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**Toward a Political Economy of the Public Sphere:
A Critique of the Charter and Newspaper Concentration**

by

James McGillivray, B.A. (Honours) Queen's University

**A thesis submitted to the
Faculty of Graduate Studies and Research
in partial fulfillment of the
requirements for the degree of
Master of Arts**

Institute of Political Economy

**Carleton University
Ottawa, Ontario
August, 2000
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TOWARD A POLITICAL ECONOMY OF THE PUBLIC SPHERE:
A CRITIQUE OF THE CHARTER AND NEWSPAPER CONCENTRATION

submitted by James C.J.D. McGillivray, B.A. Hons.,
in partial fulfilment of the requirements for
the degree of Master of Arts

Thesis Supervisor

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August 22, 2000

Abstract

This thesis represents an investigation into the status of "freedom of expression", newspaper concentration, and the *Charter of Rights and Freedoms*. It is an attempt to engage and interrogate the political and legal ramifications of increasing newspaper concentration in Canada and evaluate the effect this has on the Canadian "public sphere". The argument advanced is that "commercialised speech" and increasing newspaper concentration coupled with "legalised politics" have monopolised *Charter* rights and have put in jeopardy the rights and access of Canadians to freedom of expression. Thus, high levels of newspaper concentration, in concert with recent court decisions and legal precedents, are found to be one of the principal mechanisms that threaten the right of Canadians to freedom of expression and access to the democratic public sphere. The focal points of this study include: tracing the origins and theories the public sphere and freedom of expression; examining the relations and effects that newspaper concentration has in establishing hegemony over the public sphere; and, tracing the impact that newspaper concentration over the *Charter* has had in affecting the right and access of Canadians to freedom of expression.

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Introduction

Freedom of Expression and the Public Sphere

None but the dead have free speech. None but the dead are permitted to speak the truth. In America – as elsewhere – free speech is confined to the dead.

Mark Twain¹

Present Canadian capitalism, which thrives on new and innovative communication technologies and the “free” flow and exchange of information, makes this grim appraisal of free speech appear quaint and antiquated. Indeed, the proliferation of faster, more accessible, and cheaper forms of electronic communication systems, such as the Internet, seems to indicate that on the surface we live in a society where “free speech” is expanding. It also appears that the old medium of print is dying while being surpassed in favour of the immediacy of information in cyber-space. Thus, our present right to “free speech” appears to fulfil the promise of nineteenth century liberalism that allows for expression to be unfettered and “free”.

Corresponding to recent technological advances, in 1982, the patriation of the *Constitution Act, 1867*, [hereinafter the “Constitution”] seemed to realise and guarantee the fundamental rights of individual Canadians to free speech and freedom of expression under the law. Arguably, the introduction of *The Charter of Rights and Freedom* [hereinafter the “Charter”] meant that Canadians gained legally entrenched constitutional rights to express themselves without censure by the Canadian state. It is conventionally thought that these two developments resolve any

disputes or questions that may arise regarding a threat to freedom of expression. Quite simply, the *Charter* protects the liberty of Canadians and their freedom of expression.

Nevertheless, as technological advances have expanded, allowing an enormous amount of information and "free speech" to circulate nationally and globally, and as the influence of the *Charter* has taken firm hold in law, appearing to protect the rights of the individual to freedom of expression against coercion by the state, the threat to freedom of speech has been transformed. Arguably, the threat to free speech has entered a new phase. The first battles for universal suffrage and freedom of speech were waged against the identifiable structure of the nation-state. The present ideological struggle is much subtler.

Today, the universal suffrage and free speech victories of the past, which succeeded in producing the modern liberal democratic state, exist in a very different world. The recent phenomena of "globalisation", "neo-liberalism" and the rise in power and influence of transnational corporations have had a corrosive effect on the public institutions of the Canadian state. Over the last thirty years, the once relatively solid – and at times progressive – institutions of the Canadian state have become re-defined by the hegemony of neo-liberalism. Concomitant to this, recent Canadian legal interpretation of case law, regarding the *Charter*, has led to the virtual acquisition of constitutional protection for commercial speech's right to freedom of expression. In effect, it means that various actors and legal entities have gained and acquired parallel – if not superior – forms of

constitutional protection normally accorded to persons under Canadian law. As Herbert Schiller suggests:

What distinguishes this era is that the main threat to the free expression has shifted from government to private corporate power. This does not imply that the state has lost its taste for controlling individual expression. It means instead that a more pervasive force has emerged that now constitutes a stronger and active threat to such expression.
(Schiller, 1996: 16)

The *Charter* right to freedom of expression in Canada is not a static and absolute law. It is not a law that defines categorically citizens' rights. Like all laws, the *Charter* is a socially constructed document. However, it is a document that represents certain values, and its intent is to curb the power of the state and protect the civil rights of Canadian citizens. In the last eighteen years, Canadian courts have demonstrated that the legal interpretation of "freedom of expression" is extremely broad. Further, they have demonstrated that the *Charter* can be re-defined to recognise the rights of legal entities and corporations along-side those of the person. Arguably, at least in some instances, the *Charter's* intent to protect the individual rights of the person can come into conflict with the rights of these legal entities. If it is reasonable to suggest that the *Charter* and the right to freedom of expression are being used by legal entities to gain constitutional rights and protection, is it reasonable to suggest that the *Charter* is being manipulated to limit the democratic rights of individuals? This thesis is an attempt to answer some aspects of this question.

Since the patriation of the *Constitution*, particular legal entities and corporations have been at the forefront in determining the type of freedom of expression cases contested in Charter challenges. Under the *Charter*, these groups argued that they possess the right to freedom of expression. Oddly, Canadian courts, which set the standard of legal precedence, recognised that these legal entities possess the right to "freedom of expression". In a balancing of interests, rather than protecting the democratic rights of the person, the courts recognised the right of commercial speech to "freedom of expression". The long-term damage to the rights of persons, caused by the courts' recognition of commercial speech, is still unknown.

Section 2(b) of the *Charter* declares that all Canadians possess the fundamental freedoms of "freedom of thought, belief, opinion, and expression, including the freedom of the press and other media of communications".² Nevertheless, the manner in which the *Charter* has been legally interpreted and applied has meant that it has become the principal foil to limit and impede the fundamental freedoms of individual citizens. Moreover, as Michael Mandel suggests, in **Rights, Freedoms, and Market Power**, the debate surrounding the patriation of the constitution was a smoke screen that hid the fact that, in the future, Canadian governments were no longer committed to creating a "just society". In other words, the pursuit of constitutionally entrenched rights is really an indication that the post-World War II struggle for concrete social gains is over:

In Canada, the constitution itself, patriation, the *Charter of Rights and Freedoms*, and the plea for "national unity" all had a part to play in taking our minds off Canada's mediocre economic performance and in unifying a country riven by enormous disparities in material well-being and life chances.... Thus the increasing substitution of abstract principles for concrete policies represented by the *Charter* seems to have its source in the legitimation problems of an economic system less and less able to deliver the goods and forced to serve up rights as a substitute. (Mandel, 191: 135)

The majority of the most important free speech decisions reached throughout the history of the *Charter* demonstrate how sections of the *Charter* have been used to expand the legal rights of commercial agents. Subsequently, one area that has received some scrutiny by *Charter* and legal critics has been how corporations exercised their legal rights as "quasi-citizens" to gain the right to freedom of expression. However, one aspect that has not been as closely examined is how media corporations and, specifically, newspaper concentration affects how corporations exercise their "free speech" to construct the hegemony of neo-liberalism. Arguably, newspaper and media concentration limit diversity and this places real limits on Canadians' right to freedom of expression and their access to a democratic "public sphere".

This study will focus on the "public sphere", the *Charter*, and the effects that ownership of Canadian newspapers has on "freedom of expression". Although there are those who would argue that newspapers are an anachronism in the "information age", for

this argument to hold water one would have to ignore or down play the enormous economic impact and influence that newspapers possess as institutions and as businesses. Newspapers play an important role in setting the overall news agenda and this impacts upon the electronic media. Columnist Michael Valpy rejects the opinion "that with television, radio, and the Internet, concentration of newspaper ownership means hardly more than a fig. That argument grossly underestimates the influence of newspapers in a nation's public life. It grossly underestimates the range and depth of public-policy information that newspapers alone among the information media do (or are able) to provide".³

Newspapers possess an enormous capacity to influence public discourse. To varying degrees, newspapers, through the Canadian Press, direct and set the standard and depth of news coverage for the entire media in Canada. Moreover, newspapers are important because they usually are the historical record. Noam Chomsky holds that "history is what appears in The New York Times [and other newspapers] archives; the place where people will go to find out what happened is The New York Times [and other newspapers]. Therefore it's extremely important if history is going to be shaped in an appropriate way, that certain things appear, certain things not appear, certain questions be asked, and other questions be ignored, and that issues be framed in a particular fashion," (Chomsky, 1994: 56).

This study represents an attempt to understand the forces shaping "freedom of expression" in the Canadian "public sphere". It is not an attempt to speculate on the freedom and status of a

multiplicity of voices or 'identities' in cyber-space: rather, it is a study to determine some of the concrete limits and legal mechanisms placed on the "public sphere" and on citizens' right to freedom of expression by the concentrated ownership of Canadian newspapers.

Scope and Organisation of the Study

Jürgen Habermas, as one of the leading intellectuals of the post-World War II period, has remained a consistent voice for constructing a rational understanding of democratic societies. His work, which has influenced many fields ranging from philosophy, sociology to communication theory, holds that rational debate and consensus are - or ought to be - the driving forces of a democratic society. His consistent and staunch defence of modernity, the intellectual and historic process of the Enlightenment and the capacity of human beings to construct a rational form of democratic governance, has been unwavering.

Nevertheless, Habermas's conception of the "public sphere" is problematic. He tends to limit the "public sphere" to a sterile formula for building rational consensus through idealised communicative acts. Still, Habermas's notion of the "public sphere" is intriguing. A radicalised notion of the "public sphere" presents a unique opportunity to re-evaluate issues regarding "freedom of expression", the legitimation process of commercial speech in the context of the Charter and the problem this possesses for limiting newspaper concentration.

The object of this study is the sale and acquisition of the controlling interest of the Southam newspaper chain by Hollinger

Inc., in May 1996. This combination transformed the Canadian newspaper industry from highly concentrated ownership to super-concentrated ownership.⁴ In addition, this sale also modified and altered the democratic complexities, diversities and representations available to the Canadian public through their newspapers. However, what remains to be seen is how the constitutional protections of commercial rights to "freedom of expression" interact and impact upon the legitimacy of the Canadian "public sphere".

The central argument advanced in this thesis is that "commercial speech" has gained constitutional protection under the Charter. In terms of the media, this type of protection has allowed commercialised speech protection against government regulation over newspaper concentration. The central problem is that the courts, in early *Charter* litigation cases, extended constitutional protection to commercialised speech. In doing so, the courts granted powerful commercial interests one more avenue to directly interfere with the democratic rights of the person to be heard in the "public sphere".

This study will proceed in the following manner: Chapter One will provide an outline of the problems in materialism and current debates surrounding modernity. In highlighting these problems, I show how these two distinct spheres flow together to provide the basis for Habermas's critique of post-structuralism, post-modernism and the first generation of critical theory. In this process, brief theoretical sketches will outline the development of tensions within Marxism and various recent attempts by post-

structuralism and critical theory to overcome the problems of "economic determinism". Under-girding this discussion are the relations of the problems in the philosophy of materialism, its relation to communicative reason and to the notion of human liberation.

In Chapter Two, I deal specifically with the notion of equal and unequal rights and Habermas's theory of the "public sphere". By utilising C.B. Macpherson's insights into the construction and origins of liberal democracy, I show how the "public sphere" is intricately bound and connected to "freedom of expression" and democratic rights. Historically, the growth of bourgeois democracy and the proliferation of newspapers are linked to the growth of capitalism and modern democratic forms of governance. Therefore, my task is to suggest how commercialised speech's hegemony over the legal system threatens the already limited democratic nature of the Canadian "public sphere".

Chapter Three, is a review of critical literature on Habermas's position regarding post-structuralism, critics of his interpretation of the public sphere and a description of the relations existing between the public sphere and media that influence the development and protection for commercial speech within late-capitalism.

In Chapter Four, I analyse our constitutional history to provide a basis for my examination of the constitutional challenges that have been heard before the *Supreme Court of Canada* since the inception of the *Charter*. Further, I explore the transformation of the *Competition Act* to explain the conceptual

foundation for the *Supreme Court's* rulings regarding the *Charter*. In doing so, I show how the *Supreme Court* has elevated the right of commercialised speech over the right of an individual to "free speech". Also, I examine the court challenge by the Council of Canadians versus the Competition Bureau and Hollinger Inc. as an example of how the rights of commercial speech eclipse "freedom of expression" in the "public sphere".

In the Conclusion, I summarise the debate on newspaper concentration and its impact on the Canadian "public sphere". It attempts to delineate the impact that the *Charter* has in constraining citizens' rights while expanding commercial rights. I realise that there is much work to be done in this area, but, through this study, I hope to show how alternate conceptions of the "public sphere" can be developed to understand and build alternatives to the hegemony of increasing newspaper and media concentration.

I hope the reader will find the study important in a number of ways. I try to provide a much needed contribution to the debate surrounding the notions of the public sphere, freedom of expression and newspaper concentration in Canada. What follows is an attempt to advance the development of a critical perspective on newspaper concentration, the "public sphere", and freedom of expression. Ultimately, this work attempts to articulate and assess how the *Charter* has been used as one of the principal processes of limiting or deterring democracy in Canadian society.

Notes

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¹ Twain, Mark. (1992) **Weapons of Satire: Anti-Imperialist Writings on the Philippine-American War**, (Ed.) Jim Zwick, Syracuse University Press, Syracuse. p.162

² *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982 being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. s. 2(b).

³ Michael Valpy, journalist, from his May 28, 1996 column in *The Globe and Mail*.

⁴ The recent \$3.5 billion proposed take-over of Hollinger by CanWest Global is a further example of the commercial importance newspapers play in providing content for the process of "convergence" in Canadian media.

Chapter One

Problems with Materialism and the Origin of the Public Sphere

Materialism has been a prominent philosophy throughout the history of Western civilisation. As an ontological category of metaphysics, materialism is the epistemological premise that all existing objects have their true origin in the existence of physical matter. In this study, the conception that human beings have any fundamental rights is based upon the universal underlying assumption of materialism. Although a right by its nature is a social and human construct of the mind, which is then entrenched in law through the state, its existence is presupposed by the existence of material beings who possess and exercise a self-conscious knowledge of that right. Materialism is the theory that everything that exists, including the "mind" and a "right", is contingent upon the existence of matter. For Karl Marx, this led to the conclusion "that legal relations as well as forms of state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life," (Marx: 1978, 4). By stressing the "material conditions of life" as the formation of human knowledge and social relations, Marx, and consequently Marxism(s),¹ introduced a radically new conceptual framework to understand the world.

Marx's conception of materialism is derived from the philosophy of G.W.F. Hegel. Hegelian philosophy springs from an attempt to synthesise the work of Immanuel Kant and, concomitantly, to resolve the dilemmas of rationalism and

empiricism and the contradictions implicit in the philosophies of idealism and materialism. To do so, Hegel utilised rational critique in a truly modern fashion to overcome the persistent philosophic problems of the mind-body distinction. According to Richard Bernstein, Hegel's examination "found Kant's "solution" to the contradictions generated by "human reason" to be unstable and unsatisfactory – precisely because Kant failed to realize contradiction is the root of all movement and vitality," (Bernstein, 1991: 315).

For Hegel, the existence of rights and laws in the world are contingent and they gain their existence and coherence through the alienated and negative dialectical relations they have to their *Ideal* or *Spirit*. Hegel's famous thesis is that human knowledge is based upon the negation of the *Ideal*. Human comprehension of the *Ideal* only becomes possible when the *Ideal's* existence appears in the material form embodied in its realisation in human consciousness. This embodied form of reason is the alienated form or the negative form of the *Absolute*: that is, *Reason* or *Mind*. This alienated form of *Reason* is expressed in the *History* of the world by and through human beings who, through their (alienated) actions, craft the lesser material order or the conscious human form of history in the world:

It is only an inference from the history of the World, that its development has been a rational process; that the history in question has constituted the rational necessary course of the World-Spirit – that Spirit whose nature is always one and the same, but which unfolds this its own nature in the phenomena of the World's existence. This must, as before

stated, present itself as the ultimate result of History. (Hegel, 1957: 350)

As with most idealist philosophers, Hegel's philosophy postulated that the true nature of reality was based upon a realm of pure ideas, but it finds its expression in the material world through the self-unfolding of history. Be that as it may, what is important for this study is that the "negation of the negation", the central premise of Hegel's dialectical process and theory of immanent critique, which also under-grounds the logic of Marx, utilises the revolutionary concept of history as a process and as a vehicle for achieving universal understanding and knowledge – in other words, truth.

Just as Hegel turned the force of Kant's critique of reason against itself to undermine the transcendental leap of thought from the *phenomenal* to the *noumenal*, Marx utilised Hegel's concept of dialectical reason against itself to ground it in the material world. Because Hegel "conceived the negation of the negation from the point of view of the positive relation inherent in it as the true and only positive, and from the point of view of the negative relation inherent in it as the only true act and self-realizing act of all being, he has only found the *abstract, logical, speculative* expression for the movement of history; and this historical process is not yet the *real* history of man – of man as a given subject, but only man's act of *genesis* – the *story* of man's *origin*," (Marx, 1978: 108).

Marx's use of immanent dialectical critique is extremely important and, as Bernstein notes, "[i]mmanent critique has been

one of the most powerful and richest forms of critique practiced not only by Hegel but by Marx and those thinkers shaped by the Hegelian-Marxist tradition," (Bernstein, 1991: 315). The importance of immanent critique stems from the fact that its critical capacities exist as an ability to analyse theory in motion (time and space or history), but also immanent critique constantly re-deploys itself in this process and, ideally, it has the capacity to uncover the suppressed, concealed and constructed elements that are postulated as self-evident in the premises of a theory. In so doing, Marx, through immanent critique, grasped the heart of the Kantian-Hegelian dispute and attempted to resolve it in terms of class and history. Thus, Marx engaged the theories of idealism, empiricism, subjectivism, objectivism and relativism and through their active contradictions in the material world attempted to form a dialectical understanding of reality as expressions of human beings acting and living in and through history.

The legacy of Marx's immanent critique changes the entire nature of the nineteenth century philosophic dispute of materialism versus idealism. By ruthlessly engaging Hegel's concept of reason, Marx unleashed his critique to find the suppressed and concealed elements that undermined the totalising force of Hegel's conception of the material world as a lesser and alienated form of reason in nature and in society. In addition, Hegel's attempt at revealing the self-unfolding process of Ideas as the motor of history ends up collapsing under its own weight. Bernstein remarks that:

According to Marx, Hegel's concept of Reason – when relentlessly criticized and exposed – turns out to be a form of "rationalization" that masks and distorts the "real" contradictions and ruptures immanent in society and revealed by the critique of political economy. (Bernstein, 1991: 315)

By standing Hegel and his philosophy on its on feet, Marx radically transformed the nineteenth century debates surrounding idealism, materialism, history, class, society and the state. Hegel's conception of reason meant that the purest earthly rational expression of the Ideal of Reason became exemplified in the (autocratic) state. The notion of law, justice, property rights, et al., were embodied through the Prussian State and maintained through a political absolutism of the *status quo*. However, as Albrecht Wellmer notes:

Hegel's vindication of the modern state as the highest manifestation of Reason therefore was for Marx only the ideological formulation of a *problem*; the reconciliation of opposites in Hegel's theory was for Marx only a reconciliation in *thought*, while in fact it had still to be brought about practically. (Wellmer, 1985: 34)

Hegel's pollyannic view of the state and history are the principal reasons that allowed him to claim that "the real is rational, and the rational real," (Hegel, 1967: 10) and that to "him who looks upon the world rationally, the world in turn presents a rational aspect," (Hegel, 1956: 11). Thus, as Wellmer notes: "Marx was much more clearly aware than Hegel was of the catastrophic,

dehumanizing, and alienating aspects of the emerging capitalist societies of his day," (Wellmer, 1985: 34). In addition, Marx was attentive, in his critique of Feuerbach, that his conception of materialism fused consciousness as praxis in the world: whereby, human beings gain critical self-consciousness as living beings in the world and that it is in and through their actions, in their labour and in their political struggles, that history is created, but also the potential to change history occurs (Marx, 1978: 145).

The one distinctive feature of Marx's thought has been the legacy and unifying force of his conception of materialism. Nonetheless, although Marx appears to overcome the dichotomy of materialism and idealism, what is intriguing in a historic sense is how idealism has reappeared in various forms of Marxism over the years. In the 117 years since his death, diverse theorists claiming to draw on the body of Marx's writings have produced distinct and divergent forms of Marx's "immanent critique". Some of these theorists could be reasonably charged with being idealist Marxists. For instance, theorists who over-emphasise the analytic category of the economic sphere leave themselves susceptible to the charge of making it an analytic and *positivistic* first principle. It is these types and sorts of "first principle" Marxists that Marx was purported to anticipate (he was specifically rebuking his son-in-law) when he said "I am no Marxist".²

The Tensions within Marxian Materialism

Marx's thought influenced the formation of at least two distinct schools of Marxian materialism. One side of the

materialist debate focuses on the empirical and systemic quality of Marx's writing. This stream focuses heavily on the later work of Marx, and specifically the later work of Engels and his positions on historical materialism or "dialectical materialism" – a term that Marx did not use, (Williams, 1988: 107-108). Engels's position on historical materialism is generally associated with "scientific" Marxism and explicit examples can be found in the writings of Lenin and Stalin. From a methodological perspective, this is the school of Marxism that generally legitimises its claim to universal truth upon its assumed empirical basis. It promotes itself as a "scientific method" for understanding Marxism and producing absolute knowledge and certainty regarding history. Also known as classical or "orthodox" Marxism, it has been roundly criticised by Marxists, post-Marxists and non-Marxists. Usually the argument advanced by critics is that this form of Marxism is committed to an idealistic conception of dialectical materialism: one that elevates materialism to a "first principle" or "totalising" theory. The force and power of orthodox Marxism has been significant in the twentieth century and has been central in the debates surrounding what was known as "really existing socialism".

The origins of "orthodox" Marxism can be found in the stress placed on a particular reading (or misreading) of Engels's letter to Joseph Bloch.

According to the materialist conception of history, the *ultimately* determining element in history is the production and reproduction of real life. More than this neither Marx nor I

have ever asserted. Hence if somebody twists this into saying that the economic element is the only determining one, he transforms that proposition into a meaningless, abstract, senseless phrase. The economic situation is the basis, but the various elements of the superstructure...also exercise their influence upon the course of the historical struggles and in many cases preponderate in determining their form. There is an interaction of all these elements in which amid all the endless host of accidents...the economic movement finally asserts itself as necessary. (Engels, 1978: 760-761)

What has usually been over-emphasised in this passage is that the "economic movement" is viewed as the motor of history and, the "last instance" (Althusser, 1969), is where it "finally asserts itself as necessary". Accordingly, and in contradiction to the dialectic fluidity of Engels's intention and position, it is only by placing emphasis on the last clause of this passage that an "economistic" conception of history gains coherence - which excludes the explicit prior admonishment that Engels offers that "history is the production and reproduction of real life". Moreover, it is somewhat ironic that Marx never used the term "dialectical materialism", which "scientific" Marxists are so fond of using. In addition, it is crucial to point out that the economistic notion, which has led to popularised and spurious charges from various quarters suggesting that Marx's ideas are positivistic or possessing theological parallels, are based upon this fundamental oversight or wilful act of ignorance among the adherents of "scientific" Marxism and the vulgar critics of Marxism.

There are other schools of materialism that have not focused on the "scientific" first principles of Marx's work, but on the practical and pragmatic conditions through which human beings struggle to produce and reproduce themselves in and through history. Unlike "orthodox" Marxism, these variants of Marxism reject the "objective" and "universal" laws of dialectical materialism in favour of the value of human labour and praxis in constructing history and social life. Similar to various forms of existential philosophy, these forms of Marxism emphasise the primacy of human beings acting in and transforming the natural world. It is through collective and individual actions that human beings create the essential and material conditions for the production, re-production and the continuance of the species. In addition, this school emphasises the fact that human beings create history. It largely draws its legitimacy from Marx's famous remark, in **The Eighteenth Brumaire of Louis Bonaparte**, that "men make their own history," (Marx, 1978: 595). Unfortunately, some advocates of this type of practical Marxism, and certain streams of neo-Marxism, forget the complexity of Marx's dialectic thought. By over-emphasising that human beings make their own history, what is generally lost is Marx's insistence that:

[T]hey do not make it just as they please: they do not make it under circumstances chosen by themselves, but under circumstances directly found, given and transmitted from the past. The tradition of all the dead generations weighs like a nightmare on the brain of the living. (Marx, 1978: 595)

By ignoring the historical and social formations of the past, and Marx's dialectical conception of history, particular forms of Marxism and neo-Marxism can stray and find themselves on the same slippery slope that has led to voluntaristic and idealistic conceptions of history.

Pure voluntarism emphasises the role of human intention and will in the creation of history. A strand of this form of voluntarism exists in Hegelian idealism and Hegel's notion of "world historical individuals" and "great historical men" such as Cæsar and Napoleon, (Hegel, 1956: 31-30). Unlike Marx who wanted to "organise the myriad Lilliputians and arm them with poisoned arrows" (Keynes, 1973: 34) and bring about a revolutionary transformation of society, voluntarism is completely compatible with the individualistic trajectory of nineteenth century liberalism and twentieth century neo-liberalism. Voluntarism emphasises the individual will of women and men, and the choices they make that are detached from history and from the material conditions and social relations with other human beings. Put simply, voluntarism views history (and implicitly capitalism) as nothing but the individual acts of human beings detached from all previous social circumstances, and as an *ahistoric* passage on a page that records individuals acting *ex nihilo* - from nothing - to create history and bring the present into being.

Many of the divergent theories within and outside the Marxist tradition have actively constrained the process and capacity of Marx's ideas to transcend and confront the contradictions of late-twentieth century 'triumphalist' capitalism. Disputes among

practitioners and opponents of Marxism have fragmented much of the value of Marx's progressive notions of immanent critique. In doing so, they have intentionally or unintentionally encumbered Marx's call, which was made famous in his 1844 letter to Arnold Ruge, for "a *ruthless criticism of everything existing*," (Marx, 1978: 13). In the redundant process of attempting to establish an "authoritative" and "canonical" version of Marxism, the diverse forms of Marxism have spent more time bickering over their "correctness", and their priestly interpretative position over Marx's writing, than pursuing the internal complexities and contradictions that motivated his thought and informed his remarkable insights into the transformative quality of human beings in history (Mills, 1962: 41). Although it is obvious that Marx produced systemic and, perhaps, even "scientific" studies of history and capitalism, it is also true that there is a heuristic and dynamic interpretative process explicit in his thinking that is and can be, frankly, contradictory in its quality. No matter, Marx can be accused of being "deterministic" in many of his works, but the inquisitive flexibility of his thought demonstrates that the "totalising" characterisations of his ideas as reductivist are clearly inadequate. Unfortunately, the redemptive quality of "a ruthless criticism of everything existing" is often forgotten by many of Marx's contemporary critics. Not unlike the Cartesian process of doubt, a premise implicit in Marx's thought, where certainty is achieved through doubt and through a thorough and on going "ruthless criticism", critics often over-look this dynamic aspect of Marx's thought and they do so at their own peril.

Recent French Criticism of Marx and Marxism

In the last thirty years, post-1968, prominent French theories in post-modernism(s), post-structuralism(s) and post-Marxism have become the dominant criticisms of Marx and Marxism within French and Anglo-American academia. Although these theoretical positions are as numerous as they are distinct, they are also interrelated and they share at their core most – if not all – of their philosophical insights and sociological observations on a “structuralist” epistemology directly related to the linguistic and semiotic work of Ferdinand de Saussure.

The linguistic model of Saussure functions on a particular conception of language that is non-representationalist. The strength of Saussure's insight consists in his discovery that language is arbitrary and that the words that are produced to represent objects are completely independent from any given object, (Saussure, 1983: 67). Across languages, different words are produced to represent the same object: that is, when the same object is presented to different individuals who speak different languages the word or “signifier” that is produced to represent the object is different. Hence, for Saussure, on a comparative basis, the word or sign is completely arbitrary. What becomes fundamentally important in an epistemological sense is not the external “objective” reality that a signifier (re)presents, but the internal “structural” relationship that a signifier has to the other signifiers in the specific language or group of languages. This is usually given as the signifier-sign-signified (word-object-meaning) chain.

All recent French theories derive the substance of their epistemic force through Saussure's insight into the arbitrary nature of the signifier and the "structural" nature and constraint of language and knowledge. Because these theories break with an ontologically driven representative model of human understanding, the subject/object model or mind/body dilemma, they base their epistemic insights on the structural relationships existing within language and between signifiers and signs or the chain of signification. Thus, what becomes paramount is the meaning and the process of signification that determines the status of a sign and a signifier and their relation to the knowledge produced in this system. Once this is acknowledged, it explains at least the origins of the epistemological challenge the new French criticisms utilise in confronting Marxian materialism. In addition, this is a valuable strategy in re-thinking Marxism and lends a degree of substance to the epistemic charge that Marxian materialism is an "economistic", "totalising" and "deterministic" discourse.

In this epistemological scenario, "(post)structuralist" readings of Marx usually single out economic determinism for criticism. It is the economic determinism of Marxism that "over-determines" all other possible categories of analysis. Due to this, Marx and Marxism are positions that only lead to irreconcilable contradictions and reductivist conclusions that are circular and possess absolutely no explanatory power. This point has been acted out by different theorists and in different ways. For example, from a post-modernist perspective, Jean Baudrillard (1975) argues that Marx's immanent critique only holds a mirror up

to capitalist production and fails to transcend capitalism and comprehend the dynamic social signification that accompanies conspicuous consumption in consumer society. In so doing, Marx's analysis is only a captured and trapped negative reflection that mirrors the productivist ideology of capitalism:

The legitimacy of production rests on a *petitio principii*; i.e. [sic] that people discover *a posteriori* and almost miraculously that they need what is produced and offered at the marketplace (and thus, in order that they should experience this or any particular need, it must already exist inside people as a virtual postulation). Thus it appears that this begging of the question – this forced rationalization – simply masks the internal finality of the order of production.
(Baudrillard, 1981: 71)

As a result, for Baudrillard, Marx's thought comes full circle and proves that his ontological understanding of history is based on a "materialistic conception" and on tautological reasoning that is fundamentally flawed, idealised and at least as problematic as the transcendental Hegelian philosophy that he sought to displace.

