# CASE COMMENT: *VRIEND* v. *ALBERTA* SEXUAL ORIENTATION AND LIBERAL POLITY[1]

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Ye shall have one manner of law, as well as
for the stranger as for the homegrown.

—Leviticus 24:22

Politics must be able in fact always to be checked
and criticized starting from the ethical.

—Emmanuel Levinas[2]

To regard power as the ultimate arbiter is
to sacrifice both moral agency and moral goal.

—Harold Kaplan[3]

For some three years, Delwin Vriend was a laboratory co-ordinator at King's College in Edmonton. He was fired in 1991 both because when asked by the College's president, he confessed himself to be homosexual and because homosexuality is thought by the College to violate certain Christian principles to which it is devout.[4]

The *Individual's Rights Protection Act*[5] is a legislative affirmation of the moral

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1 (23 February 1996) Edmonton 9403-0380 (Alta. C.A.) [hereinafter *Vriend*].

2 E. Levinas, *Ethics and Infinity*, trans. R.A. Cohen (Pittsburg: Duquesne University Press, 1985) at 80.

3 H. Kaplan, *Conscience and Memory* (Chicago: University of Chicago Press, 1994) at 168.

4 *Supra* note 1 at 1.

5 R.S.A. 1980, c.I-2 [hereinafter *IRPA*]. As this comment was being written, a bill proposing amendments to the *IRPA* was introduced by the Alberta government: Bill 24, *Individual's Rights Protection Amendment Act*, Alberta, 1996 blends *IRPA* human rights protections with provisions concerning multiculturalism and citizenship under a new statutory regime, the proposed *Human Rights and Citizenship Act*. Ignoring the recommendation made by a government-commissioned public inquiry led by the then Chief Commissioner of the Alberta Human Rights Commission (see Alberta Human Rights Commission, *Equal in Dignity and Rights: A Review of Human Rights in Alberta* (Edmonton: Alberta Human Rights Commission, 1994) at 71-75) and despite vocal dissent by a province-wide coalition of human rights groups, the *Act* fails to add "sexual orientation" to the list of prohibited grounds of discrimination. Late-in-day amendments will, however, prohibit discrimination on the grounds of poverty and add references to multiculturalism. Amid the public controversy, Premier Klein designated human rights critics and groups as special interest groups unrepresentative of "normal Albertans": M. Gold, "Human rights 'not an issue'" *Edmonton Journal* (30 April 1996) B3. He also claimed — apparently on the understanding that homosexuality is "an individual matter of the individual's lifestyle choice" — that legislative prohibition of discrimination against homosexuals would provide them "special rights": M. Gold, "Homosexuality

equality of persons resident in Alberta. Through a series of prohibitions against discrimination, the *IRPA* in effect declares a principle of equal citizenship. "Equal in dignity and rights,"[6] persons resident in Alberta are not to be differentiated (or discriminated against) on grounds of "race, religious beliefs, colour, gender, physical disability, marital status, age, mental disability, ancestry or place of origin."[7] The *IRPA* declares these prohibitions against counting difference to be matters of "fundamental principle" and "public policy,"[8] and in its provisions, seeks to ensure equal treatment in a wide swath of areas, including employment practices.[9] The *IRPA* does not, however, name sexual orientation[10] as a difference which must not be counted in the conduct of civic relations in these areas. The *IRPA* instead is silent.

This statutory silence on the legality of Vriend's dismissal on grounds OF his homosexuality did not long beg for legal answer. After his complaint was rejected by the Alberta Human Rights Commission[11] because sexual orientation is not expressly a prohibited ground of discrimination within the *IRPA*, Vriend appealed to the Court of Queen's Bench[12] which in a 1994 judgment of Madam Justice Russell, upheld his complaint, declared the *IRPA* to be in violation of the equality provisions of s. 15(1)

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a 'lifestyle' — Klein" *Edmonton Journal* (20 March 1996) A3. In late May, the government invoked closure and *Bill 24* will, in consequence, pass into law prior to summer recess: M. Gold, "Ghitter wants Mar gone" *Edmonton Journal* (25 May 1996).

6 *IRPA*, *ibid.*, preamble.

7 *Ibid.*, s.7(1).

8 *Ibid.*, preamble.

9 Section 7(1) prohibits counting differences in employment. The *IRPA* also prohibits discrimination in public notices, s. 2; in public accommodations, services and facilities, s. 3; in trade unions, s. 10; and in tenancy, s. 4. Section 6 prescribes gender equity in employment.

10 Though Justice McClung appears at times both confused by the term (see *e.g.* his equating of sexual orientation with homosexuality and his equivocation over its "uncertain reach," *supra* note 1 at 23, 33) and determined to disparage it (see, in particular, his passing reference — in the context of putting aside the respondents' views regarding the reach of the term — to three infamous serial killers, *ibid.* at 22), "sexual orientation" is indeed seized of a standard use. In its widest sense, "'sexual orientation' includes both emotional-sexual attraction and actual emotional-sexual conduct resulting from emotional-sexual attraction": see R. Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995) at 9. Used in this general way as denoting "the direction of a person's attraction and the direction of their conduct," the term produces four possibilities with respect to affection — namely, heterosexual, bisexual, gay and lesbian, and asexual/celibate — and two possibilities with respect to conduct — opposite sex and same sex, *ibid.* at 8. In the context of human rights law, however, "sexual orientation" has a more precise and purposive meaning which references the grounds of discrimination. See *e.g.* E. Heinze, *Sexual Orientation: A Human Right* (Dordrecht, The Netherlands: Martinus Nijhoff, 1995) at 60. Heinze states that "sexual orientation denotes real or imputed acts, preferences, lifestyles, or identities, of a sexual or affective nature, in so far as these conform to or derogate from a dominant normative-heterosexual paradigm." For an argument against mindlessly collapsing gay men and lesbians into the single, all-embracing category "sexual orientation," see R. Robson, *Lesbian (Out)Law* (Ithaca: Firebrand, 1992), c. 1, 6. For arguments against conceiving of sexual orientation as an immutable essence, see the sources mentioned *infra* note 108 and accompanying text.

11 Section 15 of the *IRPA* gives the Commission carriage of the administration of the *Act*. The Commission is the offspring of s. 14.

12 Appeal from a Commission ruling is provided by s. 33.

of the *Charter of Rights and Freedoms*[13] in a manner unredeemable under s.1, and ordered that the *IRPA* be read as if it both named sexual orientation and prohibited discrimination on that ground.[14] The government of Alberta appealed, and it is this appeal which begot the lead decision of Mr. Justice McClung reversing the Queen's Bench decision.[15]

As was the case at trial in Queen's Bench, the broadbrush issue before the Court in the state's appeal of *Vriend* was straightforward and can be easily stated: has the state the authority arbitrarily to exclude classes of individuals from a statute whose purpose is equal protection? Justice McClung for the majority, found that the state is indeed fulsomely possessed of just such an authority. He cannot, he declares, "agree that the *deliberate* legislative omission of the words 'sexual orientation' in the *IRPA* ... when held up against the Canadian *Charter of Rights and Freedoms*, leads inexorably to the constitutional infirmity of such a statute";[16] and he is compelled, he straightaway tells us, to "the conclusion that the Alberta Legislature's exclusion of 'sexual orientation' from the enumerated discrimination prohibitions of the *IRPA* does not leave the *IRPA* in so clearly an unconstitutional state that the courts can intervene, through the agency of the *Charter*, to strike it down, let alone rewrite it."[17]

Given the *IRPA*'s manifest commitment to the principles of moral equality and equal protection, without more, this appears a most curious result. So too are its implications, implications concerning which Justice McClung appears to be at once clear-eyed and Panglossian. "The effect of the Alberta legislative stance," he instructs, "is that in the areas touched by the *IRPA*, homosexuals and heterosexuals may contract or decline to contract with each other without legislative incentives."[18] Which is to say, homosexuals and heterosexuals may at their whim[19] discriminate against one another on the grounds of sexual orientation in all of the areas covered by the *IRPA*, including employment, subject only — and this is the Panglossian caveat — to the law of contract.[20] Since, however, the homosexual is here the (loathed) stranger[21] — it was on

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13 *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 [hereinafter the *Charter*].

