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The Limits to Jndges' Free Speech: A Comment on the Report of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger

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Basing his analysis on a theoretical examination of judicial independence, impartiality, the desirability of judges maintaining a certain moral standard in their private lives, and the need to prevent the abuse of judicial authority, the author suggests appropriate limits to extra-judicial comment. In light of these guidelines Mr Justice Berger's comments are found to have been acceptable judicial behaviour, and accordingly the holding of the Committee of Investigation is criticized.

En fondant son analyse sur un examen théorique de l'indépendance judiciaire, du devoir d'impartialité, de la nécessité d'une certaine conduite morale de la part des juges et du besoin de prévenir l'abus de l'autorité judiciaire, l'auteur propose des limites appropriées à l'obligation de réserve. D'après ce modèle les propos tenus par M. le juge Berger son jugés acceptables et la conclusion du Comité d'enquête est par conséquent rejetée.

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I. Introduction

A. *"The Berger Affair"*

In November 1981, at the height of the debate over the patriation and amendment of the Canadian constitution, Mr Justice Thomas Berger of the Supreme Court of British Columbia publicly criticized two features of the constitutional accord that had just been reached between Prime Minister Trudeau and the premiers of nine provinces: 1) the failure to guarantee native rights, and 2) the denial to Quebec of a veto over constitutional change. Mr Justice Berger's remarks, contained in a widely-reported speech delivered at the University of Guelph convocation on November 10, and repeated in an article written for The Globe and Mail, raised a storm of controversy.[1] On November 18, and again on November 19, Mr Justice Addy of the Federal Court of Canada wrote to the late Chief Justice Laskin, then chairman of the Canadian Judicial Council, complaining that Mr Justice Berger was guilty of conduct inconsistent with his judicial office.[2] Mr Justice Addy's complaint was brought before the full Council, and on 8 March 1982 that body appointed a Committee to inquire into the charges. Mr Justice Berger, however, refused to participate in this Committee's proceedings, arguing that because the facts were not in dispute there was no

[1]Ottawa Citizen (10 November 1981) 4; The [Toronto] Globe and Mail (12 November 1981) 8 and (18 November 1981) 7. These articles are included as Appendices "C", "J" and "E" respectively to *Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger and Resolution of the Canadian Judicial Council* (1983) 28 McGill L.J. 378, 396-7, 414-5, and 398-401 (hereafter: *Report and Resolution*).

Appendix "I" of *Report and Resolution*, 413, contains the transcript of a television interview of 24 November 1981, in which Prime Minister Trudeau criticized Mr Justice Berger for "getting mixed into politics", and expressed the hope that "the judges will do something about it". A perusal of The [Toronto] Globe and Mail and The [Montreal] Gazette suggests that the public controversy over the propriety of Mr Justice Berger's conduct developed only after this interview. The Prime Minister had also criticized Mr Justice Berger on 18 November 1981, but solely on the grounds that the latter had not supported the constitutional package when it included native rights: The [Toronto] Globe and Mail (19 November 1981) 1. Mr Justice Berger responded to the latter criticism in his letter to the late Chief Justice Laskin, 3 December 1981, published as Appendix "G" to *Report and Resolution*, 404.

[2]These letters are included as Appendices "B" and "D" to *Report and Resolution, supra*, note 1, 394-5 and 397-8. Mr Justice Addy's complaint was phrased as one of *non se bene gesserit*, alleging that Mr Justice Berger had breached the condition of good behaviour under which Superior Court judges hold their offices in Canada: *Report and Resolution, supra*, note 1, 382.

need for an investigation,[3] and that in any case the Judicial Council had no authority to rule on a judge's conduct unless that conduct constituted grounds for removal from office.[4] The Committee, consisting of Justices B.J. MacKinnon, J.K. Hugessen and W.R. Sinclair, in due course delivered a unanimous report, concluding that although Mr Justice Berger's conduct "would support a recommendation for removal from office", such a severe sanction should not be invoked in this instance; it would be unfair, they held, to remove a judge on the basis of standards of judicial restraint which had not previously been enunciated.[5] The report was brought before the full Judicial Council, which passed a resolution declaring that although Mr Justice Berger had committed an "indiscretion", his actions "constitute no basis for a recommendation that he be removed from office".[6] The Committee's report and the Council's resolution were delivered to then Minister of Justice Jean Chrétien on 31 May 1982, and were released by him to the public on 4 June 1982.[7] On 27 August 1983, Mr Justice Berger stepped down from the bench.

"The Berger Affair", as it has come to be known, raised important questions concerning the right of judges to make public statements extra-judicially and the appropriate mechanisms to control extra-judicial conduct. These issues in turn have significant implications for the independence of the judiciary and for the position of judges within society at large. The *Report and Record of the Committee of Investigation into the Conduct of the Hon. Mr Justice Berger* (hereafter: *Report*)[8] is the only Canadian document which deals in an authoritative manner with these questions. It therefore occupies an important place in Canada's constitutional law. Yet the content of the *Report* is unsatisfying: the standards of permissible comment which it establishes are little more than the repetition of phrases which, although they have great symbolic value, provide little guidance to future conduct. This paper will attempt to remedy that defect by probing such concepts as the independence of the judiciary and the judge's duty of impartiality in order to develop a coherent theory of the limits to extra-judicial free speech. This theoretical discussion, crucial to a more precise determination of the limits to extra-judicial comment, will form the core of this essay. In order to keep the paper within manageable bounds, the second

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[3]Letter of Mr Justice Berger to Chief Justice Laskin of 2 March 1982, included as Appendix "K" to *Report and Resolution, supra*, note 1, 415, 417.

[4]Memorandum of Mr Justice Berger to members of the Supreme Court of British Columbia of 15 March 1982, included as Appendix "L" to *Report and Resolution, supra*, note 1, 418, 419.

[5]*Report and Resolution, supra*, note 1, 392.

[6]*Ibid.*, 379.

[7]*Ibid.*, 378.

[8]*Supra*, note 1.

issue raised in the Berger affair — the means by which such limits should be enforced — will not be examined in detail.

B. Mr Justice Berger's Remarks

Mr Justice Berger criticized the constitutional accord on two grounds: the failure to mention native rights in the proposed document, and the refusal to concede to Quebec a veto over constitutional change. He expressed his concerns in forceful language. According to The Globe and Mail's report of the speech at Guelph, he said, *inter alia*, "the native peoples lie beyond the narrow political world of the Prime Minister and the premiers, a world bounded by advisers, memoranda, non obstante clauses and photostat machines. . . . The agreement reveals the true limits of the Canadian conscience and the Canadian imagination. . . . In the end, no matter what ideology they profess, our leaders share one firm conviction: that native rights should not be inviolable; the power of the state must encompass them. . . . Under the new Constitution the first Canadians shall be last. . . . it is an abject and mean-spirited chapter."[9] The article that he wrote for the same newspaper, although lacking the pungent language of the Guelph speech, was no less direct in its criticism of the First Ministers.[10]

C. The Report of the Committee of Investigation

The bulk of the Committee's *Report* comprises a description of the evolution of the independence of the judiciary, a refutation of arguments advanced by Mr Justice Berger and by Chief Justice Allan McEachern of the British Columbia Supreme Court (in Mr Justice Berger's defence), and finally, the application of doctrines of judicial propriety to Mr Justice Berger's statements.

The conclusions that the Committee draws from its examination of the evolution of judicial independence provide the basis for its criticism of Mr Justice Berger's remarks. The Committee declares:

> The history of the long struggle for separation of powers and the independence of the judiciary, not only establishes that the judges must be free from political interference, but that politicians must be free from judicial intermeddling in political activities. This carries with it the important and necessary concomitant result — public confidence in the impartiality of judges — both in fact and in appearance.[11]

The Committee is content to identify these principles as emerging from history; it does not examine why they exist in order to determine their scope.

[9] *Ibid.*, 414-5. I have selected the strongest language.
[10] *Ibid.*, 398-401.
[11] *Ibid.*, 389.

Indeed, the Committee bases its assertion that the doctrine of the separation of powers requires judicial abstention from politics exclusively on 1) the fact that the achievement of judicial independence in Canada resulted in the banning of judges from legislative decision-making,[12] 2) the continuing denial in Canada of the right to vote to federally-appointed judges,[13] and 3) selected opinions expressed in the British House of Commons and by Lord Denning arguing that judges should refrain from commenting on politics.[14] The notion that speaking on political issues threatens a judge's impartiality is supported by the rhetorical question:

> If Justice Berger should be called on to interpret . . . the meaning to be given to the word "existing" in the phrase "the existing aboriginal and treaty rights of the aboriginal peoples of Canada", would the general public have confidence now in his impartiality? After Justice Berger spoke publicly on the necessity for Quebec retaining a veto, his brother judges in Quebec were called on to determine whether such a right existed.[15]

According to the Committee, then, commenting on "political" matters compromises the independence and impartiality of the judiciary. But what is a "political" matter? Although the Committee does not directly address this key point, it appears that the sole requirement is that the subject be "controversial". Responding to a portion of Chief Justice McEachern's argument that was based on British precedents, the Committee does appear to introduce a further distinction between "statements of a general nature" which are "not critical of the policy of parliament embodied in a politically controversial bill" and political comments properly so-called.[16] It is problematic, however, whether this distinction can survive within the framework of the Committee's analysis. The Committee asserts that speaking on public issues not only offends against the principle of the separation of powers, but also compromises the judge's impartiality. Impartiality concerns the judge's predisposition to decide a case in a particular manner. Whether or not an expression of opinion indicates such a predisposition must depend on the judge's state of mind, not on Parliament's interest in the matter. In fact, the Committee does not rely on this distinction: it goes on to distinguish English precedents generally, asserting that there are major differences between the English and Canadian systems of government.[17]

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[12] *Ibid.*, 386-7.
[13] *Ibid.*, 391.
[14] *Ibid.*, 388-9.
[15] *Ibid.*, 391.
[16] *Ibid.*, 389.
[17] *Ibid.*

A further consideration emerges from the Committee's *Report*: the notion that making political statements constitutes a misuse for personal ends of one's authority as a judge. The Committee states:

> If a judge feels compelled by his conscience to enter the political arena, he has, of course, the option of removing himself from office. By doing so, he is no longer in a position to abuse that office by using it as a political platform. One would not have expected Justice Berger's views to have been given the media attention they were given if he had not been a judge but merely a politician expressing his views in opposition to other politicians.[18]

There are therefore three distinct principles underlying the Committee's conclusions: 1) the doctrine of the separation of powers, by which the judiciary is secured autonomy from the other branches of the state in order to allow judges to perform their function free from political interference; 2) the principle that judges should be impartial, so that litigants have their rights determined not according to personal animosity or favour, but according to legal principles; and 3) the notion that judges should not use the authority of their office to disseminate their personal opinions. A fourth principle — that the conduct of judges should not injure the moral integrity of the Bench — although not raised in the Berger case,[19] also limits extra-judicial comment. By exploring the rationale for each of these principles, I hope to deduce more precise tests for determining the bounds of judicial propriety.