In a similar vein, Jean-François Lyotard suggests that Marx's criticisms of history are "meta-narratives" – *metarécits* – which tell a grand story or fiction. However, these grand master narratives or meta-narratives are incapable of transforming the logic behind technological culture and of providing a conceptual capacity to go beyond late-capitalism. In fact, Lyotard argues that criticisms of this state of "postmodernity" lead us to a situation where the political state acts instrumentally to legitimise, re-enforce and entrench the parameters and forms of

late-capitalism. Essentially, Lyotard is arguing that the state is the agent of history and a critical reading and understanding of capitalism only functions as a legitimating process:

[I]n countries with liberal or advanced liberal management, the struggles and their instruments have been transformed into regulators of the system.... Everywhere, the Critique of political economy (the subtitle of Marx's Capital) and its correlate, the critique of alienated society, are used in one way or another as aids in programming the system. (Lyotard, 1984: 13)

Lyotard argues that by understanding the governing ideology of late-capitalist society, instead of providing the crucial knowledge for a progressive politics, a critical understanding only broadens and entrenches our subjugated understanding of the dominant forms of repression and oppression embedded in capitalism and the modern state.

Comparatively, from a post-structuralist point of view,³ Michel Foucault believes in an almost Nietzschean-like eternal recurrence of Marxist debates and that we are condemned historically to history and to an almost endless debate about discourses and of listening and hearing what has already been said before. Although I think Foucault has a far more sympathetic and sophisticated reading of Marx, certainly when compared to most of his French contemporaries, he has a definite "economistic" bias that castigates all contemporary Marxism. For Foucault, in this well known remark, the debates surrounding Marx and Marxism reached their zenith a century ago and there has been very little accomplished since:

Marxism exists in nineteenth-century thought like a fish in water: that is, it is unable to breathe anywhere else. Though it is in opposition to the 'bourgeois' theories of economics and though this opposition leads it to use the project of radical reversal of History as a weapon against them, that conflict and that project nevertheless as their condition of possibility, not the reworking of all History, but an event that archaeology can situate with precision and that prescribes simultaneously, and according to the same mode, both nineteenth-century bourgeois economics and nineteenth-century revolutionary economics. The controversies may have stirred up a few waves and caused a few surface ripples; but they are no more than storms in a children's paddling pool. (Foucault, 1965: 274)⁴

From a post-Marxist perspective, Ernesto Laclau and Chantal Mouffe, argue, in their overall critique of Marx's "realist" epistemology, that class and the base/superstructure model are assumed as articles of faith and are "essentialistic". For Mouffe and Laclau assert that we have historically entered a post-Marxist condition and argue that:

[T]he epistemological niche from which 'universal' classes and subjects spoke has been eradicated, and it has been replaced by a polyphony of voices, each of which constructs its own irreducible discursive identity. This point is decisive: there is no radical and plural democracy without renouncing the discourse of the universal and its implicit assumptions of a privileged point of access to the 'truth' which can be reached only by a limited number of subjects. (Mouffe and Laclau, 1985: 191-92)

Generally, the post-modern and post-Marxist critiques of Marxism hone their critical edge on the vulgar Marxism of the Second International and ossifying remains of post-Soviet Marxism. However, no matter how valid these criticisms of "economic determinism" are, it is extreme to suggest that history, class and social practices are merely a chain of signifiers in a signification process. Indeed, it is one thing to demonstrate that Marxian analysis of social formations and their embedded belief system can be "deconstructed" into random fields of discourse, but quite another to suggest that this is all there is to social life. Obviously, unless one does not mind being labelled a solipsistic idealist, there must be a way to connect, mediate and interact with the social world in and through language and not just accept one's fate as an "irreducible discursive identity". Moreover, if this is the final position for the 'linguistic freedom fighters', against the curse of the ontologically driven meta-narratives of Marxism and history, and the liberation of the "floating signifier", then one can't help noticing the striking similarity these linguistic positions share with other forms of "really existing" idealism.

Although many of the post-modern, post-structuralist and post-Marxist arguments are intriguing, they fail on at least three counts. First, what Marx's critics generally overlook is the dynamism of the base/superstructure metaphor. Both the economic base and the superstructure osmotically coalesce and exist in a state that is highly complex and which is dialectically heterogeneous. Contrary to the popularised monolithic claims of

totality, and if we take Engels at his word above, Marx's economic base is composed of two distinct but concomitant activities: the forces of production and relations of production. The forces of production refer to a society's inherited means of material reproduction, its techniques, its productive skills and its resources. The relations of production encompass the social organisation or formation of the forces of production and the manner in which the forces of production are utilised, allocated and distributed. Although many of the recent critiques of Marx's purported "economic determinism" may have a certain validity, they are ignoring the crucial aspect of what Marx meant by the relations of production. As a result, it is easy to see how these critiques – in an almost Kantian inability to mediate between ideas and the world – become polarised and fall into the bottomless conceptual abyss between the empirical world and a linguistic world constituted by "discursive formations," "erasure" and "floating signifiers". Specifically, in the case of Mouffe and Laclau, it allows them to renounce universally "the discourse of the universal and its implicit assumptions" without grasping the irony in the process of achieving their universalised "eradication" of classes or subjects to construct their universal chorus of a "polyphony of voices".

Second, identifying Marx with the "economistic" interpretations of his ideas by other Marxists is to equivocate and to blur the distinctions between them. This argument functions on the level of *reductio ad absurdum*. The critics who conflate Marx's ideas solely with the economistic interpretations

by other Marxists would further the discussion if the distinctions between different Marxisms were at least recognised and further developed. By simply situating Marx wholly in the camp of "scientific" and "orthodox" Marxism, contemporary critics of the base/superstructure metaphor flatly refuse to recognise potential alternatives. In reducing Marx's ideas to reductionist and economistic conceptions of the world, these critics consciously ignore the possibilities of alternatives as well as the previous attempts by non-mechanistic Marxists to grasp and build upon the complexity and richness that exists within the critical Marxian tradition.

Third, to suggest that French critiques of Marxist "economic determinism" are wrong out of hand would be a gross mistake, but it is important to emphasise the distinct and complex epistemological nature and the non-representationalist posture of the new French criticisms. For instance, unlike the more traditional ontological Marxism of Jean-Paul Sartre (1958, 1959), the new French criticisms reject the ontology of the subject and object and of subjectivist and humanist premises. Because the new French critiques of "economic determinism" based their insights and their strength through an epistemological emphasis embedded in Saussurian linguistics, their emphasis on language becomes a position that is as circular as the ontologically based economism they despise. By comparison, Sartre's reconstructive project of Marxist-existentialism, which regards "an "anti-Marxist" argument [as] the apparent rejuvenation of a pre-Marxist idea" (Sartre, 1963: 7), ought to lead toward an ontologically grounded and

"heuristic" path that would progress towards "socialism with a human face". In short, Sartre's conception is centred on a conception of Marx's work that affords primacy to human subjectivity. Although there are serious flaws in building an ontologically reconstructive Marxism upon notions of "humanism" and "subjectivity", it is my opinion that in an attempt to achieve "objectivity" and "certainty" the new French theorists and their linguistic criticisms of "anti-representationalism" bend the stick too far the other way.

Moreover, in an effort to displace the traditional phenomenological model of knowledge based on relations between the subject and object, the post-modern, post-structural and post-Marxian critiques sweep aside ontological problems of representation (the subject/object distinction), which include "subjectivist" and "humanist" issues, and replace them with a false epistemological certainty. By building their theories on the structuralist model of language, these theories create a discursive space of synchronic (structural) relations between signs and signifiers and jettison pesky problems of the external world, i.e., hunger, poverty, war, pain. Through their analysis of language, they construct their own conception of the *objective* conditions for knowledge: an objective knowledge of the "text" that is untainted by subjective 'humanistic' concerns in the murky realm of diachronic (historical/class) relations. Generally, the linguistic model of post-modern and post-structuralist work creates the principal conceptual break that dissolves all knowledge into a "textual" or "inter-textual" relationship that

requires neither a sufficient or a necessary ontological existence in the social world.

In the final philosophical instance (if that's possible), most – but not all – of the recent French theories do away with the messy lived experience of social history (class) to build linguistic certainty and knowledge, which, however interesting, is highly suspect. The recent French theories, as suggested, have more in common with forms of idealism and are much closer logically to the "economistic" and "deterministic" Marxism they criticise. Rather than retaining the ontological and epistemological dilemma and incorporating linguistic issues in an analysis of what Marx laid bare about class and history (subject/object), recent French criticisms throw the baby out with the bath water. Put another way, the new French theories soberly abstain from what they regard as the drunken Teutonic meta-narrative(s) of Marxism and history and opt only for the "objectivity" of the sign and the text.

Thus, post-modernism(s) and post-Marxism compose a future where history is void of agency (or subjects) and these critics look forward on to an objectified world filled with an infinite play of signs. Ironically, this is the same space (I believe, contrary to the radicalised interpretative wishes of post-modernists and post-Marxists) that has recently been invaded by neo-conservative ideas that capitalism has finally brought about an "end-of-history," (Fukuyama, 1989: 17). Unfortunately, it is also the space where, in the process of unburdening itself from the baggage of history, the post-modernists and post-Marxists

abandon the contradictions of the twentieth century and through a process of reification attempt to attain a degree of "objective" certainty within a "post-modern condition", (Lyotard 1979).

Moreover, this is the position and condition that allows them the luxury and knowledge to claim that the "the year two thousand will not happen," (Baudrillard, 1984: 18).

As we passed the *fin de millennium*, and although we may agree that the year 2000 is an arbitrary point in time, or a sign, it is nonetheless a socially constructed and consciously conceived moment in time. It is one that we mutually share and is part of a conceptual framework that we conventionally refer to as creating and existing in history. The idea that history and the "material reality" of that history can be made irrelevant by the stroke of a pen or by the massive crash of computer programmes, because of faulty inception dates, or by the metaphysical de-construction of a "sign" is clearly unreasonable. Simply shifting the epistemic nature of the debate away from ontological problems surrounding (re)presentation and the method of how truth is (re)presented to one of 'textual' truth or 'non-representationalist' truth does not solve the dilemma.

The linguistic turn afforded by structuralism and post-structuralism is a powerful force. Its capacity to critically engage, re-engage and reveal the conventions and tropes undergirding the 'self-evident' epistemic assumptions of how social theories are constructed – and can be "de-constructed" – is crucial to any truly critical understanding or interpretation of late-capitalist society. However, as Jacques Derrida suggests, in

Specters of Marx, and keep in mind this is in the wake of post-modern and post-structural criticisms, neo-conservatism's triumphalistic rant, post-Soviet neo-liberalism and the victory of the "market", and the poly-vocal pronouncements of post-Marxism, "what remains irreducible to any deconstruction, what remains as undeconstructible as the possibility itself of deconstruction is, perhaps, a certain experience of the emancipatory promise," (Derrida, 1994: 59) and this promise requires us to ask where is Marxism leading us and where is it to be led? Moreover, and not surprisingly, this is the same emancipatory promise offered to humanity to lose one's chains and "forever [free] the whole of society from exploitation," (Engels, 1978: 472). This is also the epistemic and ontological certainty that led Marx and Engels to conclude:

All that is solid melts into air, all that is holy is profaned, and man is at last compelled to face with sober senses, his real conditions of life, and his relations with his kind. (Engels and Marx, 1978: 476)

What must ultimately be recognised as crucial in this debate is the thoughtful insights afforded by non-representationalist epistemology and that they should not be seen as antithetical to the work of Marx and Engels. The capacity of a non-representationalist epistemology to critically interrogate Marx and Engels and "economistic" and non-mechanistic Marxism forces all of us to recognise the constructed epistemic nature of our premises: that is, premises that were thought to be ontologically "self-evident" are in fact evidence of the human mind at work. A

non-representationalist epistemology urges "economistic" and non-mechanistic Marxists to face with sober senses their *real* conditions, relations, and the socially constructed nature of language, knowledge, race, gender, class and history. However, to move radically beyond this point as many post-modernists and post-Marxists suggest and to drift endlessly and *idealistically* on a post-modern epistemic sea listening to the Sirens of a polyphony of voices is to stretch the tether of *reasonable* criticism and credulity beyond any acceptable conceptual limit. As Marx pointed out when criticising the Young Hegelians, and it is just as valid when criticising a non-representational approach to knowledge:

The most recent of them have found the correct expression for their activity when they declare they are only fighting against "phrases." They forget, however, that to these phrases they themselves are only opposing other phrases, and that they are in no way combating the real existing world when they are merely combating the phrases of this world. (Marx, 1978: 149)

Frankfurt School and Critical Theory

The concerns and issues of late-capitalism are intricately woven into the fabric of modernity. Thirty years ago, the epistemically driven ontology of critical theory experienced at least as powerful an influence over a sympathetic generation of students, intellectuals and academics as non-representationalist post-structuralism and post-modernism does today. As in most philosophical movements, what generally defines the passing of one philosophical system is not a final confrontation between a newer and better theory. Rather, the displacement of one philosophical

system over another usually occurs when one set of philosophical issues exhausts itself and cannot solve the problems that it initially set out to resolve. What generally happens is a new theory comes along and gains ground and finds new enthusiastic adherents who – as much as they may deny it – become entranced by the latest intellectual trend or fashion. Nonetheless, the Frankfurt School⁵ and post-modern and post-structuralist theories of modern society share more in common than either of their followers generally acknowledge. For instance, both streams interrogate similar themes and objects: the social reality and the construction of the knowledge in modern society, in science, and in the creation of institutions and culture under the rule of late-capitalism.

It is crucial to acknowledge that the Frankfurt School, far from reducing the tome of Marx's work to simply an expression of "economic determinism", and similar to different post-structuralisms (specifically Foucault), engaged the contradictions of capitalism to explore the modernisation and institutionalisation processes of late-capitalist society. It is an academic oddity that the work of the Frankfurt School and of Foucault are rarely seen as being similarly let alone sympathetic to one another. This is generally since critics on both sides of the fence refuse to acknowledge the similarity of the object – or if you prefer the "text" – under investigation. Foucault was even known to lament that his exposure to the Frankfurt School was so sparse:

On a number of occasions Foucault complained that his own education in France offered no introduction to the work of the Germans: "When I was a student I can assure you that I never heard the name of the Frankfurt School mentioned by any of my professors." (Poster, 1989: 17)

In a similar vein to the French critiques of Marxism, the Frankfurt School challenged the economic determinism of classical or orthodox Marxism. But, by attempting to build upon the legacy of Marx, "its members attempted to revise both the Marxian critique of capitalism and the theory of revolution in order to confront [the] new social and political conditions which had evolved since Marx's death," (Bronner and Kellner, 1989: 1). However, compared to the present French "textual" and linguistic criticisms of the economistic and totalising discourses of Marxism, the Frankfurt School's challenge to "orthodox" and economistic Marxism came from within the dialectically and ontologically driven epistemic tradition of immanent critique. Moreover, unlike some of the Nietzschean strands of the new French post-structuralist and post-Marxist theories, which have led in some circles to the full-scale rejection of Marx and Marxism, the Frankfurt School re-engaged Kant's notion of rational critique, Hegel's notion of the dialectic, and utilised an informed version of Weber's notion of "instrumental rationality" to continue to pursue Marx's "ruthless criticism of everything existing".

In an effort to overcome the legacy of "economism" in "scientific" and "orthodox" Marxism, critical theory focuses on an elaboration of how society's super-structure expresses, exercises

and interpenetrates itself throughout the structure(s) of the economic base. Instead of renouncing the economistic discourse as an over-totalisation, the Frankfurt School employs dialectical reason to broaden and extend critical rational analysis of the spheres of science, art, culture and the economy to understand the contradictions that preserve capitalism and comprehend how these spheres coalesce and allow exploitation to thrive and sustain capitalism through a state of perpetual crisis. By disentangling economistic Marxism from the orthodoxy of an impending apocalyptic collapse of capitalism, which is precipitated through the diminishing law of returns, critical theory was one of the first attempts to examine and explain how capitalism nurtures and feeds off distortions of social life and the social sphere of society to sustain and perpetuate itself.

The combined cataclysms of the First World War and The Great Depression, which should have proved the death-knell for capitalism, provide ample evidence of capitalism's resiliency. The fact that capitalism surged forward, even when it was confronted with cataclysmic world events, called into question the truth of the Marxian prediction that capitalism would collapse. As Stanley Aronowitz remarks, the Frankfurt School critics appeared "[a]s social commentators who worked within a tradition that regarded the working class as the driving force of social change, [but they could not fail] to be impressed by the collapse of the Socialist and Communist left in the wake of working class acquiescence to the onslaught of European and Japanese fascism in the 1930s," (Aronowitz, 1992: 328). In addition:

The crucial works of the Frankfurt Institute... were inspired, in part, by the apparent success of Western capitalism not only to survive the ravages of World War II but to emerge stronger than ever, at least within its own sphere. (Aronowitz, 1988: 127)

As well, rather than the working class revolting to create a new social order in the twentieth century, authoritarianism and totalitarianism became entrenched forms of scientific governance in modern industrial states and became the fundamental expressions of instrumental rationality of a state's bureaucratic apparatus:

The critique of science and technology that reemerged in the 1950s and 1960s hinged on the judgment, shared by many but most forcefully articulated by the Frankfurt School, that reason in "advanced industrial societies" had become identical with instrumental rationality. According to this claim, reason – the Enlightenment's wager for human freedom – had instead been conflated with the domination of nature. (Aronowitz and DiFazio, 1994: 59)

The capacity to comprehend the transformation of rationality from its Enlightenment form, which gave rise to the possibility of human liberation and modern democracy, to the distorted instrumental form of reason under the banner of scientific progress, coupled with rampant capitalism, is one of lasting insights and challenges of the Frankfurt School.

It is this quality of analysis that allowed the Frankfurt School to create an intellectual space that allowed a distance to occur in which historical ideas and the history of ideas could

form a critical analysis of consumer society. Fundamentally, their philosophic insights into the formation of the "scientific" and instrumental rationality created the ability to scrutinise modern industrial society and its post-scarcity conspicuous consumption. Likewise, in an attempt to understand the ideological impact of technology and the creation of a culture of conspicuous consumption, critical theory produced a radical conceptual inquiry into how scientifically driven capitalism constructs and re-constructs the sphere of modern human consciousness, every-day existence and the operation of rationality. For Herbert Marcuse, this insight allows for the inherent conflict between society, science and late-capitalism to be grasped:

The parallel between social development and scientific development discloses a common principle: efficiency. The scientific method sees in this principle the most certain warranty of its correctness. But there isn't, there couldn't be, efficiency *per se*! In the social process, the end [of efficiency] is the production of consumer goods, which purports to satisfy needs and an exchange value which integrates subjects and objects according to a universal, quantifiable standard. It seems, however, that science wasn't originally indebted to such ends; this is a great illusion. (Marcuse, 1989: 123)

According to many critics, the later works of the first generation of critical theorists and their epistemic analysis concerning the domination of society by technologically driven late-capitalism leads to the final exhaustion of rational critique. In addition, the self-proclaimed analysis of most of

the first generation of critical theorists came to the same conclusion: that is, that the modernising impact of the Enlightenment, including Reason and the entire modernisation process of science, only concludes in producing a perpetual state of domination and the rule of instrumental reason over the "life-world". Put simply, the later works of Adorno, Horkheimer and, to varying degrees, Marcuse are burdened with a fatal degree of fatigue and hopelessness about the future of humanity and the status of universal reason. According to this conclusion, enlightened dialectical reason becomes nothing but the subjugated and positivistic conclusions of instrumental rationality. Reason and the capacity of rationality to "enlighten" only ends in distortion and fundamental contradiction. This conclusion undermines the initial premises of free and enlightened individuals and the power of human rationality that critical theory sought to preserve and strengthen. In the final instance, the critical theorists' concept of reason and rationality, which had initially been born during the Enlightenment and had been capable of throwing off the oppressive and arcane yokes of theology and feudalism, was transformed into an instrumental tool used to distort and subjugate reason and ushered in the terror of totalitarianism, authoritarianism, capitalism and all the other horrors of humankind's most violent century.

The first generation of critical theorists can lay at least part of the blame for the problematic nature of their conception of reason and human consciousness directly at the feet of Marx and Engels. Marx and Engels, in spite of their immense critical work

and their tremendous insights into history and society, caused considerable confusion regarding their conception and status of human consciousness. At times, Marx and Engels's work appears to be almost intentionally ambiguous. For example, there are moments when human consciousness appears to Marx as simply the empirical template - the *tabula rasa* - that is given its form by the information stamped upon it by the external natural world. That is, the substance of the human mind is a passive entity and it is only given its form, content, function, awareness and consciousness by an already pre-determined structure impressed upon it by the external world. For example:

To Hegel, the life-process of the human brain, i.e., the process of thinking, which, under the name of "the Idea," he even transforms into an independent subject, is the demiurgos of the real world, and the real world is only the external, phenomenal form of "the Idea." With me, on the contrary, the ideal is nothing else than the material world reflected by the human mind, and translated into forms of thought. (Marx, 1986: 29)

Ironically, it can be argued cogently that Hegel - albeit Marx frames his comments here somewhat sarcastically and idealistically - is giving a greater degree of agency and subjectivity to the human mind in this passage than does Marx. Moreover, Engels and Marx are known to repeat this error elsewhere, arguing that ideas and consciousness are "sublimates of their life-process, which are empirically verifiable and bound to material premises" and are "ideological reflexes and echoes of this life-process," (Marx and Engels, 1978: 42). The objectification of the mind as merely a

re-presentation, an echo or a reflex of the external world, leaves very little room for the capacity of the individual – the person who possesses that mind – to be an agent in, of, and through history.

However, Marx equivocates on the passive nature of the mind elsewhere and argues the exact opposite: that is, he is conscious of the capacity of human beings creatively, intentionally and consciously to shape their world and, as active agents and participants in the creation of history, to shape their future.

A spider conducts operations that resemble those of a weaver, and a bee puts to shame many an architect in the construction of her cells. But what distinguishes the worst architect from the best of bees is that the architect raises his structure in the imagination before he erects it in reality. At the end of every labour-process, we get a result that already existed in the imagination of the labourer at its commencement. (Marx, 1986: 174)

It is the capacity of human beings to intentionally form and construct, to build – but, also to destroy – and to fundamentally imagine a *different* world than the one they are given that constitutes (for lack of a better word) human *nature* and agency.

If there is one legitimate charge that sticks against the first generation of critical theorists, then, it is that their ontological conception of reality and human consciousness forgets the imaginative and creative capacity of average human beings. Where Marx could see the creative genesis at work in the worst architect, generally, the Frankfurt School theorists see only the

incompetence of human nature. Where Marx perceived the creativity expressed in the labour of the average person as an extraordinary act and as a potential force for human liberation, the Frankfurt School saw mass society, the totalitarian rule of instrumental reason and the accumulation of dead labour as the final result of technological capitalism.

The first generation of critical theorists' vitality traced and filled in the negative reflection of late-capitalism and technological society and their work has had a tremendous impact in broadening our understanding of the inherent nature of instrumental rationality in late-capitalism. However, no matter how much their work allows us to increase our knowledge of an increasingly instrumentalised world, the first generation of critical theorists hold out little hope that the world can be changed. In the end, the first generation of critical theorists sees the modern world as a place of fathomless estrangement and its conclusions regarding the future of humanity are ones of profound pessimism. Walter Benjamin's description of the angel of history anticipated his former Frankfurt School colleagues' distress and dismay:

Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. He would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. This storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him

grows skyward. This storm is what we call progress. (Benjamin, 1989: 256)

It is within this maelstrom called progress and modernity that Jürgen Habermas has attempted to re-affirm the project of Enlightenment and push the limits of critical theory forward. It is to his insights regarding communicative reason that we now must turn.

Habermas: On Communicative Reason

Habermas's theories regarding communicative reason and the public sphere attempt to broaden and enrich the conceptual framework that informs our understanding of late-capitalism. His insight into the history of democratic development and democratic governance allows for the formation of a rational, non-coercive, egalitarian and a holistic critique of modern society. In his work, he traces a path to re-configure and rehabilitate the concept of *enlightened* reason and to reinvigorate the heritage of critical theory and the practice of democracy in the twentieth century. Unlike the first generation of critical theorists, Habermas's conception of "modernity" or modern society and late-capitalism, although not un-problematic, does not break down into either the absolutism of "economic determinism" or the cultural and historical pessimism of the founding members of the Frankfurt School. In a sense, Habermas maintains and holds on to the creative insights that Marx saw in the worst architect and finds inspiration in the ordinary demonstration of human beings communicating with one another and using their reason to govern their actions and to arrive at solutions to everyday problems.

Habermas has had a tremendous influence in providing unique and crucial insights into understanding the formation of modernity and how it functions. Habermas thinks that much of the impasse that occurred in the Frankfurt School's attempt to resolve the base/superstructure dilemma was a result of grounding observations on the wrong object: the alienated individual of industrial society. Most Marxism based the conception about the nature of human society on the capacity of human beings to labour and produce. For Habermas, what should be central to any debate about the nature of society was not the means of production, but the deep underlying communicative capacity of human beings to mutually organise, share and express their ideas in the practical co-ordination of their everyday lives and through the exercise of their labour.

Habermas maintains a critical ambivalence to economic orthodoxies and the pessimistic conclusion and legacy of critical theory. His strategy, and his successes, in over-coming these interpretations exist in the re-constructive capacity of reason and rational critique to incorporate the inherent communicative capacity of human beings. Habermas's aptitude in this area has allowed him to imagine a different ontological, epistemological and communicative conception of human understanding. In addition, he attempts to go beyond the (false?) dilemmas posed by the projects of the traditional critical theory (the phenomenologically driven ontological models), but also the singularity of the approach to knowledge pursued and offered by post-structuralism and post-modernism (the newer non-

representationalist or "textual" epistemologically driven models). His work is dedicated to grappling with and explaining what he sees as the intrinsic communicative capacity of human beings that gives reason the power to create both ontological and non-representationalist approaches to human knowledge and understanding. In short, communicative reason is a third way or "third path" (Habermas, 1985: 196) to understand and restore the status and critical capacity of human rationality and the concept of enlightened reason in modernity.

Habermas's work apprehends and exemplifies the best of the liberatory potential of the Frankfurt School, but it also attempts to account for their failure(s), while incorporating the validity of the linguistic turn of post-modern and post-structuralist positions. However, his main point is to advocate the capacity to produce a cogent analysis and understanding of the context of instrumental reason in modernity and enliven and reinvigorate the concept of a critical capacity for reason through the existence of enlightened communicative action. Habermas's communicative approach utilises concomitantly a traditional but also a different concept of "enlightened" reason. According to Peter Dews:

Habermas's innovative break with the earlier Frankfurt School tradition consists in his argument that the cognitive and the instrumental relationship between subject and object, and the accompanying form of rationality, which have been a central preoccupation of modern philosophy, must be seen as embedded in a broader communicative reason which is implicit in the intersubjectivity of dialogue, and to which subjects must conform in order to achieve

mutual understanding and coordinate courses of action. (Dews, 1987: 153)

Habermas's point is to indicate that the pessimistic conclusions of the Frankfurt School, and specifically the "negative dialectics" and conclusions of Horkheimer and Adorno, are derived from a category mistake. It is their obsession with instrumental rationality that ultimately excludes and marginalises any and all other imagined and possible forms of reason capable of creating a liberatory politics. As Habermas notes, Adorno and Horkheimer's analysis ends with a situation where:

The human race has removed itself even further from its origins in the world-historical process of enlightenment, and yet it has not dissolved the mythic compulsion to repetition. The modern, fully rationalized world is only seemingly disenchanted; there rests upon it the curse of demonic reification and deadly isolation. In the paralyzing effects of an idling emancipation is expressed the revenge of primordial forces upon those who had to emancipate themselves and yet could not escape. The compulsion toward rational domination of externally impinging natural forces has set the subject upon the course of a formative process that heightens productive forces without limit for the sake of sheer self preservation, but lest the forces of reconciliation that transcend mere self-preservation atrophy. The permanent sign of enlightenment is domination over an objectified external nature and a repressed internal nature. (Habermas, 1990: 110)

Or put another way, Habermas contends that Horkheimer and Adorno's analysis concludes that:

Reason itself destroys the humanity which it had made possible in the first place – this far-reaching thesis is substantiated in the first excursus, as we have seen, with the argument that the process of enlightenment is from the very beginning dependent on an impulse of self-preservation which mutilates reason because it can only make use of it in the form of purposive-rational domination of nature and instinct, i.e., in the form of instrumental reason. This does not yet prove, however that reason remains subject to the dictates of purposive-rationality even in its *most recent manifestations*, i.e., in modern science, in the universalist conceptions of justice and morality, and in autonomous art. (Habermas, 1982: 17)

Similarly, Dews points out: "The failure of Adorno and Horkheimer, Habermas suggests, consists in not distinguishing between the rationalization of the social life-world, and the particular, pathological form of the process of capitalist modernization which, despite its non-class-specific effects, must ultimately be rooted in the dynamic of class conflict," (Dews, 1987: 154). Because Horkheimer and Adorno turn away from a socialised conception of labour to an understanding of the world based on and through an alienated individual conscience, they lose the dialectic capacity and social basis to move beyond their isolated pessimism regarding the future of human reason. As Habermas points out:

Horkheimer and Adorno have, like Foucault, described this process of a self-overburdening and self-reifying subjectivity as a world-historical process. But both sides missed its deeper irony, which consists in the fact that the communicative potential of reason first

had to be released in the patterns of modern lifeworlds before the unfettered imperatives of the economic and administrative subsystems could react back on the vulnerable practice of everyday life and could thereby promote the cognitive-instrumental dimension to domination over the suppressed moments of practical reason. The communicative potential of reason has been simultaneously developed and distorted in the course of capitalist modernization. (Habermas, 1987: 315)

Communicative action and reason rehabilitate the critical potential of rationality to infuse itself theoretically and practically through normative action. Moreover, unlike a narrower economistic conception of labour as the basis for human nature or the first generation Frankfurt School conception of human nature based on individual consciousness as labour, communicative reason is a social medium in which the recuperative ability to understand others and co-ordinate collective projects occurs initially in terms of communication. Thus, the social interrelation of communication can explain social interaction and the dynamic of class, but it can also critically engage the contradictions and crisis of advanced capitalism. Unlike essentialistic theories based on labour, which can trap human beings in a one dimensional world of endless exploitation and with only the ability to exercise individually through a "great refusal" (Marcuse, 1968), Habermas views communicative reason as the universal medium and social thread that can potentially and substantively understand and undertake the project of enlightenment. Habermas argues, for example, that "the theory of communicative action establishes an internal relation between practice and rationality. It studies

the supposition of rationality inherent in ordinary communicative practice and conceptualizes the normative content of action oriented to mutual understanding in terms of communicative rationality," (Habermas, 1989: 76). It is the mutually shared communicative capacity of reason that is the medium or social glue that bonds human beings together and gives shape, content and meaning to their lives and under-grounds the (potential) liberation of society. According to Bernstein, Habermas's work is:

[A] dialectical synthesis of the empirical-analytic and the historical-hermeneutical disciplines. It incorporates the study of nomological regularities and interpretation of the meaning of symbolic interaction. But, at the same time, it goes beyond both of these one-sided approaches. Habermas' synthesis comes into clear focus when we turn to the third type of cognitive interest: the emancipatory interest. This interest is at once derivative and the most fundamental cognitive interest. If we reflect upon the forms of knowledge and the disciplines guided by the technical and practical interests, we realize that they contain an internal demand for open, free, non-coercive communication. (Bernstein, 1985: 10)

It is this filament of freedom that runs through the fabric of the modern enlightenment project and, accordingly, allows Habermas to argue, quite persuasively, that the Enlightenment is an "unfinished project". Habermas's conception of society gains restorative strength from communicative action and reaches back to the liberatory political potential indicated by Marx that traces and connects communicative action to the modern project of human liberation grounded in the Enlightenment. For Habermas, the

interdependent and interpenetrating capacity of human beings' communicative reason can always potentially subvert and undermine the totalitarian forms of instrumental rationality that govern, repress and alienate human beings caught in the web of consumer capitalism. It is also the same resilient strength of human beings' communicative capacity that allowed them to construct a "public sphere" during the collapse of Absolutism and the violent and uneven formation of early capitalism. Moreover, it is the same strength of communicative action that Habermas sees as being able to build and reconstruct the "public sphere", even under the intense pressure of mass commodification and the crushing weight of late-capitalism, to carry forward the promise of human liberation and enlightenment.