14 *Vriend* v. *Alberta*, [1994] 6 W.W.R. 414, 152 A.R. 1 (Q.B.).

15 In addition to Justice McClung, the three member panel was composed of Mr. Justice O'Leary, who concurred in the result, and Madam Justice Hunt who dissented.

16 *Supra* note 1 at 39-40 [emphasis added].

17 *Ibid.* at 5-6.

18 *Ibid.* at 20.

19 And whimsy, according to Justice McClung, it most certainly may be: "[T]he IRPA leaves heterosexuals the choice of contracting with, or employing, homosexuals. It does not force them to do so under pain of the imposition of the sanctions of the *IRPA*. Similarly, homosexuals may employ, contract, or deal with heterosexuals as they choose," *ibid.* at 8.

20 *Ibid.* at 12.

21 Of this, his Lordship appears completely aware. See, for instance, his reliance on the (in)famous U.S. Supreme Court ruling in *Bowers* v. *Hardwick*, 92 L. Ed. 2d U.S.S.C. 1986 140 [hereinafter *Bowers*] where the Court validated a Georgia statute criminalizing sodomy by way of declaring that private consensual sexual relations between gay men are not protected by the constitutional right of privacy, *ibid.* at 19, and on Andrew Sullivan's characterization of the grounds of Western intolerance towards homosexuality (the view that homosexuality constitutes "a moral enormity" and an "abhorrent" behaviour) in his argument with respect to s. 1 of the *Charter*. See A. Sullivan,

that ground after all that homosexuals as a class were *deliberately* excluded from equal protection — the Justice's characterization of the relations between heterosexuals and homosexuals in such cases as an instantiation of an equally empowered "exercise of private choice"[22] subject only to "private resolution" is confounding.[23] So too is his Lordship's cursory and blithesome relegation of the conduct of these relations to the remedial guidance of the law of contract. Surely his Lordship is aware that the appearance of human rights legislation throughout the Anglo-American legal world was in large measure a consequence of an ubiquitous, postwar recognition of the common law's chronic failure to provide protection against identity-based discrimination.[24]

Of such a curious and confounding a result, we can fairly demand explanation, some good and sufficient cause for relief from the intellectual discomfort which otherwise so naturally attends his Lordship's conclusions. Unhappily, Justice McClung provides no such medicine. Just the opposite indeed. For on close reading, his Lordship appears[25] animated by his views on three themes, views so unacceptable and so indefensible, that rather than curing, serve instead to carry discomfort the sizeable moral distance to

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*Virtually Normal* (New York: Alfred Knopf, 1995). For commentary on *Bowers*, see J. Self, "*Bowers* v. *Hardwick*: A Study of Aggression" (1988) 10 Human Rights Quarterly 395, arguing, *inter alia*, that *Bowers* is "a classic example of discrimination against a disfavoured minority"; J.E. Halley, "The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity" (1989) 36 U.C.L.A. Law Rev. 915; and Thomas, "Corpus Juris (Hetero)Sexualis: Doctrine, Discourse, and Desire in *Bowers* v. *Hardwick*" (1993) 1.1 G.L.Q.: A Journal of Lesbian and Gay Studies 33. Following the recent U.S. Supreme Court decision in *Romer* v. *Evans*, [1996] S.C.T. No. 94-1039 (QL) [hereinafter *Romer*], the gravitational force of *Bowers* in U.S. equal protection law concerning sexual orientation will be seriously compromised. In *Romer*, the plaintiffs mounted an equal protection challenge to a 1992 amendment to the Colorado State constitution which sought to prohibit public authorities from adopting prohibitions against discrimination on grounds of sexual orientation. Colorado argued that the amendment — which was passed in a state referendum and in response to a number of municipal ordinances forbidding discrimination on grounds of sexual orientation including, notably, heterosexuality — sought equal protection by forbidding "special rights" for gays and lesbians, *ibid.* at 18. For the majority — Scalia, Chief Justice Rehnquist, and Thomas dissenting — Justice Kennedy roundly rejects this claim and thoroughly condemns the amendment as a "status-based enactment," *ibid.* at 38, which, "born of animosity," *ibid.* at 37, sought to classify "homosexuals not to further a proper legislative end but to make them unequal to everyone else," *ibid.* at 38. Justice Scalia, for the minority, takes the majority decision as sealing the fate of *Bowers*. He states that "in holding that homosexuality cannot be singled out for disfavorable treatment, the Court contradicts a decision, unchallenged here, pronounced only 10 years ago, see *Bowers* v. *Hardwick* ... and places the prestige of this institution behind the proposition that opposition to homosexuality is as reprehensible as racial or religious bias," *ibid.* at 39.

22 *Vriend*, *ibid.* at 8.

23 *Ibid.* at 16.

24 See *e.g.* W.S. Tarnopolsky & W.F. Pentney, *Discrimination and the Law* (Don Mills: DeBoo, 1985) c. 1, 2.

25 I employ the word "appears" because Justice McClung's opinion more closely resembles an exhortation than it does a legal judgment. It is, in consequence, confused, confusing, and circuitous stylistically, and moralistic in tone and temper. In the analysis which follows, his Lordship's opinion will be read in what Ronald Dworkin terms its "best light," which is to say, in a fashion which attempts "to make of it the best possible example of the form or genre" to which it belongs. See R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) at 52 [hereinafter *Law's Empire*].

dismay. His Lordship is concerned, firstly, with matters of legal philosophy and, more particularly, with judicial obligation and with the nature of rights. He is concerned, secondly, with legal interpretation and especially with the meaning of the state's deliberate omission of sexual orientation from the list of prohibited grounds in the *IRPA*. Finally, he is occupied with the morality of the way of the contemporary legal and social world. In this comment, I will canvass Justice McClung's views in each of these areas in order not only to disclose their infirmity separately, but also to propose that in concert, their effect is a wholesale renunciation of the rule of law.[26]

I have a purpose wider than the result in *Vriend* for undertaking this task. For in my view, the politically and morally repugnant reasoning there employed is not accidental or merely incidental to Justice McClung. Rather, reasoning of just that sort is required in any project of denying equal protection to political minorities defined by sexuality. In consequence, in disclosing the moves deployed to that end in *Vriend*, we are confronting the substance of a more general practice of political abjection and stigmatization.

## I. JUSTICE MCCLUNG AND THE THEORY OF LIBERAL LAW

Liberal polity has everything to do with the political division of powers of governance and with the provision, at law, of rights to be preserved from intolerable harm. Justice McClung's judgment, in turn, has everything to do with just these two, cardinal principles of liberal political and legal theory. For it is in the context of his discussion of the proper division of powers that he finds cause to forbid courts from interfering with legislative exclusions such as the exclusion at issue in *Vriend*; and it is in terms of his characterization of rights that he makes possible his condemnation of rights claims by (at least) gays as unacceptable attempts to usurp legislative and majority will. I shall explore, in some detail, His Lordship's views on both matters with the view to uncovering their genealogy and implications.

### A. LEGISLATIVE POWER AND JUDICIAL OBLIGATION

Throughout the piece, Justice McClung conceives the issue before him as one which ultimately concerns the substance and geography of legislative and judicial power. Early along, for instance, he tells us that "this appeal lies at the uneasy juncture of the autonomy of the Legislative Assembly of Alberta and the implementation of minority ... rights," and that this "a confrontive setting that is backdropped by" — among other things — "the prerogatives of Alberta's Legislature" and "the limits of their subsequent judicial edit."[27] Generally speaking,[28] there is nothing novel here. For, of course,

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[26] Since the purpose of this comment is, therefore, to subject Justice McClung's judgment to a specifically theoretical test, the caselaw — of which in the judgment, there is in fact very little — is engaged only very incidentally.

[27] *Supra* note 1 at 6.

