QUESTIONING THE LIMITATIONS OF LEGAL REFORM

LEGAL INVERSIONS: LESBIANS, GAY MEN, AND THE POLITICS OF LAW

by Didi Herman and Carl Stychin, eds. (Philadelphia: Temple University Press, 1995) pp.223

Reviewed by Margaret Hillyard Little

There has been an explosion of exciting new queer theory which has influenced debates within geography, sociology, women's studies, literature, history and many other disciplines. More recently, queer theory has challenged legal and constitutional theory. In doing so, these theorists provide all of us with new subjects, new questions and new theoretical and political challenges. This is the ambitious goal of *Legal Inversions* which the authors fulfill admirably.

Legal Inversions is unique in a number of ways. First, unlike many texts in the field, these scholars are also activists who are personally and politically committed to social change which would include gays and lesbians as full citizens with the same protections and rights as heterosexuals enjoy. As insiders in this important struggle, they understand all too well both the strengths and the shortcomings of the current gay and lesbian social movements.

Second, this book is rich in comparative work as it draws on gay and lesbian struggles in Ireland, the United Kingdom, Canada and the United States. While all of these countries are Western and share a primarily common law tradition, the book does allow readers to compare and contrast both the constitutional rights afforded gays and lesbians in different jurisdictions and the different struggles which have emerged to redress sexual inequalities.

Third, through an examination of gay and lesbian rights struggles, the reader is forced to consider the real limits of legal reform. As several authors document, much is lost in the struggle when compromises along the way result in watered-down rights amendments, divisions between lobbyists and the grass-roots movement, and an inability to acknowledge the real differences between gays and lesbians because of class, race, and ability.

This book is a mix of both practical strategies and theoretical inquiries. Some of the authors detail the formal inequalities and exclusions in the law. For example, Leo Flynn illustrates that neither lesbian sexual activity nor consenting sexual acts between unmarried heterosexuals was criminalized in Ireland whereas sexual activity between two men was very definitely considered a crime.

Other authors assess the different strategies utilized by the gay and lesbian movements. Katherine Arnup, Susan Boyd and Shelley Gavigan raise vital and controversial questions about the legal definition of parenthood. Arnup and Boyd explore custody and access battles between lesbian mothers and gay sperm donors. They situate this struggle within the larger context of the rise of the fathers' rights movement and they warn us to be wary of gay sperm donors who argue, purely on biological grounds, that they should have parental rights. They see the court's failure to recognize gay fatherhood as an important step towards the recognition of women's reproductive autonomy. Gavigan explores child custody battles between lesbians and raises alarm about lesbians who, when leaving a relationship which includes a child, deny parental responsibilities on the ground that they are not biologically the parent. These authors persuasively demonstrate the dangers of accepting biological arguments.

Still other contributors use a Foucauldian paradigm to explore how gay and lesbian subjects are constructed by the law. Mary Eaton provocatively challenges us to consider who is included and excluded in gay and lesbian struggles. After an examination of all equality right cases of homosexuals in the United States, she finds that only two referred to questions of race as well as sexuality. As a result, she argues that "Homosexuality has been legally coded as white...[and] race has been legally coded as heterosexual." While lesbians and gays are legally coded as white, Ruthann Robson demonstrates that they are also defined as victims of injustice. In the struggle for legal equality, Robson cautions that we have ignored the many ways that others are defined as criminals because of their alleged lesbianism or homosexuality. In the United States, there is a disproportionate number of lesbians on death row and lesbians are more likely to be convicted and to serve longer sentences than heterosexual women. Robson argues that how these women are defined as lesbians and how this impacts upon their criminal conviction needs to be explored within queer legal study.

Finally, a number of authors demonstrate the real limitations of legal reform for gays and lesbians. Through an examination of the 17-year struggle with the Massachusetts Legislature to approve a civil rights bill for gays and lesbians, Peter Cicchino, Bruce Deming and Katherine Nicholson raise disturbing questions about the hollow nature of this victory. They demonstrate how the lobbyists became divorced from the grass-roots gay and lesbian movement and how the language of the bill was watered down so that it protected, but did not affirm, gay and lesbian lives.