Conclusion

As I hope I have demonstrated, Habermas's notion of communicative reason exists as a foundation to build a coherent social theory of the public sphere in the late-twentieth and early twenty-first century. The particular problems of materialism and the charge of "economistic" orthodoxy against Marxism, which focuses on the specific unit of analysis as labour, are ones that have a tendency to stall and stifle debates about the existence and use of enlightened reason. Habermas's work has been an attempt to breach this impasse between the economistic and reductionist interpretations of Marx and to incorporate the non-representationalist challenge to the traditional epistemology of ontology and to build upon the rich legacy of the first generation of critical theorists. His defence of the Enlightenment project

and of human reason has been unwavering. Moreover, contrary to recent post-modern and post-structuralist works, which turn away from rational critique and the use of *enlightened* or communicative reason, Habermas demonstrates the inherent capacity of human beings to create a forum for rational debate and criticism that aspires to be universal – albeit, even if it exceeds communicative reason's grasp. Habermas unabashedly embraces the potential of human rationality and the capacity of reason to confront the contradictions of late-capitalism, but, what's more, he urges us to pursue communicative reason and to create new conditions to develop the full potential of human beings and a rational understanding of democratic society.

It is within this context that Habermas has developed his interpretation of civil society as a dynamic and communicatively based "public sphere". The "public sphere" today, more than ever, is a contested space where the struggle for a democratic society occurs. The speed and inertia of a technological society allows for an almost infinite amount of information to be exchanged daily. As well, this is the space where democracy, under the rule of late-capitalism, can be twisted and seemingly distorted to unimaginable degrees. However, this is also the identical space where Habermas confirms that we must intellectually and materially pursue human liberation and, far from being undermined by the instrumentality of consumer capitalism, this is the space where communicative reason can take root and flourish.

Habermas's intervention in the debate surrounding modernity and enlightenment represents an attempt to build a unified

conception of reason – a communicative form of reason – that incorporates the objections of traditional critical theory and the concerns of non-representationalist or the linguistic turn of post-structuralism and post-modernism. Habermas's ideas are challenging and must be critically assessed. For now, however, an understanding of Habermas's communicative reason will prove essential for our next areas of inquiry: that is, materialism, law and rights.

Notes

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¹ In the body of this text, I will refer to Marxism in a qualified singular form. However, it is important to note that it would be ridiculous to suggest that there is only one true form of Marxism. Obviously, there are numerous and different types of Marxisms.

² Marx, Karl. cite. Draper, Hal. (1977) **Karl Marx's Theory of Revolution: Dictatorship of the Proletariat**. Vol. 3. New York: Monthly Review Press. p. 347.

³ It should be noted that Foucault was not fond of being labelled a "post-structuralist".

⁴ In my own opinion, the greatest expressions of the recent French theories are embodied in the histories and the histories of history that Foucault wrote over a period of twenty years from the early 1960s till his death in 1984. Foucault's theoretical insights into the "genealogical" and "archaeological" production of knowledge and the construction of "discursive formations" to analyse the history of sexuality and the institutions of the penitentiary, the insane asylum and the hospital are unparalleled. His views regarding modern science, and the institutions born out of the "Enlightenment", as effects of knowledge as power provide a systemic alternative to Marx and Marxian explanations of history. Although I think there is potentially a great deal to explore in Foucault's work, it cannot be attended to here.

⁵ The Frankfurt School is a somewhat misleading label. As Jürgen Habermas has convincingly argued: "As a school it had been alive only during a few years of American exile. If there ever has been a Frankfurt School, it did not exist in Frankfurt, neither before nor after the Nazi period, but during the thirties, in New York," (Habermas, 1985: 68).

Chapter Two

Materialism, Rights and the Public Sphere

Lorraine Weinrib has observed that constitutions are more than a set of rules governing legal, political, economic and social development. For Weinrib: "Constitutions express a country's self-understanding of its past and its present, and perhaps most importantly, its hopes for the future," (Weinrib, 1991: 336). But if constitutions are expressions of a country's self-understanding, then it is crucial to determine what the content of that self-understanding is and the contradictory meanings that have been attached to it.

As a document, the *Canadian Constitution* is not a remarkable text. Moreover, it would appear on the surface that legal interpretations of the *Constitution* and the *Charter*, and the rights declared therein, have very little to do with debates between materialism and idealism, nineteenth and twentieth century German philosophy, Canadian political economy or the concentration of newspaper ownership. Nevertheless, just as philosophical differences arise out of particular interpretations regarding history, similar interpretative debates between idealism and materialism have surfaced in constitutional disputes and in the legislation that affects the everyday life of all Canadians and their right to freedom of expression.

There are various forms of constitutional and legal interpretation, which represent our understanding of rights and the law, and at least two forms of these are based on idealist

notions of truth. The first is the older metaphysical notion of truth and, in Plato's philosophic sense, is the type of truth where ideas form, underlie and create the permanent substance - ousia - of reality.¹ Indeed, to know the "truth" consists in unmasking the physical world and its representations to uncover the essence of things in their pure form or idea.

The other idealist notion of truth is a more recent development and accompanies the formation of modern philosophy and "scientific reasoning". In this rationalist formulation of truth, Reason is an expression of the autonomous human mind discovering consciousness and sorting the nature of mind into knowable certainties that are recognisable as universal "Truth". It is the discovery of these "universal" truths that ground us to comprehend such fundamental notions as "nature", "beauty", "the good" or "the just".

In the modern philosophical scenario - the epistemic dualism summed up by the mind-body distinction - "truth" consists in methodological doubt which eventually arrives at a first principle that establishes certainty and a foundation for knowledge (Descartes, 1960: 158-159). This is the modern Cartesian formula of idealism that allows the autonomous human mind to explore and uncover ideas free from the world of material uncertainty and the realm of history, labour and politics. It is within this Cartesian epistemological structure that knowledge of corresponding ideas are alleged to lead and ground the intrinsic logic of the human mind directly in universal principles. It is traditionally within the classic form or the modern form of

idealism that we generally situate our understanding of law, rights and the hermeneutic of legal interpretation. However, when critically informed by Marxist materialism, both these epistemic strategies become historically grounded and problematic.

An orthodox Marxist perspective on law, rights and legal interpretation views the legal system within capitalism as an ideological apparatus. As such, this perspective frames idealist notions of law as formal mechanisms and instruments that protect and legitimate the entrenched property rights of the ruling class (Woodiwiss, 1990: 108). On the other hand, a less traditional materialist approach considers the development of civil society, the liberal state, universal suffrage and constitutional rights as part of a potentially progressive movement. Nonetheless, what is important to emphasise is that the universality of legal idealism is displaced for a contingent conception of rights – a conception of rights that Marx is somewhat ambiguous about.

Marx saw the social transformation from feudalism to capitalism and the development of *laissez faire* and the liberal state as a remarkably complex process. In addition, Marx and Engels indicate that the "bourgeoisie, historically, has played a most revolutionary part" (Marx and Engels, 1998: 37) in the development of the liberal state and in forming this particular stage of pre-history. Moreover, the bourgeoisie "cannot exist without constantly revolutionising the instruments of production, and thereby the relations of production, and with them the whole relations of society," (Marx and Engels 1998: 38). Thus, to understand the differences in a critical Marxian material

perspective on law, rights and legal interpretation one must recognise that it is intimately bound to "the whole relations of society".

In confronting liberal notions regarding rights several problems and contradictions come to the surface that complicate but enrich our understanding of the Marxian theory of law and rights. Traditionally, law, rights and legal interpretation have generally been regarded as subordinate constituents and as derivative of the sphere of production. It is this stream of Marxism that has had the tendency to reduce social phenomena such as law, rights and legal interpretation to effects of the economic base. Thus, legal systems and various forms of legal interpretations, at least according to the base/superstructure metaphor, are viewed as the by-products of current economic activity and the concrete material production of any given society.

Critical Marxists, generally, have attempted to distance themselves from this stream of interpretation that over-emphasises the economic base. However, while this stream is a definite improvement over orthodox or "scientific" Marxism, the impasse for critical Marxism - specifically after the Frankfurt School - is its inability to overcome the abstract separation between the "economy" and the "super-structure". Hence, this hierarchy of abstraction has the tendency to dominate our conceptual framework or at least implicitly frame our understanding of the public sphere, rights and the law as an outgrowth or a by-product of economic activity.

As I indicated in the previous chapter, Habermas sees this conceptual impasse as part of a larger predicament that consists of not pursuing the ideas and the project of Enlightenment far enough. Moreover, certain types of Marxism, by separating material production from the production of the society's super-structure, reproduce the philosophical dualism that is reminiscent of Idealism and the age-old distinction between essence and appearance. In doing so, the economy is seen to embody the essence of all social phenomena and cultural, legal, intellectual phenomena are expressed or re-expressed only as the reified ideals in the super-structure. For Habermas, communicative reason can potentially break through this reductivist tendency of economism and render more intelligible the distorted conceptions imposed by a rigid adherence to either idealism or to an idealised materialism. Habermas's concepts of the public sphere and communicative reason, therefore, suggest that theories of law and legal interpretation cannot simply be separated from the economic and social realms, but are parts of the constitutive process of social formation. In other words, instead of conceiving law, rights and legal interpretation as effects of the base/superstructure metaphor, we ought to conceive of them as inherently part of the material process of production and as part of the overall re-production of the social, economic, political and communicative order.

Idealism and Law

Idealist theories of law are rich and varied in western civilisation and can trace their roots to the ancient Greeks. In

this tradition, truth, law and nature are not seen as social constructs or as historically contingent categories, but rather as immutable universal Ideas or forms that structure the essence of all things. It is from this classification of idealism that the concept of natural law developed. Natural law proposes that underneath the surface of any legal system there are irreducible fundamental moral principles. These moral principles, moreover, are identical with the universal propositions of natural law and they are the basis for our notion of natural justice. Ultimately, natural law and natural justice are grounded on the assumption that there is a strict order to the universe and that this order - otherwise known as God - governs all movements and actions. For Thomas Aquinas, "the rational creature is subject to divine providence... [and it is] this participation of the eternal law in the rational creature [that] is called the natural law," (Aquinas, 1948: 618).

In practice, natural law distinguishes itself from posited or positive law in that it is grounded on the transcendent qualities of nature and cannot logically be subject to change. Unlike positive law, which is based on conventions, acts of a sovereign or enactments of a legislature, natural law is supposedly unchanging and reflects the inherent natural order that leads human beings towards the good and the just. Hence, when confronted with an injustice or a crime, a human being intuitively recognises the fault or the break down in the natural moral order and has no need to consult a codified body of law to know what is "just" or "right".

During the Enlightenment, idealism adjusted to the advent of "scientific reasoning" and, instead of grounding "truth" on an abstract notion of nature, a nature based on immutable forms or divine providence, idealism sought to ground "truth" in the nature and logic of the human mind. Accordingly, this form of idealism focused on the notion of Reason and on the rational capacity of human beings to reason. For Kant, it meant that our understanding and knowledge of "objective reality" and "truth" are based on the essential structure of the knowing mind, as opposed to ideas that correspond or reflect external nature or "reality". In addition, Kant held that human beings were un-enlightened and un-free not because they lacked Reason but because they lacked the will and the "resolution and courage to use [Reason] without direction from another," (Kant, 1983: 85).

Hegel built upon Kant's notion of Reason but went further in proposing that the mind, acting dialectically to accumulate knowledge, is a process of self-unfolding that leads towards freedom and to the transcendental Absolute – to Truth. Hegel held that Kant's model of knowledge meant that Reason could only recognise the ideas of being and not being – the *phenomenal world*. Therefore, Kant's epistemological model was unable to comprehend change and was unable to explain or to comprehend the transcendental process of becoming – the *noumenal world*. As indicated in the last chapter, Hegel's triadic view of knowledge attempted to demonstrate how the process of a concept's coming into being generates its opposite – its antithesis – and how this interaction creates its own synthesis. According to Hegel, the

dialectic of thesis-antithesis-synthesis generates an expression of truth that is closer to the Absolute. To Hegel, this insight demonstrated that the dialectic of being and not being were parts of the larger process of becoming and that this process of Becoming can be demonstrably located as the process we know as world History.

Marx's critique of Hegel suggests that history is more accurately understood as socially and historically constructed. For Marx, once the speculative and idealist theories of history, production, the state and law are understood as standing on a concrete, material foundation, then Hegelianism and other forms of idealism become intensely problematic. Indeed, if it is possible to legitimately frame the law and the process of legal interpretation within the particular material conditions of a society, then appeals to an unchanging natural order or to immutable laws or to the transcendental structure of the human mind are no longer justifiable. Accordingly, the inherent essentialism of idealism must yield to the rich historical complexities that comprise the concrete material world and idealist notions of the state and natural law become the first casualties of a materialist critique. Insofar as our understanding of the material world is also comprised of ideas, one must recall that these ideas do not lurk nor are they generated in an *ahistoric* realm, but are embedded in the concrete processes of the material world and within historically determined social formations. As Marx suggests, human beings don't make history "under circumstances chosen by themselves but under

circumstances directly found, given and transmitted from the past," (Marx, 1978: 595).

This is not to suggest that idealism and the Hegelian dialectic are unimportant and that there is nothing worthy to extract from this tradition of thought. Hegel's influence on modern thought has been enormous and I cannot do justice to the scope or breadth of his work here. What will be important to emphasise eventually, however, is the impact that Hegel's thought has had on the Canadian constitutional order. That being said, materialism, by rejecting an idealist interpretation of the world, introduces an articulation that emphasises the active role for human action and consciousness. Marx perceived Hegel as creating an elaborate speculative philosophy of consciousness while standing on his head: thus, it was Marx's intention to stand Hegel and his dialectic on their feet. As Marx states: "The mystification which [the] dialectic suffers in Hegel's hands, by no means prevents him from being the first to present its general form of working in a comprehensive and conscious manner. With him it is standing on its head. It must be turned right side up again, if you would discover the rational kernel within the mystical shell," (Marx, 1986: 29).

Marxism and Rights

Marx observed that the birth of capitalism and the creation of the liberal-democratic state, from the remnant of feudal and mercantile societies, also gave birth to their contradictions. Furthermore, the creation of the modern political state introduced a situation where the universal rights of human beings are

purported to exist, but in fact are reified rights possessed by fictive non-political individuals who appeared and were represented in political discourse as "natural man".² For Marx, capitalism's separation of the economic sphere from the political sphere allows for a concrete and conceptual distinction between the individual and the state to occur. This division allowed for the separation of economic rights and political rights and for them to be abstracted from the lived experience and social relations of human beings. Moreover, this historic juncture permits the ideology of individualism to ascend and exert itself as the "natural" subject and object of political economy and grounds civil society as a pragmatic Hobbesian compromise – a compromise that forms communities only out of fear and individual "utility".

The emergence of the language of political rights parallels the development of the modern state, liberal individualism and the bourgeois public sphere. Ideally, a Marxist materialist perspective on law and rights should seek to locate legal interpretation historically embedded in the economic, political and social structures of a society. That being said, the problems confronting a materialist interpretation of the law and the notion of rights are the practical limits that constrain this type of theoretical approach. That is, if we conceptualise and theorise Marx's conception of law and rights materially and historically – and eventually within the Canadian constitutional order – then where specifically should we initiate our inquiry?

At least part of this problem exists because Marx as a political economist, although developing an expansive critique of capitalism, did not provide a systemic critique of the law or rights. That is not to say that Marx ignored legal issues or rights. On the contrary, the early Marx in **The Critique of Hegel's Philosophy of Right, The Economic and Philosophic Manuscripts of 1844, On the Jewish Question** and the **Critique of the Gotha Programme** wrote extensively on questions concerning the development of rights. However, as Marx suggests, his limited work on law and rights occurs because:

Political economy proceeds from the fact of private property, but it does not explain it to us. It expresses in general, abstract formulae the *material* process through which private property actually passes, and these formulae it then takes for laws. It does not *comprehend* these laws - i.e., it does not demonstrate how they arise from the very nature of private property. (Marx, 1978: 70)

What Marx appears to be proposing is that within the materialist critique of capitalism the right of private property, similar to Rousseau's position on "primitive accumulation", establishes the necessary condition upon which property law is founded. However, simply identifying this fact does very little to expand our understanding or comprehension of law and rights in late-capitalism.

The issues that confront a materialist conception of rights are directly related to the comprehensive difficulties that are faced by various forms of Marxist materialism, some of which were out-lined in the previous chapter. On the other hand, the lack of

a developed theory of law in Marx's own work has also contributed significantly to the various and disparate opinions and debates amongst Marxist theorists on the subject of rights. In addition, the lingering presence of the base/super-structure metaphor in Marxist theory has had the tendency to circumscribe and limit Marxist legal theory and its ability to challenge and adapt to the problems inherent in late-capitalist societies. Nonetheless, it would be incorrect to propose that the difficulties facing Marxist theory are due to it being too mechanistic, reductive or economically determined.

Toward a Material Dialectic of Rights

There are very few serious Marxists who would argue that by applying the base/super-structure metaphor, and using it as an interpretative filter, legal systems can be simply viewed as the residual by-products of the economic system. Regardless, on the issues of rights – and Marx on rights – the debate has remained contentious. For example, Steven Lukes, in **Can a Marxist Believe in Human Rights?**, strongly rejects the incorporation of rights language into Marxist theory. According to Lukes, if Marxism were to incorporate rights-talk into its theory, then it would contradict the basic convictions laid out by Marx and Engels. “[T]he principles of *Recht* are not to be understood as objective norms, as a set of independent rational standards by which to assess social relations, but must themselves always in turn be explained as arising from and controlling those relations... [and should be understood as] inherently ideological,” (Lukes, 1982: 341-342).

For Lukes, a belief in rights leads to fundamental contradictions and logical inconsistencies for persons who regard themselves as Marxists. He maintains that rights-talk "reflects the basic Kantian principle of treating persons as ends and not merely as means... [and that this idealism] involves accepting side constraints upon the pursuit of one's goals for Kantian reasons," (Lukes, 1982: 337). As such:

[Rights-talk] claims to offer "objective" principles specifying what is "just" and "fair" and defining "rights" and "obligations;" it claims that these are universally valid and serve the interests of all members of society (and perhaps all members of any society); and it claims to be "autonomous" of particular partisan or sectional interests. (Lukes, 1982: 342)

Thus, Lukes rejects the of Kantian-type imperatives and notions such as "rights", "fair" and "just".³ As Lukes suggests:

[F]rom a Marxist point of view all these claims are spurious and illusory. They serve to conceal the real function of principles of *Recht*, which is to protect the social relations of the existing order, a function that is better fulfilled to the extent that the claims are widely accepted. Marxism, in short, purports to unmask the self-understanding of *Recht* by revealing its real functions and the bourgeois interests that lie behind it. (Lukes, 1982: 342)

Indeed, Lukes indicates that a Marxist understanding of rights would conclude that claims about "equal" rights are simply liberal ideology.

For Lukes, the language of rights politically stabilises class positions, protects class interests and conceals class conflicts. In other words, rights-talk simply shrouds *laissez faire* and the bourgeois ideology of "the so called rights of man" which Marxism is attempting to unmask. Thus, a general belief in rights transforms "non-hypocritical and non-self-deceiving Marxists... [into] revisionists who have discarded or abandoned those central tenets of the Marxist canon which are incompatible with such a belief," (Lukes, 1982: 344). Hence, he sees the promotion of rights – even if strategically motivated – as doomed to surrender the revolutionary objectives of Marxism and as a betrayal of the Marxist tradition.

For Drucilla Cornell, in **Should a Marxist Believe in Rights?**, the issue is not whether a Marxist can believe in rights, but whether a Marxist should believe in rights. To Cornell, Lukes frames the debate by appealing to an interpretation of a "tradition" in Marxism that is highly problematic. Cornell suggests that Lukes, by ignoring the history and essential aspects of Marxism, overlooks the rich and complicated nature of Marxism and supports what he believes is the "true" canon of Marxism embodied by the work of Engels, Lenin, Trotsky and Kautsky. Cornell argues that "Lukes' mistake is to think that the question of whom one claims as the real Marxists can be separated from the question of what direction Marxism should take," (Cornell, 1984: 45). Moreover, her central concern is whether it is possible to reconceptualise Marx's theory of rights and go beyond his critique of Hegel? As Cornell argues:

Lukes' central confusion is to fail to distinguish between the Marxist proposition that a theory of rights is possible only as a critique of bourgeois right and the idea characterizes the "deep theory" underlying Marx's own attitude towards bourgeois democratic rights, particularly as it was expressed in Marx's critique of Hegel's juridicio-philosophical examination of the epoch of the French revolution. (Cornell, 1984: 45-46)

This suggests that Lukes's interest in rights is in defining the "correct" version of the Marxian canon, one that singularly focuses on Marx's critique of Hegel. Cornell argues that this would snare Marxist theory and entangle it so criticism could never move beyond the critique of Hegel's concepts of right, civil society and the state. According to Cornell, Lukes limits his potential to understand and to "come to terms with the nature of Marx's critique of bourgeois right... [and he] reaches conclusions that are not justified on the basis of Marx's language," (Cornell, 1984: 50). Lukes collapses the distinction between the critique of justice and the critique of legality and thus distorts and blunts Marx's criticism of civil society. "Lukes, like many others before him, suggests that Marx could not have any conception of justice, Kantian or otherwise, because his understanding of ideology would forbid his development of such a concept," (Cornell, 1984: 52). Cornell suggests that this interpretation exaggerates a "positivist strain" in the later Marx and causes Lukes's analysis to "fall into the worst kind of

positivism," (Cornell, 1984: 52). Moreover, Cornell reminds us that:

For all of the limitations of [Marx's] later concept of ideology, he at no time dropped his method of immanent critique... [and that such] a critique implies a standard of judgement even if that standard be immanent in current social relations. (Cornell, 1984: 52)

Similarly, William McBride, in **Rights and the Marxian Tradition**, suggests that Lukes's emphasis on the proper "canon" clouds his critical capacity to evaluate the notion of rights and a broader tradition in Marxism. Contrary to the "correct" Marxist tradition that Lukes attributes to Engels, et al., McBride indicates that even Lenin admitted late in life that "the entire generation of Marxists of which he was a part, never having plumbed the thought of Hegel, had really failed to understand Marx," (McBride, 1984: 59). Indeed, Lukes's failure, according to McBride, consists in not paying close enough attention to the influence of Hegel on Marx's thought and his critique of the concept of right. Moreover, the quarrel is not about "the plausibility of Lukes's Marxian hermeneutics, but rather with the heavy-handed, hammer-like, condemnatory conclusion - "revisionists" - that he allows himself to draw from," (McBride, 1984: 60).

According to McBride, part of the confusion in the debate surrounding Marx and the notion of right is that Lukes misunderstands that right or "Recht" in German means both "right" and also "law". Lukes's oversight regarding the dual meaning of

right limits his conception of Marx's critique of rights, law and civil society. This omission causes Lukes to frame his argument about the existence of rights as an "either/or" proposition and, as such, Lukes's focus on the "proper" Marxian canon or tradition can only be viewed holistically as too narrow and limited.

McBride indicates that it "is important to recall how thoroughly familiar Marx was with [**Hegel's Philosophy of Right**]" (McBride, 1984: 67) and that Marx understood and rejected Hegel's defence of the modern state and bourgeois right. However, for Marx, his central criticism of rights was the way that concrete expressions of living human beings were reified and became idealistic, abstract and alienating ideals. Nonetheless, both Hegel and Marx began their critique of law under the rubric of the "abstract right" of private property. However, whereas Hegel viewed the right of private property as the human personality personified in external objects, Marx regarded bourgeois rights and "the institution of private property as the basis of social alienation," (McBride, 1984: 66).

Marx, in his analysis of the state, realised that rights "can never be higher than the economic structure of society and its cultural development is conditioned thereby," (Marx 1978: 531). And so, according to McBride, "Marx clearly understands, then, the severe limitations of rights-talks," (McBride, 1984: 70). However, as McBride is quick to point out:

The notion of an absolute, unqualified right is ultimately incoherent, in the last analysis, just as, I would argue, is that of perfect justice. But this does not preclude,

logically speaking, either our resorting, within the Marxian tradition, to the language of rights in order to point up inconsistencies of practice in the sense of violations of asserted rights which abound within our present socio-economic-legal system.... (McBride, 1984: 70)

McBride argues that the overthrow or disappearance of capitalism "remains an exceedingly distant dream," (McBride, 1984: 71). McBride suggests, contrary to Lukes, that the abandonment of the strategic use of rights "would be very short-sighted... [and would] deny that certain features of the law can sometimes result in very progressive social outcomes," (McBride, 1984: 71). Furthermore, McBride recommends a strategic and critical use of rights. He argues that as long as a critical recognition of the underlying assumptions and the ideological uses to which liberalism has instrumentally utilised the language of rights is maintained, then a "critical way of thinking, if taken seriously, entails a set of social practices far more sensitive and responsive to the varied needs and claims of all of our consociates, our contemporaries, than are the practices of any existing political and legal system," (McBride, 1984: 70).

Amy Bartholomew, in **Should a Marxist Believe in Marx on Rights?**, suggests that the recent attempts to re-consider rights in Marx's work are a distinct improvement over theories that dismiss the subject out-right (Bartholomew, 1990: 244). Bartholomew is sympathetic to the overall notion of rights and generally approves of Cornell's position on Marxism and rights.

However, Bartholomew finds that Cornell does not sufficiently flesh out the double aspects of rights in Marx.

To Bartholomew, the reason for re-evaluating the notion of rights is "to raise the double nature of the problem of rights for those working within the Marxist tradition by indicating that the problem is composed of; first, establishing and evaluating Marx's position on rights and, second, asking how contemporary Marxists should treat the question of rights," (Bartholomew, 1990: 245). For Bartholomew, the notion of rights is provisionally compatible with the Marxist tradition. Moreover:

[A]t least with respect to freedom and democracy, and the rights, both personal and political, which are crucial to them, we need not leave marxism, and that those who argue like Lukes that a 'marxist cannot believe in rights' are misguided. The simplest support for my claim is that despite the fact that Marx did not evince a particularly strong commitment to rights, neither did he 'reject' them. (Bartholomew, 1990: 246)

She further comments that this distinction is of particular importance because it "is one thing to say that Marx was 'scornful' of rights and rejected them and quite another to say that he was critical of, and unevenly committed to, them," (Bartholomew, 1990: 247). Bartholomew's close reading of rights-talk in Marx leads her to suggest that a "better reading is that Marx did not reject rights per se... [but that] Marx's treatment of rights is critical, differentiated, underdeveloped and, in more than a few instances, ambiguous," (Bartholomew, 1990: 247).

For example, Marx argued, in the sphere of economic exchange, "equal right... is still in principle [a] *bourgeois right*" (Marx, 1978: 530) and, "to avoid all these defects, right instead of being equal would have to be unequal," (Marx, 1978: 531). As Bartholomew indicates, the distinction between "equal right" and "unequal right" is categorically different. In one instance, Marx is talking about "equal right" in terms of property and economic equivalency and exchange. However, in the other instance Marx is distinguishing the notion of a social and just notion of right compared to the economic notion of "equal right" and equivalency. The dual meaning of "right" is much broader than the restricted economic meaning of "equal right". Right in this instance implies a view of the world where things can be distinguished and measured ethically in terms of unequal, unfair or as *unjust*. In other words, each according to their need, as opposed to their ability, can only make sense within the implicit ethical framework provided by Marx and this entails the presence of a basic notion of rights. Bartholomew argues that what is important in this critical and differentiated reading of Marx on rights is the emphasis he eventually places on notions of "human emancipation" and his measurement of the "rich individuality" of human beings. To Bartholomew, Marx is correct in opposing the bourgeois rights of "egoistic man" and the reified "so called rights of man". However, Bartholomew qualifies that this is not a rejection of rights *per se*, it is a rejection of liberalism and the hollow and one-sided economic rights it purports to offer humanity. Similar to Bartholomew, Noam Chomsky indicates that one of Marx's

strengths exists in identifying the hypocrisy of liberal-democratic states, which promote constitutional claims and ideals about "equal rights", when in practice these "democratic" states produce and enforce unequal concrete results for individuals. To Chomsky, the penetrating and lasting insight of Marx is the notion of creating a "just society" with an equality of conditions for all individuals (Chomsky, 1987: 191).