[28] But generally only, since the contrast His Lordship draws between the legislative power and what he terms minority rights is idiosyncratic. I deal with this peculiarity in my exploration of his view of rights.

every constitutional case[29] concerning the moral or political competence[30] of legislation begs some understanding of the division of powers of governance as between the legislative and judicial branches. This is so because in every such case, the court must determine whether this is an instance where the legislative power ought to be subordinated to the judicial power. What always and finally matters is the calculus of this determination.

In the final analysis, Justice McClung's decision in *Vriend* turns on his understanding of the calculus proper to this undertaking. And while this is itself quite proper, the slide rule proffered by his Lordship is not. For unlike most kindred exhortations for judicial deference,[31] his relies on understandings which both defeat the political substance of the division of powers and surrender legal morality to political reality and popular convictions.

According to Justice McClung, the judiciary is faced with the starkest of choices: either judges will perform their proper "role of parliamentary defenders"[32] or they will, per force, become illegitimate and unprincipled "crusad(ers)"[33] in service to their personal visions, ideals and ideologies.[34] His Lordship arrives at this gloomiest of prospects — for dismal, surely, is any choice bounded by passive compliance and complete damnation — on three grounds: his decisionistic view of political and legal (and presumably moral and aesthetic) decision-making; his (in consequence, necessary) commitment to marjoritarianism; and his (entirely inadequate) understanding of the division of powers. Stated differently, his views on these three matters created for his Lordship a quandary of such dimensions that an uncompromising fiat of either/or alone could solve the riddle. Viewed in this light, Justice McClung's judgment demonstrates

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29 Which is not of course to say that constitutional cases alone involve issues of division of powers since clearly all cases proceed from some understanding of the nature and limits of judicial governance. In this regard, see generally Dworkin's discussion of common law and statutory adjudication, *supra* note 25, c. 8, 9. His nostalgia for the pre-*Charter* legal world would seem to imply that Justice McClung thinks the opposite. I canvass the implications of his Lordship's reverie in part III.

30 Since 1982, the *Charter of Rights and Freedoms* has, of course, grounded the assessment of the competence of legislation in terms of political morality. *Roncarelli* v. *Duplessis* [1959] S.C.R. 121 is a reminder that judicial governance in terms of political values and commitments inheres in liberal law and need not — and ought not — await the formal declaration of those values and commitments. Political competence continues to be assessed in terms of ss. 91 & 92 of the *Constitution Act,1867*, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11.

31 See *e.g.* A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis: Bobbs-Merrill, 1962). See also A. Bickel, *The Supreme Court and the Idea of Progress* (New York: Harper & Row, 1970).

32 *Supra* note 1 at 29.

33 *Ibid.* at 31. See also *ibid*: "the crusading judge." This is not the only term which his Lordship turns to describe those who decline to defend. See *ibid.* at 14: "legisceptical"; *ibid.* at 15: "constitutionally-hyperactive"; *ibid.* at 16: Charter "wielding"; *ibid.* at 23: "undisguised social engineer[s]"; *ibid.* at 31: "ideologically-determined judges", "rights-restive judges"; and *ibid.* at 35: "rights-restless."

34 See *e.g. ibid.* at 14: "legisceptical Canadian judges ... substituting their vision of the ideal statute"; and *ibid.* at 31: "ideologically-determined judges can be spectacularly creative."

yet again the truth that fundamentalism is at once the offspring and parent of fundamentalism.

Decisionism is the view, in politics and in morals, that since judgment is not accessible to reason, it is irreducibly and exclusively a matter of arbitrary decision.[35] Occasioned by positivistic relativism[36] and epistemic scepticism,[37] decisionism both breeds cultural pessimism and cynicism and sustains dogmatism.[38] For if truth is forever beyond us and if discourse is necessarily a repetition of the prejudice of the parties, hope is silly and any contrary proposal is deservedly suspect. And if this, in turn, is inevitably our circumstance, we would do well to attend exclusively to that which our history and culture have bequeathed us and simply ignore others.[39]

Justice McClung believes that law is decisionistic, entirely and inevitably in its legislative origins and forever potentially in its judicial husbandry.[40] As regards the judiciary, his Lordship throughout recognizes that legal discourse arises from and expresses deeper commitments and is, in consequence, every bit a matter of political judgment and not at all a matter of syllogistic detachment.[41] Yet in his view, unless the judiciary is committed solely to deference, its commitments necessarily become contaminated. For beyond the shelter of judicial passivism, rages an extra-legal storm of ideology. Once let loose from deference and permitted to roam in "the legislative pasture,"[42] the motivational commitments of judges become personal and private and, therefore, ideological and idiosyncratic. There is here, of course, no hint of understanding of the distinction between political and personal morality upon which the

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35 See *e.g.* G. Haarscher, "Perelman and Habermas" (1986) 5 Law and Philosophy 331 at 338, defining decisionism as "the acceptance of the impotence of reason regarding aims and values"; and F.R. Dallmayr, "Heidegger and Political Philosophy" (1984) 12 Political Theory 204, characterizing decisionism as arbitrary voluntarism.

36 Which is to say, by the view that each of us is entirely captive to historical time and cultural circumstance.

37 Which is at least to say that truth is inaccessible to us through the barriers of history and culture.

38 For a sociology of pessimism along these lines, see J. Bailey, *Pessimism* (London: Routledge, 1988).

39 For an exploration of the politics and ethics of cultural relativism and decisionism along these lines, see S.P. Mohanty, "Us and Them" (1989) 2:2 Yale Journal of Criticism 1.

40 His Lordship is, of course, not alone in this, though the intellectual company he is keeping might well surprise him. The whole of what may be termed postmodern jurisprudence — poststructuralist, radical feminist, critical, and so on — likewise proclaims that legal discourse is groundless. Unlike Justice McClung, however, the postmodernists typically make this claim preliminary to contending that legal discourse masks moves of domination and oppression. To sample the postmodern turn in legal theory, see P. Fitzpatrick, ed., *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (Durham: Pluto Press, 1991); and D. Patterson, ed., *Postmodernism and Law* (New York: N.Y. University Press, 1994).

41 I say "throughout" because his judgment everywhere attempts to disclose what he takes to be the proper constitutional commitment and motivation of the judiciary. See for example his commentary on division of powers: *supra* note 1 at 22, 26, 27, 28.

42 *Ibid.* at 31.

whole of the liberal project, political and legal, finally resides.[43] Nor, in consequence, is there any engagement with the question of adjudicative integrity and principle. Instead, judicial deference is simply assumed to exhaust legal politics, and all else is simply declared to be personal. Neither the assumption nor the declaration is, therefore, at all earned. Nor is either shown to make any practical sense. For whatever the niceties of theory, any acceptable view of the judicial datum has to offer some advice on the distinctively judicial matter of interpretation. More specifically, if one offers deference as normative principle, as does Justice McClung, then one is required to disclose how such deference is possible given the unself-recommending nature of legal texts and the inevitability of interpretation. His Lordship offers no such counsel. Interpretation is merely pointed to as yet another "guise" under which non-deferential judges pursue their ideological ends.[44]

Public morality fares no better under Justice McClung's view of the legislative power. Legislative decision-making too is beyond the reach of principle and informed moral agency; and like the judicial, the legislative too is properly cabined only by a decisionistic deference. Only the direction of deference differs. While it is the judiciary's burden to defer to the legislature, it is the obligation of the legislature to defer to popular will.[45] A perfect (and, as we will discover, a fearsome) symmetry then: the judicial defers to the legislative which in turn defers to the popular. The latter part of his Lordship's calculus, like the former, avoids all of the interesting and critical questions because it resigns moral agency to political passivism.[46] Of more concern at this point, however, is his understanding of the nature of electoral politics on which all of this turns, since it is there that he discloses the nerve of his politics of deference.