II. A Theoretical Determination of the Limits to Extra-jndicial Comment

A. The Separation of Powers

1. Functional and Institutional Aspects of the Independence of the Judiciary

This is not the place to attempt a comprehensive re-statement of the theory of the separation of powers. Some general discussion will be necessary, however, in order to precisely identify the reasons for preserving the

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[18] *Ibid.*, 391.

[19] The only possible exception to this is Mr Justice Addy's letter of 19 November 1981. At one point he says: "It appears to me that Mr. Justice Berger has not the faintest idea of the position and role of a judge in the British parliamentary system to-day. On the other hand, if he has, then he is guilty of misconduct which, in my view at least, would tend to cause far greater harm to the administration of justice than sleeping with a prostitute or driving whilst impaired." *Ibid.*, 398. It is hard to believe that Mr Justice Addy intended to imply that Mr Justice Berger's actions were as morally reprehensible as those of a judge consorting with prostitutes. A more charitable interpretation would be that Mr Justice Berger's statements were more likely to cause lasting harm because of their implications for the independence and impartiality of the judiciary.

independcnce of the judiciary. Until the reasons are made clear, it is difficult to determine what conduct may potentially harm that independence.

The notion that the three traditional components of the state — the legislature, executive, and judiciary — should be given autonomy from each other flows from the preoccupation of liberal political theory with the protection of individual rights. The authors of *The Federalist Papers*, for example, argue that tyranny would result from the unification of the three powers:

> When the legislative and executive powers are united in the same person or body, ... there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner. ... Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for *the judge* would then be *the legislator*. Were it joined to the executive power, *the judge* might behave with all the violence of *an oppressor*.[20]

According to this view, then, the institutions of the state are divided in order to lessen the opportunity for the abuse of state power.

There is some ambiguity, however, as to precisely how division will control abuse. Assuming that the legislature, acting within its constitutional authority, enacts a bad law, can the judiciary rightfully refuse to apply the law in the manner intended by the legislature, in effect rewriting the law? Some of the advocates of the separation of powers would undoubtedly answer "yes"; in opposing the use of a legislative chamber as a court of appeal, for example, Hamilton says, "From a body which had had even a partial agency in passing bad laws [*i.e.* from the legislative chamber] we could rarely expect a disposition to temper and moderate them in the application. The same spirit which had operated in making them would be too apt to operate in interpreting them. . .". Thus, Hamilton seems to condone the nullification of legislative intent through the courts purposefully altering the effect of a statute.[21] Such a result, however, runs counter to the now commonly-accepted principle that the primary law-making authority should be vested in democratically-elected representatives.

But the doctrine of the separation of powers can be justified in functional terms, thereby maintaining its consistency with modern democratic theory. The judiciary perfonns a function substantially different from that of the legislature or executive. The proper fulfillment of this role requires

[20]Madison, quoting from Montesquieu's *De l'esprit des lois* in C. Rossiter, ed., *The Federalist Papers* (1961) "No. 47", 300, 303 (emphasis in the original).

[21]Hamilton, in Rossiter, *supra*, note 20, "No. 81", 481, 483. Sir Ivor Jennings argues forcefully that Lord Coke similarly believed courts could overrule an act of Parliament which was "against common rigbt and reason" or "repugnant": Jennings, *The Law and the Constitution*, 5th ed. (1959) App. III, 318-29.

that judges be autonomous from the other two branches of the state. The granting of this autonomy does not offend against democratic principles, because the elected members of the legislature retain the primary law-making power. Although judicial law-making does occur, it is on a much smaller scale, constrained by, *inter alia*, the legislature's enactment of statutory rules. In the familiar words of Holmes J.: "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions."[22]

What are these distinctive functions?[23] The legislature's role is to enunciate general policy orientations and enact the means to achieve them. It declares society's will, establishing broad communal objectives. The executive is charged with carrying into effect such legislative policy, thus pursuing communal aims in practice. And the judiciary's function is the resolution of concrete clashes between different individuals, and between individuals and public authorities. In adjudicating such disputes, the judiciary seeks to reconcile the interests of individuals to, depending on the case, the endeavours of society as a whole, or the interests of other individuals.[24] Judges are not so much concerned with large questions of policy as they are with the resolution of very particular conflicts. They exist to ensure that individual interests are taken into account, that the latter are not simply overrun in the rush to achieve a communal goal. In short, courts protect individual rights against the pure instrumentalism of the legislature and executive.[25]

This function is reflected in a particular style of decision-making, which calls upon some notion of procedural fairness or "the rule of law" to ensure

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[22]*Southern Pacific Company* v. *Jensen*, 244 U.S. 205, 221 (1917).

[23]The following discussion necessarily simplifies the attribution of roles. Law-making functions are often performed by the Executive and the courts. Similarly, Parliament and the Executive sometimes act as judicial bodies. However, in general the differences in function are as described here.

[24]Not all interests are recognized and protected by the courts, and indeed the extent of protection has varied through time. This does not, however, reduce the force of the argument presented in the text. It is only necessary that there be *some* individual interests that are recognized by legislative or judge-made rules. If such a sphere of private rights exists, even if it is subject to continual change, courts protect against the unauthorized and (to a lesser extent) inadvertent infringement of those rights.

[25]This characterization of the judicial role is common in the writing of judges. Thus, the Hon. I.C. Rand wrote of the independence of the judiciary:

> It enables the guarantee of security to the weak against the strong and to the individual against the community; it presents a shield against the tyranny of power and arrogance and against the irresponsibility and irrationality of popular action, whether of opinion or of violence; it enables the voice of sanity to rise above the turbulence of passion; and it is to be preserved inviolate.

I.C. Rand (Commissioner), *Royal Commission of Inquiry, re: The Honourable L.A. Landreville* (Canada, 1966) 95-6. See also Dickson, *The Role and Function of Judges* (1980) 14 L.S.U.C. Gaz. 138, 142.

that legitimate interests are fully heard, and fairly considered. Depending on the nature of the interests in question, the appropriate mode of decision-making may include procedural safeguards (for example, requiring that litigants have the opportunity to articulate their interests, or limiting the types of evidence that might be relied upon) and prescriptions concerning the basis on which a decision should be taken (for example, demanding that like cases be treated alike, or requiring that if a validly-enacted rule governs the situation, that rule be considered in reaching a decision). It is not surprising that such considerations play a key role in administrative law. A central issue in the development of the judicial review of administrative action has been the determination of what decisions made by the executive should be subjected to at least some of the safeguards of judicial decision-making. Recently, this determination has come to be based primarily on the extent to which the relevant decision affects significant individual interests.[26] When a decision does have a direct and substantial impact on an individual, the courts will require that safeguards appropriate to the nature of the decision be taken (for example, allowing the person implicated an opportunity to address the tribunal). Thus, the courts insist that decisions affecting in a major way individual interests, even if made by administrative agencies, come at least partially under the control of a tribunal independent of the executive. In a real sense, then, judicial review represents the judiciary's assertion of its role as the bastion of individual rights within the framework of the state.

The above discussion, stressing the value of institutionally separating the pursuit of communal goals from the protection of individual interests, would be fully applicable to a state where the legislature was sovereign. But in Canada, where legislative and executive power is limited by a written constitution, there is a further need for an independent judiciary. A body which determines its own limits is not limited at all. Therefore, the desire to have constraints on legislative power such as those embodied in Canada's federal division of powers and in the new *Canadian Charter of Rights and Freedoms* demands their enforcement by an *independent* entity, the courts.[27]

There are therefore strong reasons, rooted in the different nature of the functions performed by the three components of the state, for preserving the independence of the judiciary. The preservation of the integrity of these functions is accomplished through institutional structures. These structures have assumed characteristics appropriate to the respective components'

[26]See, *e.g.*, *Martineau* v. *Matsqui Institution Disciplinary Board* [1980] 1 S.C.R. 602, 618-9, (1979) 106 D.L.R. (3d) 385, 402-3 *per* Dickson J., as he then was.

[27]This argument is essentially the same as that adopted by the Supreme Court of the United States in *Marbury* v. *Madison*, 5 U.S. 49, 68-70 (1803).

functions. Because the legislature and executive serve to enunciate and execute the will of the community at large, for example, they have, through the responsibility of elected officials, been made representative of and accountable to the mass of the population. Judges, on the other hand, are appointed by the executive, and are guaranteed security of tenure. Election, it is believed, would be incompatible with their role as a bulwark against majoritarian excesses, concerned more with protecting individual interests than with pursuing communal goals. Thus, alongside the different functions performed by the branches of the state are radically different institutional characteristics. Because both considerations affect greatly the representativeness, authority, and ability to function of the components of the state, both must be considered in any discussion of the modern independence of the judiciary.

The above account sketches the functional basis and institutional structure of judicial autonomy. I will now examine the extent to which judges' freedom to speak extra-judicially is constrained by the need to maintain this independence.

2. Limits on Extra-judicial Speech Derived from the Threat Posed by the Judiciary to the Autonomy of the Legislature and Executive

If one is contemplating restricting the conduct of judges on the basis of the doctrine of the separation of powers, one must of course examine the extent to which their conduct might impair the proper functioning of the other two branches of the state. Now, it is inconceivable that the adoption by the legislature or the executive of a judicial mode of decision-making (ensuring the full consideration of individual interests) would of itself be objectionable. Extensive judicial influence over law-making and administration is opposed not because these operations should necessarily be concerned with communal goals to the exclusion of individual interests, but because those who perform these operations must be responsive to the will of the majority. Thus, it is for institutional reasons that judicial legislation is restricted to the interstices, "confined from molar to molecular motions".[28] Does this concern with democratic control over law-making justify the imposition of constraints on extra-judicial free speech?

The literature on the separation of powers has not, by and large, been concerned with a possible threat by the judiciary to the autonomy of the

[28] *Southern Pacific Company* v. *Jensen*, *supra*, note 22.

legislature and executive. Indeed, the judiciary is normally seen as the weakest of the three bodies. Hamilton says, for example:

> Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.
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> This simple view of the matter suggests several important consequences. It proves incontestably that the judiciary is beyond comparison the weakest of the three departments of power; that it can never attack with success either of the other two; and that all possible care is requisite to enable it to defend itself against their attacks.[29]

The immense power of the executive and legislature relative to that of the judiciary is therefore the result of the former bodies' control over the coercive tools of the state and over public funds. It is further buttressed by their greater legitimacy as policy-makers, flowing from the representative nature of legislative and high executive office; these bodies can claim to speak for at least a plurality, and perhaps a majority, of citizens. In view of this imbalance of power, the mere expression of opinions by judges surely cannot pose a threat to the ability of the legislature and executive to properly perform their functions. The only possibility of effective judicial control over legislation arises not in extra-judicial pronouncements, but in the very performance of judicial duties, when judges are able, through their interpretation of a statute or constitution, to alter the effect of that statute, or impose constitutional limitations on state power. Mere extra-judicial comment, although it may embarrass the legislative and executive authorities in the same way that the comments of any respected citizen might, cannot result in the subjection of law-making or law-executing power to the will of the

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[29]Hamilton, in Rossiter, *supra*, note 20, "No. 78", 464, 465-6 (footnotes omitted). See also Hamilton, *ibid.*, "No. 81", 484-5 and Madison, *ibid.*, "No. 48", 308, 309-10. The relative weakness of the judiciary is also indicated by the history of judicial independence. The achievement of this independence was predominantly a matter of separating and protecting the judicial function from the control of the other two bodies, not *vice versa.* See Dion, *Plus de démocratie pour les juges* (1981) 41 R. du B. 199, 201-2; S. Shetreet, *Judges on Trial*[:] *A Study of the Appointment and Accountability of the English Judiciary* (1976) 3-13; and Lederman, *The Independence of the Judiciary* (1956) 34 Can. Bar Rev. 769 and 1139. It is noteworthy that much of the historical discussion in the *Report* similarly concerns the struggle to protect judges from interference: *Report and Resolution, supra,* note 1, 386-9.

appointed judiciary. Thus, there is no reason, on this basis alone, to restrict extra-judicial comment.