In many ways, the various issues raised surrounding a material hermeneutic of Marx and his critique of rights goes directly to the heart of contemporary Marxism in late-capitalist societies. Contrary to the trends of a "correct" interpretation of the canon and tradition of Marxism, a critical materialist interpretation suggests that orthodox readings, such as the one Lukes offers, are not materialist enough. That is, Lukes ironically would rather confine Marxism to a strict and inflexible idealist structure that avoids contradictions rather than engage it with the concrete history of the day and the obstacles confronting human beings in late-capitalist societies. By comparison, McBride, Cornell and Bartholomew provide three distinct approaches to rights that enrich our comprehension of Marx and Marxism and re-engage our understanding of Marx's immanent critique of rights and the dialectical heritage of Hegel.

As we have seen, Marxist critics, such as Lukes, view the incorporation of rights-talk into contemporary Marxism as incompatible with Marxist principles. Hence, according to this position, pursuing legal avenues for the protection of rights is fundamentally contradictory and misguided. However, Marx and

Engels understood the cosmopolitan nature of capitalism that revolutionised and internationalised production and the nation-state:

In place of the old local and national seclusion and self-sufficiency, we have intercourse in every direction, universal inter-dependence of nations. And as in material, so also in intellectual production. The intellectual creations of individual nations become common property. National one-sidedness and narrow-mindedness become more and more impossible, and from the numerous national and local literatures, there arises a world literature. (Marx and Engels, 1998: 39)

This internationalisation of production and the state – what is currently called “globalisation” – does not rule out the notion of human rights and international conventions protecting human beings and their rights. As McBride points out, the guarantees found in the new literature of international law, although feeble, “are designed to begin to curb wrongs perpetrated by governments not only against citizens or other states, but even against their own citizens,” (McBride, 1984: 72). Thus, at the cusp of the millennium a strict devotion to a rarefied and pure Marxism advocated by Lukes is unconvincing – to say the least. Moreover, in The Principles of Communism, Engels suggests that:

[W]here a democratic constitution has already been established, the communists must make the common cause with the party which will turn this constitution against the bourgeoisie and use it in the interests of the proletariat.... (Engels, 1975: 356)

Consequently, a politically discerning Engels did not rule out the strategic use of democratic constitutions to promote and advance the interests and rights of the oppressed. In pursuit of this course of action, Habermas's work offers one possible direction to understand the issues of democracy, rights and the public sphere in late-capitalism.

Liberalism and the Public Sphere

Habermas's work is an effort to go beyond the constraints of traditional critical theory and various forms of Marxism. However, it is significant to note that both trends of thought are deeply embedded and have had a profound influence on his understanding of the world. Habermas's theory of communicative reason represents a challenge to these traditions, but, also, it is an attempt to incorporate these traditions within his broader project of reconstructing the public sphere.

In his encounter with critical theory, Habermas accepts the method of negation and many of the themes associated with Adorno, Horkheimer and Marcuse. However, Habermas holds that:

With the *Dialectic of Enlightenment*...
[Horkheimer and Adorno] definitely lost their trust in the revolutionary dynamic of the productive forces, and in the practical impact of negative thinking. Both the productive forces and critical thought were seen in the perspective of merging with their opposite, with the forces of domination. (Habermas, 1985: 73)

In spite of his concerns about critical theory's negative conclusions regarding the Enlightenment, it is Habermas's intention to incorporate and transcend the negative conclusions of

the first generation of critical theorists. Thus, opposed to the view that negative dialectics has developed into a "gloomy exposition" of instrumental reason in a totally administered society (Dews, 1987: 153-154), Habermas locates himself closer to the ideas of an "affirmative" Herbert Marcuse. For Habermas, Marcuse's approach retained and held fast critical theory's original concept of creating a rational and free society. According to Habermas, Marcuse's explanation of why a pessimistic negative dialectics came to dominate critical theory is that the free and rational society that Adorno and Horkheimer were advocating "made one mistake... it did not promise too much but rather too little," (Habermas, 1985: 73).

In Habermas's mind, Marcuse's vision of a "great refusal" by the individual in a totally administered society is a distinct improvement over the bleak conclusions reached by Horkheimer and Adorno regarding reason and the Enlightenment. However, Marcuse's articulation of rebellious subjectivity "has the weakness that it cannot consistently account for its own possibility," (Habermas, 1985: 75). According to Habermas:

If rebellious subjectivity had to owe its rebirth to something that is beyond – a too deeply corrupted – reason, it is hard to explain why some of us should at all be in a position to recognize this fact and to give reasons in defense of it. In this respect, Adorno was the more consistent thinker. However, implausible the argument may seem, it had the function to preserve in Herbert Marcuse one of his most admirable features – not to give in to defeatism. (Habermas, 1985: 75-76)

To Habermas, Marcuse's faith in an inexplicable rebellious subjectivity is one that is beyond human reason and experience. Unfortunately, Habermas argues, this rebellious subjectivity also exists out-side our capacity to understand it and consequently it cannot be of any practical use in transforming the dominion of instrumental reason or the realm of total administration. Therefore, the problem becomes whether it is possible for a potentially liberating rationality to exist within the individual situated in an instrumental society. In addition, if this is possible, what role and structure does reason play in constructing a liberated public sphere in the maelstrom of instrumental and bureaucratic centralisation?

Historically, the liberal theory of the state and equal rights for citizens is the purported democratic narrative of the last two hundred years. It is within this framework that Habermas wishes to situate his concept of the public sphere. For Habermas, the public sphere acts as the organising principle that extends into all facets and experiences of everyday social life. Moreover, the public sphere describes, in a general way, the framework upon which our social communication occurs and is lived:

By "the public sphere" we mean first of all a realm of our social life in which something approaching public opinion can be formed. Access is guaranteed to all citizens. A portion of the public sphere comes into being in every conversation in which private individuals assemble to form a public body.... Citizens behave as a public body when they confer in an unrestricted fashion - that is, with the guarantee of freedom of assembly and association and the freedom to express and

publish their opinions – about matters of general interest. (Habermas, 1989: 136)

The public sphere depicts the informal conversations of individuals through to the formal institutions where individuals master communication to express and form their opinions. It is the formation of public opinion and the communicative exchange of individuals that Habermas views as containing the potential for reviving communicative rationality that under-lies the instrumentality of late-capitalist societies. The issue of access to the public sphere is a persistent problem, but Habermas confidently claims that everyone is guaranteed access to the public sphere. The question, though, is how?

Habermas defines access to the public sphere as the ability to enter into rational public debate. From the Enlightenment onward, according to Habermas, rights were no longer attributed or maintained according to the status of one's birth, but by the use of one's reason. Rights and entry to the public sphere became accessible to "anyone who understood how to use his reason in public," (Habermas, 1989: 105). For Habermas, the condition for access to the public sphere is that persons, through the use of their reason, participate in rational debate and that this communicative exchange constitutes the basis for the creation of public opinion and the forum of the public sphere. According to Habermas, the "public sphere was realized not in the republic of scholars alone but in the public use of reason by all who were adept at it" (Habermas, 1989: 105).

C.B. Macpherson is much less romantic than Habermas on the issue of access to the public sphere. However, Macpherson, in **The Life and Times of Liberal Democracy**, does concur with Habermas that liberalism has retained a sense that it "meant freeing the individual from the outdated restraints of old established institutions," (Macpherson, 1977: 21). In addition, the idea of freedom has persisted and by "the time liberalism emerged as liberal democracy this became a claim to free all individuals equally, and to free them to use and develop their human capacities fully," (Macpherson, 1977: 21). Macpherson indicates that part of the democratic problem, however, is not about individuals and their capacity to use their reason but about the equality of access – or the lack thereof – that each individual has to democratic fora within the modern political process.

There are various competing notions of democracy and Macpherson conceives of the dominant democratic movements of the seventeenth and eighteenth centuries as being universal movements. Contrary to Habermas's bourgeois public sphere, Macpherson sees these democratic movements as either a classless or of a one-class variety that opposed and radically challenged the authority of the Absolutist state. Interestingly, where Habermas locates the development of the public sphere in the late eighteenth century, Macpherson locates the birth of pluralistic liberal democracy that supplants the earlier radical and universal notions of democracy. It is the class-divided pluralistic notion of democracy, Macpherson argues, that has since become synonymous with liberal democracy. In other words, contrary to Habermas, who locates the

development of an enlightened and universal reason grounded in "bourgeois public sphere", Macpherson, in the same period, unearths the origins of a class-divided democracy grounded upon capitalist ideology. According to Macpherson, class-divided democracy "has pretty constantly included [the] acceptance of capitalist relations and hence... [a] class-divided society," (Macpherson, 1997: 21). Macpherson cautions us that what is important to recall and to recognise about this period is how seriously "the market assumptions about the nature of man and society have penetrated liberal-democratic theory," (Macpherson, 1977: 21). Thus, it is safe to assume that Macpherson is far more sceptical about the idealised moment in "modernity" that Habermas locates as birthplace of "bourgeois public sphere".

For Macpherson, this period illustrates that pluralistic and radical visions of democracy are diametrically opposed. Pluralistic democratic ideals are representative of what Marx called the "so called rights of man". The other radical form of democracy is the "older view of democracy [that] keeps being rediscovered [and] indicates that it corresponds to some reality which the pluralistic theory [of liberal democracy] does not adequately comprehend," (Macpherson, 1953: 241). Nonetheless, it is the class-divided democratic liberalism that has triumphed in capitalist regimes and for Macpherson this means that:

The achievement of universal suffrage and the flowering of voluntary associations as political pressure groups have not erased class lines, nor is there any reason to expect that they will do so. We may conclude, therefore, that in a mature capitalist world

the problem of democracy is not only the pluralistic one of representing and reconciling the conflicts of multitudinous group interests, but also (and more fundamentally) one of expressing and containing the conflict of class interests. (Macpherson, 1953: 241)

Radical democracy, in Macpherson's hands, remains a resilient force. Thus, it is the radical form of democracy that continues to re-appear and to challenge the legitimacy of the mature capitalist world and the dominant form of liberal democracy. As Macpherson suggests, liberal democracy may advocate universal values – the “so called rights of man” – but in practice it deploys strategies to marginalise individuals or groups within the liberal democratic framework. Thus, idealised notions of universal participation must be weighed according to the democratic marginalisation and exclusion that prohibit individuals and communities from access to the *polis* or the public sphere.

In framing the public sphere and the notion of radical democracy together in this manner, I hope I have illustrated that there exists a link and a tension between Macpherson's notion of radical democracy and Habermas's public sphere. However, it remains to be seen whether Habermas's implied ideal of guaranteed access to the public sphere is even possible in late-capitalist society. By comparison, Macpherson is not naïve about the exclusionary power of modern pluralistic liberal societies and their potential to marginalise and distort democratic impulses. Thus, for Macpherson the issue surrounding democracy is not about guaranteed access to the public sphere or arriving at an ideal

communicative consensus, but overpowering the forces that contain and defer democratic expressions.

The Public Sphere as Praxis

With Macpherson's observations firmly in our minds, in **The Structural Transformation of the Public Sphere**, Habermas attempts to map the dynamic development of the private/public sphere and construct a critique of modern society based on communicative reason and the democratic principles that he believes are embedded in communicative action. For Habermas, the most significant development of modernity and the Enlightenment was the appearance of the public sphere. Its appearance signalled the departure of feudal forms of power and authority which allowed for "the rise of the normative bourgeois public sphere, who were united by their universal access to reason and public debate," (Habermas, 1989: 105).

According to Habermas, the formal origins of the modern "public sphere" emerged in an uneven pattern during the latter half of the eighteenth century in western Europe. At that time, European feudal society did not possess the public/private distinction of contemporary societies. Rather, the authority and physical presence of a ruling feudal lord represented the direct and absolute link of the lord to the power of the monarchical state. This direct connection to authority meant that there was no need for the mediation of a public space or to negotiate and legitimate the local authority with the power of the absolute monarch and the state.

For Habermas, as the Enlightenment took hold of European societies, a Copernican shift occurred in the logic and rationale for ruling the state. This paradigm shift was partly due to economic and technological transformations, but it was also the result of popular and democratic movements, similar to the ones described by Macpherson, that challenged and loosened the grip of absolutism and the Absolutist State. In so doing, what we know as the modern private/public spaces of society came into existence and could be recognised, analysed and became objects of study. For Habermas, it is the development of the public sphere and the private sphere that comprise the birth of what we know as civil society.

[In the 18th-century the] bourgeois public sphere arose historically in conjunction with a society separated from the state. The "social" could be constituted as its own sphere to the degree that on the one hand the private realm as a whole assumed public relevance. The general rules that governed interaction among private people now became a public concern. In the conflict over this concern, in which the private people soon enough became engaged with the public authority, the bourgeois public sphere attained its political function. (Habermas, 1991: 127)

Habermas views the creation of the "public sphere" as a social and institutional transformation occurring from within the structure and power in the Absolutist State. This new space was created by an expressive and growing "middle-class" which was struggling for political and economic power within the Absolutist State. For Habermas, the development and growth of informal

associations of individuals congregating in literary salons, coffeehouses, scientific groups, societies, and debating clubs mark the beginning of the "bourgeois public sphere". As these informal associations and societies spread, the need for sharing and communicating among members led to the emergence of various and diverse forms of popular communication that ranged from pamphlets, journals, broad-sheets and newspapers.

It is the appearance of this shared communicative space that allowed for the growth of a public sphere and for a place where "a realm of our social life in which something approaching public opinion can be formed," (Habermas, 1989: 136). The bourgeois public sphere was forged and organised around discursive argumentation and the opinions formed were held to be the result of the "better argument". Thus, private individuals and their collectively formed opinion revolutionised the process of governance associated with the modern state. That is, the governance of the state could no longer be justified by the rule of brute force but had to be rationally justified in the public realm. As Habermas suggests:

The public sphere as a sphere which mediates between society and state, in which the public organizes itself as the bearer of public opinion, accords with the principle of the public sphere – that principle of public information which once had to be fought for against the arcane policies of monarchies and which since that time has made possible the democratic control of state activities.
(Habermas, 1989: 137)

The public sphere is not a cryptic and esoteric space. Rather, it is the normative communicative existence that all human beings share. It is the ground for our comprehension of everyday lived experiences and the basis for human communication and reasoning. What is substantial in late-capitalist societies is that the communicative capacity of the public sphere, although disturbed and disrupted by "mass society", generally remains intact. According to Habermas the public sphere is still present and "[i]n a large body, this kind of communication requires specific means for transmitting information and influencing those who receive it. Today, newspapers and magazines, radio and television are the media of the public sphere," (Habermas, 1989: 136).

The strength of Habermas's examination of communication lies in his capacity to conceptualise the public sphere as the integral and fundamental process at the heart of social interaction. For Habermas, what shaped us as human beings is not simply an opposable thumb and the capacity to produce tools, but the human ability to communicate with one another and share that communication collectively as a communicative act within a diverse discursive community. Thus, for Habermas, communicative interaction and the public sphere become the primary site for the social and material interactions that generate our various forms of consciousness. However, this does not mean that communicative reason is free from distortion or that it can be prevented from legitimating or constructing ideologies that deform our understanding of the world.

For Habermas, if Marx had emphasised the linguistic and communicative dimension of human nature more clearly, then the orthodoxies of economism would not have appeared as a dominant and dominating force in Marxism. However, in defence of Marx, although he did perhaps over-emphasise labour, in The German Ideology, he argues that "[a]s individuals express their life, so they are," (Marx, 1978: 150). Contrary to an economistic interpretation of human nature, Marx contends that human nature should not be confused with simply the physical reproduction of individuals. Clearly, he is indicating, similar to Habermas, that there exists a much richer and complex conception of human nature, one where:

[The] mode of production must not be considered simply as being the reproduction of the physical existence of the individuals. Rather it is a definite form of activity of these individuals, a definite form of expressing their life, a definite *mode of life* on their part. (Marx, 1978: 150)

Nonetheless, with the public sphere Habermas succeeds in expanding and re-introducing a communicative dimension of human existence that Marx explains is a mode of our life and how we express our lives. In so doing, Habermas has shifted the debate surrounding the base/superstructure metaphor in late-capitalist society back to the issue of communication as the ground that provides the basis for our consciousness and our communicative acts. Thus, the public sphere is not an idealised space nor is it ultimately a final instance determined by economic production. The public sphere, therefore, is not derivative of other primary

activities but is part of our fundamental social-material practices as human beings who express our life. As Terry Eagleton suggests: "Humanlife is signmaking - 'significant' - existence.... If squirrels, as far as we know, are not at this moment busy secretly constructing nuclear weapons, it is not particularly because they are a nicer crowd than we are but because they cannot deploy our kind of signs," (Eagleton, 1990: 25).

The force and value of Habermas's inquiry lies in his ability to conceptualise the public sphere, communicative action and other social activities as interrelated material-social practices. Habermas's knowledge and understanding of communicative reason underlies the method in which the public sphere is to be recognised and conceived as a practical and tangible activity. The theories of orthodox Marxism and the first generation of Frankfurt theorists all work, to varying degrees, to repeat the central error contained within the base/superstructure metaphor. That is, the centrality of economic production and instrumental reason carve up social-material practices, the social-material practices which first gave rise to the possibility of the sphere of production, and inverts and diminishes the creative and liberating potential of these practices. Thus, communicative reason is viewed as a subordinate constituent of instrumental rationality, which is synonymous with economic production. Thus, communicative reason and the public sphere can be detached from but remain dependent on instrumental reason and current economic activity. In doing so, communicative reason, the public sphere, and other social practices lose their substantive contributions to

our *mode of life* and exist solely to reproduce the current ideologies of domination and legitimate the existing forms of social and material organisation and exploitation.

By reconstructing the origins of the public sphere, Habermas denies that communicative reason is simply a social forum for mediation that facilitates the dominion of instrumental reason and the alienating forces of late-capitalism. To Habermas, communicative reason is intricately woven into the fabric of all our material-social practices and is not merely an "effect" of production. Communicative rationality is the animated and essential component that defines, organises and constructs the social world and produces political practices, economic practices and cultural practices. Rather than conceiving of communicative reason as a reproductive component of the superstructure which is utilised to maintain the base, Habermas implies that a real materialist point of view recognises that communicative reason is concomitant but, also, synonymous with a holistic understanding of production. Ultimately, within Habermas's work, one can locate communicative reason as a fundamental practical activity. It is through exercising communicative reason that the expression of our *species being* becomes possible and enables us to socially organise and transform the world. Communicative reason is not simply the representation or reflection of the external world, it is the medium of communicative organisation that allows the possibility of interpretation and the active process that Eagleton refers to as "significant existence".

A materialist reading of Habermas's notions of communicative reason and the public sphere presents a series of developments. Habermas's theory of communicative reason realises the historically contingent nature of the public sphere. That is, by positing the public sphere within history, Habermas is aware that, rather than presenting communication as a reflection or representation of an "objective" world, communicative action is understood as a purposive, material and immanent hermeneutic activity that constitutes the public sphere. The public sphere is not merely a viscous space that exists to assist instrumental manipulation as ideology and to legitimate and achieve the particular ends of a totally administered society. That is, the public sphere is not a functionalist reflection or an instrumental representation of the world tied to *ahistorical* and transcendental ideas of economic laws. Rather, the public sphere and communicative reason are the dynamic constituting forces that can be understood as material relations and as forces of production. Therefore, communicative action can be conceived as the social and material struggle that constitutes the public sphere in the world – a world that includes a hermeneutic of law and rights.

Notes

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¹ It should be emphasised that there are at least two Platos. As John Dewey points out there is the "dramatic, restless, cooperatively inquiring Plato of the Dialogues, trying one mode of attack after another to see what it might yield; back to the Plato whose highest flight of metaphysics always terminated with a social and practical turn, and not to the artificial Plato constructed by unimaginative commentators who treat him as the original university professor," (Dewey, 1960: 13).

² The use the *gendered* form of man is intentional. With the exception of Woolstonecraft, the vast majority of thinkers writing about rights at this time were framed by and for other "common" men.

³ Apparently, Lukes is unaware that in the spring of 1847 both Engels and Marx became members of the League of the Just [Bund der Gerechten], which was subsequently renamed the League of the Communists (Hobsbawm, 1998: 3).

Chapter Three

Habermas and the Public Sphere

Until the mid 1980s there was a discernible lack of interest and scholarly debate in Anglo-American academe around Jürgen Habermas's notion of the public sphere. The lack of interest in the public sphere was partly a result of intellectual trends that, I believe, identified and articulated that the dominant post-war narratives of the left had failed to adequately address issues of hitherto excluded and marginalised groups in society. These marginalised groups, theorists and activists, ranging from feminists and environmentalists to civil, lesbian and gay rights movements, found a voice in the prevailing theories of post-structuralism, post-modernity and deconstruction. Generally, these theories of dissent have successfully challenged notions of "reason" and "totality" with "identity" and "otherness" and located their significance in the heterogeneity of meaning that celebrates and praises "différance" (Derrida, 1978; 1982).

The lack of discussion around the public sphere is because The Structural Transformation of the Public Sphere, although first published in 1962, was not translated and printed in English until 1989 (McCarthy, 1989: xi; Dalhgren, 1991: 3). The fact that this work was the foundation upon which Habermas built his subsequent endeavours left a vacuum that led to misunderstandings in Anglo-American circles which, after its first encounter with critical theory, had become enamoured with French criticism during the 1970s. In addition, Habermas's work on the public sphere received less attention because his sustained interest in communicative

reason had gained notoriety in other fields of research: areas such as sociology, linguistics, history, media theory and critical legal studies.

Post-modern and post-structural critics¹ argue that Habermas's conception of modernity, the Enlightenment and the public sphere are based upon a fundamental misunderstanding of language and the heterogeneity of meaning. They suggest that Habermas merely supplants the Enlightenment's logic, which is responsible for the horrors of modernity and capitalism's "productivist ideology" – the meta-narrative which is inherent and mirrored in Marxism (Baudrillard, 1975) – with an equally totalitarian form of domination that comes in the form of communicative reason. Further, they argue that Habermas parallels Western metaphysics and Enlightenment forms of idealism – and its various forms of "truth" – and over-totalises and diminishes the significance and irreducible differences of all symbolic, social, political and cultural meanings. That is, according to post-structuralists, Habermas reduces and flattens incommensurable philosophic differences in society to make any contradictions appear as merely the result of communicative misunderstandings. Generally, then, Habermas's project has been framed as being nothing but the reconfiguration or the repressed return of discredited forms of reason in modernity – a modernity that is on the whole categorised as being synonymous with totalitarian forms of violence.

Marxist theorists and critics have been more sympathetic to Habermas's endeavour to construct a notion of the public sphere in late-capitalist societies. Acutely aware of the lack of

democratic public spheres that exist and existed in “really existing socialist” societies, Marxist theorists have struggled with these democratic concerns and have tried to balance them within the framework of class analysis. Habermas’s solution, which supplants Marxian materialism with a democratising form of communicative reason as the foundation for critically analysing society, has been tentatively greeted with guarded acceptance to scepticism. Nevertheless, Habermas’s intervention regarding the public sphere has been vital in reinvigorating and pushing forward a much needed debate concerning democracy and rights in technologically driven late-capitalist societies.

Post-Structuralism: The Critique of Communicative Rationality

The links between the public sphere and communicative reason are not always transparent in Habermas’s work. Moreover, it would seem that Habermas’s debates with post-structural theorists have had little to do with his initial interest in the public sphere. As the controversy surrounding modernity and post-modernity grew – that is, the debate between consensus versus “différance”, totality versus heterogeneity and communicative reason versus a deconstructive *jouissance* – very distinct positions regarding the public sphere have slowly begun to emerge.

Habermas’s first salvo in his debate with post-structuralism was delivered during his acceptance speech of the *Adorno Prize* in September of 1980. In this speech, **Modernity – An Incomplete Project**,² Habermas argues that post-structuralists and post-modernists, in their attempt to go beyond modernism, “recapitulate the basic experience of [an] aesthetic modernity” (Habermas, 1983:

14). Habermas claims that post-structuralist critiques exist at the cusp of the "gloomy" Enlightenment, which was eloquently described by Adorno and Horkheimer, and he contends that these arguments are inherently problematic. For Habermas, post-structuralists are "young conservatives" who

claim as their own the revelations of a decentred subjectivity, emancipated from the imperatives of work and usefulness, and with this experience they step outside the modern world. On the basis of modernistic attitudes they justify an irreconcilable antimodernism. They remove into the sphere of the far-away and the archaic the spontaneous powers of imagination, self-experience and emotion. To reason they juxtapose in Manichean fashion a principle only accessible through evocation, be it the will to power or sovereignty, Being or the Dionysiac force of the poetical. In France this line leads from Georges Bataille via Michel Foucault to Jacques Derrida. (Habermas, 1983: 14)

It was the force of such statements that caused Martin Jay to remark that Habermas's "initial efforts, in part because of their imperfect command of the French intellectual scene and in part because of their controversial attribution of a conservative political implication to postmodernism, proved to be a lightning rod for criticism," (Jay, 1991: 98). Moreover, Habermas's charge of post-structuralism as being neo-conservative produced an environment where he "was pilloried as a naively one-dimensional celebrant of an outdated liberal, Enlightenment rationalism," (Jay, 1991: 98). In this setting, Habermas's re-conceptualisation of reason, let alone his notion of the public sphere, meant that

any attempt "to formulate a theory of social evolution was damned as a new version of a discredited objectivist philosophy of history," (Jay, 1991: 98).

However, it was with the publication of **The Philosophic Discourse of Modernity**, in 1985, that Habermas is regarded to have crystallised and articulated his objections to post-structuralism most forcefully. In this book of essays, Habermas's reading and criticism of Foucault, Lyotard, Derrida and others philosophically demarcated and dissected his positions on the subject of modernity and the Enlightenment. Although these exchanges were extremely important in defining the scope of the debate surrounding modernity versus post-modernity, they initially appeared to do little to elucidate Habermas's defence as always being grounded upon the fundamental premise and presence of the public sphere. Nonetheless, it is in these lectures that the connection to Habermas's earlier theme of the public sphere slowly emerged and linked his consistent commitment to maintain a dialogue based on the tenets of the Enlightenment and with the struggle to re-formulate and defend "the rational organization of everyday social life," (Habermas, 1983: 9).

Habermas's defence of the Enlightenment has caused a number of his critics to deem his reconceptualisation of everyday social life as a eulogy or a "mourning" for modernity (Lyotard, 1984: 1989). By rejecting the notions of master discourses, based on either the "grand narrative" of history or the "universality" of communicative reason, post-structuralists argue that Habermas is merely recycling worn out ideas. That is, the frequent charge

levelled at Habermas is that, in his attempt to understand the structure of society based on communicative reason, he is merely re-presenting the flip side of the janus coin of modernity (Huhn, 1988: 121). Also that Habermas's ideas possess the latent capacities that re-create the totalisations and hierarchies that would lead to another out-break of totalitarian forms of governance and violence that have plagued the twentieth century (Lyotard, 1984: 34; 75).

Post-structural critics claim that Habermas's project fails to grasp the fundamental plurality of modern society. Lyotard suggests that post-modernity, in an almost Nietzschean over-coming of modernity, produces an "aesthetic of the sublime" (Lyotard, 1984: 77) that is no longer bothered by the obsession of locating foundations for "truth". Lyotard regards Habermas's position as a rejection of the multi-dimensional and the polysemic nature of post-modern societies and as a stubborn refusal that Lyotard finds untenable: "Modernity is not an era in thought, but rather a mode (this is the Latin origin of the word) of thought, of utterances, of sensibility," (Lyotard, 1989: 314). Thus, by describing modernity as a mode of thought, Lyotard rejects any unity or meaning to be found in history. Indeed, in defining his post-modern condition, Lyotard uses

the term *modern* to designate any science that legitimates itself with reference to a meta discourse of this kind ["a discourse of legitimation", "a discourse called philosophy"] making an explicit appeal to some grand narrative, such as the dialectics of the Spirit, the hermeneutics of meaning, the emancipation of the rational working subject,

or the creation of wealth. (Lyotard, 1984: xxiii)

Lyotard suggests that the notion of universal consensus is mired in a "dialogue of argumentation" (Lyotard, 1984: 65) that might be well intentioned, but is one that he ultimately finds inadequate. Lyotard claims that Habermas's notion of rationality and the form of consensus he wishes to preserve "have become... outmoded and suspect value[s]," (Lyotard, 1984: 66). Lyotard interprets Habermas as sadly suggesting that:

[I]f modernity has failed, it is in allowing the totality of life to be splintered into independent specialties which are left to the narrow competence of experts, while the concrete individual experiences "desublimated meaning" and "destructured form," not as a liberation but in the mode of that immense ennui which Baudelaire described over a century ago. (Lyotard, 1984: 72)

According to Lyotard, the splintering of "truth" into specialties and the shattering of modernity is not to be lamented. On the contrary, it is the splintering and shattering of modernity that Lyotard regards as a form of maturation. That is, Lyotard wants us to grow up or to wake up from the dream of modernity and wants us to declare a "war on totality... [that would allow] us [to] be witness to the unrepresentable," (Lyotard, 1984: 81). For Lyotard, Habermas is merely "a talented teatrologist for whom postmodernism, with its games and fantasies, carries very little weight in front of political authority, especially when a worried public opinion encourages authority to a politics of totalitarian

surveillance," (Lyotard, 1984: 72). Thus, for Lyotard by becoming aware of the shattered nature of modernity we gain the requisite capacity to dissect and deconstruct repressive regimes of thought.

Mark Poster, in Critical Theory and Poststructuralism, argues that Habermas has misunderstood the post-structuralist critique of totality. In doing so, "Habermas seriously underestimates the difficulties of the current conjuncture in democratic societies," (Poster, 1989: 24). According to Poster, the conceptual distinction that Habermas wishes to make between instrumental and communicative rationality is a false dichotomy. For Poster, Habermas's "defense of reason appropriates highly dangerous discursive practices... [and he] uncritically legitimates science... as an achievement of consensus," (Poster, 1989: 24). Far from viewing science as an objective, impartial and progressing discourse, Poster points out that:

[M]odern science largely operates with an exclusion of women and minorities from its discourse, an exclusion that is legitimated precisely by the apparent procedural neutrality of "unrestricted discussion," of communicative rationality. Modern science instantiates the figure of the rational individual; it constitutes the subject of its discourse in a thoroughly Cartesian manner that discounts the value of rhetoric, fiction and art and invalidates the voices of culturally determined subjects, such as women, who somehow do not have the "communicative competence" to engage in "unrestricted discussion." (Poster, 1989: 24-25)

For Poster, Habermas's reliance on the bifurcation of reason into instrumental and communicative forms fails to comprehend the

hierarchies that result in such a division and that he possesses no way to unify reason after this artificial separation.