In his Lordship's view, electoral politics is about will formation. Which is to say, he thinks it a process through which popular conviction is at once formed and disclosed. It is just this conception which informs his invocation of "the wishes of the people"[47] as a means of cabining the judiciary and grounds his preferencing of the legislative over the judicial. The calculation for the latter is particularly instructive. If — and, of course, only if — electoral politics is about determining "the preference of the ... electorate,"[48] may the legislative be about "express[ing] the will of the majority";[49] and if the legislative power is truly about that, then it must have priority by virtue alone

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43 This is so because the liberal commitment to moral equality requires that "public reason" — that is, a reason not repetitive of personal moral attachments — be possible. Otherwise, of course, public discourse is always personal and beyond shared *moral* purpose and vulnerable always to the seduction of power. For the definitive exploration of public reason, see J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), Lecture VI.

44 *Supra* note 1 at 28. See also *ibid.* at 17: "under the cloak of merely interpreting it." See generally text accompanying note 176.

45 See *supra* note 1 at 12, 15, 40.

46 For an attempt to articulate a theory and practice of legislative integrity see *Law's Empire*, *supra* note 25 at 217-218, 223-225. See also K.I. Winston, "Legislators and Liberty" (1994) 13 Law and Philosophy 389.

47 *Supra* note 1 at 26.

48 *Ibid.* at 32.

49 *Ibid.* at 38.

of democratic principle.[50] Now, it is no matter for present purposes that all of this is nonsense sociologically.[51] What really matters is the political and legal philosophy to which such a view of polity unavoidably leads.

To declare popular will the guiding and confining norm of legislative and judicial practice is to commit entirely to a majoritarianism of a particularly unbridled and pernicious sort. For such a view not only requires that principle be put aside in favour of a robust decisionism, it also renders virtuous a political existentialism which concerns itself with concrete political reality at the expense of justice. It is just this existentialism that appears to be the nerve of Justice McClung's politics: deference to popular will indeed makes preeminent sense if legislative and judicial practice are properly confined to the politics of the present and are, in consequence, necessarily beyond the reach of both moral goal and agency. But such a view not only surrenders legal morality to political reality, it does so only by completely eviscerating the division of powers of which it claims to be a theory.

Montesquieu claimed that political liberty "is present only when power is not abused" and that in order for power not to be abused, "power must check power by the arrangement of things."[52] "In order," he thought, "to form a moderate government, one must combine powers, regulate them, temper them, make them act; one must give one power a ballast, so to speak, to put it in a position to resist the other."[53] These understandings led Montesquieu to distinguish between the legislative, executive, and judicial powers of the state and to propose that their distribution among different bodies alone ensures liberty. For when two forces face, "the one will be chained to the other by their reciprocal faculty of vetoing"[54] and they will, in consequence, be "counter-balanced."[55] Hence the classic view of the division of powers as a fundament to liberty: the priority of law over power alone purchases the right to liberty; and the division of powers alone makes possible the enjoyment of that right.

Justice McClung too has a view of the division of powers. But his is a view that provisions ballast to neither the legislative nor the judicial. Each, instead, is simply subsumed by popular will; and the judicial is then subordinated to the legislative on that account alone. Since it conflates rather than divides power, such a view hardly counts as a view at all, not at least if division of powers is understood as political principle about the constraint of power and not, say, as a *modus vivendi* by which power is allotted. Nonetheless, his Lordship's ruminations on the matter bear inquiry if only because his denial of the principle in *Vriend* has so much to do with his subsequent denial of political equality to the respondent.

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50 *Ibid.* at 33, 39.

51 For an excellent analysis showing the lie of such tidy versions of electoral politics, see J. Cohen & J. Rogers, *On Democracy* (New York: Penguin, 1983). See also C.B. Macpherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).

52 Montesquieu, Charles de Secondat, *The Spirit of the Laws*, (1748) trans. A.M. Cohler, B.C. Miller, & H.S. Stone (Cambridge: Cambridge University Press, 1989) at 155 (Book XI, c.4).

53 *Ibid.* at 63 (Book V, c. 14).

54 *Ibid.* at 164 (Book XI, c. 6).

55 *Ibid.* at 182 (Book XI, c. 18).

For his Lordship, division of powers is more a way of conducting state business than a principle concerning the constraint of state power. There is, he tells us, "a territorial truce between the courts and the law-makers," [56] and ideally, that truce ought to permit the legislative and the judicial to be "complementary institutions" which "inform and fortify each other" in the business of governance. [57] While under this view, judges are "co-servants with the law-makers in the business of representative government"[58] and the legislative and the judicial are in consequence "autonomous, co-equal branches of government,"[59] because each is finally accountable to popular will[60] and because legislatures more directly can and do express that will,[61] it is the peculiar burden of the judicial power to subordinate itself to the legislative by defending the legislative expression of "the wishes of the people."[62] In consequence, the judicial power does not really, and ought not ever, participate in the "governance of the citizenry."[63] The judicial, rather, is properly an addendum to governance, and the business of judges is "merely"[64] to resolve disputes among the citizenry according, presumably, [65] to the wishes of the people as they are expressed legislatively. Any judicial activity which is more wide-ranging than this constitutes an "unwelcome, even corrosive, intervention into the equilibrium of the community."[66] So in his Lordship's view, judges are only notionally co-equal political agents: theirs is to defend and to resolve, but never "to pitchfork their courts into the uncertain waters of political debate."[67]

Justice McClung's elucidation of "the compartmental theorems"[68] of the division of powers strips, then, the principle of any political or moral purchase. Only at some ill-defined and uncertain margin,[69] does the principle act as a breach in the unity of power in Montesquieu's sense. But his Lordship provides no instruction on the path to that liminal destination. He is satisfied instead to declare that that point has not been reached where, as in *Vriend*, the legislative power is exercised arbitrarily to exclude a class of individuals from the law's protection. And he is eager to proclaim that with

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56 *Supra* note 1 at 24.

57 *Ibid.* at 27.

58 *Ibid.* at 29.

59 *Ibid.* at 15.

60 *Ibid.* at 26: "Justice according to Canada's constitution is best advanced when the courts listen to the wishes of the people along with the hortatories of the Charter."

61 *Ibid.* at 33.

62 *Ibid.* at 26.

63 *Ibid.* at 28.

64 *Ibid.*

65 Presumably because on number of occasions, Justice McClung appears, if only barely, to temper his majoritarianism: See *ibid.* at 26: courts are instructed "to listen to ... the hortatories of the *Charter*" as well as to the "the wishes of the people"; *ibid.* at 29: since the *Charter*, "judges are ... permitted, sparingly, to correct legislative excess"; *ibid.* at 36: it is conceded that "if a statute is clearly bad ... it must be judicially condemned"; and *ibid.* at 38: the protection and defence of "minority interests" are counted "among" the "other constitutional duties [of] the courts."

66 *Ibid.* at 28. See also *ibid.* at 22. The object of this "equilibrium" is presumably the community's prevailing morality: see *ibid.* at 13, 26.

67 *Ibid.* at 35.

68 *Ibid.* at 15. His Lordship has not apparently reflected on the role of nationally appointed judges in a federal state. Judging by his views on enumerated and unenumerated rights (see *infra* note 125 and accompanying text), he should think no more of the matter than s. 96 lists such appointments as a federal power. I attempt to provide a more fulsome significance in part III.

69 See *supra* note 65 and accompanying text.

respect to the vast wealth of similar, centrally-located cases, the division of powers operates not to compromise, but always to co-ordinate and to consolidate power. For in all such cases, the goal of divided powers is not reciprocal resistance, but for each "to inform and fortify" the other.[70] This, of course, renders the division of powers a morally empty *modus vivendi*, an arrangement of power among powers instead of an institutional expression of a political morality determined to pluralize and thereby to delimit power. In the broad swath of the ordinary, it renders courts second-order functionaries of majoritarian will. It is not their province "to see that the statute law is just";[71] the courts, rather, are to defer to whatever happens to constitute the legislative will precisely because that will alone declares "the wishes of the people."[72]

So Justice McClung's decisionism begets his commitment to legal populism which in turn consumes the division of powers. The hunger of this populism is not, however, satisfied unaided, and before turning to the matter of his Lordship's lamentable views on rights, it may be profitable to discuss briefly the conceptual table servant he employs to lay the feast. Justice McClung's populism only fully defeats the division of powers because he conflates recognition of the legitimacy of authority and deference to the acts of such an authority. Separating these two matters — which the distinction itself inclines us to do — permits us to ask whether an authority's acts are just and to declare some such acts unjust without thereby challenging the authority's legitimacy or forsaking our view that the authority is indeed legitimate.[73] When, however, the two matters are conflated, the just becomes equated with whatever is ordered by those with authority. It is at just this juncture that we come face to face with the notion of legitimate authority as the uncommanded commander, with Hobbes' *autoritas non veritas facit legem*[74] or as more modestly construed, with John Austin's superior to which all are "habitually obedient or submissive."[75] Under such a positivist view — a view, incidentally, which is now rejected in all quarters — courts (and presumably the rest of us) are morally indifferent to the political foundations of law. It is sufficient that the law *is*, whatever it may be. Except perhaps at the margins,[76] Justice McClung is pledged to this empty-headed and politically corrosive positivism. And it is by virtue of this commitment that he gives free rein to his populism and assures the victory of the political over the legal. For only thus can docility and passivism with respect to the actions of authority become virtuous.