A final concern about the limitations of legal reform which this collection begs is the question of class. Few authors address in any real way the important question about whose rights are protected by civil rights legislation. Low income lesbians and gays do not have the financial means to seek redress through the courts. Consequently, they do not have the privilege of declaring their sexual orientation to their employers, their co-workers, their landlords or their neighbours. As legal aid funds rapidly shrink, low income gays and lesbians have ever diminishing opportunities to fight injustices. Interestingly, it is only William Flanagan, in his discussion of HIV/AIDS politics, who raises the question of class. As many gay men with HIV or AIDS have become impoverished there has been increasing awareness of the need to address class inequality in any struggle for gay and lesbian liberation. Flanagan argues that if Bill 167 for same-sex spousal rights had passed in the Ontario Legislature, this would have financially hurt low income people with HIV and AIDS who were seeking welfare to cover their expensive medications. Bill 167 would have forced people with HIV and AIDS to declare their same-sex partner as their spouse and the spouse's income would be factored into any determination of the welfare cheque, just as it is for common law heterosexual couples. While this issue could have been a means to bring anti-poverty and gay and lesbian activists together, this did not occur. Instead, the lobby group supporting Bill 167 largely ignored the issue during its lobbying efforts. This is an important lesson that all of us need to learn — as academics and/or activists seeking a more just world. Any legal reform which does not address the inequalities within the gay and lesbian movement remains beyond the reach of many.

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CHANGING REALITIES, CHANGING THE CONSTITUTION

AMENDING CANADA'S CONSTITUTION: HISTORY, PROCESSES, PROBLEMS AND PROSPECTS

by James Ross Hurley
(Ottawa: Canada Communication Group, 1996)

Reviewed by Nelson Wiseman

This is a valuable book on a vital subject by a pivotal practitioner. James Ross Hurley has been a constitutional advisor to Ottawa since 1975 and currently serves as Director of Constitutional Affairs in the Privy Council Office. His effort is cogently constructed, accessible and illuminating. Coherently and logically he retells the story of the 52 year search — from 1926 to 1982 through 14 separate exercises — to develop and entrench an amending formula. Two thirds of the book is narrative, the balance is Appendixes. They range from old nuggets such as the Fulton-Favreau Formula and the Victoria Charter to a box score — offering data on votes, hearings and days of debate in various legislatures — on the fate of constitutional amendment resolutions between 1983 and 1993. Particularly interesting is a six letter exchange between Pierre Trudeau and René Lévesque. These letters are hard to find elsewhere and will be news even to students of the *travails* of amendment. The bibliography is helpful if incomplete. Alas, there is no index nor footnotes.

Hurley reviews the conventional rules that governed the amendment process before 1982 and analyses the amending formula's various procedures outlined in the *Constitution Act, 1982*. These differentiate the general rule (the 7/50 standard established in Section 38) from the unanimity procedure (Section 41), the bilateral manoeuvre (Section 43), and the unilateral options available to Parliament (Section 44) and the provinces (Section 45). He dissects amendment proposals since 1982 and writes of the barely known technical mechanics and communications issues — that only an insider such as he would be familiar with — of carrying a ratified amendment through to its proclamation. Canada has ratified amendments as recently as this past year in which both Quebec and Newfoundland liquidated their public denominational school systems. These and other amendments — such as the sole multilateral one, dealing with Aboriginal rights (1983) — may offer lessons respecting prospects for further constitutional adjustments. At first blush, the amending procedures are straightforward. Actually, they are technically fuzzy and Hurley insightfully exposes some of the riddles. Consider tampering with or abolishing the Senate. Section 38 explicitly singles this out for the 7/50 rule, but the Senate is a player — however limited given its mere suspensive veto — in the amending formula. Any adjustment to that requires unanimity (Section 41). So go figure.