Moreover, Poster is suggesting that Habermas's position on the duality of reason maintains a built in dichotomy that is insurmountable and untenable given Habermas's communicative premise concerning rationality.

In a similar vein, Stanley Aronowitz, in **Science as Power**, argues that science is ideological and as a discourse it "narrates the world in a special way," (Aronowitz, 1988: 34). According to Aronowitz, science conflates knowledge with "truth" and this outcome makes Habermas's conception of instrumental reason being under-girded by communicative reason as highly suspect. As Aronowitz suggests, this is problematic because "Habermas is prepared to grant technical reason, that is, the domination of nature, its sphere of autonomy but insists that communications be accorded a space in the conscious rules that govern social life," (Aronowitz, 1988: 164). As Poster maintains, Habermas's forms of the spheres of instrumental and communicative reason requires reason to be re-inscribed "in the new register of communicative action [and that Habermas] ...reproduces this doubling effect as the rhetorical figure of his own discourse," (Poster, 1989: 25). Poster suggests that Habermas's "own discourse contains the same hidden "performative contradiction" he attributes to his French opponents," (Poster, 1989: 25). Thus, the kind of special sphere and characteristics that Habermas wishes to maintain for communicative reason, and in composing and promoting a public sphere, devolves precisely into the chaos he was trying to avoid.

In a much more radical position, Gianni Vattimo, in **The End of (Hi)story**, observes that Habermas and Lyotard agree that post-modernity means the "disappearance of the *metarécits* as ways of legitimation," (Vattimo, 1991: 132). However, what Habermas and Lyotard disagree on is what comes after the rejection of meta-narratives of legitimation. According to Vattimo:

Habermas accepts, in a way, Lyotard's description; but in his view, it is not the description of the condition of contemporary man but simply a (wrong) interpretation of this condition that involves a more or less explicitly passive acceptance of the existing disorder of late capitalism, technology, and mass society. (Vattimo, 1991: 132)

Vattimo's reading of the debate between Lyotard and Habermas finds that it is the inability of post-modern thinking to rationally critique current society that frustrates Habermas. In addition, it is post-modernism's inability to provide a "basis for any rational discussion, which is the main reason why Habermas disagrees with Lyotard... [and] is clearly related to the fact that... [for] postmodernist thought... the *metarécits* have been dissolved," (Vattimo, 1991: 133).

Indeed, Vattimo points out that the Lyotard unsatisfactorily reduces all conceptions of rationality to "historical rationality, that is, to a *metarécit*," (Vattimo, 1991: 133). Thus, according to Vattimo, Habermas's criticism regarding Lyotard's blanket treatment of historical rationality gains certain validity because the post-modern perspective reduces reason's capacity to make any determination or judgement regarding rationality. Vattimo,

however, pushes his analysis even further than Habermas and argues that both Habermas and Lyotard are caught by a narrative of history while they are both attempting to escape history: Habermas, on the one hand, yearns to escape historical meta-narratives by grounding rationality in communicative reason; and Lyotard, on the other, yearns for an escape from *metarécits* and "foundational thought" altogether. As Vattimo points out:

What is important to me is to observe that... Lyotard (as well as Habermas, by the way) still uses a procedure of historical legitimation in arguing that the *metarécits* have been dissolved. Facts such as Stalinism or Nazism confute metaphysical philosophies of history only because, paradoxically, they are assumed to belong to a sort of rational development, namely, the development of a postmodern condition. The dissolution of the *metarécits* is itself a (paradoxical) kind of *metarécits*. (Vattimo, 1991: 135)

Nonetheless, for Vattimo the paradox in Lyotard's thought ought not to be regarded as a rejection of his thesis, but rather to extend post-modern and post-structural criticisms even further. In a radical extension of Lyotard's relatively modest post-modernism, Vattimo suggests that we "engage actively in the de(con)struction of all the metaphysical residues that still are alive in our philosophy, psychology, ethics, culture in general," (Vattimo: 141). This is extremely similar to Derrida's position requiring a project of an ongoing deconstruction because "[t]here is no outside-text," (Derrida, 1976: 158). The conundrum reached is that "[s]tructuralism, poststructuralism, postmodernity, Marxism, post-Marxism, or any of the other "new-isms" and "post-

isms"... (Derrida, 1991: 41) are all caught in the text of history or, as Derrida might put it, the history of the history of the text. That is, all the "new-isms" and "post-isms"

make the claim to reinterpret globally the state and their own inscription of and within the state. The formalization of both the past and the future of the state has to be read in the present; and the *new* and the *post*, what they announce and what they outdate, give the exact measure and the clear, synchronic and systemic formulation of that present.
(Derrida, 1991: 41)

Post-structuralism views modernity, Marx, Marxian materialism and Habermas's philosophy as a "closed" and univocal narrative.³ By rejecting the notion of "totality", post-structuralist critics argue that they have correctly identified the idealism that lurks behind the façade of these philosophic positions concerning history. In so doing, post-structuralism claims that the Hegelian-Marxian tradition, of which Habermas is a part, is simply another addition in the tradition of Western metaphysics. That is, Hegel sought to ground "truth" as the expression in history of Absolute Spirit. Marx identified the idealism of the Hegelian system, but then merely replaced Hegel's Spirit with the notion of economy. Similarly, Habermas replaces the material economy with a communicative economy and all this is simply an over-turning of Marxian materialism with communication as the moving force of history. Put another way, the critique of Hegel's spiritual "totality" is subsequently replaced by Marx's material "totality" and then eventually by Habermas's communicative "totality". Thus, all these theories, according to post-structuralists, are the

manifestations of idealism that is ultimately rooted in the onto-theology of Western philosophy. By comparison, post-structuralism argues that if there is (that is, if its possible?) a unifying characteristic of history then it is rooted in discontinuity – not continuity – and that the “meaning” of any and all material and communicative processes are the products of *différance* and discursive play rather than the hegemony of a structure, an ideal or a *logos*.

I believe Habermas’s theory of communicative reason is not completely unsympathetic to the particular values of heterogeneity and plurality advocated by post-structuralists. Nor is he unaware of post-structuralists’ desire to locate in language – and ultimately within society – a symbolic playfulness that no longer is based upon totalitarian forms of reason. However, Habermas’s notion of communicative reason is an attempt to provide the “normative” basis or foundation upon which the discursive play and the heterogeneity of meaning can actually occur. Indeed, Habermas argues that it is this foundation that allows for the production of discursive formations that allow post-structuralists to practice their deconstructive *jouissance*. For Habermas, the French critics are too ready and willing to abandon politics altogether to avoid the problematic and troublesome premises of universalistic philosophy. Habermas, on the other, hand is willing to retain an open – albeit qualified – universalistic notion of philosophy and communicative reason, along with all the problems of modernity, in order to uphold and strengthen a democratic political dialogue in the public sphere (Rorty, 1991:

85). According to Habermas, critics who denounce the Enlightenment as being rooted in a "terroristic reason" have missed the mark and are conceptually confused.

Those who lump together the very project of modernity with the state of consciousness and the spectacular action of the individual terrorist are no less short-sighted than those who would claim that the incomparably more persistent and extensive bureaucratic terror practiced in the dark, in the cellars of the military and secret police, and in camps and institution, is the *raison d'être* of the modern state, only because this kind of administrative terror makes use of the coercive means of modern bureaucracies. (Habermas, 1983: 12)

Elsewhere, Martin Jay has similarly suggested that:

It would be dangerous to turn deconstruction from an essentially literary approach into a more universal solvent of all structures and systems, in the hope of reconvening the sacred community of Bataille's ecstatic general economy. For the result would be a night of endless *différance* in which all cows were piebald, which is as deceptive as the old idealists trick of turning them all black. (Jay, 1991: 108)

There is little question that post-structuralists have been quick to label Habermas as a monolithic thinker who is trying to impose "totality". There is a certain truth in this claim. However, I do not think that the post-structuralists' characterisation of Habermas's work has been completely fair. It is true that the modernity that we have experienced has left us exhausted after the most violent century in human history, but it would be a mistake, in my opinion, to suggest that this is solely

the fault of modernity and human reason. In a sense, if this were true, then post-structuralists would have to claim that the structure of modernity and human reason possesses *a priori* the power to determine our past, present and future. In so doing, post-structuralists would be just as essentialistic – albeit in a negative sense – as the charge of essentialism which they level at Habermas. Moreover, Habermas does not ignore the bleak and destructive force of modernity. He clearly addresses the limits of reason and attempts to address its shortcomings. Habermas thus concedes that instrumental reason can potentially destroy the possibility of freedom and humanity, but he is firmly committed to identifying the ways in which the constraints of a “totally administered society” can be over-come. Communicative reason represents an attempt to mediate between subjects and create inter-subjective forms of understanding between individuals. Thus, for post-structuralists to say that Habermas is simply reducing social reality to a single form of tyrannical reason would be to ignore his project of reconstructing the public sphere altogether.

Critique of the Public Sphere

In spite of the post-structuralist criticisms of communicative reason and modernity, Habermas's use of communicative reason and the public sphere has attracted considerable interest and attention. Terry Eagleton (1984), Alex Callinicos (1990) and Nancy Fraser (1992), among others, have expressed their concerns with the conclusions that Habermas has reached regarding his re-conceptualisation of the public sphere.

Their views are generally more sympathetic to the public sphere. However, they are critical of Habermas's purported neutrality in which he frames the dialogic space of the public sphere.

As a structural Marxist, Eagleton's opinion (1984) is that Habermas is inclined to ignore the social and historic context of the public sphere. Not unlike Macpherson, Eagleton indicates that Habermas's periodisation of the public sphere is problematic. For example, Eagleton argues that the era that Habermas proposes as the cerebral formation of the public sphere in England, and citing E.P. Thompson (1968), is the "epoch of intensive class struggle... [and] is already nothing less than a 'counter-public sphere'," (Eagleton, 1984: 36). In other words, Habermas confuses the collapse of the bourgeois public sphere in England with the period that in fact gave birth to a democratic public sphere. That is, the period to which Habermas attributes to the separation of public and private matters, the era where private individuals coalesced in the public sphere to form public opinion, is actually that of the origins of popular mass movements that brought about the crisis which led to the formation of the "bourgeois public sphere".

Eagleton suggests that Habermas's concept of the public sphere has had a deep influence on his own interpretative work. Nonetheless, according to Eagleton, Habermas's argument regarding the public sphere being destroyed by the state intervening in the economy and in civil society, which obliterates the public/private distinction, is problematic if not inaccurate.

[The public sphere] has proved by no means uncontroversial: it hovers indecisively between ideal model and historical description, suffers from severe problems of historical periodization, and in Habermas's own work is not easily dissociable from a certain view of socialism which is deeply debatable. The 'public sphere' is a notion difficult to rid of nostalgic, idealizing connotations; like the 'organic society', it sometimes seems to have been disintegrating since its inception. (Eagleton, 1990: 8)

Eagleton points out that Habermas omits important information regarding the formation of the public sphere and, in doing so, Habermas tends to mask the social conflict that produced the popular political struggles that accompanied the "political necessities of lifting... repression, so that dialogism can actually take place," (Eagleton, 1990: 29).

Thus, Eagleton suggests that Habermas has simply overlooked the importance of class and class struggle and misinterprets the historic data that actually led to the political formation of the English public sphere. In addition, Eagleton perceives that Habermas attributes too many qualities to the bourgeoisie's elevation of "rationality" in the formation of the public sphere and argues that a "radical politics can prescribe what must be done for... [a public sphere] to occur; but it cannot prescribe the content of what will then be lived, for the content, as Marx says, goes beyond the phrase," (Eagleton, 1990: 29).

For Alex Callinicos (1990), Habermas is "without any doubt the major philosopher of the contemporary Western left" (Callinicos, 1990: 92) and he is "a figure of considerable

stature, certainly dwarfing the *epigoni* of poststructuralism," (Callinicos, 1990: 104). However, Callinicos, as a revolutionary Marxist, takes issue with Habermas's conception of the public sphere and mass democracy. Specifically, Callinicos objects to Habermas's "sarcastic reference" (Callinicos, 1990: 119) to the "nonexistent Marxist theory of democracy," (Habermas, 1989: 138). Not unlike Engels's suggestion to use constitutions to further progressive rights, Callinicos contends that "the classical revolutionary socialist tradition... [has] always rejected the idea that Marxists should be indifferent to reactionary attacks on the rights and institutions of liberal democracy," (Callinicos, 1990: 119).

Callinicos acknowledges that Habermas's portrayal of the disappearance of the public sphere under the regulation of the welfare state and mass democracy has certain validity. That is, that "[u]nder late, 'organized' capitalism political control of the economy secures, thanks to Keynesian techniques of demand management, class peace, albeit at the price of displacing these contradictions onto other spheres," (Callinicos, 1990: 116). However, Callinicos finds that Habermas's account is largely descriptive and not a critical explanation of this transformative process. Moreover, Habermas fails to take into account that, since the 1960s, the return "of the classic cycle of boom and slump, involving two major global recessions, in 1974-5 and 1979-1982" (Callinicos, 1990: 116) have occurred. Currently, this opinion would have to be modified to account for the third recession in the early 1990s as well as the various currency

devaluations that have recently rocked the so called "developing world" from Mexico, to Russia, to the "Asian tigers". Callinicos is correct in pointing out that "over the last couple of decades [capitalism has] returned to a condition of 'disorganization'... [and] it is clear that the ability of the nation-state to manage economic activities within its borders has been very significantly reduced," (Callinicos, 1990: 116). Hence, the various forms of mediation and regulation of the economy by the state are no longer readily available to neutralise class antagonisms.⁴ Callinicos suggests that:

These developments makes it very hard to sustain the idea that of 're-politicization' of the relations of production has bought a large measure of economic stability at the expense of the cultural reproduction of the system. However precisely we characterize them, the internal contradictions of the capitalist mode of production still have an effectivity which no measure of control by individual states has been able to overcome. (Callinicos, 1990: 116)

Indeed, Callinicos is not comfortable with Habermas's framework for understanding the development of modern democracy and the tensions inherent in late-capitalist societies. For Callinicos, Habermas is inclined to overlook the problems with liberal democracy and defend his interpretation of society simply to remain consistent with his theory of communicative reason. Thus, acceptable sorts of consensus in the public sphere – and for that matter agreeable capacities and forms of dissent – become

contained if not manipulated by the state and commercial interests.

The danger with Habermas's defence of liberal democracy against the neo-conservatives is that it can lead him close to an apologetic position: thus in his intervention in the *Historikerstreit* over the uniqueness of the Nazi Holocaust he tends so strongly to stress the democratic virtues of the *Bundesrepublik* as to play down such infringements of civil liberties as the *Berufsverbot* and the constitutional ban on 'extremist' parties, and to treat its integration into the Western political order as a necessary break with the authoritarian past. (Callinicos, 1990: 119)

According to Callinicos, Habermas grounds communicative reason so firmly upon "normative foundations" that he is unwilling to acknowledge when his standards are no longer historically useful, acceptable or progressive. Callinicos indicates that:

Habermas in rightly rejecting the critique of Enlightenment developed by Nietzsche and his successors, which opens the door to the imposed return of a fictive 'original fullness' – the project of Heidegger, Schmitt et al. in their Nazi period, tends to fall into an equally one-sided exaggeration of the extent to which modernity has already realized the Enlightenment project. Marx celebrated capitalism both because it immeasurably developed human powers and because it created the class which would achieve 'its blessed end'. (Callinicos, 1990: 120)

For Callinicos, Habermas is so protective of a "normative standard" that he is unable to move beyond it and becomes bogged

down in dialogue that echoes the sentiments of neo-conservative critics who desire an end of history.

Philosophically, Fraser takes aim at the scope of Habermas's gendered conception of the public sphere. Fraser points out that Habermas limits his observation concerning the rise and decline of the bourgeois public sphere and that he oddly "stops short of developing a new, post bourgeois model of the public sphere... [and] he never explicitly problematizes some dubious assumptions that underlie the bourgeois model," (Fraser, 1992: 111). For example, Fraser suggests that Habermas overlooks the gendered bias of the liberal public sphere of republican France, a public sphere that was hostile to women and which replaced the culture of woman-friendly salons with an austere, rational and "manly" forms of public speaking. In doing so, this republican public sphere harkens back to an idealised *polis* where the "etymological connection between "public" and "pubic" [is] a graphic trace of the fact that in the ancient world possession of a penis was a requirement for speaking in public," (Fraser, 1992: 114). Fraser correctly notes the basic competitive hierarchy of the public sphere, but she also notes that Habermas fails to comprehend the "remarkable irony" that governs participation in the public sphere:

A discourse of publicity touting accessibility, rationality, and the suspension of status hierarchies is itself deployed as a strategy of distinction. Of course, in and of itself this irony does not fatally compromise the discourse of publicity; that discourse can be, indeed has been, differently deployed in different circumstances and contexts.

Nevertheless, it does suggest that the relationship between publicity and status is more complex than Habermas intimates, that declaring a deliberative arena to be a space where extant status distinctions are bracketed and neutralized is not sufficient to make it so. (Fraser, 1992: 115)

Fraser adds that Habermas complicates the problem of the public sphere by failing to "examine other, nonliberal, nonbourgeois, competing public spheres," (Fraser, 1992: 115). Thus, Habermas fails to understand how "less privileged women... [gained] access to public life... through [their] participation in supporting roles in male-dominated working class protest activities... [while] other women found public outlets in street protests and parades," (Fraser, 1992: 115).

For Fraser, Habermas's conception of the bourgeois public sphere "is not adequate for the critique of the limits of actually existing democracy in late-capitalist societies," (Fraser, 1992: 136). According to Fraser, the normative standard that Habermas wishes to ascribe to the bourgeois public sphere assumes equality when, in fact, it entrenches a particular and privileged "normative standard" of masculinised inequality. In place of the conception of the bourgeois public sphere, Fraser argues we need a post-bourgeois public sphere where there are multiplicities of public spheres. Moreover, that a "defensible conception [of these public spheres] must allow both for strong publics and for weak publics and that it should help theorize the relations among them," (Fraser, 1992: 137).

Fraser cautions that Habermas's neutrality about the public sphere can lead to complacency. Indeed, for Fraser theories of the public sphere must "render visible the ways in which social inequality taints deliberation with publics in late-capitalist societies" (Fraser, 1992: 137) and not merely mask the normative dimensions of social inequality. Moreover, Fraser suggests that "a critical theory should expose ways in which the labelling of some issues and interests as "private" limits the range of problems, and of approaches to problems, that can be widely contested in contemporary societies... [and] how the overly weak character of some public spheres in late-capitalist societies denudes "public opinion" of practical force," (Fraser, 1992: 137).

I believe that Eagleton, Callinicos and Fraser, unlike their post-structuralist colleagues, have some very powerful arguments against Habermas's positions. Eagleton clearly indicates that Habermas's periodisation of the birth of the bourgeois public sphere is problematic - if not invalid - and that he undervalues the popular movements that led to freer speech and to democratic enfranchisement. In addition, Habermas elevates the bourgeois public sphere as the standard for consensus rather than the working class public sphere or a combination of both spheres. Clearly, working class movements in the eighteenth, nineteenth and early twentieth centuries, struggling under the general repression and exploitation inherent in the liberal state, demonstrated a genuinely dynamic force and process for achieving democratic consensus and transforming the capitalist state against the

material and economic interests of capitalists and the cultural treasure of their bourgeois public sphere.

Alternatively, Callinicos indicates that the "welfare-statism", which Habermas uses to collapse the distinction between the economy and politics and to reject Marxian materialism, is indeterminate. According to Callinicos, the "golden age" of the welfare state and the period of the post-war "legitimation crisis" appears to be on the wane – that is, it would appear that neo-liberal economic policies are successfully rolling back the Keynesian welfare-state. In addition, it appears that the Keynesian welfare-state may have only been a temporary period of stability in the development of capitalism and that the current process known as "globalisation" is merely bringing to fruition the longer historical process of cosmopolitan capitalism anticipated by Marx and Engels 151 years ago (Henwood, 1997). In this process, according to Marx:

There will come a time when everything that men had considered as inalienable became an object of exchange, of traffic and could be alienated. This is the time when the very things which till then had been communicated, but never exchanged; given, but never sold; acquired, but never bought – virtue, love, conviction, knowledge, conscience, etc. – when everything, in short, passed into commerce. It is the time of general corruption, of universal venality, or, to speak in terms of political economy, the time when everything, moral or physical, having become a marketable value, is brought to the market to be assessed at its truest value. (Marx, 1963: 34)

Comparatively, Fraser notes that Habermas fails to recognise that the fragmented nature of late-capitalist societies and the problems this presents for public sphere formation. According to Fraser, Habermas's access to the public sphere through the simple use of reason alone is no guarantee that one will be permitted to enter the public sphere, let alone that a person's concerns will be heard. Thus, the normative politics of communicative rationality could be used to exclude and marginalise individuals and groups in the public sphere and the notion of consensus could devolve into simple majoritarian politics. That is, a communicative public sphere, instead of being a democratic sphere of rule by the people, can potentially contain the same flaws that Habermas attributes to instrumental reason and the manipulation of public opinion through the public relations industry.

The objections raised by Eagleton, Callinicos and Fraser are not easily dealt with by Habermas. Unlike Habermas's post-structuralist critics, these individuals ground their objections and criticisms about Habermas's public sphere on the basis of the material conditions of late-capitalism. Habermas, I believe, comes up short in not paying sufficient attention to these types of criticisms regarding the exclusionary practices of late-capitalist societies and how this limits the forms of communication available to individuals and to their access to the public sphere. In addition, Habermas's interpretation of Marx, and elsewhere the argument regarding the "refeudalisation" of the public sphere collapsing the state and the economy together, is unconvincing. By over-emphasising the communicative aspects of

human beings, Habermas appears to commit the same "totalising" mistake he attributes to Marx: that is, Habermas overemphasises communication under-girding production as the *raison d'être* of human kind. To re-emphasise, Habermas fails to acknowledge the deep communicative insight of Marx that held that "[a]s individuals express their life, so they are," (Marx, 1978: 150). Clearly, Marx was not unaware of the communicative capacity of human beings to express themselves. Contrary to Habermas's interpretation, Marx appears to be suggesting that the collective historical material, mental and communicative aspects of human beings comprise our '*species being*' rather than an abstract individualised human nature defined simply in terms of economic production or an idealised public sphere.

With these qualifications in mind, Habermas's notion of the public sphere still presents a provocative position about understanding how public opinion and how media in late-capitalist societies function. In other words, I think there exists in Habermas's theory of the public sphere workable elements that provide the necessary recognition of how opinion formation and media concentration affects the way the public understands the world. In the Canadian context, Habermas's concept of the public sphere presents a perspective for understanding how the courts have come to protect commercialised speech over the individual's right to free speech and how this protection assists newspaper concentration.

The Public Sphere and the Press

Various theorists and media critics have expressed concerns regarding Habermas's historical treatment of the public sphere and the "free press". Generally, these theorists argue that Habermas's concern about the distortion of communicative rationality is problematic because of his inaccurate historical interpretation regarding the formation of the early press and the public sphere. James Curran (1991) and Peter Dalhgren (1987) represent different critical views of Habermas's contribution to media theory. However, they both note that Habermas's introduction of the public sphere has been immensely influential in reassessing the notion of democracy in contemporary society.

In a robust and critical assessment of the public sphere, Curran (1991) argues that Habermas's "seminal study" has triggered widespread debate and emphasised the importance of historical research in contributing to the "debate about the role of media in liberal democracies," (Curran, 1991: 27). However, Curran suggests that Habermas has misinterpreted the historical data regarding the press. According to Curran, Habermas over values the contribution of the bourgeoisie in the formation of modern democracy and the "free press" and under values the contribution of the working class and radical intellectuals.

Curran uses three different positions to demarcate the various theories and schools of media studies to understand the formation of the press: liberal theories; Marxist theories; and radical democratic theories. For Curran, liberal theories fulfil a number of different functions in capitalist democracies. Generally, the press is seen as being a disinterested conduit or

objective source of information that is used to inform the public and to place a check on the 'arbitrary' actions of governments. According to Curran, the liberal version of the public sphere (better known as the public forum) functions so that:

[The media] distribute information necessary for citizens to make an informed choice at election time; they facilitate the formation of public opinion by providing an independent forum of debate; and they enable people to shape the conduct of government by articulating their views. The media are thus the principal institutions of the public sphere or, in the rhetoric of nineteenth-century liberalism, 'the fourth estate of the realm'. (Curran, 1991: 29)

The media in the liberal public sphere are generally conceptualised as a self-regulated "market-place of ideas". However, as Curran suggests, "[u]nderlying the traditionalist version of this theory is a simplistic view of society as an aggregation of individuals, and of government as 'the seat of power'," (Curran, 1991: 29). Curran contends that:

[O]ne problem with this approach is that it fails to take adequate account of the way in which power is exercised through capitalist and patriarch structures, and consequently does not consider how the media related to wider social cleavages in society. It also ignores the way in which interests have become organized and collectivized, and so does not address the question of how the media function in relation to modern systems of representation in liberal democracies. (Curran, 1991: 29)

Marxist critiques of the media hold that class interests dominate the liberal public sphere and that media are simply used as a vehicle for maintaining class control. However, as Curran notes, "marxist critique[s] of the media in the west cannot be readily reproduced as a single set of ideas since Marx himself never formulated a fully fledged analysis of the capitalist press, and subsequent marxist interpretations have taken a number of divergent forms," (Curran, 1991: 36). Nevertheless:

According to old-style marxism, the liberal concept of the public sphere is a chimera, disguising the reality of bourgeois domination. The media are agencies of class control since they are owned by the bourgeoisie or are subject to its ideological hegemony. Indeed, the media should be viewed as an ideological apparatus of the state - the ideational counterpart to the repressive apparatus of the police, judiciary and armed forces through which the ruling order is ultimately sustained. (Curran, 1991: 36)

Whereas the "market place of ideas" is held to be an exemplar of democratic freedom and individual choice, marxist critiques argue that classical liberal media theories mask institutional arrangements and the social mechanisms that filter information. As Curran points out:

This familiar argument is usually based on a conception of the dominant ideology as a monolithic and faithful rationalization of dominant material interests. This generally overstates the homology between ideas and economic interests, the internal consistency of dominant discourses, the homogeneity of dominant interests and the extent of

ideological domination of subordinate classes.
(Curran, 1991: 37)

Thus, for Curran, one must be aware of the institutional structure of the press, but one must acknowledge the permutations that exist within media institutions and the relative autonomy that journalists and their audience possess.

Unlike an "old-style" Marxist critique, a radical democratic view of the press attempts to account for the "wider environment in which media organizations operate," (Curran, 1991: 37). For Curran, this radical democratic understanding of the press acknowledges the existence of its own ideological premises to look at the relationship between the media and the public sphere in a new way. Thus, for Curran, a radical democratic understanding of the role the press plays in late-capitalist societies goes beyond the formation of ideological consensus to relay the various forms of pragmatic consensus that comprise the public sphere. He suggests:

[The radical democratic theory] has the effect of 'repositioning' the place of the media in society. The media are assumed to be caught in an ideological crossfire rather than acting as a fully conscripted servant of the social order. By implication, the media have a greater potential to affect the outcome of social contests since these are no longer viewed as inevitably unequal and one-sided.
(Curran, 1991: 37)

However, Curran warns that this doesn't mean that a radical democratic theory of the press accepts uncritically the liberal pluralist arguments about the media (Curran, 1991: 38). As Curran

suggests, the "media systems in most liberal democracies are not representative... [and most media systems] ...under-represent subordinate interests and are canted more towards the right than their publics," (Curran, 1991: 38).

This reflects the prevalence of capitalist media ownership, and consequent influence on personnel recruitment and promotion, market distortions limiting real choice, media dependence on powerful groups and institutions as news sources and the unequal distribution of resources within society for the articulation and generalization of social interests. But the radical democratic approach believes that the media can be reorganized in a way that will make them more representative or progressive. One way in which this can be done is to secure democratic consent for their reform through the state. (Curran, 1991: 38)

For Curran, a radical democratic articulation of the press and the public sphere is a distinct improvement over liberal and, ultimately, Habermas's theory of media. In addition, he notes that the radical and working class press were extremely popular and the press' influence went well beyond the literate bourgeoisie:

Newspaper reading was essentially a social activity: newspapers were usually read in a social setting outside the home or shared between friends. Above all, radical newspapers were often read out aloud (and indeed were written to be read aloud), providing a focal point of interaction. The messages transmitted by the radical press were mediated far beyond the immediate audiences of newspapers on a scale unknown to the twentieth century. (Curran, 1977: 204)

Curran argues that Habermas's account of the bourgeois public sphere and his "central arguments have been tacitly repudiated in recent historical accounts of the British press," (Curran, 1991: 39). According to Curran, Habermas calls into question and eventually dismisses the value of the radical press. Ideally, Habermas desires a "press as a forum of rational-critical debate [which would be] released from the pressure to take sides ideologically," (Habermas, 1989: 184). Nonetheless, according to Curran:

[The] dismissal of the radical press as an ideological pollutant highlights the problematic nature of Habermas's conception of reasoned discourse. The newspapers celebrated by Habermas were engines of propaganda for the bourgeoisie rather than the embodiment of disinterested rationality. Their version of reason was challenged by radical papers which became the circulation leaders in the first half of the nineteenth century. The more militant of these developed a radical and innovatory analysis of society going far beyond the bourgeois critique of the aristocratic constitution.... They challenged the legitimacy of the capitalist order, arguing that poverty was rooted in the economic process and was caused principally by the profits appropriated by capitalist, as well as by a corrupt state controlled by the propertied class. (Curran, 1991: 40)

Curran, I believe, correctly observes that the radical democratic theory of the press adequately challenges Habermas's views in three ways: first, it contests the "normative" foundation for communicative rationality upon which Habermas elevates the

bourgeois public sphere as ideal; second, it re-introduces the dimension of class struggle as a vital aspect of establishing a dialogic space in history as well as the historical formation of the press; and, third, it indicates the ways that the commercialisation of the press has led to a narrowing of access to the public sphere and how it has entrenched the values of the bourgeois liberalism as the "normative" state of affairs. In addition, Curran suggests that, unlike Habermas's view that the modern mass media have a narcotising and stupefying effect over the mass public, there are significant empirical studies that show that audiences are recalcitrant and fractious and that they are "neither as malleable nor as passive as Habermas feared," (Curran, 1991: 42).