## B. RIGHTS, MINORITIES, AND LISTS

A regime of rights is the second girder of the liberal state. The theoretical blueprint of this architecture is simple enough. Legal rights enforce negative tolerance in service

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70 *Supra* note 1 at 27.

71 *Ibid.* at 17 [citing *Richert Co.* v. *Forbes*, [1937] 3 W.W.R. 632 at 635 (Alta. App. Div., Harvey, C.J.A.), a case in which an action by the holder of a mechanics' lien against the Registrar of Land Titles for issuing a certificate of title free of the lien was found statute barred].

72 *Ibid.* at 26.

73 See *Law's Empire*, *supra* note 25 at 376-379, 429.

74 T. Hobbes, *Leviathan* (1651), ed. by C.B. Macpherson (London: Penguin, 1968), c. 18, 19.

75 J. Austin, *The Province of Jurisprudence Determined* (1832), ed. by W.E. Rumble (Cambridge: Cambridge University Press, 1995) at 179 (Lecture VI).

76 *Supra* note 65 and accompanying text.

to the moral equality and equal citizenship of individuals. Negative tolerance is the political commitment not to use power (public or private), where it is available, to interfere with phenomena which are disapproved or disliked or, liminally, are considered loathsome. Negative tolerance, therefore, assumes diversity, disapproval, and the power to act regarding disapproved difference. Unlike positive tolerance, then, negative tolerance is not an exhortation to approve or to love, but an injunction against acting against — against deploying power against — the loathed action, belief, conduct, way of life, or identity.[77]

Rights are the political practice of societies committed to moral equality and characterized institutionally by negative tolerance. Rights ensure tolerance by enveloping each individual in a sphere of inviolability;[78] and the tolerance thus purchased and preserved is constitutive of moral equality because it requires that individuals, despite their diversity, be treated as beings defined by their moral autonomy and deserving moral independence. The "foundational" right is just this right to "treatment as an equal," as one deserving "equal concern and respect" in political decisions, just because one is an individual.[79]

Justice McClung appears blind to these rudiments of liberal political and legal theory. He appears unaware that in societies such as ours, rights are "a test of the legality of legislation."[80] He appears unconvinced by the liberal view that "constitutional rights are designed ... to prevent majorities from following their own convictions about what justice requires."[81] He appears unmoved by the plea against intolerance by the loathed other. He appears uninformed of the history of legal struggle by the gay and lesbian other and ignorant that this case and his judgment are part of just that on-going history and only intelligible in terms of it.[82] Above all else, he appears "to have no idea of what it means to be treated unjustly," nor any idea what it means to lack such knowledge.[83] On close reading, his Lordship arrives at this unhappy consciousness of rights for the same reason that he was led inadvertently to parody the division of powers, that is, by reason of a fundamental misconception of the matter.

Justice McClung seems to believe that rights come in two sizes ("majority rights"[84]

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77 For treatment of the conceptual content and political significance of tolerance, see S. Mendus, *Toleration and the Limits of Liberalism* (Atlantic Highlands, N.J.: Humanities Press, 1989) c. 1, 5.

78 Of course, the inviolability of individual moral independence which rights provide is subject to the Millian caveat that interference is warranted when independence is exercised in ways harmful in legally significant ways to "assignable" others. See J.S. Mill, *On Liberty* (1859), ed. by J. Gray & G.W. Smith (New York: Routledge, 1991). The whole of law is a discourse about which harms are intolerable and when harms of that sort have or have not been sustained.

79 R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977) at 273.

80 R. Dworkin, *A Matter of Principle* (Harvard, MA: Harvard University Press, 1985) at 368 [hereinafter *A Matter of Principle*].

81 *Law's Empire*, *supra* note 25 at 376.

82 For a useful summary of the legal struggle by gays and lesbians against state-sanctioned intolerance, see P.A. Cain, "Litigating for Lesbian and Gay Rights: A Legal History" (1993) 79 Va. L. Rev. 1551.

83 J. Shklar, *The Faces of Injustice* (New Haven: Yale University Press, 1990) at 87. The sense of injustice presumed by liberal legal practice is considered in part III.

84 *Supra* note 1 at 38.

and "minority rights"[85]) and in two fashions (enumerated and unenumerated).[86] His views on these two categories constitute a massive assault on the foundations and functions of rights in liberal law and polity, and they deserve our close attention because together with his understanding of division of powers, they permitted his Lordship to deny to the respondent and to all gay and lesbian persons resident in Alberta, the equal care and respect which rights are meant to ensure.

With respect to the kinds of rights, his Lordship appears[87] to believe: a) that "majority rights" are (variously) those "posit[ed]"[88] or "grant[ed]"[89] by the legislative power, and in consequence, are those rights which are "imposed upon [the people] by their chosen representatives";[90] b) that "minority rights," including "homosexual rights,"[91] tend to be the kind of rights pursued at the "impetus"[92] of "special-interest constituencies";[93] c) that recognition of minority rights results in the "validation"[94] of the "life-style"[95] of the minority — including, in this case of "homosexual relations," "sodomy"[96] — "as a protected and fundamental right";[97] d) that majority and minority rights exist in an "uneasy"[98] tension both because of "c" and because "you cannot legislate morality or successfully order people to love each other";[99] e) that presently this tension centres on the claim that *Charter* rights "belong to Canada's minorities" and that "therefore the courts must invoke legislative powers because they are the guardians of minority rights," notwithstanding that "all Canadians must pay" the *Charter* piper;[100] f) that this claim — which in a fit of phrase turning, his Lordship terms "minority rites"[101] — is indefensible because the "framers of the *Charter*" did "not [expect] that majority rights and interests would curtsy endlessly to minority rights,"[102] and because, in consequence, the constitution is meant to "serve" the people "according to their own expectation of its purposes and result"[103] and allows "some fractious and morally-laden ... issues" — such as "homosexual rights" — "to be resolved in the community market place."[104]

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85 *Ibid.* at 27.

86 His Lordship proceeds from the distinction throughout. See *e.g. ibid.* at 2, 5, 7.

87 See *Law's Empire*, *supra* note 25 for a caution regarding this appearance.

88 *Supra* note 1 at 11.

89 *Ibid.*

90 *Ibid.* at 26.

91 *Ibid.* at 6.

92 *Ibid.* at 1.

93 *Ibid.* at 26.

94 *Ibid.* at 19.

95 *Ibid.* at 41.

96 *Ibid.* at 19. His Lordship, of course, is here assuming that homosexuality reduces to sodomy and that sodomy is a practice unique to gays. These assumptions have everything to do with the naturalism on which his curious views about rights depend and about which we shall inquire next.

97 *Ibid.*

98 *Ibid.* at 6.

99 *Ibid.* at 15-16.

100 *Ibid.* at 27.

101 *Ibid.* at 38.

102 *Ibid.*

103 *Ibid.* at 26-27.

104 *Ibid.* at 39. His Lordship's reference to the market place carries unintended poignancy since it has indeed been in the public sphere that gay men have been most barbarously bashed. See C.F. Stychin, *Law's Desire: Sexuality and the Limits of Justice* (London: Routledge, 1995) at 147-151.