Hurley dashes off some good historical and comparative (Australia, the United States, Switzerland) synopses as well as serving up some barely known details. For example: Did you know that the *British North America Act, 1867* represented the first time in British history that a statute spelled out some of the constitutional conventions respecting money bills? Or that there are two "originals" of the *Constitution Act, 1982* and that both are physically damaged? (One by rain on that stormy April day and the other — signed indoors — by a student who retrieved it at the National Archives only to throw red ink at it as a protest against Canadian defence policy) Both originals, somewhat like the Canadian condition, remain unrepaired.

Although published under the imprimatur of the Government of Canada, Hurley strives for an impartial, non-partisan account of amending Canada's constitution. This is a noble objective, laudably accomplished for the most part. It is precisely Hurley's insider and employee status, however, that inevitably both enriches and taints his analysis. Consider his slant on the preeminent imperial power of the federal government: on the basis of a 1975 letter from Pierre Trudeau to the Quebec Association of Protestant School Boards, Hurley concludes "[t]he powers of reservation and disallowance do not therefore appear to be spent as a result of convention" (16). This flies in the face of the opinions of other constitutional authorities and the provinces. More pointedly, it elevates Trudeau's correspondence above the Supreme Court's observation in the 1981 *Patriation Reference*[1] that these powers "have to all intents and purposes, fallen into disuse." Similarly, the author depicts 1982 as a compromise in which the parties settled for less than ideal solutions. This begs some questions: What did Quebec get in the "compromise"? Why has the federal government since adopted a regional veto statute (its pre-1982 preference) which undermines the 1982 formula by effectively extending vetoes to Ontario, Quebec, British Columbia and Alberta?[2]

"Executive federalism" is the single explanatory phrase that appears most often in the text. Continuing as a necessary condition for constitutional amendment, it has proven sadly dated and insufficient as an operative principle. Referendums were at play in Newfoundland's and Prince Edward Island's bilateral amendments. Some 30 odd municipal plebiscites undid Manitoba's proposed amendment in the 1980s on French language rights. Ironically, Quebec jettisoned its denominational schools without such public participation but it is the leader in insisting on a referendum for comprehensive constitutional change. No one foresaw that in transferring provincial ratification authority from premiers to legislatures in the 1982 formula that they (British Columbia, Alberta) would in turn devolve it *de facto* to their citizenry.

Constitutions are and should be difficult to change. Political culture, however, is constantly and unpredictably evolving. Reconciling these relatively fixed and changing realities is the contemporary Canadian challenge. This very good book helps us to appreciate it.

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[1] *Re Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.

[2] *An Act Respecting Constitutional Amendments*, S.C. 1996, c.1.

DISPELLING MYTHS

THE CLASH OF RIGHTS: LIBERTY, EQUALITY AND LEGITIMACY IN PLURALIST DEMOCRACY

by Paul M. Sniderman, Joseph F. Fletcher, Peter H. Russell, and Philip E. Tetlock (New Haven and London: Yale University Press, 1996) pp. xi, 291

Reviewed by Christopher P. Manfredi

The Clash of Rights explores one of the most enduring and crucial practical questions of democratic theory: the extent to which the attitudes of individual citizens converge with the general principles of the democratic regimes in which they live. Based on surveys of both the general Canadian population (n=2084) and decision-makers drawn from the legislative, executive and judicial branches of government (n=1348), the study examines attitudes toward such issues as freedom of expression, equality, governance

and identity, and language rights. The findings range from the obvious (broad agreement over general principles often breaks down upon specific application) to the surprising (democratic elites are not more consistently attached to principle over policy than the general population). Although the amount of data and scope of the questions addressed in the study make it impossible to do justice to the entire book in a short review, there are some key points that deserve special attention.