This is, I believe, the correct position in Canada today. But at the time when Canada achieved judicial independence, while most of the discussion did indeed concern the threat to the judiciary from the executive or legislature, some of the debate *was* phrased in terms of freeing the executive and legislature from judicial interference. The explanation for this lies in the historical coincidence between the struggles for the independence of the judiciary and for responsible government in Canada during the early nineteenth century. Popular control over the executive and legislature had not been achieved prior to the agitation for an independent judiciary. Although there was an elected Assembly in each province, the members of the upper houses (the "Legislative Councils") and the Executive Councils were appointed. Much of the executive and legislative power was in the hands of an oligarchy: the Château Clique in the lower province, and the Family Compact in Upper Canada. The reform elements in the Assembly competed with this oligarchy for influence over the executive and control of the legislative process. Now, virtually all the judges were members of the ruling cliques. Several of them sat on the Legislative and Executive Councils. In order to bolster its own influence, then, the reform party combined its demand that executive ministers be responsible to the Assembly with an attack on the political role of the judiciary.[30] The extent to which this objection was based on principle is doubtful (although constitutional arguments were marshalled in support of the reform position), as is evident from the case of Mr Justice Robert Thorpe, puisne judge of the Upper Canadian Court of King's Bench, one of the few judges who championed the cause of reform. His election to the Upper Canada House of Assembly in 1806 was disputed by the losing candidate on the grounds that allowing judges to sit in the Assembly offended against the doctrine of the separation of powers. The House, however, sitting as Committee of the Whole, upheld the validity of the election. The reform party (the one ostensibly in favour of removing judges from politics) supported Mr Justice Thorpe, while the Tories voted against him.[31] Thus, the rhetoric attacking the inordinate influence of judges on legislative and executive decision-making must be

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[30]For historical accounts linking the advocacy of judicial independence to the demand for responsible government, see Mignault, *L'indépendance des juges* (1927-28) 6 R. du D. 475, 486 *et seq.*; Riddell, *Judges in the Parliament of Upper Canada* (1918-19) 3 Minn. L.R. 163 and 244, 172 *et seq.*; Riddell, *Judges in the Executive Council of Upper Canada* (1921-22) 20 Mich. L.R. 716, 720 *et seq.*; Brode, *Of Courts And Politics: The Growth Of An Independent Judiciary In Upper Canada* (1978) 12 L.S.U.C. Gaz. 264; Lederman, *supra*, note 29, 1149. That a similar situation existed in Nova Scotia is indicated by Lederman at 1154-5. It is in this light that the letter from the Colonial Secretary, Lord Glenelg, quoted in *Report and Resolution*, *supra*, note 1, 386-7, must be understood.

[31]Riddell, *Judges in the Parliament of Upper Canada* (1918-19) 3 Minn. L.R. 244, 246-9.

understood as the product of very particular historical circumstances. Once popular control of the legislature and executive was established, judges were no longer seen as a threat.

3. Limits on Extra-judicial Speech Derived from the Threat Posed by the Executive and Legislature to the Autonomy of the Judiciary

There are two ways in which the making of extra-judicial comments may serve to undermine the judicial function itself: 1) judges' comments may so annoy the executive or legislature that the offended body turns on the judiciary, reducing the latter's independence; 2) judges may, by participating in public debate, develop an overriding concern with broad communal goals, thereby undercutting their role as the protectors of the individual.

a. The Fear that the Judiciary Will Alienate the Legislature and Executive, Provoking Retaliation

Clearly the executive and legislature have the tools at their disposal to undermine judicial independence, should they wish to do so. It is very difficult, however, to establish theoretical limits to extra-judicial free speech based on the fear of such action. Any limitation would have to be a political accommodation based on an awareness of the gravity of the threat and a calculation of what would provoke it. Thus, any restriction of judges' behaviour would depend on the particular circumstances, and is not susceptible of statement in a general rule. One would only hope that such an accommodation would not be necessary in Canada, the acceptance of the principle of independence being such that the courts could appeal to public opinion to counter a potential threat.

Beyond these empirical considerations, however, to constrain the conduct of judges on this basis would raise theoretical objections flowing from the very nature of judicial independence. Independence is cherished because it allows judgment untrammeled by the desires of the legislature or executive. If, however, judges would modify their conduct merely in order to avoid annoying these bodies, has not the judiciary already surrendered its independence? The approval or disapproval of the legislature and executive is an unsafe basis on which to build a theory of permissible judicial conduct.[32] Moreover, as Léon Dion has argued, judicial reticence may itself

[32]Yves Ouellette, in *La stérilisation politique des juges* (1968) 3 R.J.T. 167, 169, although arguing for severe limitations on what judges may say extra-judicially, rejects in strong terms the tendency to base those limitations on the fear of reprisal: "Au Canada, l'obligation de réserve des juges est souvent considérée comme la rançon ou la contrepartie de la sécurité et de l'indépendance relative dont ils jouissent.... Il y a dans cette conception de type contractuel et d'esprit britannique un élément de marchandage assez détestable et indigne de la fonction judiciaire."

serve to undermine the independence of judges by impairing public understanding of the role of judges and making judges appear to acquiesce in all projects of the executive and legislature:

> la bienveillance de l'exécutif et du législatif qu'on espère obtenir pour le judiciaire par le silence des juges pourrait bien souvent être illusoire et déservir la cause de la justice. Loin de garantir l'autonomie du judiciaire, le silence des juges pourrait bien plutôt constituer l'une des sources de sa dépendance à l'égard des deux autres pouvoirs.[33]

b. The Fear that the Judiciary Might Adopt a Legislative Approach to Decision-making, Forsaking the Judicial Function

This threat to the independence of the judiciary is more subtle. It is not based on ill will towards the judiciary, but rather on the fear that, through judges' own actions, communal policy goals will come to dominate the adjudicative process, causing judges to neglect their primary role — the full consideration of individual interests. This is sometimes treated as a form of partiality or bias,[34] but I would submit that it is analytically separate. The problem of bias is concerned with the entry of irrelevant factors into the reasoning process. Communal policy goals may well be relevant, and should therefore be considered in reaching a proper decision.[35] The displacement of the judicial function by the legislative function is not concerned with the mere admission of policy arguments, but with their domination of the decision-making process. Adjudication should not be so preoccupied with enunciating and implementing communal goals that the procedural and substantive protections which are the essence of judicial decision-making are subverted. This desire to keep the judiciary uncontaminated by the strongly instrumental, majoritarian impulses of the legislature is reflected in the following argument by Hamilton against the use of legislative bodies as judicial decision-makers:

> on account of the natural propensity of such bodies to party divisions, there will be... reason to fear that the pestilential breath of faction may poison the fountains of justice. The habit of being continually marshaled on opposite sides will be too apt to stifle the voice of both law and of equity.[36]

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[33]Dion, *supra*, note 29, 203.

[34]Perhaps this is what the Committee is doing in *Report and Resolution*, *supra*, note 1, 391, when it implies that Mr Justice Berger's statements in favour of native rights compromised his impartiality.

[35]See pages 394-7 below.

[36]Rossiter, *supra*, note 20, "No. 81", 484.

In the British North American context, Joseph Howe expressed with vigour the same need to isolate the judicial function from legislative influences when he declared in the Nova Scotia legislature:

> Let us ... act decisively on that truly British idea, that judges should be kept from the heats and contentions of politics. While we battle with each other in the open fields of political strife, while the conflicts of opinion rage without and within these walls, while we struggle and contend for the mastery, let us have some sacred tribunal to which when blinded and agitated by passion or interest, we can all with confidence appeal.[37]

Of course, the possibility that the judicial function will be undermined is present even when judges do not make extra-judicial statements; political views secretly held can pervert judgment. Are there certain sorts of statements which increase this likelihood, or at least raise a reasonable suspicion that the judicial mode of decision-making has been compromised?

The mere expression of general opinions on matters of principle does not suggest that the judge will ignore individual interests in his desire to reach a cherished political goal. All judges are expected to have opinions,[38] yet this is not considered sufficient to undermine adherence to procedural and substantive rules. To put this adherence in doubt, the gap between the judge's action in his personal capacity and his decision-making office must be bridged; there must be a reasonable suspicion that the judge's personal opinions will dominate his performance of official functions. This gap is not insignificant. Institutions exist precisely to separate the exercise of judicial duties from action in one's personal capacity: these include the physical arrangement of the courtroom, the ceremonial robes and procedures, the professional ethic of judges, and various formal devices (procedural rules, rules of evidence, the need to justify one's decision, control by an appellate court). The mere extra-judicial expression of opinion, then, cannot be said to raise a reasonable suspicion that judicial decision-making has been subverted.

The line is crossed, I believe, when the judge identifies himself closely with a particular faction in the legislature or executive, or when he lobbies consistently and forcefully for a specific political goal — in short, when his

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[37]W. Annand, *The Speeches and Public Letters of the Honourable Joseph Howe* (1858), vol. 1, 141, 106, quoted in Lederman, *supra*, note 29, 1155. For Upper Canadian statements in the same vein, see Brode, *supra*, note 30, 268-9.