The whole of this requires some view concerning the nature of minorities in general and of the nature of the "homosexual" minority in particular. Otherwise, of course, the founding distinction between the majority and the minority from which it all devolves cannot stand. His Lordship is not at all precise in this matter. Sometimes he speaks of minorities in a strictly numeric sense.[105] But such a simple preference-counting view cannot carry the critical burden he places on the distinction, namely, that recognition of minority rights constitutes the "validation" of the social (and, in this case, sexual) "relations" which define the minority.[106] Something much more substantial than electoral demographics is required for that arduous task, and Justice McClung seeks to provide it. For at least with respect to sex,[107] he appears to be seized by the view that the minority/majority distinction is nourished by a natural difference between the homosexual[108] and the heterosexual, a difference to which the law, he thinks, ought properly to respond.[109]

Whatever else is true about the world — and, as we have already discovered, elsewhere in his judgment, his Lordship relinquishes much of the true to cultural contingency[110] — it is in his Lordship's appraisal, true that people are either

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105 See *e.g. supra* note 1 at 23: "the electors of the Province of Alberta"; *ibid.* at 32: "the preference of the Alberta electorate"; and *ibid.* at 38: "the will of the majority."

106 *Ibid.* at 19.

107 We can only speculate regarding his Lordship's views on other matters of difference, such as race and gender, though in order to be at all consistent, if such a difference came before him, he would be compelled both to count the difference and to construct a natural explanation for it.

108 His Lordship appears unaware that the category "homosexual" is as recent as the mid-nineteenth century or that it was coined as a legal and cultural strategy to protest intolerance towards male/male genital relations. See J. Lauritsen & D. Thorstad, *The Early Homosexual Rights Movement (1864-1935)* (New York: Times Change Press, 1974) at 6-8, attributing the coining of the term to a Hungarian doctor Benkert and detailing its celebratory significance; T. Zeldin, *An Intimate History of Humanity* (London: Sinclair-Stevenson, 1994) at 121-128 providing a thumbnail history of male/male genital relations; and, more generally with respect to the social construction of the category "homosexual," D.F. Greenberg, *The Construction of Homosexuality* (Chicago: University of Chicago Press, 1988). Nor does he seem aware that the term has since been replaced by the term "gay" precisely because of the naturalistic content with which it became imbued. See Gay Left Collective, ed., *Homosexuality: Power and Politics* (London: Allison & Busby, 1980). Nor, finally, *is* he aware — nor, judging by his Lordship's redaction of their views, were Vriend's counsel (see *supra* note 1 at 22, 33, and 41) — that "homosexual" and "gay" are presently being discarded as confining naturalisms in favour of "queer" which declares "a rejection of minority group categorization in general." See Stychin, *supra* note 104 at 145; and see generally, the essays collected in M. Warner, ed., *Fear of a Queer Planet* (Minneapolis: University of Minnesota Press, 1993). See *contra* R. Nordahl, "Ronald Dworkin and the Defense of Homosexual Rights" (1995) 8 C.J.L.J. 19 at 27-38 arguing, that homosexuals comprise "a distinct grouping of people" on what appear to be naturalist grounds. For a collection dealing with the naturalist thesis, see E. Stein, ed., *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* (New York: Garland, 1990). For an analysis of the legal implications of the debate, see J.E. Halley, "Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability" (1994) 46 Stanford L. Rev. 503.

109 Regarding the significance of the difference between the homosexual and the heterosexual, his Lordship is direct and offensive. In ever so briefly addressing s. 1 of the *Charter*, he sides with the "millennia of moral teaching" condemning male/male genital relations, *supra* note 1 at 19. In a brief excursus into s. 15 of the *Charter*, he takes judicial notice of how the "Dahmer, Bernardo, and Clifford Robert Olsen prosecutions have recently heightened public concern about violently aberrant sexual configurations and how they find their expression against victims," *ibid.* at 22.

110 See the sources mentioned at *supra* note 35 and accompanying text.

homosexual or heterosexual. "People" are, he tells us, "of either sexual base."[111] It is precisely this ontological claim about the world that informs both his construction of the homosexual as minority and the heterosexual as majority and his etiology of the minority. Though he says little about the heterosexual, he is abundantly clear about the defining characteristic of the minority: the homosexual is the sodomite.[112] Whatever else they may be — whether, as he singularly says, they be "strident or stolid"[113] — "members of the homosexual community" are members of that community, and are not members of the majority, because they are sodomites.[114] But matters do not end there. Because they are members of that community, a community whose web is sodomy alone, they share not only the sexualized identity constituted by "the behaviour [of their] group,"[115] they share as well everything which devolves from sodomy. They share in their violation of "a millennia of moral teaching";[116] and they share in the deviant and violent proclivities which attend sodomy.[117] So there it is: to find that Mr. Vriend's rights were violated by reason of the omission of "sexual orientation" from the *IRPA* is to validate sodomy precisely because Mr. Vriend is a member of a community defined by sodomy and composed of sodomites.[118]

Putting aside the very significant problems which attend the concept of minorities generally[119] — and declining the contest which his curious ontology begs[120] — Justice McClung's sexualized view of both "communities" is profoundly illiberal and fundamentally destructive of the moral fibre and practice of rights. According to the liberal view which (alone) informs our law, minorities exist exclusively as a byproduct of majoritarian politics and as an occasion for judgments about justice.[121] Minorities are not ontologic categories defined by race or sex or gender or any other classification which may be nominated, including sexual orientation; and minorities do not have rights different from, or in addition to, those possessed by the majority, however one might wish to calculate it. Instead, members of political minorities are, as individuals,

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111 *Supra* note 1 at 14.

112 *Ibid.* at 19.

113 *Ibid.* at 21.

114 *Ibid.*

115 *Ibid.* at 9.

116 *Ibid.* at 19, citing *Bowers*, *supra* note 21.

117 *Ibid.* at 22. In his appraisal of sodomy, Justice McClung is expressing two of the several grounds on which discrimination against gays (and, sometimes, lesbians) has traditionally been defended, namely, that sodomy is immoral or, as sometimes put, a crime against nature, and that homosexuality is a sickness. In addition to the moral and psycho-sexual theories, discrimination has also been defended on grounds that sodomy is a crime and on grounds of its effects on the heterosexual majority. See D.C. Knutson, "Introduction" in D.C. Knutson, ed., *Homosexuality and the Law* (New York: Haworth Press, 1980) at 5-23. In as much as Justice McClung associates rights diminution with majority will, he may also be endorsing the last theory, that is, that "discrimination against the minority is justified by intolerance and prejudice of the majority," *ibid.* at 14. For an argument which seals the fate of such a view, see R.D. Mohr, "Gay Rights" (1982) 8 *Social Theory and Practice* 31; *A Matter of Principle*, *supra* note 80 at 366.

118 The concluding part of this reasoning would, of course, declare (I borrow from Dworkin here) that the sodomite "[way] of living" is "inherently wrong or degrading": see *A Matter of Principle*, *ibid.* at 368. I consider the apparent homophobia of Justice McClung's judgment in part III.

119 See Heinze, *supra* note 10 at 50-62, 253-257; and Stychin, *supra* note 104 at 142, 145.

120 See discussion at *supra* note 108.

121 See *e.g. Law's Empire*, *supra* note 25 at 375.

seized of the same rights to equal care and respect as are the individuals who reside in political majorities. That there are inevitably political minorities does, however, raise questions about rights simply because whichever is the difference by which the minority becomes a minority politically, it remains to be decided whether that difference is a difference which should count at law and as a matter of justice. That there are differences which historically have been invested with prejudice and used as an occasion for unequal treatment is, therefore, from the liberal perspective, cause for corrective justice and not a reason for constructing a minority status any thicker than the political.