One of the most interesting findings in the study concerns an issue of contemporary political importance. One important explanation, indeed justification, for the rise of Quebec nationalism concerns the process of constitutional amendment in 1980-82 and the substance of the Charter of Rights and Freedoms which is the principal product of that process. To simplify a very complicated argument, Guy Laforest and others suggest that constitutional patriation alienated Quebecers from Canada because it proceeded without their consent, produced a rights document that is contrary to their self-understanding and advances a vision of Canadian citizenship to which they could never adhere. Many of the findings in *The Clash of Rights* raise serious questions about this argument.

Although francophone Quebecers were slightly less aware of the Charter than English-speaking Canadians, the two groups held positive views toward it, with 62 per cent of francophone Quebecers and 72 per cent of English-speaking Canadians characterizing the Charter as either "Very Good" or "Somewhat Good." Even more surprising, 94 per cent of the Parti Québécois activists in the survey judged the Charter to be very or somewhat good. Francophone Quebecers (70 per cent) and English-speaking Canadians also held virtually identical opinions about the Charter's positive impact on national identity, as they did with respect to its negative impact on provincial power. Indeed, francophone Quebecers were actually less likely (27 per cent) to believe that the Charter would weaken provincial power than were English-speaking Canadians (30 per cent). To be sure, on this point PQ activists held a clearly negative position: 89 per cent thought that the Charter would weaken provincial power. What can one conclude from these data? With the notable and obviously important exception of PQ activists, francophone Quebecers and English-speaking Canadians appear to share the following perception of the Charter: it is a good thing that strengthens national unity without unduly undermining provincial power. This shared perception is hardly indicative of alienation.

Another interesting finding in the book concerns what the authors call the "thesis of democratic elitism." It has long been conventional wisdom in democratic theory that political elites preserve democratic values by maintaining their commitment to those values even, or especially, when the general population is willing to abandon them for reasons of expedience. Throughout *The Clash of Rights* we find evidence that political elites, no less than the general population, are often torn between their commitment to democratic principle and their policy preferences. For example, in a discussion of attitudes toward anti-hate legislation and censorship of pornography, the study finds that both the general population and political elites initially hold similar views. Support for anti-hate legislation among the general population is 74 per cent, while political elite support ranges from 74 to 85 per cent; 48 per cent of the general population opposes censorship compared to a range of 49 to 86 per cent for political elites. Both groups, in other words, are willing to suppress freedom of expression. Even more significant, both elites and the general population exhibit similar levels of pliability in their support for the democratic value of free expression: they are relatively equally willing to abandon it in the

face of competing considerations. The contest over principle and policy is not between elites and the general population, but between "competing sets of elites" who exploit the general population's pliability for political advantage (51).

On the whole, *The Clash of Rights* is a worthwhile contribution to both public opinion research and scholarship on the politics of rights. It is impossible, of course, for survey research to capture the richness of the debate over rights, but the study makes a real effort to do so through devices such as "principle-policy experiments" and counterargumentation. At times the authors hint at their own normative preferences, as they do when they imply that morality-based support for censorship is "closed-minded and illiberal," while harm-based support is characteristic of "citizens sympathetic to liberty and tolerance and comity" (79). The authors do not appear to consider the possibility that the public morality-social harm dichotomy may be a false one. Prevention of harm is, of course, a principle of public morality; and there may be a link between the establishment of public morality and reducing social harm. It might also have been useful to compare support for affirmative action for francophones in the federal public service with support for similar policies for anglophones in the Quebec bureaucracy.

In reminding us that contestable principles characterize democracy, and that political elites and the general population both struggle with that fact, *The Clash of Rights* underscores the importance of maintaining a rich public conversation about those principles. Indeed, the study's most important contribution might be that it forces us to consider whether we have been successful in doing so.