[38]See pages 390-4 below.

activities become partisan in nature.[39] When this occurs, many of the considerations which lead the legislature or the executive to pay insufficient attention to individual interests begin to operate on the judge. If he joins the day-to-day struggle for a particular policy outcome, he may increasingly be tempted to decide matters solely on the basis of whether they conduce to that end, taking insufficient account of other interests involved in the decision. And in order to muster popular support for the desired policy or party, the judge may, in his adjudication of controversial disputes, be eager to appease public opinion. Furthermore, identification with a particular faction in a political debate may generate animosities or alliances tending to undermine his impartiality. In 1906, while debating in the British House of Commons the alleged misconduct of Sir William Grantham (a judge of the King's Bench Division), then Attorney-General Sir John Walton described the nature of partisanship which would justify removal. His comments reflect the concerns just described, with the added element that the judge must realize that he is perverting judgment:

> I understand partisanship to mean a conscious partiality leading a Judge to be disloyal even to his own honest convictions. I understand it to mean that the Judge knows that justice demands that he should take one course but that his

[39]Something like this line is, I believe, supported by the English materials on judicial misconduct collected by Shetreet, *supra*, note 29. While there is considerable diversity in the opinions given by those interviewed as to what kinds of extra-judicial comments are permissible (see especially 341-5), there is more agreement when one examines the cases in which judicial conduct was criticized in Parliament. In many of the instances concerning comments by judges on political matters, the partisanship was evident in the course of the judge's official duties: see Shetreet, 140-1, 145-6, 149-50, 169, 171, and 318-9. It is indicative of the licence granted judges that in none of these cases was the judge removed from office; at most his conduct was criticized during debate in the House. As for extra-judicial comments, judges have been rebuked for 1) attacking in the House of Lords and on a political platform the plan for an Irish Free State (Shetreet, 257-8, 340, and 345-6), and 2) violently attacking the House of Commons itself (Shetreet, 149). Each of these showed evident partisanship. Mild criticism was directed at Lord Chief Justice Hewart in the 1930's for writing a series of controversial articles for the News of the World and publishing the polemical *The New Despotism*, but this criticism did not induce him to abandon his journalistic pursuits (Shetreet, 176, 328-9, and 342). Lord Chief Justice Goddard's "outspoken campaign" against the abolition of capital punishment drew both criticism and support during the 1950's (Shetreet, 177 and 184-5). When, in 1876, Irish Lord Justice Christian wrote a letter to The Times levelling certain charges against the government, Prime Minister Disraeli declined to criticize him (Shetreet, 175). That something more than mere controversy is necessary to make remarks objectionable is also indicated by the frequent remarks by prominent English judges on controversial topics: *e.g.* Sir Edmund Davies's criticisms of the right of the accused to remain silent in *The Rôle of The Judge in Contemporary Society* (1971) 5 L.S.U.C. Gaz. 210, 217-8; Lord Parker's comments to the same effect (Shetreet, 327); Lord Justice Scarman's call for an entrenched Bill of Rights in the United Kingdom (Shetreet, 328); and Lord Denning's criticisms of the powers of trade unions in *What Next in the Law* (1982) 321-2.

> political alliance or political sympathies may be such that he deliberately chooses to adopt the other.[40]

I am not concerned here with determining whether a judge should be removed from the bench for alleged partisanship, but rather with suggesting guides to extra-judicial conduct in order to avoid partisanship arising. It seems, then, that one must guard against unconscious as much as conscious partisanship. To create a reasonable apprehension that partisanship exists, the participation in political matters would have to be intense, the judge clearly endorsing one particular outcome. The following types of extra-judicial comment would therefore appear to be improper: sponsoring or criticizing a political party; personal attacks on public figures; the strong advocacy of, or opposition to, particular measures under consideration by the legislature or executive.[41] As the adjective "strong" implies, whether conduct is objectionable is often a matter of degree. Most commentators distinguish, for example, between permissible and impermissible criticism of a statute.[42] If the foregoing analysis is right, this determination should be made on the basis of whether the comment amounts to the judge identifying himself closely with the struggle for one particular option. By this test, the simple criticism of legislative or executive action would not constitute improper conduct.

In summary, it is not precise enough to say that, at least for reasons of maintaining the independence of the judiciary, judges should avoid controversy in their extra-judicial statements. The creation of a reasonable suspicion that a judge will replace protection of individual interests with the overriding concern for communal goals characteristic of the legislature or executive does not depend upon the controversy which is elicited. Rather, it depends upon the apparently wholehearted embracing by that judge of a partisan approach to public issues.

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[40] *Grantham's Case*, 160 Parl. Deb., 4th Ser., 394 (1906), quoted in Shetreet, *supra*, note 29, 273.

[41] This would appear to be the best rationale for preventing judges from sitting in the Cabinet, and for the current opposition to judges serving on Royal Commissions concerned with formulating public policy. Dion, for example, says: "Les conditions particulières du déroulement de ces enquêtes risquent de créer l'impression que le judiciaire est en collusion avec le gouvernement pour l'accomplissement des basses oeuvres de ce dernier ou qu'il s'érige en bras vengeur de la société contre les individus." *Du social, du politique et du judiciaire. Pour l'autonomie du judiciaire* (1978) 38 R. du B. 769, 782.

[42] See, for example, Shetreet, *supra*, note 29, 315-8; Dion, *supra*, note 29, 218-21; G. Gall, *The Canadian Legal System*, 2nd ed. (1983) 202; and the authorities cited *infra*, note 66.

c. *The Special Case of Constitutional Questions and Matters Affecting the Administration of Justice*

There are two instances in which strong advocacy by judges is permissible (although judges should still refrain from endorsing a particular political party or politician): 1) when constitutional matters are involved, and 2) when the administration of justice is in issue.

Why should constitutional matters be treated differently from ordinary legislation? The changing of a constitution is not merely a particularly important type of law-making. The constitution forms the basic institutional and normative framework within which judges, legislators, and civil servants operate.[43] It therefore can never be the exclusive preserve of one branch of the state, for the structure defines the duties and powers of all. The autonomy guaranteed each branch under the constitution requires that all branches be able to comment on constitutional matters (although this right to comment need not be enshrined in a particular amending formula — it may be permitted informally).[44]

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[43]I use "constitution" in its wide sense, as "the collection of rules which establish and regulate or govern the government." As K.C. Wheare states in *Modern Constitutions*, 2nd ed. (1966) 1:

> These rules are partly legal, in the sense that courts of law will recognize and apply them, and partly non-legal or extra-legal, taking the form of usages, understandings, customs, or conventions which courts do not recognize as law but which are not less effective in regulating the government than the rules of law strictly so called.

[44]In fact, Canadian judges have on occasion made controversial statements extra-judicially on constitutional matters. In 1840, John Beverly Robinson, Chief Justice of Upper Canada, published a book-length criticism of the proposed union of the Canadas: *Canada and the Canada Bill; being an examination of the proposed measure for the future government of Canada; with an introductory chapter, containing some general views respecting the British provinces in North America* (1840). To justify his action he writes, at page vi:

> If the course [*i.e.* the union of Canada], which has always appeared to me to be on several accounts inexpedient, should be adopted, and should proudce [*sic*] those unfortunate results which are apprehended by me, ... I should have to consider hereafter, and perhaps under painful circumstances, upon what satisfactory ground I had suppressed the public declaration of my sentiments at so critical a moment, when my accidental presence in England had enabled me to state them with convenience, and possibly not wholly without effect. I could only account for the omission by acknowledging an apprehension that by openly expressing my opinions upon a public question, however respectfully, I might incur the displeasure of the Government, and that I had therefore been silent; a reason which, if it should have become necessary to give it, would not have done honour to the Government, or to myself.

Of course, when Chief Justice Robinson made these statements, the principle of judicial independence had not yet become firmly ensconced in Canada; Chief Justice Robinson had himself sat on the Executive Council (until 1831), and until recently had served as Speaker of the Legislative Council. See Brode, *supra*, note 30, 268-70. In 1963, a judge of the Quebec Court of Appeal, Bernard Bissonnette, published *Essai sur la Constitution du Canada* (1963), setting forth his views on constitutional reform. In 1967, Mr Justice Bora Laskin (as he then was) delivered a paper at the University of Saskatchewan strongly criticizing the Fulton and Fulton-Favreau constitutional amending formulas, and opposing any decentralization of legislative authority in the Canadian federation: *Reflections on the Canadian Constitution After the First Century* (1967) 45 Can. Bar Rev. 395, 397, 399-401.

Moreover judges have a unique perspective on the proper organization and scope of state power which cannot be represented by the legislature. As noted above,[45] judges serve to reconcile communal goals to individual interests, and to adjudicate conflicts between individuals. Thus, they see the effect of the law and state institutions on the lives of many particular persons. They have a great awareness of the relationship to the state of individuals who may not belong to vocal minorities. In advocating the independence of the judiciary, we seek to protect the interests of just such people, interests which we feel would be insufficiently guaranteed by other state institutions based on majoritarian principles. It would be odd if, precisely when the basic norms and institutions of society are in question, these values could not be articulated because indulging in vigorous debate offended our notions of judicial propriety. When the constitution is fixed, the judiciary can generally preserve these values through upholding them in their decisions; it is not ordinarily necessary to lobby for their acceptance. But when the constitution is in flux, fundamental individual rights may be compromised through the amending process, and after the reform the judges, faced with a new normative structure on which they must base their decisions, would have no choice but to acquiesce in the change. Surely in such a situation it is appropriate that the concerns of judges be voiced extra-judicially before the courts are faced with a *fait accompli.*

Judges must similarly have wide licence to speak on matters which concern the administration of justice. The independence of the judiciary is not and cannot be absolute; the proper performance of the judicial function requires a certain measure of cooperation from the legislature and executive (for example, the provision of adequate funds for judicial services, the existence of a workable set of procedural rules and efficient mechanisms for executing judgments). In order to preserve its efficacy, the judiciary must be free to advocate measures conducive to the proper performance of its function, and to oppose policies which undermine it. Thus, judges often speak out on such topics as judicial control of administrative action, plea-bargaining, sentencing, and the availability of legal aid. Indeed, the Canadian Judicial Council recognizes "matters that directly affect the operation of the courts" as the only exception to its recommendation that "members of the Judiciary should avoid taking part in controversial political discussions...".[46]

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[45]See page 377.

[46]*Report and Resolution, supra,* note 1, 379. Ouellette, who otherwise takes a very strict approach to extra-judicial statements, recognizes the need for judges to speak out to protect judicial prestige: *supra,* note 32, 171.

B. The Duty of Impartiality

The need to maintain the real or apparent impartiality of judges is often used to justify strict limits on extra-judicial comment. For example, Glenn argues:

> Le juge qui se prononce sur une question hors cours s'associe publiquement à une position donnée, qui devient la sienne. Il se contamine à travers chaque expression publique et chaque prise de position, en matière constitutionnelle aussi bien qu'en matière de droit privé, et à travers chaque discours, chaque livre et chaque rapport de commission royale. ... Le juge ne devrait pas avoir de liberté d'expression. La lui accorder, c'est attaquer la neutralité et ainsi l'indépendance de la magistrature.[47]

The most common rationale for restrictions based on the duty of impartiality is that judges should, at the outset of a trial, have no predisposition favouring one party or another, that speaking extra-judicially on public issues may indicate such a predisposition, and that therefore judges should refrain from contentious public statements.[48]

Certainly, impartiality is a cardinal virtue in a judge. For adjudication to be accepted, litigants must have confidence that the judge is not influenced by irrelevant considerations to favour one side or the other.[49] But do statements on broad issues of public policy or law raise such an apprehension? I think not. The duty of impartiality forbids adjudication when the judge is biased with respect to the *persons* involved in the dispute, or when it appears that he has prejudged the particular case at bar, but it does not

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[47]Glenn, *La responsabilité des juges* (1983) 28 McGill L.J. 228, 277, note 185. See also Ouellette, *supra*, note 32, 169; Shetreet, *supra*, note 29, 324; Canadian Minister of Justice Mark MacGuigan's comments, reported in The [Toronto] Globe and Mail (29 April 1983) 10; and *Report and Resolution*, *supra*, note 1, 389-91.