All of this is simply to declare that the legal subject — the political possessor of rights and the moral object of equal respect — is necessarily a member of no community save political community[122] and to require that the biographic individual's attachments be invisible juridically. The juridical invisibility which follows upon this political conception of legal personality is the minimum requirement of moral equality and equal care and respect because any more significant account of personhood at law defeats, *ab initio*, equality and leads, inexorably, to intolerance through a tailoring of rights to account for difference. The liberal commitment to the political subject is not, then, an ontological or naturalist claim about personhood, but a political practice undertaken to ensure that rights follow from and purchase equality and to forbid their calculation in any terms other than — or different from — shared legal personhood.

Justice McClung's ontology violates just these requirements of equality and justice. Mr. Vriend appears in his judgment not as a co-equal, disencarnate legal subject, but as an instantiation of a natural category about which in his Lordship's view, the law is properly concerned. With this initial accounting for difference, this forfeiture of the blindness on which the law depends, all was lost for Mr. Vriend. For he had already declared himself disqualified from possessing the other, unsuspect legal personality on offer in Justice McClung's expanded legal ontology. Because that suit was tailored for someone else, for some other, majoritarian personality, and because the only garment available for Vriend was one woven in sodomy, his was only to lose. His losing, of course, was only ensured at the cost of the conceptual and moral intelligibility of rights, but that was a price which his Lordship paid eagerly in the currency of a sexualized legal subject.[123]

Matters become no more palatable when considered from the perspective of his Lordship's understanding of enumerated and unenumerated rights.[124] Though he

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122 For discussion of liberalism's political community, see *ibid.* at 211ff; and R. Dworkin, "Liberal Community" (1989) 77 Calif. L. Rev. 479.

123 For a discussion of the sexualization of legal subjectivity, see D. Cornell, "Gender, Sex and Equivalent Rights" (1995) 13 Current Legal Theory 3 at 13-16, discussing *Bowers*, *supra* note 21.

124 His Lordship's discourse on unenumerated rights is motivated by the Supreme Court's decision in *Egan* v. *Canada* [1995] 2 S.C.R. 513 [hereinafter *Egan*] which declares "sexual orientation" an analogous ground within s. 15(1) of the *Charter*. Since this affirmed Madam Justice Russell's view at Queens Bench in *Vriend*, it was critical for Justice McClung somehow to avoid *Egan*. He offers an argument in two parts: a) there is in *Vriend* no infringement of s. 15 because omission does not constitute "governmental action for the purposes of s. 32(1) of the *Charter* (see *supra* note 1 at

recognizes that specific rights are a matter always of judicial interpretation and that, in consequence, a right may be found to exist without its being expressly listed in a legal text, this nod to unenumerated rights is a hailing without purpose. For according to his Lordship, the instances where judicial recognition of such rights is proper are so rare and so narrow really to leave the matter entirely besides any point of inquiry or of justice.[125] He mentions the trivial. A judge may find a right where its "omission in the statute resulted from ... a matter of oversight, bad draftsmanship, or some other legislative misfire."[126] In such cases — where the omission is "the product of ... law-making slip or error"[127] — courts may properly act as handmaids to legislative power and crease and fold the statutory sheets. But in any case requiring anything more than judicial roomservice, he forbids judicial initiative.

Judicial action is even foreclosed when the legislative act violates constitutional commitments and precepts.[128] His reasoning in this regard is brutally simple: a) when they declare rights to exist where none is listed, judges are not necessarily serving "the general interest";[129] b) when they do so, they are necessarily countermanding "the preference of ... the electorate"[130] and overriding "the expressed and sovereign will" of the legislative power;[131] c) because these consequences of judicial legislation are so repugnant to "our adopted British parliamentary safeguards"[132] and to "our constitutional heritage,"[133] on finding "legislative excess,"[134] courts should normally simply return the matter to the legislative power, that constitutionally considered, is "the preferred consequence."[135]

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6, 16); and b) "enumerated and emerging analogous grounds contemplated by s. 15(1) of the *Charter* [do not have to] "be mirrored in any rights legislation [competently] passed by the provinces," *ibid.* at 7, 11, 12, otherwise "the autonomy of provincial law-making" would become "a debacle," *ibid.* at 11. Putting aside the question of their integrity as assessed with reference to the relevant decisional law, neither of these views withstands scrutiny because neither can carry the burden of the law's principles and commitments. I consider the first argument from just such a jurisprudential perspective in part II, and the second in part III. For an analysis of *Egan*, see Wintemute, *supra* note 10 at 254-60.

125 Justice McClung is fully aware that he is condemning unenumerated rights to a limbo from which full redemption is rarely, if indeed ever, possible. See *Vriend*, *ibid.* at 32: "if judicial reading-up is ever considered, it should be attempted only within the fullest respect for, and understanding of, the legislative function."

126 *Ibid.* at 25.

127 *Ibid.* at 33.

128 *Ibid.* at 21.

129 *Ibid.* at 35.

130 *Ibid.* at 32.

131 *Ibid.* at 23.

132 *Ibid.* at 34.

133 *Ibid.*

134 *Ibid.* at 29.

135 *Ibid.* at 36. His Lordship caveats even this instruction: the judicial "task," he tells us, nonetheless "goes beyond considerations of 'irrationality,'" *ibid.* at 37. As are his more general caveats regarding (diminished) judicial power (see sources at *supra* note 65), this caveat too is unburdened by either support or instruction.

Simple too is the result. Except at the undisclosed margins[136] and provided only that the legislative silence is respect to "a step that had been weighed and deliberately declined,"[137] the legislative power can properly elide constitutional constraint through "silence"[138] because legislatures cannot be constitutionally "castigat[ed] ... for what they *fail* to produce"[139] and because, in such cases, the only court that counts is the court of popular will electorally expressed.[140] Besides, of course, its resigning, yet again, the judiciary's role as countervail to legislative power, the problem with all of this is that it trivializes the very notion of constitutional rights and guarantees. Worse still, it does so under cover of the enumerated/unenumerated dichotomy which on any acceptable view of the matter of legal interpretation, is an ideologically driven fiction.[141]

Justice McClung believes that legal interpretation is bounded by the physics of the page. Words are either there or they are not; rights are either listed or they are not. Under such a view — a view, notably, not shared by the Supreme of Canada[142] — if a word (or a right) is not there, it can only appear by adding it, by deliberately altering the physical appearance of the text.[143] For this reason, the matter of unenumerated rights reduces to a question of amendment or, to be more precise, to the issue of authority to amend. In his Lordship's view, of course, — and as we've seen, excepting the trivial[144] — that authority resides exclusively with the legislative power.

As deployed by Justice McClung, then, the distinction between enumerated and unenumerated rights is another venue and strategy for deference. Now, this is clearly not the place to canvass, let alone to offer, a theory of adjudication on which a full consideration of the matter finally depends. However, since his Lordship recommends the distinction, thinks it critical in cases such as *Vriend*, and uses it to deny the respondent any remedy beyond popular will, some few words are in order.

At one point in his judgment, Justice McClung undertakes to illustrate the monstrous results which could follow on investing, under the aegis of unenumerated rights, amending authority in the judiciary.[145] Considering s. 229 of the *Criminal Code*[146]

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136 *Supra* note 1 at 35.

137 *Ibid.* at 25.

138 *Ibid.* at 9, 12, 18, 20.

139 *Ibid.* at 16 [emphasis in original].

140 *Ibid.* at 12, 14, 19, 23, 32. It is just at this point that Justice McClung comes closest to invoking the intolerance of the majority as a reason at law for diminishing the rights of the minority: see *supra* note 117.

141 See R. Dworkin, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom* (New York: Alfred Knopf, 1993) at 129-131, 139-144. Dworkin, incidentally, claims that its proponents fail to argue the distinction in the one instance where it is intelligible, namely, where state action beyond the express wording of a statute is at issue.

142 For discussion of Supreme Court jurisprudence on interpretation, see Wintemute, *supra* note 10 at 155ff; and Stychin, *supra* note 104 at 108ff.

143 See *e.g. supra* note 1 at 2, 6, 23, 25 and 26.

144 See *supra* note 125 and accompanying text.

145 *Supra* note 1 at 30-31.