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SEEKING UTOPIA

WAITING FOR CARAF: A CRITIQUE OF LAW AND RIGHTS

by Allan C. Hutchinson (Toronto: University of Toronto Press, 1995)

Reviewed by David Johnson

One cannot read Allan Hutchinson's *Waiting for Coraf: A Critique of Law and Rights* without being impressed by the scope of the task which he seeks to accomplish in this book. Quite simply, the work is designed to be an indictment of the *Canadian Charter of Rights and Freedoms* (Coraf), of rights advocacy, constitutional law, judicial review, the rule of law, the legal profession, the business profession, the academic profession, capitalism, liberalism, communitarianism, social democracy and the media, not necessarily in that order and with this list not necessarily being exhaustive.

And yet, Hutchinson is not finished. Having attacked the established liberal order in this country, he proceeds to sketch the contours of a new political order dedicated to the realization of a transformative conception of the state. The state to come must be radically democratic and egalitarian, calling forth "A New Citizen" capable of being an active participant in a "dialogic community" which governs itself according to the substantive results of "democratic conver-sation." Through this social conversation politics will become truly progressive in that political activity will become "engaged," "civic," "popular," "visionary," "full-blooded," or "inclusionary" and "expansive" (216-17).

Most of the themes addressed here will be familiar to anyone conversant with Hutchinson's prior writing. On first appearance what one finds here is the now standard post-modernist critical legal theory deconstruction of the *Charter*, rights consciousness, judicial review and the liberal state. Hutchinson takes to this task with great relish, armed with a sarcastic wit, making this book one of the best

of its genre. This is not to say, however, that this is a good book. In seeking to do so much, Hutchinson's analysis falls prey to over-simplification, bias, and a remarkable absence of critical judgement. For most readers, this book will be remembered not for being impressive but for being irritating. Just a few examples of textual analysis will suffice.

At the core of Hutchinson's thought is the belief that the *Charter* is illegitimate in that in promoting rights consciousness and rights discourse, the *Charter* and its supporters promote an elitist and anti-democratic approach to political life. Politics become legalized and judicialized, the scope of public argument becomes narrow, and the content of protected rights and freedoms assume a distinctly liberal, individualist, pro-market perspective. There is much truth to this critique. It is true that the judicial review of state action in light of constitutionally entrenched rights and freedoms is highly problematic in any democracy. The tension found here between individual rights and collective interests, between the role of unelected courts and elected parliaments, in turn, becomes the foundation for sections 1 and 33 of the *Charter*.

These provisions, and their logic, receive inadequate treatment in this book. Section 1 is denounced as merely perpetuating indeterminate and undemocratic judicial power while section 33 is barely mentioned. Such an approach is unworthy of the subject matter. Both sections 1 and 33 provide for a unique dialogue between the courts and governments respecting the scope and application of rights, duties and state power in this society. Section 1 allows for governments to seek reasonable limitations to Charter rights and freedoms so as to advance other social goals. The courts, in their judgemental discretion, may uphold such state claims or not. If the result is negative, federal and provincial governments retain a broad right, under section 33, to override such judicial decision and sustain their desired legislation. Far from theoretically emasculating the power of the state, sections 1 and 33 recognize, structure, and privilege this power and frame it in such a manner as to promote the cause of democratic rule which Hutchinson professes to support.

It is not surprising, however, that Hutchinson fails to address these matters; he has a broader objective in mind. Far from being a study of the *Charter*, this book is a critique not just of law and rights but of liberal democracy itself. In his penultimate chapter, Hutchinson sets out a framework for a new social order rooted in the principles of post-modern democratic discourse. In this order, both liberalism and communitarianism are transcended as being unjustifiably narrow — the former for privileging the individual over the community and the latter for privileging the community over the individual. In Hutchinson's vision, there is a need for the reconceptualization of the state away from these narrow public/private dichotomies so as to conflate the public and private into a discursive whole. The state should not be viewed as "an institution or set of organizations; it is a site and a structure for the creation or exercise of power. ... At the heart of power lies the productive medium of beliefs, truths, and knowledge. Accordingly, the state is not a universal pattern of fixed relations, but a dynamic regime of political struggle that encompasses and oppresses citizens as it constitutes and contains them" (208-09).