[48]If the judge is biased in a particular matter, he must of course disqualify himself from hearing that case. Because this remedy exists, it is not immediately obvious why judges must shun all situations that may threaten their impartiality. But as Shetreet, *supra*, note 29, 324, indicates, disqualification may involve considerable inconvenience and expense. For this reason, judges should indeed avoid rendering themselves unfit to try large numbers of cases.

[49]There need be no bias in fact; apparent bias is enough. In the familiar words of Lord Hewart C.J., "justice should not only be done, but should manifestly and undoubtedly be seen to be done." *The King* v. *Sussex Justices* [1924] 1 K.B. 256, 259, [1923] All E.R. 233, 234. But the litigants' subjective views as to what constitutes bias, or reasonable grounds for inferring bias, are irrelevant. In considering apparent bias, one is not concerned with what some litigants might believe to have compromised the judge's impartiality, but with conduct which would indicate that there was a real likelihood of bias in fact existing: *The Queen* v. *Rand* (1866) L.R. 1 Q.B. 230, *per* Blackburn J. For this reason, if voicing political beliefs shows apparent bias, holding such beliefs must be equally prejudicial. Therefore, Ouellette must be wrong when he says that public political statements give rise to apparent bias, yet "la manifestation rigoureusement privée d'une opinion politique ne saurait être considérée comme un manquement au devoir d'impartialité judiciaire." Ouellette, *supra*, note 32, 169.

apply when the judge holds an opinion on what constitutes good law, when he approves or disapproves of a particular legal rule, when he adheres to a given social philosophy (as long as this does not prejudice him against the persons involved in the case, for example, if he believes that members of a certain racial group are inveterate liars), or when he suggests that certain principles should be upheld in public policy. Bias concerns the persons involved in a dispute, or the application of law to the particular facts in question; it does not concern judges' views on the merits of legal rules, principles, or arguments.

1. The Definition of "Impartiality" in the Case Law

This distinction is evident from the case law on bias.[50] It was clearly expressed by Field J. in the case of *R.* v. *Mayor and Justices of Deal.*[51] An officer of the Royal Society for the Prevention of Cruelty to Animals had prosecuted the applicant for cruelty to a horse. Some of the justices who took part in the conviction were subscribers to a branch of the Society, although they had nothing to do with the prosecution. On an application for *certiorari*, Field J. held:

> The interest or bias which disqualified must be real and substantial, and such as was likely to influence the mind — not a mere interest in humanity or the welfare of society, or an interest in the protection of animals from cruelty; such an interest would no more disqualify a magistrate than an interest in the suppression of vice. The interest or bias which disqualified must be an interest or bias in the matter to be litigated — that is, in this case, whether the person prosecuted had been guilty of cruelty to an animal. A mere general interest in the general object to be pursued would not disqualify a magistrate. All magistrates and all judges have general sympathies and feelings of this kind — feelings in favour of the protection of the innocent or the helpless, feelings in favour of the punishment of crime; but these general feelings or sympathies do not disqualify them from sitting in criminal cases. The interest or bias which disqualifies is an interest or bias in the particular case — something reasonably likely to bias or influence their minds in the particular case.[52]

A similar issue was raised in *R.* v. *Alcock.*[53] A commoner of Epping Forest destroyed some signs in order to protest the City of London's management of the forest, and was consequently prosecuted. He alleged that one of the two justices who convicted him was biased, on the grounds that in a parallel

[50] I shall leave aside the voluminous case law on licensing justices (although it supports the analysis I am proposing here); the licensing function being administrative in nature, the same considerations may not apply. See *The King (John Findlater)* v. *The Recorder and Justices of the County of Dublin* [1904] 2 I.R. 75 (K.B.Div.).

[51] (1881) 45 L.T. 439 (Q.B.Div.).

[52] *Ibid.*, 441; see also the remarks of Cave J., 441.

[53] (1878) 37 L.T. 829 (Q.B.Div.).

civil action, that justice had sworn an affidavit stating that the City's management rendered the forest better for both commoners and public. In the Queen's Bench Division, Cockburn C.J. declared: "It is preposterous to suppose that any one in the position of a magistrate would be biassed in his administration of justice by the mere expression of his views as to what is for the advantage of a defendant's interests.... There is no authority for saying that an expressed opinion is sufficient to oust a magistrate's jurisdiction."[54] Mellor J. added: "I know of no reason for saying that the expression of a man's opinion on any subject should render him unfit to adjudicate upon it."[55] A comparable question was raised before the Supreme Court of Canada in the case of *Morgentaler* v. *The Queen.* Me. C.-A. Sheppard, representing a doctor charged with performing an illegal abortion, requested that Mr Justice de Grandpré, puisne justice of the Supreme Court, disqualify himself because of the apparent bias allegedly resulting from his support for the anti-abortion movement prior to his elevation to the bench. The Supreme Court unanimously denied the request (Mr Justice de Grandpré did not participate in the decision on the preliminary objection).[56] Indeed,

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[54]*Ibid.*, 830.

[55]*Ibid.*, 831.

[56]For the text of this unreported decision, see Appendix A of this article.

Another English case supporting the proposition that a mere expression of opinion does not disqualify is *R.* v. *Pettitmangin* (1864) 9 L.T. 683 (Q.B.) (conviction of publican for suffering prostitutes to assemble on his premises; information laid by police inspector after watch committee passes resolution instructing police "to see that the public-houses in the borough are properly kept"; one of the convicting magistrates was on watch committee and promoted the resolution: magistrate not disqualified).

For Canadian cases to the same effect, see *The King* v. *Charest* (1906) 37 N.B.R. 492, 496 (S.C.) *per* McLeod J. (liquor conviction; magistrate disqualified because informant in previous prosecution of accused, but *obiter dicta* to the effect that the magistrate is not disqualified by circulating a petition opposing the granting of liquor licences); *The King* v. *Davis* (1907) 38 N.B.R. 335 (S.C.) (liquor conviction; magistrate's signing of a petition against granting licence to accused does not disqualify); *Re Doherty and Stewart* (1946) 86 C.C.C. 253, [1946] O.W.N. 752 (H.C.) (illegal picketing; comments by magistrate regarding picketing, made in a previous case, do not disqualify); and the cases cited *infra*, note 57. Some decisions that concern administrative tribunals exercising judicial functions would also appear to be relevant here. These hold that members of such tribunals may, without undermining their impartiality, declare in advance policies which they intend to follow in deciding cases (as long as they hear and consider alternative submissions): *Re Hopedale Developments Ltd. and Town of Oakville* [1965] 1 O.R. 259, (1964) 47 D.L.R. (2d) 482 (C.A.); *Re Armstrong and Canadian Nickel Co.* [1970] 1 O.R. 708, (1969) 9 D.L.R. (3d) 330 (C.A.); and *R.* v. *Pickersgill* (1970) 14 D.L.R. (3d) 717 (Man. Q.B.).

Re Regina v. *Jackson* (1959) 125 C.C.C. 354, (1959) 29 W.W.R. 579 (Sask. Q.B.) contains *dicta* contrary to this trend. At 359, Hall C.J.Q.B. writes: "Every accused has an inherent and constitutional right to a fair trial by an impartial court and that means a court without any preconceived notions or ideas respecting the necessity of suppressing certain types of offences as distinct from others." With respect, I would submit that this *dicta* goes too far. To be impartial a judge need not consider all crimes to be of equal gravity. Indeed, in his decision, Hall C.J.Q.B.

the case law indicates that some further element must be present before disqualification occurs: the judge must have a pecuniary interest in the outcome of the case; the judge in a criminal trial must be associated with the particular prosecution;[57] there must be a special link or antagonism between the judge and one of the parties;[58] the judge must be tied to a party crucially affected by the events in issue (for example, to the victim of a criminal offence);[59] there must be some indication that the judge will decide not according to the law and facts presented, but solely on the basis of

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places great weight on the "tensions" and "manifest antagonisms" existing between the magistrate and the accused's lawyer, showing bias towards the person. Perhaps the fact that the magistrate's remarks were made in court during the accused's bail hearing also indicated that the magistrate's concern with a communal goal (the suppression of security sales fraud) might dominate his decision.

Compare the U.S. position as stated in *New Hampshire Milk Dealers' Ass'n* v. *New Hampshire Milk Control Bd* 222 A. 2d 194, 198 (N.H. Sup. Ct. 1966):

> It is a well-established legal principle that a distinction must be made between a preconceived point of view about certain principles of law or a predisposed view about the public or economic policies which should be controlling and a prejudgment concerning issues of fact in a particular case. 2 Davis, Administrative Law Treatise, s. 12.01, p. 131. There is no doubt that the latter would constitute a cause for disqualification. However "Bias in the sense of crystallized point of view about issues of law or policy is almost universally deemed no ground for disqualification." Id. ... If this were not the law, Justices Holmes and Brandeis would have been disqualified as would be others from sitting on cases involving issue of law or policy on which they had previously manifested strong diverging views from the holdings of a majority of the members of their respective courts. 2 Davis, Administrative Law Treatise, s. 12.01, p. 132. Decisions of judges on certain questions of law and policy may reflect the economic and social philosophy of the times. ... This detracts in no way from the requirement that a judge or board member must not have a bias or prejudgment concerning issues of fact in a particular controversy.

[57] *Leeson* v. *General Council of Medical Education and Registration* (1889) 43 Ch.D. 366, [1886-90] All E.R. Rep. 78 (C.A.); *Allinson* v. *General Council of Medical Education and Registration* [1894] 1 Q.B. 750, [1891-4] All E.R. Rep. 768 (C.A.); *The Queen* v. *Allan* (1864) 4 B & S 916, (1864) 122 E.R. 702 (K.B.); *R.* v. *Milledge* (1879) 4 Q.B.D. 332, [1874-80] All E.R. Rep. 745; *R.* v. *Sproule* (1887) 14 O.R. 375 (Common Pleas); *R.* v. *Brown* (1888) 16 O.R. 41 (Q.B.); *R.* v. *Klemp* (1885) 10 O.R. 143 (Q.B.); *R.* v. *Simmons* (1872) 14 N.B.R. 158 (S.C.); *R.* v. *Herrell* (1898) 12 Man. R. 198 (Q.B.); *Daigneault* v. *Emerson* (1898) 20 C.S. 310; *Beauchene* v. *Gunson (No. 2)* [1928] 2 W.W.R. 703, *sub nom ex parte Beauchene* [1928] 4 D.L.R. 944 (Sask. K.B. in chambers); *R.* v. *Suck Sin* (1911) 20 Man. R. 720, 18 W.L.R. 141 (Q.B.); *Nichols* v. *Graham* [1937] 2 W.W.R. 464, [1937] 3 D.L.R. 795 (Man. K.B.); *Ex parte Michaud* (1896) 34 N.B.R. 123, 32 C.L.J. 779 (S.C.).