Alternatively, for Dalhgren (1987), the current stage of global media and information saturation manifest difficulties and challenges for democracy. He suggests that a "genuine democracy requires, among other things, the formulation, articulation, and implementation of something approximating a popular political will," (Dalhgren, 1987: 24). According to this definition of democracy, Dalhgren suggests that the notions of ideology and ideology critique are important in understanding the context of the public sphere. Incorporating Habermas's notion of the public sphere, but rejecting his particular formulation of it, Dalhgren suggests that the "information revolution now unfolding will no doubt offer still newer methods for subverting democratic participation. Yet it should also hold out possibilities for

evolving new strategies to enhance people's political control over their own lives," (Dalhgren, 1987: 24).

Dalhgren indicates that with "the production of information in the public sphere... we are experiencing transitions in its political economy, especially the growing pattern of privatization of information which is of public relevance," (Dalhgren, 1987: 28). In Dalhgren's opinion, we are encountering "growth in the number of outlets, countered by the trend toward the concentration of their ownership," (Dalhgren, 1987: 28). Indeed, Dalhgren suggests that, as information outlets increase, late-capitalism reduces the number of sources and the variety of concepts available in the "marketplace of ideas" (Dalhgren, 1987: 25). Similarly, Wallace Clement, in **The Canadian Corporate Elite**, observes that:

Increase in the means of mass communication in a society does not necessarily imply increased communication if communication is taken to mean two-sided or equal exchange of information.... Mass media actually decreases the communication relationship reducing the number of sources and increasing the number of recipients thus reducing the variety of communicative relationships. This argument runs contrary to the usual position that the increasing complexity of the social structure generates more "constellations" of ideas and belief. (Clement, 1975: 274)

Dalhgren and Clement, I believe, correctly identify this disturbing trend in late-capitalist societies where one way or mass communicative relationships actively submerge real "two way" communication. Thus, it is possible that the rise of one way

communicative spheres, which are controlled by private commercial interests, can have a deleterious affect on the range of ideas available to citizens in the democratic formation of public opinion.

In his introduction to Communication and Citizenship, Dahlgren notes that "Habermas's analysis is truly ambitious and largely compelling, yet there remain some areas of difficulty," (Dahlgren, 1991: 5). Two specific areas that Dahlgren outlines as problematic are: first, the possible relations and political dimensions of alternative public spheres; and, second, Habermas's rationalistic formulation of the content of communication and how this relates to media and the broader public. As Dahlgren suggests, Habermas leaves a very large theoretical vacuum by remaining silent on "alternative, 'plebeian', popular, informal or oppositional public spheres," (Dahlgren, 1991: 6). Similar to other critics, Dahlgren finds that the privileged place that Habermas grants to the bourgeois public sphere is too restrictive. Moreover, "under both the periods of liberal and advanced capitalism there have existed other *fora* which have shaped people's political consciousness, served as networks for exchange of information, rumor and gossip, and also provided settings for cultural expression," (Dahlgren, 1991: 6).

However, Dahlgren notes that Habermas's analysis, when rooted in the tradition of the Frankfurt School, gains a "historical concreteness" when pitted against his more esoteric speculation regarding "speech acts" and "ideal speech situations". Methodologically, Dahlgren indicates that it is this aspect of

Habermas's work that allows other theorists to develop conceptions of other notions of the public sphere that can, within certain limits, provide insights into current struggles over real democratic opinion formation versus the public relations industry and its attempt to manipulate the public. Of course, this means that the notion of "mass society" has to be reconceptualise as no longer a pre-determined social formation, but, rather, the public sphere has to be viewed as a dynamic space where citizens' participate in their communities to establish their emancipatory interests and probe these interests "to reveal their historical conditions and limits," (Dahlgren, 1991: 7). As Dahlgren suggests, new social movements, as they mediate their representation in the public sphere, may "have a growing political capacity to transmit their versions of political reality to the dominant media... [and that this both serves] to diffuse and legitimate a wider array of viewpoints and information," (Dahlgren, 1991: 15).

Dahlgren potentially sees a liberatory testing of the limits and conditions of late-capitalism by new social and alternative media movements. In addition, Dahlgren indicates that these new social and alternative media movements, acting in the public sphere, appear to parallel Habermas's conception regarding the formation of the bourgeois public sphere. As Dahlgren suggests:

For... [Habermas] the political struggles of the emerging bourgeois classes against state powers resulted in the creation of a new public sphere, which in turn began the decay and finally disintegrated under what he terms the refeudalization of social power under the

welfare state. While new movements are not likely to dissolve or supplant the prevailing state-corporate-media power nexus, their alternative media may be ascending to a much larger complementary role vis à vis the dominant communications systems. If such is the case, a new, more solidified two-tiered public sphere would at least be a reflection of altered social relations of power. (Dahlgren, 1991: 15)

Dahlgren is suggesting that at a time of mass media concentration, in either the electronic or the material format, there still exist alternative sources that have the potential to enable modern societies to become familiar with the issues confronting the public and make informed decisions in the public sphere beyond the control of commercial interests and the legions they deploy in the public relations industry.

Dahlgren, in my opinion, does present some interesting possibilities regarding the formation of different public spheres through alternative media. However, as Curran notes, market forces have a strong tendency to exclude or marginalise alternative voices and information that contests or questions the status quo of the economic system (Curran, 1991: 52). Moreover, the economic regulation of the press and other mass media flourishes because the state intervenes to subsidise advertising rates and favours private ownership over public ownership.⁵ Thus, the economic actors or newspaper owners favour a "business friendly" media rather than a combative one. Curran advocates the Swedish model of press subsidies to assist in providing a democratic forum of alternative points of view (Curran, 1991: 51-

52).⁶ Although this is a laudable goal, the likelihood of this occurring in Canada is next to none. However, what is of interest in the Canadian context is how the state – unlike in Sweden, where the state supports diversity – actively regulates newspaper concentration and ownership to exclude and marginalise voices that would constitute a more democratic public sphere.

Conclusion

There is little doubt that the objections raised above, by various critics, go directly to the heart of Habermas's conception of the Enlightenment, the public sphere and the construction of a dialogic space in the media. Habermas has, I believe, competently addressed the concerns regarding poststructuralism and the Enlightenment. However, the criticisms raised regarding the public sphere and the press are difficult to overcome. The objections to Habermas's "rationalistic" conception of communication, his idealised bourgeois public sphere and his undervaluation of the radical press undermine his notion of democratic consensus formation.

Nevertheless, a broad use of Habermas's notion of the public sphere allows for one to connect the various inter-related institutions that regulate the formation of public opinion. In addition, by using the concept of the public sphere, it assists in understanding how political, economic and legal constraints have historically furthered newspaper concentration in Canada. That said, it is necessary to stress that the public sphere is only part of the larger complex social totality. In the following chapter, however, I will attempt to demonstrate how particular

legal decisions concerning the *Charter* have had the tendency to diminish individuals' rights to freedom of expression and favour the commercialised speech of corporate interests. Moreover, I hope to show how these decisions have assisted our current state of newspaper concentration, one that promotes and universalises a naturalistic vision of the social world based on neo-liberal values.

Notes

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¹ When I use the terms "post-modern" and "post-structural", I'm loosely including the positions advocated by "deconstructionists". In addition, I tend to use the terms "post-modernism" and "post-structuralism" interchangeably. Although this is casting an extremely wide net, and is problematic, I believe there are enough similarities between these positions, and their critiques of modernity, to warrant the generalisation of these labels.

² This lecture has also been translated and printed, with a slightly more adversarial title, **Modernity versus Post-Modernity**. in New German Critique. Vol. 22. (Winter, 1981).

³ This statement should be qualified. As John Rees notes, Derrida's significant philosophic intervention in the post-Soviet debate, with the Specters of Marx, has ushered in a serious re-engagement of Marxism. Rees suggests, and Derrida provides ample evidence in this text, "that we [are] ...all inheritors of Marx and that none of us could reckon without his legacy," (Rees, 1998: 8). For a further exposition between Marx and deconstruction: see Ryan (1982).

⁴ Central to Karl Polanyi's interpretation of the "double movement" was the capacity of the state to intervene and regulate economic activity. This appears, in qualified terms, to be no longer possible.

⁵ Clearly, the one exception to the private slant to media ownership is the CBC in Canada.

⁶ The Swedish model of press subsidies provides low interest loans that facilitate "market entry" for new newspapers and compensation, in the form of selective aid, that comes from taxes on overall advertising rates.

Chapter Four

The Charter and Newspaper Concentration: A Materialist Perspective on Law and the Public Sphere

In scrutinising Habermas's theory of the public sphere and Charter litigation from a materialist perspective on freedom of expression and newspaper concentration, one must temper one's analysis with what Nicholas Garnham calls, in Capitalism and Communication, the "expressive totality" of the "disequilibrium" of capitalist development. Garnham proposes that a truly materialist reading of the political economy of mass communication, and in our case newspaper concentration, should not consider the abstract as "opposed to the concrete, just as... phenomenal forms should not be opposed to... real relations," (Garnham, 1990: 22). Garnham maintains that critical political economies cannot elude a "discussion of the base/superstructure, but in so doing... [they need] to avoid the twin traps of economic reductionism and of the idealist autonomization of the ideological level," (Garnham, 1990: 23).

Garnham further observes that if we are to remain consistent with Marx's immanent critique of the incomplete process of capitalist development, then a good tactic would be to utilise Raymond Williams's notion of cultural materialism as a compass (Williams, 1977; 1981). To Garnham, Williams's concept of cultural materialism allows one to construct and pursue a relational form of analysis to understand how mass communication forms and interpenetrates late-capitalism (Garnham, 1990: 24). For Garnham, a relational form of critique avoids the pit falls

associated with other deterministic and orthodox schools of Marxian critique. Therefore, what is crucial, indeed essential, in our analysis of the public sphere and the *Charter* is that the "right" to freedom of expression and newspaper concentration be understood as a contested social terrain that is "linked to historically distinct modalities of cultural production," (Garnham, 1990: 24). Moreover, the public sphere is a space that is embedded in the larger process that involves the cultural and material production and reproduction of society. That is, the public sphere is not merely an idealised reflection of the concrete hegemonic interests of the dominant class, but a contested and constantly evolving space. Indeed, the public sphere is the context for the struggle of winning popular consent and gaining legitimation for the hegemonic or counter-hegemonic values present in society.

Habermas's concept of the public sphere (limited as it is) provides a materialist critic with a unique perspective to investigate the intersection between the *Charter*, freedom of expression and newspaper concentration. It is my intention in this chapter to outline, from a cultural materialist perspective, how recent *Supreme Court* decisions concerning the *Charter* and freedom of expression have entrenched neo-liberal rights and commercial speech over the rights of the individual to freedom of expression. However, this is not an attempt to demonstrate how Habermas's concept of the public sphere functionally operates. Rather, this approach will apply some of the central themes of the public sphere to broaden the discussion regarding freedom of

expression and how its legal articulation has been problematically entrenched in the *Charter*.

In employing a cultural materialist perspective on Habermas's notion of the public sphere, I will explore a series of freedom of expression cases that represent important elements in providing and extending *Charter* protection for commercial speech and newspaper concentration. First, I will outline a brief history of the cases seeking protection for freedom of expression under section 2(b). In examining the holdings of these decisions, I will demonstrate how the court has attempted to shaped the public sphere in a particular way, one that is more receptive to commercial interests and neo-liberal conceptions of free speech. Finally, I will turn to the Council of Canadians' failed court challenge, which was an attempt to use the *Charter* to block Hollinger's take-over of the Southam Newspaper chain, and demonstrate how the Competition Bureau and the courts currently facilitate newspaper concentration and promote the dominance of commercial speech over individuals' speech. However, before proceeding, it will be necessary to outline a brief history of the *Constitution*, economic regulation and recent debates on the *Charter* and rights in Canada.¹

Early Economic Regulation and the Constitution

In an effort to understand how economic regulation functions in Canada, one must also understand the role different levels of government play and how the enforcement of economic regulation occurs. For our purposes, what is necessary to comprehend is how

the courts, through the *Constitution Act, 1867*, review legislation regarding economic regulation and either uphold or disallow it.

Constitutions are a posited set of conventions, laws and institutions that delineate the basic rules for the governance of a given state. In essence, our *Constitution* represents the source that provides the state with the legal framework to enact other laws that are, in theory, coherent and consistent. Our constitutional legal tradition is deeply informed by English common law – and in Québec through the Civil Code – and by the legal precedents of *stare decisis*. In this extremely positivistic interpretative framework, the facts of a case are aligned to correspond with previous cases and it is the specific case's correspondence with preceding case law that determines its outcome before the court.

Yet, below the surface of this positivistic veneer exists a radically different and powerful philosophical interpretative approach, one which has come to dominate Canadian constitutional interpretation. In the Canadian constitutional order, a complex dialectical interplay of ideas and legal precedents under-gird and inform the various regimes of federal and provincial powers concerning economic regulation. Thus, similar to Karl Polanyi's insight that the road to the free market is heavily regulated (Polanyi, 1944: 140), economic regulation in Canada has been deeply affected by various government policies and regulations. However, what marks Canadian economic regulation is not the lack of effort to regulate the economy, but, rather, the dialectic of disputes regarding regulation that have occurred between the

federal and provincial governments. Thus, to understand how governments regulate economic activity, let alone newspaper concentration in Canada, one must understand the constitutional role our courts play in economic regulation.

Until 1949, the court of final appeal for legal cases in Canada was the Judicial Committee of the Privy Council (JCPC) in the United Kingdom. During the nineteenth century and for the first half of twentieth century, the JCPC heard all final constitutional appeals and made the final rulings concerning cases that involved the distribution of Canadian constitutional powers. In these cases, the separation and distribution of powers between federal and provincial governments, as spelt out in the *Constitution Act, 1867*, were interpreted and became our constitutional precedents.

In the *Constitution, 1867*, the federal and provincial distribution of powers are found in sections 91 and 92. Section 91 outlines the federal powers of Parliament to "make Laws for the Peace, Order, and good Government of Canada [and exclusive legislative authority to all] Matters coming within the Classes of Subjects next herein-after enumerated,".² Section 92 is the source of provincial legislative powers and defines all "Matters coming within the Classes of Subjects next herein-after enumerated".³ Federal and provincial government disputes generally occur over conflicts concerning sections 91-92 - particularly, in matters concerning economic regulation under section 91(2) which are federal authority over trade and commerce; and, section 92(13), provincial authority over property and civil rights.

The original interpretation of the *Constitution, 1867*, and the problem of federal and provincial distribution of the heads of powers presumed that there would be a strong exclusivity between sections 91 and 92: that is, that there would be little or no overlap between federal and provincial heads of power. However, as industrial and economic development occurred in Canada, the first set of cases – the nineteenth century economic regulation cases – that appeared before the JCPC proved that the “exclusivity doctrine” between sections 91 and 92 was untenable. These pivotal cases were *Parsons*,⁴ *Russell*,⁵ *Hodge*,⁶ and the *Local Prohibition Reference*.⁷ Aside from *Parsons*, a case that involved a fire insurance claim, all the other cases involved the regulation concerning the sale or consumption of alcohol.

In the early part of the twentieth century, a second major set of economic regulation cases appeared before the JCPC. During this time, Canada was growing rapidly and undergoing intense modernisation and industrialisation. The second set of cases were *Reference Re The Board of Commerce Act*,⁸ *Fort Frances Pulp and Paper Company*,⁹ and *Snider*.¹⁰ What distinguishes the second series of cases from the first is that the second were vigorous attempts by the federal government to regulate the emerging industrial sectors of the Canadian economy. The holdings in these cases firmly established the separation of powers between different levels of government and constructed the limits of jurisprudence for Canada’s newly industrialising economy.¹¹

In this set of cases, the first two, *Re The Board of Commerce Act* and *Fort Francis Pulp and Paper*, dealt with the federal

government's authority to set prices. Due to the economic pressures of the First World War, the federal government enacted its emergency powers to hold down and regulate commodity prices. The JCPC held that the legislative powers of the federal government could only regulate during times of national crisis. Thus, post-war application of federal price fixing was *ultra vires* the federal government.

The *Snider* case was slightly different. In 1907, the federal government enacted legislation called the *Industrial Disputes Investigation Act*. This Act attempted to assert federal authority arising from labour disputes. Similar to the logic in *Re The Board of Commerce Act* and *Fort Francis Pulp and Paper*, the JCPC held that federal government could only regulate labour disputes in times of national crisis. Put differently, when not in a state of emergency, the federal government could not invoke its authority over provincial control of property and civil rights.

In the holdings of this series of cases, the JCPC entrenched in constitutional law the proposition that federal heads of powers can only intrude upon provincial jurisdiction in times of national crisis. Moreover, once the national crisis has passed the original balance between federal and provincial powers must be reinstated, and that any application of federal powers which intrudes upon provincial jurisdiction when the country is not in crisis is *ultra vires* the federal government and is unconstitutional.

The central figure in writing the early twentieth century decisions for the JCPC was Richard Burdon Haldane. Haldane was a

leading member of the JCPC and, at one time, the Lord Chancellor. Haldane was also a leading British philosopher whose interest in German idealism meant that he was deeply influenced by the work of Hegel. As a major interpreter of the *Constitution Act, 1867*, Haldane contributed significantly to the complex lexicon of constitutional interpretation that accompanied and paralleled the economic regulation of the newly industrialised Canadian state. Haldane's interpretation of sections 91 and 92 of the *Constitution Act, 1867* had a direct influence in establishing and inserting Hegel's dialectical method into the standard interpretative process of the *Constitution Act, 1867*. Although this may appear an historical oddity, it is significant in this investigation to acknowledge the influence of a practising Hegelian as a law Lord of JCPC. In shaping these influential cases concerning modern industrial economic regulation in Canada, Haldane's contribution suggests that a hidden dialectical interpretative dynamic is 'going on behind our backs'; one that has become a major influence in constitutional interpretation and the cases that comprise current Canadian constitutional jurisprudence. Thus, a cultural materialist critique of Canadian constitutional order is a logical means to test the limits of the *Charter*.¹²

The holdings of the early twentieth century economic regulation cases, and others throughout the 1930s, constitutionally entrenched the limited legal capacity of the federal government to regulate economic activity in the country. In addition, it was through these decisions that the operation of a "free market" economy was attained in Canadian law. As F.R.

Scott laments, in **The Consequences of the Privy Council Decisions**, "[i]t would seem that even without special mention in the *British North America Act*, the doctrines of *laissez-faire* are in practice receiving ample protection from the courts," (Scott, 1937: 492).

Similarly, J.R. Mallory observes, in **The Courts and the Sovereignty of the Canadian Parliament:**

The force that starts our interpretative machinery in motion is the reaction of a free economy against regulation.... In short the plea of *ultra vires* has been the defence impartially applied to both legislatures by a system of free enterprise concerned with preventing the government regulating it in the public interest. (Mallory, 1944: 169)

The legal reasoning contained in these early economic regulation cases has had a dramatic impact on how current economic regulation occurs and is dealt with by our courts. According to Alan Cairns, in **The Judicial Committee and Its Critics**, the holdings of Lords Watson and Haldane were central in mediating the forces for centralisation and regionalisation in Canada. For Cairns, "[t]he powers of reservation and disallowance were not eroded by the stupidity or malevolence of British judges but by concrete Canadian political facts. The failure to employ section 94 of the BNA Act to render uniform the laws relating to property and civil rights was not due to the prejudice of Lords Watson and Haldane, but to the utopian nature of the assumptions which inspired it, and the consequent failure of Canadians to exploit its centralizing possibilities," (Cairn, 1971: 322).

What these economic cases crystallise are the particular and limited forms of economic intervention and regulation that are constitutionally allowed, protected and politically expedient. Unlike the US, the Canadian government's capacity to intervene and economically regulate industry is legally relatively weak. It is limited to trans-Canadian corporations, and federal politicians have generally declined to intervene to prevent the formation of monopolies or to limit corporate concentration.¹³ Comparatively, for example, the current Microsoft case is the latest attempt by the US government to intervene and regulate monopoly practices. Since the Reagan era, US regulation of monopolies has been relatively weak. However, Microsoft stands for the proposition that certain interests in the US do have the potential to break up monopoly practices – if only temporarily. Canada is not so inclined.

According to Bruce Doern, in **Fairer Play**, "[i]n Canada, antimonopoly law has never remotely approached the vigor of the the US *Sherman Act*, section 2 of which deals with both monopolization and attempts to monopolize," (Doern, 1995: 77-78). In Canada, various levels of government struggle with jurisdictional questions while tacitly allowing the formation of monopolies and oligopolies. Consequently, corporate concentration has deeply shaped the political economy of our country through our economic élite's capacity to centralise and control both industrial and financial capital (Clement, 1975: 126). For our purposes, it is historically important to recognise the porous and problematic structure of the Canadian state. Although we should

have some concern about how the weak federal nature of the Canadian state and the *Competition Act*¹⁴ operate, our real concern is how economic power facilitates the concentration of newspaper ownership and shapes the public sphere through the *Charter*.¹⁵

In 1985, the Conservative government of Brian Mulroney, in response to the Trudeau years, further weakened Canada's already ineffective competition policies and law (Doern, 1995). This Conservative government fundamentally changed competition policy and overhauled the restrictions on monopoly ownership through the revised *Competition Act*. In doing so, most of the restrictions that did exist to prevent oligopolies and monopolies were further relaxed or eliminated. What motivated this, according to Doern – not known as neutral economic observer – was the elevation of neo-liberal economic theories that had gained credibility in the eyes of politicians. As Doern tentatively acknowledges, these changes to the *Competition Act* under the Conservative government were the by-product of the economic theories of the Chicago School. That is, at least according to Doern, the "Chicago School's presumptions have more pride of place in Canadian law than other theories," (Doern, 1995: 78).

As the neo-liberal re-regulation took hold during the 1980s, the fact that consolidations and mergers were made easier by the Conservative government left very few options for critics to act against the formation of monopolies, oligopolies and foreign ownership in Canada. Put differently, the new "liberalising" trends in Ottawa, coupled with business community's concerted push toward "free trade", meant that there were very few government

regulations that could prevent monopolisation. Indeed, it meant that there would be even more concentration of wealth in industrial and financial sectors.¹⁶

For some progressive critics and to some members of the marginalised minorities in Canadian society, the introduction of the *Charter* was a potential strategy to slow or possibly reverse the economic policies emerging from the neo-liberal agenda. However, this did not occur. Arguably, it has been the introduction and the application of the *Charter* that has led to a broadening of the private commercial rights in Canada. That is, the introduction of the *Charter* tends to support and protect the legal and political hegemony of neo-liberalism. The question is how? To answer this, we will now turn to the *Charter* and some complaints by its critics.

The Charter and Its Critics

The introduction of the *Charter* was an attempt to consolidate the ideals held within the *Canadian Bill of Rights*.¹⁷ One of the central complaints against the *Canadian Bill of Rights* was that it was not an entrenched document: hence, the *Canadian Bill of Rights* was a non-binding piece of legislation that granted minimal if any protection to average Canadians. On the other hand, the *Charter* was an entrenched document and constitutionally bound all levels of government. In this way, the *Charter* had an impact on the provincial jurisdiction over civil rights, contained in section 92(13). Thus, the *Charter* shifted provincial responsibility concerning jurisdiction over civil rights to the courts. Consequently, once a provincial government enacts laws, in any

area that is within its exclusive jurisdiction, these laws must comply with the *Charter* – that is, all laws must be *Charter* proof.¹⁸

The introduction of the *Charter* triggered a series of freedom of expression cases that were to map out the precedents for all future *Charter* challenges. These series of cases were *National Citizens' Coalition Inc.*¹⁹ *Ford*,²⁰ *Irwin Toy*,²¹ and *R.J.R. MacDonald*.²² For Michael Mandel, this series of cases illustrated how the liberatory language of the *Charter* was interpreted, applied, and used to become the principal foil to limit and impede the fundamental freedoms and equality of individual citizens.

Mandel claims, in **The Charter of Rights and the Legalization of Politics**, that the "Charter has to be handled with care, something like nitroglycerine. To think of it as just another strategy, or, worse yet, a preferred strategy, can be disastrous," (Mandel, 1989: 309). For Mandel, the use of the *Charter* is a dangerous weapon that can cut both ways: that is, "if you legitimate the *Charter* by using it, you cannot claim foul when it is used against you," (Mandel, 1989: 309). Further, the *Charter* replaces democratic approaches to decision-making with a legal process of adjudication and the courts.

[That is, the *Charter* is a] substitution of judicial for representative forums and of abstract/principle for concrete/policy forms of argument for the resolution of political controversy, represents a fundamental change in the structure of Canadian political life, a "legalization of politics." ...Legalized politics can be seen as a defence mechanism developed to preserve the status quo of social

power from the threats posed to it. (Mandel, 1989: 71)

For Mandel, early *Charter* challenges were directly aimed to cripple progressive social policies of the post-war era. Mandel interprets the judicial decisions in *National Citizens' Coalition Inc.*, *Ford*, *Irwin Toy*, and *R.J.R. MacDonald* as the watershed for the neo-liberal "deregulation movement" in *Charter* litigation (Mandel, 1991). He indicates that this series of *Charter* litigation cases undermined social progress and democratic solidarity in favour of powerful private interests. For Mandel, the thread that linked the litigation in these cases was the promotion of commercial speech as a right. Accordingly, this strategy became part of neo-liberalism's privatising ethos to entrench neo-liberal rights regarding freedom of expression in all future *Charter* litigation.

In the debate surrounding the patriation of the *Constitution* and the introduction of the *Charter*, Mandel argues that the federal government no longer had an interest in the "just society". For most liberals, the realisation of the *Charter* and its entrenchment in law was the final recognition of "liberal" rights in Canada. That is, the existence of the *Charter* as the foundational text of the Canadian state was considered a satisfactory outcome – the proper set of principles are in place and all that was now required was to properly calibrate those principles to make the system work.

For Mandel, however, the introduction of the *Charter* became a legal reality that displaced the ongoing struggle for concrete

social gains and real "equality". He claims the introduction of the *Charter* was merely an extremely effective ruse that stalled and deflected progressive social movements and re-directed their limited resources to the pursuit of costly and ineffective legal remedies. Moreover, according to Mandel, this was a strategy used to contain democracy.

In terms of the goal of achieving social equality, the central problem with the *Charter* is the confusion surrounding how it defines individual rights versus social rights and between private sphere versus public sphere. As a document, the *Charter* is only supposed to protect individual rights against government action.

According to Mandel, in spite of corporate and business interests possessing enormous social power, they nevertheless hold that the economy is, strictly speaking, part of the "private" sphere and that government has no place in interfering with transactions made therein (Mandel, 1989: 72). Mandel, noting Habermas's concept of a legitimation process, suggests that the introduction of the *Charter* is really part of the legitimation crisis of the Canadian welfare-state to reverse the "[i]ncreasing government involvement in the economy [that] breaks down both the fact and ideology of the distinctions between public and private spheres," (Mandel, 1989: 72).

In the **Legitimation Crisis**, Habermas concedes that private power is threatened by the presence of an interventionist state.

[T]he appearance of functional weaknesses in the market and dysfunctional side effects of the steering mechanism, the bourgeois ideology

of fair exchange collapses. Re-coupling the economic system to the political – which in a way repoliticizes the relations of production – creates an increased need for legitimation. (Habermas, 1975: 36)

According to Mandel, *Charter* politics or legalised politics are a problematic legitimation process used to maintain and expand the integrity of the private sphere. According to Habermas:

The arrangement of formal democratic institutions and procedures permits administrative decisions to be made largely independently of specific motives of the citizens. This takes place through a legitimation process that elicits generalized motives – that is, diffuse mass loyalty – but avoids participation.... This structural alteration... provides for application of institutions and procedures that are democratic in form, while the citizenry, in the midst of an objectively political society, enjoy the status of passive citizens.... (Habermas, 1975: 36-37)

It seems reasonable to suggest that most Canadians have a "diffuse mass loyalty" to the notion of the *Charter*. However, it has been the presence of the neo-liberal conception of rights that has been extremely active in establishing the pattern of *Charter* litigation.

According to Mandel, when there is mass support for government intervention in the economy, people become less tolerant of private interests and private power (Mandel, 1989: 72). For Mandel, the history of *Charter* litigation shows how it became a favourite technique to protect private power in the process of rolling back the welfare state.

The popular myth that the *Charter* would achieve true democracy effectively derailed progressive social justice projects and movements. Mandel indicates that we should "[r]emember that one of the popular chords struck by *Charter* advocates was the general dissatisfaction Canadians felt with their experience of democracy" (Mandel, 1989: 72) and the Liberal Party introduced the *Charter* "[a]s a solution to the failings of democracy," (Mandel, 1989: 72). According to Mandel:

[T]he *Charter* seems a strange device, especially when compared to the more obvious solution of democratizing popular institutions. However, if the idea is not to enhance real democracy, but rather to avoid enhancement by giving merely a sense of enhancement with a formal substitute, the *Charter* makes perfect sense. (Mandel, 1989: 72-73)

For Mandel and other *Charter* sceptics, many of the important judicial decisions of the early *Charter* cases demonstrate how sections have been used to expand the legal rights of powerful private institutions and corporations – in effect, diminishing the rights of individual citizens. That is, the "Charter of Rights and Freedoms is an example of how the very form of domestic government can be adapted to mirror and accommodate global movements such as trade liberalization and continental economic integration," (Mandel, 1991: 147).