Through this reordering of the concept of the state one must also reorder the practice of politics and law. For the modern state to be democratic, the people constituting society must be actively and directly involved in the decision-making surrounding the exercise of state power. As such, demo-cracy necessitates a "dialogic community" devoted to a "democratic conversation" inclusive of all citizens and supportive of a progressive social agenda. "There must be a reaffirmation of the idea that people can simultaneously be ruled and be free, but only if they rule themselves" (210). And further: "The challenge is to replace liberalism with a substantive vision of social justice that is capable of responding to the vast inequalities of economic and political power that liberalism and its disciples permit and, through their theoretical intransigence, condone" (207).

Dialogic democracy, in turn, "not only offers a substantive measure for judging the quality of political life, it also provides the means by which to bridge the normative gap between general ideas and practical application" (212). And more: "A fully developed 'dialogic entitlement' would combine active steps to bring in previously stilled voices and positive moves to shut down stentorian voices. ... Dialogue demands more than the existence of speech somewhere by someone, but a realistic opportunity to have that speech heard and, preferably, responded to by others" (213). And the relationship of "democratic conversation" to rights? "The only viable solution — and one that is demanded by both ideological and strategic considerations — is to abandon the whole endeavour to grant a spurious constitutional privilege to particular rights, including and especially those to free speech. Without such a bold step, the commitment to attaining a truly substantive practice of democratic politics will be stillborn" (201-2).

Leaving aside the undercurrents of repressive authoritarianism as being self-evident, at the core of Hutchinson's position is a utopian faith in the inherent goodness of the community and in the progressive potential of discourse. "The vision of a dialogic community — 'mutual under-standing, respect, a willingness to listen and to risk one's opinions and prejudices, a mutual seeking of the correctness of what is said' — is not abstract or disembodied, but can give concrete guidance to our practical lives" (203-4). On these points there are many questions, and Hutchinson refuses to devote critical attention to the darker side of public debate and community action. Just as speech can be progressive, it can also be regressive; and just as certain communities can reflect the best of human values, others can reflect the worst. Ignorance, intolerance, arrogance, racism and sexism, for example, will not necessarily fade simply because people engage in dialogue; under certain circumstances such dialogue may only serve to reinforce the established intolerance of the majority. Think of Mississippi in the 1950s.

Which brings us back to the question of rights. Hutchinson believes that the community is inherently just and that such justice is thwarted by an elitist system of politics and law. That our existing system is strongly elitist, few would deny. Does this system produce greater democratic benefits than would Hutchinson's ideal world? Most Canadians, I suspect, would answer in the affirmative. For not only do the rule of law and the *Charter* provide for the role of the democratic will of the majority, they also provide guarantees and protections for minority rights against the will of the majority. This idea seems quite foreign to Hutchinson's world view. Contrary to Hutchinson's beliefs, most advocates of minority groups or historically disadvantaged groups continue to value the protection of a *Charter* and the principles of rights discourse. For it is through this discourse that justice is not necessarily contingent on majoritarian voice. Now this may be elitist but it is also, in its own unique manner, a core democratic principle.

And so to the key metaphor in the book. Hutchinson claims that liberal rights advocates are "Waiting for Coraf" and the blessings it will bestow, much the way Vladimir and Estragon, in Samuel Beckett's play, are "Waiting for Godot." They wait for someone, something, some presence, purpose or principle that will never arrive because it cannot arrive because it likely does not exist. In making his post-modernist attack on the *Charter*, Hutchinson fails to deliver on the metaphorical reference. The *Charter* has arrived, we are living with its legal and political ramifications, and most members of the Canadian community are relatively content with what they see. If there is someone waiting, it is undoubtedly Allan Hutchinson himself, "Waiting for PosModUC" (Post-Modern Utopian Community).

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