggressive, American, out-of-the-closet about it, it is not a problem. So that if you are otherwise "normal," you can be gay or you can be a communist and you can be accepted in an incredibly conservative culture like that of Nova Scotia. You can even be openly gay on a law faculty in Canada, as long as it does not mean that you are not a regular guy.

Alan: There is a similar example in British culture with the traditional tolerance for the upper class homosexuality as contrasted with the way they treated the mathematician Alan Turing, who was not upper class, who did not go for upper class lovers, and who was persecuted for it. Is that what you are talking about?

David: That's exactly what I am talking about.

Alan: His story is a tragedy on account of his sexuality.

David: Right. But if outside of sexuality, if you are otherwise normal, if you otherwise conform, then you will be quite all right in Canada. So if you are gay but you are a regular law professor and do your committee work and you vote for the classic Conservative party and you are active in the community and you don't seduce young boys, then everything is fine and nobody cares. Sexuality is not the norm by which your status as insider or other is defined.

Alan: So are you saying there is a sort of social-contextual mode that is at least as good as rights?

David: It is probably better in many ways than rights, in that your connection with other people is in some sense real and authentic as opposed to constructed through a reified abstract notion of rights. Your identity is not as this individual but as someone who is a member of some

kind of community. At least as opposed to the rest of the world you belong to something.

Alan: You are basically insisting that the rights mode is inherently alienating and distancing.

David: Right.

Alan: And contrary to any possibility of true community?

David: I think the rights mode is always alienating. This is where I differ from Peter Gabel, who argues that there is occasionally the moment of liberation through rights. That has never been the Canadian experience and has never been my experience. And when I, as a foreigner, look at the United States, what I see as one of the fundamental problems is the notion that issues like abortion or homosexuality or being a member of the Communist Party can be resolved by going to the Supreme Court and arguing about individual rights. This is just so totally incomprehensible for my culture that it has to be totally rejected.

Alan: So what is all the fuss about hockey?

David: Hockey? Hockey is a national cultural artifact which has historically allowed us as Canadians to excel in something which is identifiable as Canadian.

Alan: You beat everyone else in the world?

David: Right.

Alan: Except perhaps the Russians.

David: Well, we can even beat the Russians. And when we do, it confirms our superiority as the dominant hockey force which allows us to be something which is essentially Canadian.

Alan: How did Canadians experience the American hockey team's triumph over the Russians in 1980?

David: I rooted for the Russians because as a Canadian who had lived through the various Canadian/Soviet hockey experiences, it was clear to me and even acceptable that the Russians were good hockey players and were nearly as good as the Canadians who are the best hockey players in the world.

Alan: Anybody who could beat the Russians had to be good and no American team could ever do it.

David: At the same time there was the feeling that this is our game, what are the Americans doing, this is awful, this is just another example of Americans taking over something Canadian. This feeling combined with the fever pitch of American ideological excitation about the game

brought forward in me and in most of my friends a spirit of intense anti-Americanism.

Alan: Where were you watching it?

David: I was in Montreal, which is not far from Lake Placid, saying I do not want the Americans to win because it will lead to an awful exhibition of what we as Canadians always experience as the worst manifestation of American jingoistic patriotism, of exultant Americanism combined with anti-Sovietism. And the Americans won. I went to Lake Placid the next day and they were selling tee shirts which read "Puck You Russians" with the score of the game written on the tee shirt. And I thought this was classic pro-American bullshit, classic anti-Soviet bullshit, combined with American entrepreneurial ingenuity. Those guys got the tee shirts printed with the score of the game in less than twenty-four hours. I was thoroughly and totally disgusted.

Alan: So hockey is the one thing that you Canadians own?

David: It is what we own and the one thing that makes us truly Canadian.