The outcome of much of the *Charter* litigation process Mandel finds disheartening. He claims that "[t]here is no shortage of theorists who argue that documents such as the *Charter* can actually be used to counter conservative forces," (Mandel, 1991:

147). For Mandel, although these are shrewd arguments – and may be theoretically cogent – in practice these positions demonstrate that the promotion of social justice through the *Charter* has been the exception and not the rule. “Clever constitutional arguments can indeed be made for socialism under the rule of the courts (“equal benefit of the law”), the way they were made in religious terms in the middle ages under the rule of the church (“the Poverty of Christ”),” (Mandel, 1991: 147). However:

[T]he reason these arguments do not succeed is that the institutions within which they are made are far more congenial to one kind of result than to the other. Let us not forget the historical anti-democratic sentiment behind legal politics. Its proponents, at least, believe that democratic claims were far more easily made through democratic institutions. Law was the solution to more democracy for those who stood to lose from it. De-legitimizing government and fending off popular demands for more democracy is an important part of the current overall strategy of international business in its drive for the free exercise of economic power. (Mandel, 1991: 147-148)

Comparatively, in **Waiting for Coraf**, Allan Hutchinson, similar to Mandel, holds that the greatest threat to freedom of expression is not government, but powerful private agents and their capacity to dominate the public sphere. Harking back to Macpherson’s criticism regarding liberalism and how it thwarts radical democracy, Hutchinson indicates that democracy is not the central component of contemporary liberalism. For Hutchinson, “[a]lthough there is much trumpeting to the contrary, democracy has always been optional to a liberal scheme of democratic

governance rather than its precondition and *raison d'être*," (Hutchinson, 1995: 198). That is:

Each person is primarily a rights holder; his or her identity as a member of a social group and as a citizen in a common and democratic enterprise is secondary. However, notwithstanding liberals' protestations, it is only by recognizing the need to nourish a genuine experience of shared commitments and mutual understanding – the very antithesis of liberal values – that theorists could make good on liberalism's critical promise. Paradoxically, it would seem that liberals must abandon liberalism if they want to meet successfully the modern challenge that liberalism has set for itself. (Hutchinson, 1995: 197-198)

For the most part, it is within this liberal paradox that the Canadian debate concerning freedom of expression occurs. For Hutchinson, "[i]n all its different threads and strands, the contemporary tapestry of free speech draws on a very inadequate set of premises and assumptions; it has an impoverished view of human personality and language and, most importantly, of the crucial relation between them," (Hutchinson, 1995: 190). For Hutchinson, "language is not a transparency through which the world is observed nor a catalogue of labels to be attached... to the appropriate contents of the world," (Hutchinson, 1995: 191). Language is a much richer medium and is not merely a one-sided pure form of communication of re-presentations, but, rather, it creates and re-creates our world. According to Hutchinson:

The world is within the language and the language within the world. Language is a social medium. It shapes society and its

individuals as they work to reshape it. No one is free to describe the world as they wish; they are always and already constrained by the prevailing ways of speaking.... Language is not a system of static symbols, but a form of social action and history making. To acquire and exercise a language is to engage in the most profound of political acts. (Hutchinson, 1995: 191)

In our social world, Hutchinson is sceptical about the value of Charter litigation as a vehicle for promoting freedom of expression. For Hutchinson, the discourse of rights and freedom of expression is always already framed within an "impoverished and partial notion of social life" (Hutchinson, 1995: 25). Thus, at least for Hutchinson, "rights-talk" frames the limits of the debate on freedom of expression and results in Charter litigation that proves to be an extremely expensive waste of time. For constitutional and Charter sceptics such as Mandel and Hutchinson, liberatory documents, or at least the institutions that oversee them, are conservatively administered. To sceptics, the process of achieving minimum levels of social justice requires tremendous economic resources and dedicated litigation that generally fail to bring about the realisation of social rights through constitutional adjudication. Ultimately, for Hutchinson, "[l]egal adjudication is a truncated conversation that assumes a correct [or corrective] hermeneutic... [and that] operates within an institutional framework of coercive and normative violence," (Hutchinson, 1995: 204).

Alternatively, Amy Bartholomew and Susan Boyd, in **Toward a Political Economy of the Law**, suggest that we explore a "richer

development of law... [based on] the concept of the relative autonomy of law" (Bartholomew and Boyd, 1989: 218). For Boyd and Bartholomew, *Charter* sceptics fail to grasp the concept of the "relative autonomy of law" and have not seriously considered or developed this concept in Canadian legal theory. For Boyd and Bartholomew, the "relative autonomy of law" recognises that "different forms and areas of law and legal institutions may be unevenly developed, even contradictory, and may have their own patterns of determination," (Bartholomew and Boyd, 1989: 218). Bartholomew and Boyd contend that the "relative autonomy of law" can step in to mediate the intensification of repressive labour laws while, at the same time, balancing the contradictory expansion of legal protection through civil liberties, human rights tribunals and through the *Charter* (Bartholomew and Boyd, 1989: 218).

Bartholomew and Boyd suggest that Marxist and post-Marxian sceptics of *Charter* litigation, such as Mandel and Hutchinson, have yet to develop a coherent theory of adjudication to account for the progressive transformation of the state that has been historically demonstrated through the development of Canadian law (Bartholomew and Boyd, 1989: 223). The "failure to adequately conceptualize courts as located within broader societal conflict may help explain... [the] conclusion that progressive groups should not engage in struggle in the courts," (Bartholomew and Boyd, 1989: 222-223). For Boyd and Bartholomew:

An elaborated theory of the state, however, suggests that in addition to being embedded within the balance of class forces and overt

political struggle, courts may be arenas of class, gender and other struggles, even though that standing suggests the need to re-examine... abstentionist position[s] and raises the question whether refusing to participate in constitutional litigation may permit other interests, such as capital and the reactionary right, to define the issues unilaterally. (Bartholomew and Boyd, 1989: 222-223)

Boyd and Bartholomew are correct to indicate that abstentionist positions are problematic. Further, they suggest that the development of civil rights tribunals and the expansion and application of new law can develop contrary to neo-liberal legal forms of capital accumulation and that this is an expression of the "relative autonomy of law".

[D]ifferent forms and areas of law and legal institutions may be unevenly developed, even contradictory. For example, increasingly repressive labour law exists alongside expanding protection of at least some civil liberties under the Charter of Rights. Hence each area of law will require specific analysis, as will various legal institutions and practices. (Bartholomew and Boyd, 1989: 218)

However, although I am sympathetic, I am not convinced that Bartholomew and Boyd's "relative autonomy" thesis is helpful in the commercial speech cases. Boyd and Bartholomew are correct to indicate the potential possibilities for the progressive use of law, and I agree with them that we "could do worse than to recall the work of some of the "old" political economists, including that of Macpherson and F.R. Scott in their defence of "liberties,""

(Bartholomew and Boyd, 1989: 232). However, I do not share their optimism regarding *Charter* cases involving commercial speech. In addition, if F.R. Scott is right that doctrines of *laissez-faire* are constitutionally embedded, then we must re-examine the social reality of how constitutional cases are determined.

Clearly, it is not sufficient to claim that legal outcomes are merely the product of a particular class' interests. This argument, even if it were true, would be interpreted by most critics as a crude form of instrumentalism. However, Edward Herman and Chomsky argue that, at least in the media, there is an institutional process that acts as a filter and which "arise[s] from the preselection of right-thinking people, internalised preconceptions, and the adaptation of personnel to the constraints of ownership, organization, market, and political power," (Herman and Chomsky, 1988: 62). Correspondingly, there is no reason to think this professional filtering process doesn't exist in determining who enters the legal community and how constitutional questions are framed and eventually answered. Comparatively, Duncan Kennedy, in **Legal Education and the Reproduction of Hierarchy**, suggests that "there is no "logic" to monopoly capitalism, and law cannot be usefully understood, by someone who has to deal with it in all its complexity, as superstructural," (Kennedy, 1982: 599). However, according to Kennedy:

Legal rules the state enforces, and legal concepts that permeate all aspects of social thought, constitute capitalism as well as responding to the interests that operate within it. Law is an aspect of the social totality, not just the tail of the dog. The

rules in force are a factor in the power or impotence of all social actors (though they certainly do not determine outcomes in the way liberal legalists sometimes suggest they do). Because it is a part of the equation of power rather than simply a function of it, people struggle for power through the law, constrained by their limited understanding and limited ability to predict the consequences of their maneuver. To understand the law is to understand this struggle as an aspect of class struggle and as an aspect of the human condition to grasp the conditions of social justice. (Kennedy, 1982: 599)

If we take Bartholomew and Boyd's suggestion and do recall Scott and Macpherson, and their promotion of "liberties", then we should also recognise the pitfalls of legal remedies. In Canadian legal culture, W.P.M. Kennedy indicates that there is an "uncanny stranglehold with which *stare decisis* seems doomed to rob law of creative vitality," (Kennedy, 1937: 399). Recalling Macpherson's concern with a truly radical democracy in a previous chapter, law is structurally limited by institutional liberal democracy and reproduces traditional liberal jurisprudence. That is, as Hutchinson observes, "[l]iberal institutions and instincts neither promote [political or social] equality nor engender respect for it... [and liberalism] limit[s] the process and agenda of politics to the furtherance of private self-interest," (Hutchinson, 1995: 207). In other words, what Vincent MacDonald calls the "shackles of previous decisions" (MacDonald, 1948: 45) and Bora Laskin refers to as "the inertia" (Laskin, 1947: 1086) and "encrustation of *stare decisis*" (Laskin, 1947: 1087) severely constrain the "relative autonomy" that could lead toward progressive social

change concerning Canadian constitutional law. Although this is not solely determinative, I tend to agree with Hutchinson that "liberal start points inevitably lead to liberal end results," (Hutchinson, 1995: 202). For good or ill, constitutional jurisprudence in Canada has been overwhelmingly the product and expression of the monopoly of our legal culture and the privileged few who have access to it.²³

Alternatively, Joel Bakan suggests, in **Just Words: Constitutional Rights and Social Wrongs**, that being a *Charter* sceptic means that the "relative autonomy" thesis is not the best approach to understand or analyse *Charter* interpretation. For Bakan, the values expressed in the *Charter* are only words that add little toward the social progress required to promote social justice. That is, the conservative nature of the legal system and Canadian legal culture act as a deterrent against progressive social movements. To Bakan, the liberatory principles of freedom and equality are administered by the inherently conservative institution that is the legal system. This legal system acts – directly and indirectly – to undermine the social conditions that could lead toward a realisation of progressive principles.

Bakan suggests the language of the *Charter* "is composed of words that describe the foundations of a just society: equality, freedom, and democracy," (Bakan, 1997: 3). Nevertheless, these words of justice are just words. Playing on the living tree metaphor of the law, Bakan indicates that "the *Charter* is only paper, dead tree, with ink on it," (Bakan, 1997: 3). Thus, the "fine-sounding words of justice are only words, just words. They

can do nothing on their own, and the social processes that give them effect tend to thwart whatever progressive promise they might hold," (Bakan, 1997: 3). Bakan further holds:

These words of justice, or just words, state the highest ideals of progressive social movements and have inspired struggles for social justice throughout history. People have fought for civil rights, self-determination, trade unionism, the right to vote, and social equality in their name. The Charter has become a symbol of hope for social justice advocates because of its powerful words. A decade and a half after its constitutional entrenchment, however, the social injustice remains pervasive in Canada. (Bakan, 1997: 3)

According to Bakan, the peculiar emphasis in *Charter* litigation on "individual" rights has effectively elevated the rights of powerful private interest groups – as legal entities – over the rights of flesh and blood citizens. In practice, these private interests have tended to focus *Charter* litigation on their own commercial rights. In essence, if there is any demonstration of the "relative autonomy" of law in the first series of freedom of expression cases, then it is the subordination of individual rights to economic forces and commercial interests. Similar to Hutchinson and Mandel, Bakan holds that the first series of *Charter* cases gave private interests the right to freedom of expression and established legal precedence of commercial rights over the rights of individual citizens.

Situated between the *Charter* sceptics and Bartholomew and Boyd, Bakan insists that the *Charter* is "dead tree", paper "with

ink on it", but that the *Charter* is also a crucial document that potentially leads to particular concrete results and social outcomes for particular Canadians. However, the "just" words contained in the *Charter* are what must be combated, but combated in a concrete way. As Bakan remarks, paraphrasing Marx, one must confront the "real existing world" and not just combat "the phrases of this world," (Bakan, 1997: 3). Regrettably, in the war of words which has comprised the interpretation process of *Charter* litigation, the war has been principally buttressed the protection of commercial speech.

The implementation, operation and application of the *Charter* are all processes based upon the traditional liberal conception of law, democratic rights and the right to property. In our case, the notion of the right to free speech is one that protects private individuals from state interdiction. The problem is, according to Bakan, that "[f]ocusing on official repression...[we] distort [the] issues of free speech" (Bakan, 1997: 63) and only recognise the state's restrictions on freedom of expression. Thus, critics fail to comprehend how commercial forces shape and restrict democratic values. It is this commercial shaping of ideas and practices that has had a dramatic impact on the Canadian public sphere. Bakan argues that:

People's capacities to speak are increasingly undermined by economic concentration, technological change, and privatization in the communications sphere. Yet the liberal discourses of freedom of expression that dominate public and legal debate tend to concentrate on discrete cases of governmental

restriction of speech – censorship. (Bakan, 1997: 63)

I believe Bakan convincingly argues that the classical liberal conception of freedom of speech is incapable of comprehending the force and power that modern commercialised speech possesses and how it threatens freedom of expression and democracy.

For Bakan, “effective communication requires that people have audiences ...[and w]ithout an audience a person can only speak, not communicate, and her capacity to communicate effectively will depend on which, and how many, people hear her message,” (Bakan, 1997: 66). Similarly, as Wallace Clement observed earlier, an increase in mass communication in a society doesn’t mean an increase in real communication if we mean communication that is more than a one-way and unequal supply of information (Clement, 1975: 274). Arguably, as concentrated ownership of newspapers has increased, so the impact of one-way communication has come to dominate the form, structure and dynamics of our public sphere.

National Citizens’ Coalition Inc., Ford, Irwin Toy and R.J.R. MacDonald

In Canada, there are four cases that have substantially shaped and defined rights for commercial speech: they are the *National Citizens’ Coalition Inc.*, *Ford*, *Irwin Toy* and *R.J.R. MacDonald*. Surprisingly, other than the hate speech cases, such as *Keegstra*²⁴ and *Zundel*,²⁵ the major freedom of expression cases have been about commercial speech’s right to freedom of expression. In 1984, the National Citizens’ Coalition challenged federal laws regarding spending limits that restrict third party

expenditures during elections. This watershed case was to have a momentous impact in increasing commercialised speech's capacity to influence the political process during federal and provincial elections. As well, the *National Citizens' Coalition* case was the first significant salvo by a neo-liberal interest group, well funded by some members of the corporate sector, to challenge the *Charter* for the recognition of third-party spending rights for advertising.

In the last thirty years, the neo-liberal "think tanks", such as the National Citizens' Coalition, the Business Council on National Issues (BCNI) and the Fraser Institute, have sought to re-shape the Canadian political and public sphere. With varying degrees of success, these organisations have promoted and popularised the neo-liberal economic theories that displaced the hegemony of the Keynesian welfare state. According to Mandel, the "National Citizens' Coalition is a right-wing lobby... run by a small board made up of representatives of some of the biggest corporations in Canada," (Mandel, 1991: 128). Like most neo-liberal movements, the National Citizens' Coalition is obsessed with the welfare-state and government regulation opposing the operation of the "free market". These right-wing movements claim that government involvement in the economy, through social programmes, medicare, minimum wage laws, pay equity legislation, affirmative action and the protection of sexual minorities are unnecessary and must be stopped.

In the *National Citizens' Coalition*, the Coalition's central argument was that the introduction of the *Charter* granted their

organisation the right to "freedom of expression". In effect, this right meant that government could no longer act or interfere in limiting and regulating third party political speech. According to Mandel, the Coalition "persuaded an Alberta judge to strike down new federal restrictions on non-party campaign expenditures as an interference with "freedom of expression"," (Mandel, 1991: 128-129).

The 1983 legislation restrictions had been designed to limit the growing influence of wealthy groups, such as the Coalition, who, following the example of right-wing political action committees in the United States, had started to spend great amounts on election campaigns. (Mandel, 1991: 129)

For Mandel, as Canadians we already experienced relatively weak disclosure laws and lax election spending limits. Indeed, it is the lack of effective disclosure laws and spending limits in the past and present that has tended to promote large donations by commercial interests in an attempt to influence the political process. However, what the decision in the *National Citizens' Coalition* did was to undermine our already problematic principle of one-person-one-vote with the "one-dollar-one-vote principle of market despotism," (Mandel, 1991: 129). The court in this case rejected the federal government's argument that limits on third party spending actually "enhance freedom of expression by not allowing the voices of the many to be drowned out by those of the few with money," (Mandel, 1991: 129). Thus, with the decision in the *National Citizens' Coalition*, "Justice Medhurst of the Alberta Supreme Court followed American precedents and ignored the

question of inequality of economic power," (Mandel, 1991: 129) and established a precedent that led directly to the "free trade" spending spree of the 1988 election. For the Coalition, the BCNI and the Canadian Alliance for Trade and Job Opportunities,²⁶ the victory of the *National Citizen's Coalition* allowed for third party spending and lobbying – of which approximately six and a half million dollars were spent during the final three weeks of the "free trade" election campaign (Mandel, 1991: 128). To many observers, the inability to place limits on third party spending has further reduced participation in our already precarious democracy.

The second significant *Charter* case that asserted and gained protection for commercial speech was *Ford*. *Ford* was a case where the Ford Motor Company challenged the law regulating the language of advertising in the province of Québec. The *Québec Charter of the French Language*²⁷ requires that public signs, posters and commercial advertising be in the French language only. Under section 2(b) of the *Charter*, Ford challenged the constitutionality of the *Charter of the French Language* and its prohibitions against advertising in English. Similar to *National Citizens' Coalition*, Ford characterised itself as a private actor who claimed that the prohibition against its use of English offended its right as a "citizen" to exercise its right to freedom of expression. For the Supreme Court, the most important presumption in this case was to give 'a broad and liberal interpretation' to the *Charter*, one that gives a broad guarantee to every citizen – corporate citizen or

individual citizen – of the right to “freedom of thought, belief, opinion, and expression”.²⁸

In *Ford*, the *Supreme Court* identified two distinct issues in the case: first, whether the actual language used is intimately linked to the formation of expression; and, second, whether advertising is a form of expression. On the first issue, the *Supreme Court* held that:

Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice. Language is not merely a means or medium of expression; it colours the content and meaning of expression.²⁹

Regarding the second issue, the *Supreme Court* held that commercial speech is a form of expression and restrictions on commercial speech should be viewed as an infringement of freedom of expression. The *Supreme Court* held “that the rights and freedoms guaranteed in the Canadian Charter should be given a large and liberal interpretation, there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b) of the Charter.”³⁰ Further, the *Supreme Court* held that commercial speech has an intrinsic value and contributes to the broader public dialogue. The *Supreme Court's* holding meant that advertising, as a form of information, is a form of expression that allows citizens to make informed decisions regarding consumer purchases. As the *Supreme Court* states:

Over and above its intrinsic value as expression, commercial expression which, as has been pointed out, protects listeners as well as speakers plays a significant role in enabling individuals to make informed economic choices, an important aspect of individual self-fulfillment and personal autonomy. The court accordingly rejects the view that commercial expression serves no individual or societal value in a free and democratic society and for this reason is undeserving of any constitutional protection.³¹

Finally, the *Supreme Court* held that both the language and nature of commercial speech were forms of expression and that Québec's prohibitions on English language advertising is unconstitutional. After *Ford*, the Québec government successfully invoked section 33 – the "notwithstanding clause" – of the *Charter* to override the *Supreme Court's* decision. In my opinion, however, the fundamental issue in *Ford* is the constitutional recognition that commercial speech gained and its guaranteed protection under the *Charter*. Although Québec could successfully invoke the "notwithstanding clause" to circumvent the *Supreme Court's* ruling, this does not change the conclusions or the precedent set that grants commercial speech *Charter* protection.

Irwin Toy further extends and broadens *Charter* rights for commercial expression. At issue in *Irwin Toy* was whether the National Assembly of Québec, through its *Consumer Protection Act* [hereinafter the "C.P.A."],³² could prohibit advertising that was directed at children. There were multiple issues in *Irwin Toy*, but we will only focus on two: first, *Irwin Toy* argued that the National Assembly of Québec had violated its rights to freedom of

expression by placing restrictions, through sections 248 and 249 of the C.P.A., on television advertising directed at children under the age of thirteen; and, second, Irwin Toy argued that the impugned legislation deprived the corporation of its liberty as a citizen and infringed section 7 of the *Charter* and was in contravention of the principles of fundamental justice. At first instance, the trial judge on a finding of fact and law held that Irwin Toy had no case.

However, the *Supreme Court*, following the precedent set forth in *Ford*, held that freedom of expression must have a broad and liberal interpretation. However, the *Supreme Court* distinguished *Irwin Toy* from *Ford*:

[Irwin Toy] concerns the regulation of advertising aimed at children and thus raises squarely the issues which were not treated in *Ford*. Whereas it was sufficient in *Ford* to reject the submission that the guarantee of freedom of expression does not extend to signs having a commercial message, this case requires a determination whether regulations aimed solely at commercial advertising limit that guarantee. This, in turn, requires an elaboration of the conclusion already reached in *Ford* that there is no sound basis on which to exclude commercial expression, as a category of expression, from the sphere of activity protected by s. 2(b) of the Canadian Charter and s. 3 of the Quebec Charter.³³

Thus, *Irwin Toy* affirmed the principle conclusion of *Ford* that commercial expression is protected sphere of activity. Therefore, sections 248 and 249 of the C.P.A. were found to infringe Irwin Toy's right to freedom of expression under s. 2(b). However, the

Supreme Court further held that the prohibitions were of a limited nature, since the advertising was directed at children, and the impugned legislation could be saved under section 1. Thus, the *Supreme Court* found that the Attorney-General of Québec adequately demonstrated the concern that brought about the legislation, a concern that was "pressing and substantial and that the purpose of the legislation is one of great importance".³⁴

The concern is for the protection of a group which is particularly vulnerable to the techniques of seduction and manipulation abundant in advertising. In the words of the Attorney-General of Quebec, "Children experience most manifestly the kind of inequality and imbalance between producers and consumers which the legislature wanted to correct." The material given in evidence before this court is indicative of a generalized concern in Western societies with the impact of media, and particularly but not solely televised advertising, on the development and perceptions of young children.³⁵

Thus, the *Supreme Court* held that the restrictions on advertising directed at children could not be saved and concluded "that ss. 248 and 249 constitute a reasonable limit upon freedom of expression and would accordingly uphold the legislation under s. 1 of the Canadian Charter,".³⁶

Regarding the issue of whether Irwin Toy as a corporation could object to the impugned legislation because it infringed on its liberty as a person under section 7 of the *Charter*, the *Supreme Court* wisely rejected the claim that a corporation could possess the rights of a person. Section 7 states: "Everyone has the right to life, liberty and security of the person and the

right not to be deprived thereof except in accordance with the principles of fundamental justice."³⁷ The *Supreme Court* recognised that corporations are "fictive" citizens and not persons: thus, the "respondent corporation could not invoke s. 7 of the Charter to challenge the provincial legislation".³⁸

A plain, common sense reading of the phrase "Everyone has the right to life, liberty and security of the person" serves to underline the human element involved; only human beings can enjoy these rights. "Everyone" then, must be read in light of the rest of the section and defined to exclude corporations and other artificial entities incapable of enjoying life, liberty or security of the person, and include only human beings.³⁹

Thus, the *Supreme Court* recognised that it is one thing to be a citizen, but quite another to be a person.

Unfortunately, although the *Supreme Court* correctly rejected the notion that a corporation could possess the core rights of a person, its holding reaffirmed the position that corporations possess the right to freedom of expression. Unlike the trial judge, who, I believe, correctly rejected *Irwin Toy* on every issue at first instance, the *Supreme Court* held that a corporation did possess the right to freedom of expression. In doing so, the *Supreme Court* fail to comprehend the enormous power and insidious nature that commercial speech possesses in our society. Thus, the *Supreme Court* again failed to protect Canadians' right to freedom of expression and any fundamental notion of democracy.

The last important freedom of expression case that shaped the early Charter litigation process involves commercial speech in

R.J.R. MacDonald. *R.J.R. MacDonald* was a *Charter* challenge directed at the *Tobacco Products Control Act*.⁴⁰ In 1988, the federal government introduced the *Tobacco Products Control Act* that placed prohibitions on advertising and the promotion of tobacco products in Canada. In addition, the *Tobacco Products Control Act* required tobacco manufacturers to add labels that warned consumers about the known health risks associated with smoking. By the time the case got to the *Supreme Court*, the central *Charter* issue was whether the federal government had infringed upon the freedom of expression of tobacco companies. *R.J.R. MacDonald* argued that the ban on advertising and coercion used to force manufacturers to place health warnings on tobacco products infringed upon their freedom of expression.

Again, the *Supreme Court* remained true to the precedents set in the case law established in the *National Citizens' Coalition*, *Ford* and *Irwin Toy*. The *Supreme Court* held that the federal government's restrictions did infringe on section 2(b), but that this infringement was justifiable under section 1. That is, the tobacco industry had the right to freedom of expression, but that section 1 of the *Charter* could override that right. According to Mr. Justice LaForest:

[T]he nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and the weighing of the relevant evidence. In this respect, it is essential to keep in mind that tobacco addiction is a unique, and somewhat perplexing, phenomenon.⁴¹

What is so problematic in the four central holdings in these freedom of expression cases is how all of them affirmed the proposition that freedom of expression should extend to commercial speech. Further, the *Supreme Court* in all of these cases consistently entrenched commercial rights to freedom of expression – not the rights of persons. To a rational observer, it is clearly incoherent and absurd to presume that a person's right to freedom of expression is at all comparable to that of a corporation – let alone the din from third parties during elections.

Stuart Hall, in **The State in Question**, suggests that language has "the symbolic power to map or classify the world for others... [and set the] limit to what will appear as rational, reasonable, credible, indeed sayable or thinkable," (Hall, 1988: 44). By confirming that *Charter* protection extends to commercial speech, the courts in the *National Citizens' Coalition*, *Ford*, *Irwin Toy* and *R.J.R. MacDonald* have fulfilled and legitimated Schiller's observation that the greatest current threat to the freedom of expression and democracy is the threat posed by private commercial power. As Mandel has shown forcefully, *Charter* litigation has ensured that democratic decision-making shifts to the margins and legalised politics is mediated through the legitimization process of *Charter* litigation. As Mandel notes:

Despite all the heavenly exaltations, the *Charter* has merely handed over custody of our politics to the legal profession. The defence of the status quo has followed from that as naturally as night follows day. The *Charter* would be a mute oracle without a legal

priesthood to give it life. And the legal profession has shown itself more than willing to play the lead part in this hoax. Canadian lawyers and judges have, for the most part, gleefully and greedily undertaken a job – deciding the important political questions of the day – for which they lack all training and competence. (Mandel, 1989: 308)

In doing so, decision-making shifts from public hands into legal hands: and as Mandel notes, incompetent hands that actively undermine democracy.

Generally, what has been remarkable about the history of the Charter is how the public has witnessed the promotion of Charter virtues, but have rarely been informed about its defects. Arguably, it is the high cost of Charter litigation (or any other type of litigation) that exists as an institutional barrier for average citizens: this has meant that legalised politics displaces power into those hands who can afford legal counsel. This is not monolithic, but the high cost of Charter cases has the tendency to deter the community's or "special interests" from participating in expensive litigation. As Chomsky has argued, the "systems of indoctrination vary, depending on the capacity of the state... and the modalities of effective control... [and the most] interesting system is that of capitalist democracy, relying on the free market – guided by direct intervention where necessary – to establish conformity and marginalize the "special interests", (Chomsky, 1988: 47).

Comparatively, in terms of understanding how Charter outcomes are determined, if Herman and Chomsky's suggestion that

"right-thinking people" with "internalised preconceptions" are institutionally preselected is correct, then, arguably, it seems reasonable to assume that over time and in terms of law, the "adaptation of personnel" reveals the *Charter's* legalised politics but conceals its contradictions. That is, certain questions are asked and answered while others are simply ignored. With qualifications, this legalised capacity to weaken and lessen democratic participation currently vests with the courts. This process is not the product of a conspiracy by élites: rather, it rests in the broader legitimation process embedded within the constitutional framework of the Canadian state and the hegemonic forces of neo-liberalism.

The Council of Canadians versus Hollinger Inc.

No competent journalist or serious reader need worry about us taking over the Southam newspapers. Hollinger is the greatest corporate friend of the working journalist.

Conrad Black⁴²

To many Canadian journalists, having Conrad Black as a best friend is akin to being an orphan with only one person willing to adopt you.

Chris Cobb⁴³

The example of the early commercial expression cases demonstrated how *Charter* protection gave private actors, who already dominate the sphere of Canadian communications, an even greater level of protection for their rights to influence the public sphere. Furthermore, as we have seen, these cases blur the distinction between the meaning of freedom expression and

commercial expression. In doing so, these holdings indicate that the commercial power that dominates freedom of expression in the public sphere is legitimate, reasonable, and legally justifiable. If the inherent purpose of section 2 of the *Charter* was to protect expression that is threatened and marginal, then the holdings of the commercial expression cases establish and prove the contrary.

In May of 1996, Hollinger Inc. petitioned the Director of Investigations and Research of the Competition Bureau and requested a certificate for advanced clearance to be issued under section 102 of the *Competition Act*. The certificate would allow a quick merger of Hollinger Inc. with Southam Inc. The Competition Bureau issued the certificate but in doing so failed to consider whether the editorial content or diversity of Canadian newspapers would suffer as a result of the merger. At the time of the merger, Hollinger acquired 20 daily newspapers increasing its control to 58 out of Canada's 104 daily newspapers - circulation that consisted of 43% of Canadian dailies.

As a result of the Hollinger-Southam merger, the Council of Canadians launched a *Charter* challenge to the merger in mid-September of 1996. Unlike other *Charter* cases involving freedom of expression, the Council's challenge to the Hollinger-Southam merger attempted to advance a freedom of expression case balanced with the equality rights provisions rooted in section 15. The Council's challenge was ultimately defeated on a technicality. However, I will attempt to show how this modified legal strategy, although original, could not succeed given the established

precedents of the original freedom of expression cases concerning commercial speech.

The Council's case embraced a two tiered strategy to challenge the Hollinger-Southam merger. The Council argued that the activation of equality rights under section 15 of the *Charter* in 1985 meant that freedom of expression cases must now be read in lieu of the right to equality. That is, that the rights contained in section 2(b) must be read concomitantly and must harmonise with section 15's equality provisions. Further, that the interpretation of the *Competition Act* must cohere to the *Charter*.