[58] *Hannam* v. *Bradford City Council* [1970] 2 All E.R. 690, [1970] 1 W.L.R. 937 (C.A.); *Charest, supra*, note 56; *Jackson, supra*, note 56; *Ladies of the Sacred Heart* v. *Armstrong's Point* (1961) 29 D.L.R. (2d) 373, (1961) 36 W.W.R. 364 (Man. C.A.). This would appear to be the reason why covert immoral behaviour by judges is thought to undermine impartiality. See Robins, *Report of the Commission of Inquiry into the Conduct of Provincial Judge Harry J. Williams* (1978) 12 L.S.U.C. Gaz. 161, 168; Rand, *supra*, note 25, 92-3.

[59] *R.* v. *Altrincham Justices* [1975] 2 All E.R. 78, [1975] 2 W.L.R. 450 (QBD Divl Ct); *The Queen* v. *Meyer* (1875) 1 Q.B.D. 173 (Q.B. Div.).

personal predilection;[60] or there must be prejudgment with respect to the application of law to facts in the very case before him (and even here, forming a preliminary opinion may be acceptable).[61]

2. Impartiality with Respect to Law, and Judicial Practice

The proposition that judges need not be "impartial" with respect to the law or policy involved in a case is also in accordance with the working assumptions of judicial decision-making. First, judges are expected to have, and use, preconceived ideas of what the law is. Appointment to the bench occurs only after a period of legal practice or teaching. During this period, judges acquire preferences for some legal doctrines, rejecting competing ones. These preferences undoubtedly influence their later decisions. This process is not frowned upon; on the contrary, the judges we consider to be most competent are those who have a good grasp of legal principles. Moreover, the very structure of our adversarial system requires that judges possess such prior knowledge. In the course of a hearing, a judge is presented with at least two rival interpretations of the parties' legal relations. In order to choose between them, he must have some way of evaluating the cogency of each argument. This determination can only take place through the application of standards possessed by the judge when he enters the courtroom.[62]

Nor are judges' permissible opinions limited to their definition of the positive law; they may also distinguish between good and bad law without disqualifying themselves from adjudicating in a case where the disputed rules are in question. This is particularly evident with respect to judge-made law. If common-law judges were expected to repress all opinion on the desirability of positive rules, one would be locked within a system of absolute *stare decisis*, previously-established rules being inexorably applied. Yet judges

[60] I have dealt more fully with this above at pages 383-6. For an example in the case law, see *The King* v. *Rand* (1913) 47 N.S.R. 556, (1913) 13 E.L.R. 450 (S.C.).

[61] *The Queen* v. *Spedding* (1885) 2 T.L.R. 163 (Q.B.Div.); *The Queen* v. *Gaisford* [1892] 1 Q.B. 381; *Committee for Justice and Liberty* v. *Nat. Energy Board* [1978] 1 S.C.R. 369, (1976) 68 D.L.R. (3d) 716. For the permissibility of forming a preliminary opinion, see *Re Gooliah* (1967) 63 D.L.R. (2d) 224, (1967) 59 W.W.R. 705 (Man. C.A.).

[62] Of course, this does not mean that the judge should keep his views on the appropriate law to himself; he must give the parties a chance to argue before him all relevant issues.

The argument in the text assumes that rules are part of the law. If judicial decision were merely a matter of balancing the interests of the parties, one could perhaps claim that judges can be *absolutely* neutral, simply attempting to find an accommodation between those interests. Even with such a perspective, however, surely the judge's own opinions must enter into the determination of the weight to be attached to each interest.

in England and Canada have decided that such rules may be critically reconsidered,[63] and this is not thought to demonstrate a lack of impartiality. Chief Justice Laskin declared:

> My own view of the public expectation of the judicial role is in its creative possibilities, in the capacity, the ability of the Courts to keep the law in motion, to nudge it along through review and reassessment to make and keep it contemporary. ... I can safely say that Judges do not regard their function as requiring them to be indifferent to the quality of the law. Courts in Canada have given evidence by their decisions that principles stated by predecessor Judges have no eternal verity.[64]

That judges do not show bias when they declare a preference for a legal doctrine other than that prevailing is most evident when judges who have delivered dissenting judgments in previous cases are later called upon to decide a similar question. Even though they have shown themselves opposed to what appears to have become the positive law, they are not disqualified from judging. Often they maintain their original views in the later decision without exposing themselves to accusations of bias.[65] Similarly, with respect to statutes, judicious criticism is permitted, although judges are not to overrule validly-enacted laws.[66]

3. Impartiality with Respect to Law, and the Nature of Adjudication

It is not only customary that judges have opinions on matters of law and policy, it is also necessary. Adjudication is more than the technical application of previously-established, clearly-defined rules to a particular case. Rules must continually be refined and adjusted to meet unforeseen circumstances. Occasionally, it is not so much a matter of refining old rules as creating new ones to fill gaps in the law. In addition, conflicts between rules must be resolved, and there are often no clear super-rules by which to perform this process. Sometimes, old rules are rejected when they are judged to no longer reflect the prevailing attitudes of society. In short, there is a good measure of what might be called "judicial legislation" — decisions which must be based on considerations not previously embodied in a rule. This is not to say that judges have unbounded discretion when performing this legislative role, although there is not yet agreement on what the precise

[63] *Practice Statement* [1966] 3 All E.R. 77, [1966] 1 W.L.R. 1234 (H.L.); *Paquette* v. *The Queen* [1977] 2 S.C.R. 189, 197, (1977) 70 D.L.R. (3d) 129, 135.

[64] Laskin, *A Judge and his Constituencies* (1976) 7 Man. L.J. 1, 14.

[65] See, *e.g.*, the following line of cases: *Murdoch* v. *Murdoch* (1973) 41 D.L.R. (3d) 367, [1974] 1 W.W.R. 361 (S.C.C.); *Rathwell* v. *Rathwell* [1978] 2 S.C.R. 436, (1978) 83 D.L.R. (3d) 289; and *Pettkus* v. *Becker* [1980] 2 S.C.R. 834, (1980) 117 D.L.R. (3d) 257.

[66] For an argument in favour of this practice see Davies, *supra*, note 39, 216-7, where he gives the example of *Cartledge* v. *Jopling* [1963] A.C. 758, [1963] 1 All E.R. 341 (H.L.). See also Laskin, *supra*, note 64, 10 and the authorities mentioned *supra*, note 42.

bounds are.[67] It does mean that judges must use criteria other than authoritatively-pronounced rules in order to perform their task. These criteria must necessarily be determined according to the judge's own evaluation of the relevant principles.[68]

Does this mean that there is, in all judicial decision-making, an inbuilt bias undercutting the justice of the results achieved? No. There is a qualitative difference between this necessary partiality with respect to principle, and potentially harmful bias with respect to the parties involved or the application of law to the facts in issue.

Impartiality with respect to the parties is demanded because of our legal system's basic adherence to the moral equality of persons. Presumptively, every person is entitled to equal consideration. When distinctions based on personal characteristics are relied upon, they must be expressly stated and justified. This requirement is designed to ensure that such distinctions are not the result of the whim of a single judge: when stated, the decision may be reviewed on appeal. Bias towards persons is reproved because it may result in illegitimate, hidden distinctions.

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[67]For a recent Canadian attempt to define these bounds see Weiler, *Legal Values and Judicial Decision-making* (1970) 48 Can. Bar Rev. 1.

[68]See Dion, *supra*, note 41, 788:

> La réserve des juges pose enfin la question de savoir si les juges, sous forme d'un *obiter dictum* ou autrement, peuvent légitimement s'inspirer de conceptions philosophiques personnelles pour rendre jugement. Dans un monde où même dans les meilleurs des cas ceux qui font et appliquent les lois ne peuvent que tendre vers la justice sans jamais être assurés de l'atteindre complètement, il ne siérait guère aux juges de se réfugier derrière un écran de neutralité et de prétendre que leur rôle, en rendant jugement, se borne à « dire » ou à « lire » la loi.

See also his comments at 778-9 and those of Chief Justice Jules Deschênes (as he then was) in his work, *Les plateaux de la balance* (1979) 92. And see excerpts in Dion, *supra*, note 29, 216-7 from Déprez, *A propos du rapport annuel de la Cour de cassation "sois juge et tais-toi" (Réflexions sur le rôle du juge dans la cité)* [1978] Rev. trim. dr. civ. 503, 517-32. Compare also the views of Mr Justice I.C. Rand in his article *The Role of an Independent Judiciary in Preserving Freedom* (1951) 9 U.T.L.J. 1, 12-13. In an eloquent statement of his own social philosophy, he discusses what theories are admissible in judicial deliberation, basing his determination on a notion of natural law: "what, considering all factors and interests, the mass of free and rational men applying the rule of universality will ultimately accept or demand. . .". Lederman, in "The Independence of the Judiciary" in A. Linden, ed., *The Canadian Judiciary* (1976) 1, 11, argues that precisely because there are difficulties of interpretation, it is necessary to have an unbiased adjudicator so that a non-partisan reading may prevail. It is unclear whether Lederman means that a judge can be neutral even with respect to legal principles or social philosophy. It is also significant that biographies often dwell on the philosophies that motivated judges' decisions. See, *e.g.*, Pollock, *Mr. Justicé Rand*[:] *A Triumph of Principle* (1975) 53 Can. Bar Rev. 519, 527 *et seq.*; Castel, *Le Juge Mignault*[:] *défenseur de l'intégrité du droit civil québécois* (1975) 53 Can. Bar Rev. 544.

Prejudgment of the particular issue in question (*i.e.* a pre-determined application of law to the facts of the case at bar) is condemned because of the great difficulty in determining the precise facts of a dispute. The proper application of law to facts of course depends upon the reliable ascertainment of those facts. In order to promote reliability, complex rules of evidence and procedure have been developed for use in court. But judicial prejudgment is not subject to such controls, and for this reason, prejudgment is condemned. Now, with respect to the prohibition of judges to sit in appeal of their own decisions, these considerations may not apply: the initial determination may well have been made subject to the proper controls. In such a case, disqualification depends upon the principle that appeals are intended to be a test of the original decision, including the trial judge's determination of the law. Such testing is obviously impaired if the original judge rules on his own decision.