In pursuing the case, one of the legal issues that the Council hoped to explore were the *obiter* statements of Mr. Chief Justice Laskin in *K.C. Irving Ltd.*⁴⁴ *K.C. Irving Ltd.* was a case that involved the old *Combines Investigation Act* and the monopoly ownership of English language newspapers in New Brunswick. *K.C. Irving Ltd.*'s purchase of the fourth and remaining independent English newspaper in New Brunswick gave the corporation monopoly ownership over the English newspaper advertising market in that province. The central issue was whether monopoly ownership of the English language newspaper market created unfair market practices that would drive up advertising rates in an un-competitive manner. Mr. Chief Justice Laskin noted at trial that Limerick J.A. "made a point... of separating the newspaper as a physical object, consisting of pages of newsprint, from the expression of ideas therein, its editorial content and the editing of news; and he held that although as a physical object a newspaper was caught by the *Combines* legislation as being an article of trade or commerce,

the legislation would not cover the contents of such."⁴⁵ However, at the *Supreme Court*, Mr. Chief Justice Laskin held that "[a]t first blush, it seems incongruous that a prohibited merger or monopoly should not include newspapers in respect of the editorial direction".⁴⁶

This was the Council's central concern. That the concentrated ownership of newspapers inevitably leads to a real reduction in the diversity of opinion. According to the appellant's factum, Maude Barlow states:

[T]he Council is concerned about the quality and political direction of the newspapers now owned by Hollinger. Hollinger is known to engage in head office rationalization of news delivery, using chain reporters and columnists to replace local reporters and columnists. Diversity of opinion suffers. The quality and quantity of local news reporting suffers.... Newspapers may look the same... but the editorial product is significantly diminished. With fewer voices covering the events of the world and the nation, the Council is concerned about the quality and diversity of the news we receive.⁴⁷

It was the Council's position that the *Competition Act* must consider editorial policies and diversity, rather than just simply advertising rates, and that this consideration must balance section 2 freedom of expression rights with the section 15 rights that ensure equality for diverse opinions: in other words, the right to freedom of expression is a fundamental right of citizenship.

Due to the novelty of the subject, the Council relied on the persuasive holding from the United States Supreme Court that anti-

trust legislation applied to newspapers and to their editorial contents. Mr. Justice Black, writing for the majority in Associated Press v. U.S.⁴⁸ held:

It would be strange indeed, however, if the grave concern for freedom of the press which prompted the adoption of the First Amendment should be read as a command that government was without power to protect that freedom. The first amendment, far from providing an argument against the application of the Sherman Act, here provides powerful reasons to the contrary. That amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, the free press is a condition for a free society. Surely a command that the government itself shall impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not. Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests. The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.⁴⁹

Therefore, if wealthy newspaper monopolies can dominate the overall communicative sphere, while owning the medium for "free" expression in Canada, then in practise marginalised groups and disenfranchised voices are excluded from protection under section 15. Further, if disempowered groups are to have any opportunity

in gaining equality, then Canadian newspapers, which are controlled by fewer but more powerful media conglomerates, must provide the forum for diverse and divergent views of equality-seeking groups. That is, freedom of expression and equality must have legitimate access to the public sphere and are not merely rights to be meted out by market forces. However, a persistent reality for freedom of speech and the press is, as F.R. Scott noted, over sixty years ago, in **Freedom of Speech in Canada**:

The most potent influence upon the popular mind, the press, is obviously not free in Canada from those practices which, by controlling the news, controls our liberty of thought. Exceptions of course there are, but Canadian newspapers for the most part are owned by interests and make their profits from advertisers who are for economic reasons opposed to freedom of speech.... (Scott, 1977: 74)

A particular problem that hobbled the Council's potential case - or any other freedom expression case that challenges commercial speech under section 15 - was the three year delay in the implementation of section 15 equality guarantees. The pattern of determining the meaning of freedom of expression established in *National Citizens' Coalition*, and further developed in *Ford*, *Irwin Toy* and *R.J.R. MacDonald*, meant that the issue of equality and the rights of individual Canadians to freedom of expression never truly entered into the judicial debate or legal reasoning. Many progressive critics hoped that the implementation of section 15 would correct the social wrongs experienced by much of Canadian society. However, section 15 has not been a watershed. At best,

section 15 has been a piecemeal approach to gaining limited social equality. According to Bakan, and similar to our previous discussion on rights, the problem is that the "ideological form of rights is composed of the basic tenets of liberal discourse: anti-statism and atomism," (Bakan, 1997: 47). Anti-statism is part of the neo-liberal market ideology and neo-conservative social values that insist that the state should be prevented from interfering in private affairs: that is, "market forces" and "family values" are the best ways to produce a useful and moral society. As Bakan suggests, what is implicit and explicit in this position is the "presumption... that state power, not the oppressive and exploitative social relations that typify civil society, is the primary threat to human liberty and equality," (Bakan, 1997: 47). For Bakan, atomism is the ideology of individualism that drives liberalism and it is this form of rationality which is blind to relational discrimination.

Atomism represents rights as belonging to individuals (or groups), with the other individuals (or groups), institutions, or state agencies having corresponding duties. It constructs social conflict in dyadic terms, as an accumulation of discrete clashes between rights-bearers and duty-holders, each clash potentially resolved by adjusting the relationship between the two disputants. Power relations and social conditions beyond the rights/duty dyad are irrelevant; disputes are considered and resolved outside the multi-layered and complex social realities in which they arise. (Bakan, 1997: 47)

Bakan argues that since complex and multi-layered social realities are usually excluded from judicial decision making, we should not

be over confident that the *Charter* will provide equality protection under section 15. As Bakan points out, *Charter* rights only gain protection and become meaningful when there is state action. Thus, for Bakan, "because only state action, not inaction, triggers rights, they limit what the state can do but do not require that the state do anything," (Bakan, 1997: 48). Finally, "a rights claim must be framed in dyadic terms (a feature that follows from rights' atomistic form), as a challenge to a discrete state action with specific effects on a particular individual or group" (Bakan, 1997: 48). These limitations function separately and together bar litigation from "making substantial inroads on social inequality," (Bakan, 1997: 48). For all of the above reasons, the Council's court challenge against Hollinger, even if it had been allowed to proceed, would have ended in failure. The socially conservative nature of judicial reasoning and the values expressed in the *Charter* limit the possible alternatives for social progress through the courts.

Bakan suggests that "for progressive people and causes, constitutional rights strategies share with all other forms of political action some positive potential and various negative risks, yet their overall effect is unlikely to be substantial in light of the multitude of factors that produce social justice," (Bakan, 1997: 144). Accordingly, if the Council's initial case had been successful, because the law grants a form legal entity or citizenship upon corporations, Hollinger could just as easily appeal and mount its own *Charter* claim. As has been demonstrated in the other freedom of expression cases, the *Supreme Court* will

readily grant *Charter* protection to corporations and their freedom of expression. In doing so, any attempt to limit newspaper concentration through a section 15 *Charter* claim is likely to fail. Further, if the *Competition Act* were amended to constrain newspaper concentration on the grounds of editorial content, it is likely that newspaper corporations could challenge the law and find it unconstitutional under section 2(b).

Legalised Politics, the Public Sphere and Newspaper Concentration

From the late 1980s through the 1990s, the legalisation of politics represented an important transformation of the Canadian public sphere. Mandel suggests that change was from democratic representative politics – as limited and problematic as it is – to legalised politics (Mandel, 1989; 1991). As social, political and economic crises reshaped Canadian society under neo-liberalism, the legal debates surrounding the *Charter*, freedom of expression and newspaper concentration developed a united adherence to three fundamental beliefs: 1) the prevention of government intervention in the private sphere was the primary purpose of the *Charter*; 2) that freedom of expression ought to be determined by the “free marketplace of ideas”; and, 3) that newspaper concentration could proceed in a (non)regulated manner shaping the public sphere through its (non)regulation of the “market” the revamped *Competition Act*.

During this period, neo-liberal economics coupled with the legalisation of politics proceeded to shape the structure and nature of the limited welfare-state in Canada. Indeed, the *Charter* litigation process shows how the construction of a body of

precedents established by powerful private interests enhanced commercial citizens' power and rights to protection under the law. What is central to this process has been how the courts were positioned to enforce and impose a new layer of social control and discipline upon Canadian society. However, though this can never be proven, Bakan holds that:

[T]he day-to-day lives of people in Canada would not be that much different – not that much better, nor that much worse – if the Charter had never been entrenched in the constitution. Constitutional law, including the Charter, imposes constraints on the exercise of political power. The social constitution – historically rooted patterns of power relations among groups and individuals that profoundly affect and determine the nature and quality of people's existence – is largely beyond its grasp. (Bakan, 1997: 145)

Although I agree with much of Bakan's argument, I tend not to be persuaded by his position regarding the constitutional precedents that protect commercialised speech. Arguably, the right to freedom of expression could allow private entities to claim that virtually any regulation of their commercial expression is a fundamental infringement of their freedom of expression. As the freedom of expression cases demonstrate, the courts have consistently affirmed commercial speech the right to freedom of expression under 2(b). As Mandel has pointed out, Charter litigation is a double edged sword. Accordingly, a refusal to allow further newspaper concentration on the basis of editorial content could be challenged as unconstitutional and the courts would likely recognise the Charter right and freedom of newspapers

to combine. In addition, the precedents set in the freedom of expression cases mean that government action to regulate new media conglomerates and the burgeoning communications and information industries could potentially be regarded as unconstitutional. The limited provisions that exist in the *Competition Act* mean that when media conglomerates want to combine, then it may be possible to use the *Charter* to override any or most of the limitations placed on private entities by claiming protection to freedom of expression under 2(b).

It is within this legal framework, then, that we can locate one of the persistent problems of the *Charter*: that is, the neo-liberal hegemony over the legalisation of politics and the precedents set in the commercial expression cases. Most advocates conceived the *Charter* as playing a strong role in the promotion of social justice, protecting individual rights and limiting state intervention in the private sphere. In practice, what the commercial expression cases allowed was a broadening of the neo-liberal assault on the public sphere and welfare-state. With the increasing concentration of newspapers ownership, recent trends in editorial policy demonstrates that the Thompson, Hollinger and Sun chains tend to construct 'news' stories and editorial policies that consist of a constant attack on social spending and the "evils" of big government. In the cultural struggle for the state, neo-liberal hegemony over newspapers has successfully shaped the "news" to reflect and promote the hegemonic belief that social concerns are best left up to individuals and that the "free

market" is the proper mechanism to reward or discipline individuals.

The hegemonic interests of commercialised speech have largely defined freedom of expression in the Charter era. The unchecked concentration of newspapers has seen a visible shift to the right in editorial policy and this reflects the interests of their owners (Winter, 1997). It is within the constitutional, historical and material reality that freedom of expression has been abstracted from one of the basic rights of individual citizenship into a right that is fundamentally shaped and defined by neo-liberal interests in Canada. As has been stated elsewhere, the trend toward newspaper concentration in Canada is not a new phenomenon: that is, the difference is that it is only more extreme and ideologically strident. However, it would appear that under the *Charter*, the *Supreme Court* is only willing to recognise the holders of commercial speech rights on a comparative basis with those of the individual citizen: a bizarre comparison when one considers the limited resources of the average individual as being similarly situated. Nevertheless, in her dissenting opinion in *Lessard*,⁵⁰ Madam Justice McLachlin (as she was then) held:

The history of freedom of the press in Canada belies the notion that the press can be treated like other citizens or legal entities when its activities come into conflict with the state. Long before the enactment of the *Charter*, the courts recognized the special place of the press in a free and democratic society.⁵¹

Unfortunately, it appears that Canadian jurisprudence is only willing to recognise "the special place of the press in a free and democratic society" in dissent and affirm that the *Competition Act* applies to advertising rates and not to editorial content or the diversity of speech and opinion.

What is central in the problem of newspaper concentration and freedom of expression is the inability of the government to meaningfully intervene and regulate concentration to promote diversity without the threat of judicial intervention. As Bakan notes, "transferring authority over many areas of social policy to the judiciary inevitably constrains government activity, including that aimed at promoting social justice and equality in society," (Bakan, 1997: 100). Nonetheless, the argument that limiting newspaper concentration through the *Competition Act* would infringe freedom of expression of the owners is misleading. Limiting ownership through merger provisions would not tell newspaper magnates what to print: as noted in Associated Press v. United State limiting ownership would merely allow for the possibility of alternative and diverse voices to be heard.

It is within our current historical and material situation that we find *Charter* litigation and newspaper concentration co-existing. To varying degrees, this has allowed and assisted the various agents of the neo-liberal agenda to promote newspaper concentration and the *Charter* protection of commercial expression. By according commercial speech the right to freedom of expression, the courts have severely harmed the democratic capacities of individuals. Indeed, the further concentration of newspaper

ownership in Canada has only allowed a bad situation to become worse. Given the legal holdings of our courts, it would appear that any possible solution that would regulate and diversify ownership and editorial opinion in favour of freedom of expression is doomed to failure for the foreseeable future. As A.J. Liebling noted, "[d]iversity – and the competition that it causes – does not insure good news coverage, but it increases the chances," (Liebling, 1981: 33). In our current state of newspaper concentration, it would appear that Liebling's famous remark that freedom of expression is only guaranteed to those individuals who own the press is under no threat.

Notes

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¹ I have chosen not to go into the findings of the Davies or the Kent Commissions. Both these Commissions definitely laid out the problem of newspaper concentration and the threat it poses for Canadian democracy. The dilemma was that Commissions' proposals and recommendations were never acted upon.

² Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5. at 26-28. This area is known as the POGG – that is, peace order and good government.

³ Ibid., at 29-32.

⁴ Citizens Insurance Company v. Parsons (1881) 7 A.C. 96 (P.C.).

⁵ Russell v. The Queen (1882), 7 A.C. 829 (P.C.).

⁶ Hodge v. The Queen (1883), 9 A.C. 117 (P.C.).

⁷ Attorney General of Ontario v. Attorney General of Canada (Local Prohibition Reference) [1896] A.C. 348 (P.C.).

⁸ Reference Re The Board of Commerce Act, 1919 and The Combines and Fair Prices Act, 1919 [1922] 1 A.C. 191; 60 D.L.R. 513 (P.C.).

⁹ Fort Frances Pulp and Paper Company v. Manitoba Free Press Company, [1923] A.C. 695; [1923] 3 D.L.R. 629 (P.C.).

¹⁰ Toronto Electric Commissioners v. Snider, [1925] A.C. 396; [1925] 2 D.L.R. 5 (P.C.).

¹¹ Although there are some observers who argue that the Great Depression brought about a fundamental change in the judicial interpretation of economic regulation, it is clear that the judicial decisions in a number of 1930s cases entrenched the jurisdictional disputes between the federal and provincial governments. For further elaboration see: Proprietary Articles Trade Association v. Attorney General Canada [1931] A.C. 310; [1931] 2 D.L.R. 1 (P.C.); Reference Re The Regulation and Control of Aeronautics in Canada [1932] A.C. 54; [1932] 1 D.L.R. 58 (P.C.); Reference Re Regulation and Control of Radio Communication in Canada [1932] A.C. 304

(P.C.); Attorney General of Canada v. Attorney General of Ontario (Labour Conventions) [1937] A.C. 326; [1937] 1 D.L.R. 673 (P.C.); Attorney General of Canada v. Attorney General of Ontario (The Employment and Social Insurance Act) [1937] A.C. 355; [1937] 1 D.L.R. 684 (P.C.).

¹² For further elaboration of this perspective see: Robinson, Jonathan. (1970) **Lord Haldane and the British North America Act.** in University of Toronto Law Journal Vol. 20. Toronto: University of Toronto Press.

¹³ Through the 1960s and until the introduction of the Charter, there were a further series of constitutional cases involving sections 91-92 that confirmed the limitations placed on all levels of government to regulate economic activity. For further elaboration see: Carnation Co. Ltd. v. Québec Agriculture Marketing Board [1968] S.C.R.; 67 D.L.R. (2d) 1; Attorney General of Manitoba v. Manitoba Egg and Poultry Association [1971] S.C.R. 689; 19 D.L.R. (3d) 169; Re Agricultural Products Marketing Act [1978] 2 S.C.R. 1198; 84 D.L.R. (3d) 257; Central Canada Potash Co. v. Government of Saskatchewan [1979] 1 S.C.R. 42; 88 D.L.R. (3d) 609; Caloil Inc. v. Attorney General of Canada [1971] S.C.R. 543; 20 D.L.R. (3d) 472; Canadian Industrial Gas and Oil Ltd. v. Government of Saskatchewan [1978] 2 S.C.R. 545; 80 D.L.R. (3d) 449; and, Reference Re Proposed Federal Tax on Exported Natural Gas [1982] 1 S.C.R. 1004; 136 D.L.R. (3d) 385.

¹⁴ Competition Act, R.S.C. 1985, C-34.

¹⁵ I believe that there is much more to be said about Lord Haldane and the early economic regulation cases regarding the division of powers between the federal and provincial governments. However, due to the limited scope of this project, I am unable to adequately address these interests.

¹⁶ For example, economist Jim Stanford claims that current economic concentration means that the "top 10% of Canadian society probably owns about 50% of all wealth (including real assets such as homes), and something closer 70% of all financial wealth. The top 1% of society probably owns about one quarter of all wealth, and something approaching 40% of all financial wealth," (Stanford, 1999: 269-270).

¹⁷ Canadian Bill of Rights, R.S.C. 1960, c-44. As an aside, it has been argued that the Charter was to articulate the

lesser known legal principle, which exists on the margins of Canadian jurisprudence, that there has always been an implied bill of rights located in the original Constitution, 1867. The best example of this "implied" bill of rights existing is contained in Mr. Justice Rand's dissent in Saumur v. City of Québec and the Attorney General of Québec [1953] 2 S.C.R. 299; [1953] 4 D.L.R. 641.

¹⁸ Section 52(1) of the Charter states: "The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect." For example, in Vriend v. Alberta [1998] 1 S.C.R. 493, the Supreme Court held that once a provincial government enacted legislation, such as the Individual's Rights Protection Act, R.S.A. 1980, c. I-2, the legislation must extend equal protection to all minorities under the law, including sexual minorities. Mr. Vriend was fired from his job upon self-disclosing to his employer that he was gay.

¹⁹ National Citizens' Coalition Inc. v. Attorney General of Canada, (1984) 11 D.L.R. (4th) 481 (Alta. QB). National Citizens' Coalition involved restrictions on third parties spending during provincial elections.

²⁰ Ford v. Attorney General of Québec [1988] 2 S.C.R. 712; 54 D.L.R. (4th) 577. Ford is a case that involved provincial restrictions concerning advertising in English in Québec.

²¹ Attorney General of Québec v. Irwin Toy, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577. Irwin Toy is a case that challenged the provincial restrictions on advertising directed at children in Québec.

²² R.J.R. MacDonald Inc. v. Canada (Attorney General) [1995] 3 S.C.R. 199, 127 D.L.R. (4th) 1. R.J.R. MacDonald is a case that involved the federal restrictions on tobacco advertising.

²³ As Alan Cairns notes, regarding the early JCPC cases and prior to Charter litigation: "The high cost of appeals, which played into the hands of the wealthy, and thus buttressed the position of the economically strong, was a frequent criticism of the Privy Council," (Cairns, 1971: 314). The former Liberal Minister of Justice (1906-1911), Sir Allen Aylesworth, stated that the high cost of appeals gave the

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wealthy an advantage but this was "after all, but one of the advantages which the possession of wealth carries with it in every walk of life," (Aylesworth, 1914: 144). I have no good reason to assume that this dynamic has significantly changed in the post-Charter era.

²⁴ R. v. Keegstra [1990] 3 S.C.R. 697; 61 C.C.C. (3d) 1.

²⁵ R. v. Zundel [1992] 2 S.C.R. 731; 95 D.L.R. (4th) 202.

²⁶ According to Mandel, one umbrella organisation, the Canadian Alliance for Trade and Job Opportunities, spent two million dollars in the last three weeks of the election "to sell the Tories and vilify the opposition through every conceivable medium of communication," (Mandel, 1991: 128).

²⁷ Québec Charter of the French Language, R.S.Q., c. 11.

²⁸ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11. s. 2(b).

²⁹ Ford v. Attorney General of Québec [1988] 2 S.C.R. 712; 54 D.L.R. (4th) 577, at page 604.

³⁰ Ibid., at page 618.

³¹ Ibid.

³² Consumer Protection Act, R.S.Q. 1978, c. 9.

³³ Attorney General of Québec v. Irwin Toy, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577, at page 605.

³⁴ Ibid., at page 620.

³⁵ Ibid., at page 620-621.

³⁶ Ibid., at page 630.

³⁷ Charter of Rights and Freedoms, Part I of the Constitution Act, 1982 being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. s. 7.

³⁸ Attorney General of Québec v. Irwin Toy, [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577. at page 633.

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³⁹ Ibid.

⁴⁰ *Tobacco Products Control Act*, S.C. 1988, c. 20.

⁴¹ LaForest, J. **Canadian Constitutional Law**, (Ed.) F. Macklem, R.C.B. Risk, C.J. Rogerson. K.E. Swinton, L.E. Weinrib and J.D. Whyte. Toronto: Emond Montgomery Publications Limited. p.737.

⁴² Conrad Black, chair and CEO of Hollinger Corp., speaking at the annual meeting of Hollinger. Quoted in the *Ottawa Citizen*, May 30, 1996.

⁴³ Chris Cobb, media reporter, from his July 22, 1996, column in the *Ottawa Citizen*.

⁴⁴ *The Queen v. K.C. Irving Ltd.*, [1978] 1 S.C.R. 408.

⁴⁵ Ibid., at page 415.

⁴⁶ Ibid.

⁴⁷ Barlow, Maude. in the Appellants' factum, at page 7.

⁴⁸ *Associated Press v. United States*, 326 U.S. 1 (1945).

⁴⁹ *Associated Press v. United States*, 326 U.S. 1 (1945), at page 20.

⁵⁰ *CBC v. Lessard*, [1991] 3 S.C.R. 421. *Lessard* involved a CBC camera crew who videotaped a group of people occupying and damaging a post office building. The police acquired authorisation from a justice of the peace to search the CBC for the videotapes the day after the broadcast. The *Supreme Court* held that the search warrant was valid.

⁵¹ Ibid., at 451.

Conclusion

Toward a Critical Theory of Newspaper Concentration and the Charter

It is by the goodness of God that in our country we have these three unspeakably precious things: freedom of speech, freedom of conscience, and the prudence to practice neither.

Mark Twain¹

This study has sought to explore the implications of Habermas's concept of the public sphere in relation to a materialist perspective on newspaper concentration and the Charter. In my analysis, I have argued that Habermas's insights regarding communicative reason and the formation of the public sphere – as problematic as they are – provide a valuable and significant starting point for a reinterpretation of Canadian democracy. Further, it was illustrated that Habermas's notion of communicative reason can be utilised to reconstruct a social theory of the public sphere and explain how the Charter has been used as a means to assist and legitimate the rights of commercial speech in the era of legalise politics and the Charter. By re-engaging Marx and materialism, I believe I have shown how a critical Marxian reading of Habermas allows for a more comprehensive understanding of the forces shaping the right to freedom of expression, public dialogue and our constitutional order in Canada.

Habermas insists that, even in the highly instrumental world of late-capitalism, the communicative sphere allows for a

recuperation of the liberatory politics that gave birth to the Enlightenment. That is, it is still possible to rediscover the latent potential and under utilised promise of the Enlightenment to promote progressive politics in late-capitalist societies. This may be true. However, in coupling a materialist reading concerning the early economic regulation cases, it seems that a dialectical articulation of the legitimization process in *Charter* litigation has not produced positive results. Rather, it suggests that the constitutional structure and the legitimization process of the *Charter* have made liberatory politics and dialogue in the communicative sphere even more difficult in Canada. In addition, the *Supreme Court* has construed the right to expression so broadly that it means almost nothing. Thus, given the structure of our liberal democratic state, it would appear as almost inevitable that liberal rights theory leads to even more abstract and empty interpretations of political rights.

Various critiques and criticisms of Habermas's public sphere and communicative reason have been raised. Many of the criticisms of Habermas's work point to serious flaws in his analysis and are valid concerns. Yet, in spite of Habermas's "normative" neutrality, his earlier work on the public sphere and its formation speaks to our current dilemma of newspaper concentration. Habermas argues that the "original" public sphere and its formation constituted a moment where expression appeared that was not shackled strictly to commercial or private considerations.

In retrospect, it is obvious that the "free press" was never autonomous from the material base of society. Rather, the base/superstructure metaphor shows how a "free press" interpenetrates and mediates the economic with cultural spheres. Moreover, when Habermas claims that the birth of the public sphere allowed for public dialogue to occur free from private considerations he is mistaken. Eagleton is correct to note that in England the demise of bourgeois public sphere and rise of the democratic public sphere was an era of the "counter-public sphere" and where a free press was most prolific and productive.

The post-modern critics dismiss Habermas and his work as idealised theories that are mired in the "totalising" influence of the Enlightenment. As weak as Habermas's approach may be, I have argued that the major problem with Habermas is that he has not realised the radical potential of modernity enough. In attempting to balance between the extremes of the "rage against reason" (Bernstein, 1991), somewhere between the Frankfurt School and post-modernism, Habermas limits the potential to reconceptualise the radical democracy that was at the heart of the Enlightenment project (Macpherson, 1977).

Nevertheless, as a critical tool, the value of Habermas's public sphere is that it embraces many of the aspects of our daily lives. Even though the commodified nature of late-capitalism attempts to convert everything into exchange relationships, the popular belief that there is a public sphere and that social entities such as communities exist are powerful ideas and social practices that the atomistic trends inherent in neo-liberalism

find difficult to displace. That is, as Fraser points out, we live in a world of multiple public spheres that constitute the social relationships and communal practices that we share with one another. For good or ill, this is the lived material space that is the public sphere and that constitutes our everyday struggle for life, solidarity and freedom.

Freedom of Expression and the Charter

I began this investigation with a sombre account of Canadian newspaper concentration and the how the *Charter* has become a legitimization tool for commercial rights. There is little doubt that *Charter* protection for commercial speech and newspaper concentration has seriously reduced the quality and level of public debate in this country. Daily, the uniformity of the editorial content in major newspaper chains provides us with ample evidence of the lack of diversity. As Canada has undergone the restructuring of its economy to suit the needs of late-capitalism, newspaper concentration and the editorial policies of most major dailies has reflected these ideological changes – and at times preceded them.

The rise in the stature and power of commercial speech in Canadian society has been the ideological defeat of the Keynesian welfare-state. Moreover, the failure of the *Charter* era has been the legal recognition of commercial speech as a right. As Allan Hutchinson notes, this event has been a collective failure on the part of politicians and the judiciary who have chosen to sacrifice any pretence of a meaningful democracy in defence of the market paradigm of "free speech". In his words:

The constitutional protection of commercial speech and speech generally through the institution of judicial review frustrates rather than enhances democratic dialogue, individual freedom, and social enrichment. It threatens to realize a state of affairs in which corporate tyrants indulge in monologues over millions of solitudes. Information is a two-edged sword, and more is not always better; quality is more important than quantity. In today's social world, it is the commercial dilution of public discourse to a distracting anodyne patter that is as much a threat as Big Brother.... By granting constitutional immunity to commercial speech, we hasten this demise of democratic politics and place social justice at the behest of corporate boardrooms and other foyers of private power. (Hutchinson, 1995: 202)

The inability of the courts to recognise the enormous power of private actors through commercialised speech has led to a polarisation in Canadian democracy, and in Canadian society in general. The hegemony of neo-liberalism suggests that it has successfully manufactured the dominant terms that shape the dialogue of the Canadian public sphere. Unlike Canada, most democratic societies have restrictions on the concentration of media and newspaper ownership. As shown in *Associated Press*, even the United States – the bastion of “free enterprise” – determined over fifty years ago that that combining newspaper companies is in contravention to the *Sherman Act* and presents a serious threat to the average citizen's right to freedom of speech. In Canada, in spite of two royal commissions arguing for ownership limits to be placed on newspapers, parliament, the Competition Bureau and the

judiciary have seen fit to dismiss any serious challenge to the monopolisation occurring in the Canadian newspaper and media industry.

Moreover, it would appear that, unlike the United States, because our *Supreme Court* saw fit to define commercial speech so broadly, legislation directed to limit the ownership of newspapers or other media, in an attempt to increase diversity, would be found unconstitutional. That is, it would appear from the holdings in the commercial speech cases that the *Supreme Court* would only affirm their past precedents. In doing so, parliament and the courts affirm the proprietary right of ownership of the press over expanding diversity for the freedom of expression for all Canadians.

The dominating trend of newspaper and media concentration in Canada over the last century has led to one of the highest levels of concentrated ownership existing in modern democratic countries. These high levels of concentration have privileged neo-liberal forces who shape the information disseminated to the public. One of the out comes of newspaper and media concentration has been an exceedingly shrill and narrow editorial focus regarding the concerns of the vested interests that promotes "free trade", tax cuts, flat taxes, the privatisation of health care and, of course, the need for smaller government.

However, this trend is not all one way: that is, such a re-politicisation of the press in the public sphere has a tendency to call the legitimacy of the "free press" into question. As Noam Chomsky demonstrates, the "agenda setting" press in a liberal

democracy is most ideologically effective when it maintains its veil of "objectivity" and cloaks its propaganda. Indeed, when the press becomes re-politicised and partisan, it runs the risk of losing its legitimacy as an "objective", "truthful" and "neutral" observer. Nevertheless, a critical theory of newspaper and media concentration and freedom of expression must not only recognise the current hegemony of the neo-liberal press, but it must re-imagine the cultural, economic and political struggles necessary to re-invent a new and counter-hegemonic public sphere. What is needed is a public sphere that is prepared to confront and combat the various forms of legal constraints that limit the possibility of a truly democratic "free press". A youthful Marx reminds us that:

The free press is the ubiquitous vigilant eye of a people's soul, the embodiment of a people's faith in itself, the eloquent link that connects the individual with the state and the world, the embodied culture that transforms material struggles into intellectual struggles and idealises their crude material form. It is a people's frank confession to itself, and the redeeming power of confession is well known. It is the spiritual mirror in which a people can see itself, and self-examination is the first condition of wisdom. It is the spirit of the state, which can be delivered into every cottage, cheaper than coal gas. It is all-sided, ubiquitous, omniscient. It is the ideal world which always wells up out of the real world and flows back into it with ever greater spiritual riches and renews its soul. (Marx, 1975: 164-165)

To re-imagine what a free press could be in Canada, we must reconfigure our politics so that the constitutional interpretation that has granted commercial speech the right to freedom of expression is withdrawn. If one of the central concerns of a democratic society is the ability of the individual to make informed decisions, then our free press ought to be, as Marx suggested, "the spiritual mirror in which a people can see itself, and self-examination is the first condition of wisdom". Until there is a concerted effort to deprive commercial speech of its right to "freedom of expression" under the *Charter*, the task of building alternative public spheres, due to newspaper and media concentration, will remain a difficult struggle.

Notes

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