The same considerations do not, however, govern the preference of a judge for a legal principle or social philosophy. As noted above, the judge's function is not merely the technical application of defined rules; in large measure, his function is to declare the law. One therefore need not worry, as one must regarding the facts of the case, whether the judge has preconceived notions of what the law is or should be, as long as the parties are given the opportunity to rebut these notions. As Frankfurter J. stated in a case concerning a judicial decision made by the U.S. Secretary of Agriculture,

> Cabinet officers charged by Congress with adjudicatory functions are not assumed to be flabby creatures any more than judges are. Both may have an underlying philosophy in approaching a specific case. But both are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.[69]

[69]*U.S.* v. *Morgan* 313 U.S. 409 (1941), 421. This passage, and the quotation from *New Hampshire Milk D. Ass'n, supra*, note 56, were quoted with approval in Mr Justice de Grandpre's dissenting judgment in *Committee for Justice and Liberty, supra*, note 61, 398 and 399-400. The majority opinion in that case did not disapprove of the American authorities. It was based on the fact that the officer in question "had a hand in developing and approving important underpinnings of the very application which eventually was brought before the panel", *i.e.*, that there was a distinct likelihood that the officer had prejudged the particular issue (388-91).

Note that Mr Justice Frankfurter emphasizes that the judge must still fully consider the representations made in the hearing of the case. This, I believe, is what Mr Justice Dickson (as he then was) is referring to when he writes:

> When I speak of impartiality, I am not referring to such obvious things as sitting on a case in which one has a personal interest, but to the more subtle influences of personal prejudices. Judges are human.... They may hold strong views on many issues; yet when presiding at a trial, those views must be cast aside. The judge must show, to the extent of his ability, open-mindedness, courtesy and patience. *Supra*, note 25, 143.

Mr Justice Dickson is not saying that judges must discard all views as to what the law is or should be, for he later states: "With respect to the law, ... an appellate court judge will place

The judge is, to a degree, the author of the rules he applies. Therefore, preference for law is not analogous to prejudgment of facts, where the difficulty of ascertaining an objective truth forces one to impose strict controls on procedure and the admission of evidence. Nor is it analogous to bias towards persons, for there is no fundamental principle in the law that all arguments, all moral principles, or even all legal rules have equal validity and weight. The judge's function is precisely to make distinctions between rules.

What consequences does this analysis have for establishing the proper limits to extra-judicial comment? Clearly, the duty of impartiality imposes less restraint on judges' comments than is commonly supposed. Pronouncements of legal opinion, principle, or social philosophy do not undermine impartiality. Only when the comments suggest prejudice towards the parties in a case or the particular facts in issue will this occur. It is very common to see in speeches by judges declarations of principle such as the following by the late Mr Justice Rand of the Supreme Court of Canada:

> the courts in the ascertainment of truth and the application of laws are the special guardians of the freedoms of unpopular causes, of minority groups and interests, of the individual against the mass, of the weak against the powerful, of the unique, of the nonconformist — our liberties are largely the accomplishments of such men.[70]

Surely, such a statement cannot render a judge unfit to hear cases involving popular causes, the powerful, and the conformist.

C. Undermining the Moral Integrity of the Bench

This heading is included here primarily for the sake of completeness. While it does set limits to judges' extra-judicial speech, these limits are minimal. Up until now, it has been invoked only in cases where a judge's

far less reliance on counsel". *Supra*, note 25, 160. Mr Justice Rand, while stressing that theory must enter judicial deliberations, *supra*, note 68, 12, also speaks of the need for a "relentless self-scrutiny":

> It is not a question of honesty in intellect or morality; it is of the quality of judicial disinterestedness. One's individual views undoubtedly reflect the general thought of the community; but they can present obstacles to the true understanding of what is being examined....
>
> To be aware of the mental domination of these and like ideas, to appreciate their possible irrelevance and danger, and to achieve a power of neutralizing them through a mobility of mind in orienting itself to any group of assumptions, is the condition of subjective independence. *Ibid.*, 7.

[70]Rand, *supra*, note 68, 13.

conduct has clearly violated commonly accepted moral or criminal standards (for example, consorting with prostitutes, accepting bribes when performing public duties[71]).

Shetreet argues that this restriction is based on the necessity of maintaining public confidence in the judiciary.[72] For litigants to accept the legitimacy of adjudication, especially in criminal matters, they must not suspect the judge of hypocrisy. Judges must therefore maintain in their personal lives the moral standards which they impose on those who appear before them. In addition, many judicial decisions are not governed by clear rules, and in such cases (for example, determining whether a given publication is obscene, or even whether a conflict of duty and interest exists) the moral standards of the judge will greatly affect the outcome. The public must be able to trust that the judge's moral standards do not depart radically from society's norm. Indeed, many commentators have asserted that a judge serves in his private life "as an exemplar of justice".[73]

The question of a judge undermining the moral integrity of the bench usually arises from a judge's actions rather than his words. However, one can imagine cases in which a judge's extra-judicial statements are so contrary to generally accepted moral standards that his continuation in office would bring the administration of justice into disrepute. In the case of actions, the consensus appears to be that the impugned conduct must carry real moral blame; the conviction for an ordinary traffic offense or an act resulting from a bad error in judgment will not require the resignation of the judge.[74] This determination has necessarily been a matter of degree. In establishing limits to permissible extra-judicial comment, the boundaries must be similarly vague. Certainly, judges must not counsel the breaking of the law. They should also avoid making statements which would offend against generally accepted moral principles.

D. *Abuse of Judicial Office to Make Personal Statements*

The Committee invokes this consideration at several points in the *Report*.[75] Although the Committee itself does not elaborate, the following argument would appear to be an appropriate basis for this limitation: the

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[71]See respectively Robins, *supra*, note 58 and Rand, *supra*, note 25.

[72]*Supra*, note 29, 281-4.

[73]Robins, *supra*, note 58, 173. See also his comments at 172-4; Rand, *supra*, note 25, 94-8; and Grant, *Guide of Ethics of Magistrates* (1968) 2 L.S.U.C. Gaz. (Dec.) 8.

[74]Shetreet, *supra*, note 29, 280-1.

[75]*Supra*, note 1, 390-2. See also the complaint of Mr Justice Addy at 395. For an example of this argument prior to the "Berger Affair", see Bouthillier, *Matériaux pour une analyse politique des juges de la Cour d'appel* (1971) 6 R.J.T. 563, 565: "Publiques ou pas, ces prises de positions s'appuient implicitement sur le prestige qui s'attache au juge en qualité d'expert en matière législative."

authority of judicial office is given to the judge for a limited purpose — the decision of cases according to law; great restrictions have been placed on the exercise of this authority in order to promote rational deliberation (for example, rules of evidence, rules specifying appropriate sources of law, measures promoting equality of presentation by the parties); using the office as a platform from which to comment on controversial matters of which one is not seized, under conditions lacking the controls inherent in the adjudicative process, amounts to a misuse of authority for personal ends. In this section, I will briefly discuss the force of this argument.

First, it must be noted that this objection cannot prevail when judges have, because of their judicial office, a positive right to comment extra-judicially (for example, at a time of constitutional revision, or when the administration of justice is in question). They cannot be abusing their authority when the very nature of their office justifies the conduct.

Second, any possible misuse of authority can only be partial. The authority of a judge speaking extra-judicially is significantly less than that of a judge on the bench. The latter's pronouncements are phrased, not as mere opinions, but as declarations of law, and indeed they have effect as law: judgments may be enforced, and may be cited as precedents in future cases. The physical accoutrements of judicial decision-making — the robes, the raised dais at the front of the courtroom, the ceremony — are all intended to buttress the judge's authority. A judge speaking extra-judicially, on the other hand, does not have the advantage of these institutional supports. He does, however, benefit from the substantial confidence and respect which society accords its judges.

Now, surely not every extra-judicial comment (other than those concerning the constitution or the administration of justice) will be considered a misuse of authority for private purposes. If they were, judges would be unable to accept invitations to address university audiences, professional associations, and service clubs — activities which few would wish to stop. In order for comments to constitute a misuse of authority, the office must be harmed in some way.[76] The harm usually foreseen (other than injury to the independence or impartiality of the judiciary) is that controversial comments may provoke criticism, thereby lowering the dignity and hence the

[76]The Committee implicitly accepts this argument in its response (*supra*, note 1, 390) to Mr Justice Berger's mention of some controversial statements made by the Hon. Mr Martland after the latter had retired from the bench:

> In our view, Justice Berger completely misses the mark when he says "does it make all the difference that nothing was said until he (Mr. Martland) retired?" It makes the greatest of difference. Politically controversial statements by a citizen who is no longer a judge and who can never again be called on to be a judge, do not destroy the necessary public confidence in the impartiality of judges.

authority of the bench. When the criticism takes the form of bickering between judges, the injury is seen as being all the more serious.[77]

This argument does have some force. Judges might therefore wish to avoid causing controversy unnecessarily. This reluctance should not, however, stifle all comment that may evoke opposition; there are often strong compensatory benefits from judicial participation in a limited amount of public debate — benefits which outweigh the possible harm. Criticism itself is not always a negative force. As discussed above, when the applicability of rules is unclear, the general opinions of judges on law and policy must influence their decisions. It may be better to have these attitudes subjected to public scrutiny than to have untested, tacit assumptions govern the decision-making process. Several commentators have recently emphasized the value of public criticism as a means of keeping judges responsive to societal attitudes.[78] Moreover, there may well be cases when silent compliance will injure the integrity of the judiciary more than speaking out. Dion gives the example of judges asked to enforce repressive laws in Nazi Germany. Mr Justice Berger picks an instance closer to home: "if a member of this court had spoken out against the internment of the Japanese Canadians in 1942, or against their deportation in 1946, would that have been regarded as misconduct?" There is merit in Dion's perceptive comment:

> dans une société pluraliste et divisée comme l'est la société contemporaine, quoi qu'il fasse, qu'il s'abstienne ou qu'il s'engage, le juge, comme le prêtre, risque d'être objet de scandale: les uns s'indignent de ses abstentions et les autres de ses engagements.[79]

Finally, judges have usually had long and distinguished careers prior to their appointment to the bench. As judges, they may serve as Royal Commissioners studying important public issues. While on the bench, their unique view of the working of the law undoubtedly gives them insights valuable to society at large. It would be unfortunate if the experience and insight thus gained must remain closed off from society, solely because of the judges' desire to avoid controversy.

In short, judges cannot be said to be misusing their authority whenever they comment publicly, even on controversial questions. While discretion is advisable, there are often benefits to society of having judges speak out.

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[77]See Shetreet, *supra*, note 29, 277; Dickson, *supra*, note 25, 162; *Report and Resolution*, *supra*, note 1, 388, 392; and, with respect to the participation of judges on Royal Commissions, Dion, *supra*, note 41, 783. For concern with judges expressing divergent views, see *Report and Resolution*, *supra*, note 1, 391.

[78]Martin, *Criticising the Judges* (1982) 28 McGill L.J. 1; Dion, *supra*, note 29, 209 and 214-5; Shetreet, *supra*, note 29, 324.

[79]Dion, *supra*, note 29, 209 and 220-1; Berger, *supra*, note 1, 418.

III. The Guidelines and Their Application

A. Applying the Tests to Mr Justice Berger's Remarks

The above discussion has identified the tests to be applied in assessing the propriety of extra-judicial comments: 1) the maintenance of the independence of the judiciary requires that judges avoid becoming committed partisans in political debate (although they may more strongly advocate a defined outcome when constitutional questions or matters affecting the administration of justice are at stake); 2) the preservation of judicial impartiality demands that judges refrain from showing prejudice against particular persons, and from prejudging the application of law to facts in a case; 3) judges should not counsel the breaking of the law, nor make comments offending against generally accepted moral principles; and 4) judges should avoid causing controversy gratuitously. According to these criteria, were Mr Justice Berger's remarks improper?

Neither his personal independence nor the independence of the judiciary as a whole were imperilled by his comments. Mr Justice Berger did argue strongly for a particular policy outcome (although he did not identify himself with any faction). However, his statements clearly concerned issues of broad constitutional principle, on which members of the judiciary have a right to comment. In spite of this, his remarks provoked considerable criticism, much of it using language drawn from separation of powers doctrine. Perhaps the reason for this is rooted in the peculiar circumstances of our period of constitutional renewal. Many Canadians evidently looked upon the patriation and amendment of our constitution as simply one more project of the legislature and executive, not as a revision of the state's fundamental institutional framework.

Mr Justice Berger's comments did not threaten his impartiality. In advocating that native rights be included in the accord and that Quebec retain a veto over constitutional change, he was speaking to matters of principle or policy. He did not indicate a preference for certain individuals over others, nor show prejudgment of a particular legal claim. To assert that preferring one constitutional provision over another undermines a judge's ability to impartially adjudicate is to misunderstand the nature of bias.[80]

[80]Interestingly, in 1965 Mr Justice Emmett Hall, while on the Supreme Court of Canada and eight years before his landmark judgment in *Calder* v. *A.-G. B.C.* [1973] S.C.R. 313, (1973) 34 D.L.R. 145, said in a lecture, "we as a nation, have failed our Indians and Metis" (quoted in Vaughan, *Emmett M. Hall: a Profile of the Judicial Temperament* (1977) 15 Osgoode Hall L.J. 306, 321). Surely no one would suggest that that statement, similar in content to those of Mr Justice Berger, undermined Mr Justice Hall's impartiality.

Clearly Mr Justice Berger's statements did not undermine the moral integrity of the bench. Such a possibility was never seriously asserted.

Did Mr Justice Berger improperly use his office as a political platform? Again, the fact that he was speaking on a constitutional issue is conclusive. One might still ask, however, whether his comments, even if permissible, tended to undermine the authority of the judiciary. His remarks certainly embarrassed the federal government before the Canadian people, and drew criticism, not least from that government and from fellow judges. But there was also considerable support for his actions. Readers must determine for themselves on which side the balance falls.

Applying the above tests, then, it is clear that Mr Justice Berger's comments were not improper. With all due respect for the Committee's *Report*, I submit that Mr Justice Berger should not have been censured.

B. Conclusion

This paper has proceeded on the assumption that the mechanism used to enforce judicial propriety is irrelevant to determining what judges should and should not say. This is not necessarily the case, however. Many of the tests enunciated above involve a judgment between competing policies: do the benefits of hearing what judges have to say outweigh the possible damage caused to their authority by public criticism; is a controversial comment one of principle, or is it partisan in nature? The answer to such questions may, in large measure, depend on who is charged with the determination. Furthermore, if the damage which may result from transgressing the bounds of permissible conduct is great, one may wish to constrain more strictly that conduct in order to avoid tragic errors. As noted at the beginning of this paper, this is not the place to discuss these issues fully, but I would like to offer a few observations. In general, the judgment of what constitutes permissible conduct should, I submit, be left to the individual judge concerned. Only when there is, *prima facie*, a clear case that the guidelines have been violated should disciplinary authorities intervene. The nature of the judicial function is such that *any* reprimand by a body such as the Canadian Judicial Council is likely to gravely undermine the authority of the judge. One need not fear that judges will be unaccountable for their actions. Informal mechanisms, including public criticism itself, are likely to continue to restrain judges' extra-judicial conduct. Moreover, such informal mechanisms are better able to encourage more subtle, but not less important virtues, which cannot be reduced to rules (for example, the maintenance of courteous relations between the branches of the state). Judges are, of course, carefully chosen for their roles; they are, for the most part, capable of policing themselves. If they do err on occasion, public support for our judicial institutions is robust enough to survive the indiscretion.

Throughout this paper, I have attempted to derive guidelines from the requirements of the proper exercise of the judicial function. There is an argument, however, that the effectiveness of adjudication depends in large measure on the public *misapprehending* the nature of the judicial function. Lon Fuller, for example, has described the particular value of judge-made law in the following terms:

> In putting their stuff over, judges enjoy various advantages over legislators. They work in an atmosphere of ritualistic impartiality. They avoid a too active and direet intervention in men's affairs. They assume, as far as they can, the position of umpires over a dispute. ... The common-law courts always refused to assume a too conspicuously active role. ... When they overruled previous decisions, they did it not as legislators, but on the theory that the law had always been what they now declared it to be. Some of these inhibitions on judicial action are stupid, others are hypocritical. But underlying them there is, I submit, a sound political instinct which realizes that there is a problem of making government "go down well". In Pareto's terms, the judges have realized that they have to govern as foxes and not as lions.[81]

In order to preserve these advantages, might one have to maintain the "atmosphere of ritualistic impartiality"? Should one then pretend that judges truly are impartial with respect to law and social philosophy, even if this is impossible? The answer depends on the depth of one's commitment to democratic principles, to the notion that the public has a right to know how the institutions of the state operate. It also depends on one's assessment of the basis and fragility of the judiciary's legitimacy. Such considerations are particularly insusceptible to reasoned argument. I would only suggest that in the past, the Canadian judiciary has perhaps relied too much on its isolation from society to buttress its authority. More openness regarding the judicial process may well result in solid, reasoned public support, and may indeed serve to dispel harmful misconceptions about the judicial role.[82]

This paper's attempt to define the limits of extra-judicial free speech has required the close examination of concepts, such as the independence and impartiality of judges, which are fundamental to our judicial institutions. The solutions suggested are, I hope, rooted in the reality of judicial decision-making, workable, and appropriate to Canadian society. I believe they are also in accordance with the practice of Canadian judges, which has generally been more liberal than the strict expressions of judicial restraint

[81]"Letter from Lon L. Fuller to Thomas Reed Powell", in K. Winston, ed., *The Principles of Social Order* (1981) 302.

[82]For an impassioned argument along these lines see Dion, *supra*, note 29, 203-5.

would indicate.[83] Finally, the guidelines presented here have the added benefit of providing greater scope for judges to exercise their own personal freedoms — and this without endangering the institutions and values which the judiciary maintains.

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[83]Accord: Dion, *supra*, note 29, 200-1. Proof of this observation would require the presentation of a tediously long catalogue of statements by judges. A few prominent examples will have to suffice. An editorial in The [Toronto] Globe and Mail (22 June 1983) 6, gives the following instances of judicial participation in controversial debates: in 1963, Mr Justice Thorson, President of the Exchequer Court of Canada, publicly criticized the Government of Canada's policy with respect to nuclear weapons; in 1971, Mr Justice Freedman of the Manitoba Court of Appeal, speaking before the Empire Club of Canada, supported the 1970 imposition of the *War Measures Act*; and in 1964, Mr Justice Hall of the Supreme Court of Canada publicly defended the recommendations of the Royal Commission on Health Services, of which he had been Chairman. In 1971, Chief Justice Dorion of the Quebec Superior Court spoke against the Ministry of Education's plan to deconfessionalize the University of Sherbrooke: Bouthillier, *supra*, note 75, 565. In 1979, Chief Justice of Ontario William Howland urged the establishment of bilingual courts in that province: The [Montreal] Gazette (11 April 1979) 8. On 7 May 1976, Chief Justice Jules Desehênes of the Quebec Superior Court, lectured on the rights of the unborn child (for the text of this speech, see Deschênes, *supra*, note 68, 197-208). In 1983, Mr Justice A.M. Monnin of the Manitoba Court of Appeal (now Chief Justice of Manitoba) signed an anti-abortion petition published in a Winnipeg newspaper: The [Toronto] Globe and Mail (13 May 1983) 1. For examples of statements on constitutional and native affairs, see *supra*, notes 44 and 80.

Mr Justice Berger is not the only Canadian judge to have been censured for his extra-judicial comments, however. In 1980, the Conseil de la magistrature of Quebec reprimanded Mr Justice Marc Brière of the Quebec Provincial Court for publishing, during the referendum debate, two articles on the nature of Canadian sovereignty and the right of a province to secede from Confederation. Mr Justice Brière had himself referred the matter to the Conseil for consideration. See *Souverainetê et Droit de Sécession des Enfants de L'Empire*, Le Devoir [Montreal] (1 November 1979) 5 and *Souverainetê et Réserve Judiciaire*, Le Devoir [Montreal] (19 November 1979) 5 for the offending articles. An account of the reprimand may be found in Le Devoir [Montreal] (30 April 1980) 3, and an editorial in defence of Mr Justice Brière in Le Devoir [Montreal] (1 May 1980) 12. Unfortunately, the report of the Conseil has not been released to the public.

Appendix A

The Supreme Court of Canada's decision on the preliminary objection in *Morgentaler* v. *The Queen, supra,* note 56, has not been reported. For the reader's convenience, it is here reproduced in full.

DR. HENRY MORGENTALER v. HER MAJESTY THE QUEEN

S.C.C., No. 13504, October 2, 1974.

Coram: — The Chief Justice, Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz JJ.

THE CHIEF JUSTICE (Orally for the Court):-

We have listened to submissions by counsel for the appellant challenging the propriety of one of our members, Mr. Justice de Grandpré, sitting on this appeal. Counsel for the appellant says that he does not attack the personal integrity of Mr. Justice de Grandpré or his objectivity, but he suggests that in view of the wide ranging debate going on in Canada on abortion Mr. Justice de Grandpré's attitude to this appeal could be influenced by reason of views expressed in a speech and comments made by him during a joint meeting in April, 1973 of the Quebec Branch of the Canadian Bar Association and of the Quebec Bar. Mr. Justice de Grandpré was then President of the Canadian Bar Association but he made it quite clear that he was expressing personal views.

This Court is not concerned in this appeal with the public debate on abortion. Its sole concern is with the exercise of its jurisdiction to hear this appeal on questions of law. This is prescribed by s. 618(2) of the Criminal Code under which the appeal has been brought.

Every judge of this Court has subscribed to an oath in the following terms:

> I, ... , do solemnly and sincerely promise and swear that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me as Chief Justice (or as one of the judges) of the Supreme Court of Canada. So help me God.

All members of this Court, past and present, have, to a greater or lesser degree, before appointment to the Bench and to this Court, expressed views

on questions which have legal connotations, and this has never been a disqualifying consideration.

We are all of the opinion that there is no impropriety in Mr. Justice de Grandpré taking his seat as a member of this Court in this appeal.