146 R.S.C. 1985, c. C-86.

which defines culpable homicide, he speculates just "how easy it would be for any judge to de-criminalize mercy killing" by simply amending the provision to "exempt" euthanasia[147] or, later along, "by a few strokes of the judicial pen, ... [to] recast pregnancy termination, under any circumstance, as an act of murder."[148] These *in terrorem* arguments[149] are, of course, silly, yet they carry instruction. For they illustrate the far-reaching implications of the jurisprudential views elsewhere espoused by Justice McClung. Consistent with his decisionism[150] and with his morally empty views of the division of powers[151] and of rights,[152] in his construction of enumerated and unenumerated rights, his Lordship prescribes "judicial abstinence"[153] and forecasts judicial anarchy if that medicine is not faithfully ingested. This he must do since he believes both that courts are possessed of no principled basis for deliberation and adjudication, none that is, beyond passive deference, and that citizens are possessed of no legally enforceable rights against the state beyond those expressly posited or granted by the state. But his compulsion comes at quite considerable cost because it forecloses courts from doing what we would otherwise have them do. It forbids their criticizing the state for the *scope* of the rights it enforces, for the *accuracy* of the rights it recognizes, and for the *fairness* of its enforcement; and it puts beyond the reach of judicial principle, any remedy whatsoever with respect to each of these matters.[154] Without the means of demanding a reply of principle, citizens are, instead, instructed to translate their moral concerns into concerns of power and to seek relief or reek revenge at the polling station.[155]

The dimensions of Justice McClung's theory of his case are, in sum, enormous, presumably by intent and most certainly in effect. In his discourse on the division of powers and on rights, he not only grounds his dismissal of the respondent's complaint

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147 *Supra* note 1 at 30.

148 *Ibid.* at 31. His Lordship also deploys his abortion analogy at 7-8, 14, 15.

149 His Lordship uses just this term to dismiss certain floodgate arguments offered by the respondent, *ibid.* at 12. Besides the contribution made by his euthanasia and abortion arguments, he joins the *in terrorem* fray at several other points in the judgment. See *ibid.* at 22: "It is pointless to deny that the Dahmer, Bernardo and Clifford Robert Olsen prosecutions have recently heightened public concern about violently aberrant sexual configurations and how they find expression against their victims"; *ibid.* at 28: "what will prevent spirited judges in time from re-legislating ... regulations, Orders in Council, board orders, municipal by-laws"; *ibid.* at 31: "are we to encourage a setting where we would allow rights-restive judges to exempt militant trade unionists from conviction for all offences against property, exempt all abused women from conviction for all offences against the person, or exempt the wealthy from submission to progressive taxation..."; *ibid.* at 35: "An overridden public will in time, demand, and will earn, direct input into the selection of judges.... There will be renewed calls for a supplementary process wherein their judges' performance, even the continuance of their employment ... can be periodically reviewed. Those forces are already gathering"; and *ibid.* at 41: "Yet the long-term goals of the respondents include legislative and judicial recognition of an 'alternative life-style,' an objective well beyond the mere inclusion of 'sexual orientation' in the *IRPA*...."

150 See the sources listed at *supra* note 35 and accompanying text.

151 See text accompanying *supra* note 74.

152 See text accompanying *supra* note 121.

153 R. Dworkin, "Mr. Liberty: Review of Learned Hand: The Man and the Judge by Gerald Gunther" (11 August 1994) New York Review 17 at 21.

154 See *A Matter of Principle*, *supra* note 80 at 11-18.

155 For his Lordship's instructions in this regard, see *supra* note 1, at 12, 14, 40.

about the state's action, but also constructs a peculiar and unsavoury version of the proper roles of legislatures, courts, and citizens in societies such as ours. More particularly, by renouncing the judiciary's role as a countervail of principle to legislative and executive power, by granting overweening importance to popular will and electoral politics, and by sexing the legal subject, he dismantles the structural characteristics and moral substance of the liberal state. No longer a normative structure possessed of moral personality, goals, and commitments, Justice McClung's state is, in all of its parts, a configuration and expression of power wielded by transient political majorities. Lost in all of this is that which alone nourishes the project of justice, namely, authority legitimated not by power, but by moral agency and accountability. Starved in this critical sense, the justice on display in his Lordship's judgment is barter, a fungible for trade at the exchange of electoral politics.

It remains for us to inquire both what Justice McClung does with the freedom he has in this fashion provided himself and what motivated his taking these paths to these unhappy results. I make the former inquiry in part II and the latter in part III.

## II. JUSTICE MCCLUNG'S INTERPRETIVE PRACTICE

Justice McClung's theoretical commitments take practical form in his interpretive practice. The focus of this practice in *Vriend* is, of course, the meaning at law of the legislative omission of "sexual orientation" from the list of prohibited grounds in the *IRPA*. Not surprisingly given his general view of unenumerated rights[156] and, as we will discover, not without considerable importance, his Lordship is at pains throughout to remind us that the omission was anything but inadvertent. It was, he tells us, "not a mere oversight,"[157] but instead, a "deliberate"[158] and "considered"[159] legislative act. Having thus characterized the matter, he undertakes to interpret its nature and effect.

The outcome of this hermeneutic exercise is easily stated: a) as far as its legal nature is concerned, the omission is an instance of "legislative silence";[160] and b) as far as its legal effect is concerned, the omission is "neutral."[161] Less certain is his reasoning to these results. It appears[162] that his Lordship reaches the first result on three grounds: that legislative silence is a "charter" element of legislative power;[163] that absolute silence is "hardly law";[164] and that legislative silence is absolute when legislative activity is absent.[165] The second result appears grounded on two claims: that the

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156 See text accompanying *supra* note 144.

157 *Supra* note 1 at 23.

158 *Ibid.* at 39.

159 *Ibid.* at 20.

160 *Ibid.* at 16.

161 *Ibid.* at 9.

162 See discussion at *supra* note 25.

163 *Supra* note 1 at 18. See also *ibid.* at 13.

164 *Ibid.* at 16.

165 *Ibid.* at 10-12, relying on Madam Justice L'Heureux-Dube's dissent in *McKinney* v. *University of Guelph*, [1990] 3 S.C.R. 229 at 436.

omission draws no distinction "between heterosexuals and homosexuals";[166] and that, apparently in consequence, the omission neither carries nor produces any discriminatory impact as regards either heterosexuals or heterosexuals.[167] Both outcomes appear then to turn on his claim that the omission does not distinguish between heterosexuals and homosexuals. For if that claim fails, the omission is neither silent nor benign. It is, therefore, just that matter which warrants attention.

Since Locke, the generality of laws has been considered a foundational element of justice and liberty.[168] In order both that "the Rulers [be] kept within their due bounds" and that "the power [of] Government [be exercised] only for the good of Society,"[169] Locke proscribed personalized legislation aimed at specific situations, individuals, or groups. All he claimed would be lost if state action "be varied in particular Cases" and if there be "one Rule for the Rich and Poor, for the Favourite at Court, and the Country Man at Plough."[170] In order to be legitimate — or, as he would say, in order for its "end" not to be "subvert[ed]"[171] — state action in liberal society must apply to all cases and persons in the abstract. Whenever it is directed in a more particular and personalized way, state action lacks universal justification and becomes an expression, not of moral agency, but of brute force and power.

Whether the *IRPA* omission *names* the homosexual becomes, then, a matter of whether legislative power was there exercised in a *personalized* way, which is to say, in a fashion directed towards homosexuals as a group. If it was, then it stands condemned under principles as ancient as Locke's. And if it was, it cannot be said that it "inclines to neither the homosexual nor the heterosexual communities"[172] or that its "impact ... is the same upon the homosexual segment of Alberta's population as it is upon the heterosexual segment"[173] or that it "levies [no] burdens, limitations or disadvantages on the homosexual community."[174] For the naming alone is inclination, impact, and burden enough.[175]

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166 *Ibid.* at 7.

167 *Ibid.* at 8, 14, 21, and 39.

168 J. Locke, *Two Treatises on Government* (1690), ed. by P. Laslett (Cambridge: Cambridge University Press, 1963). See especially Treatise II, c. XI, para. 137.

169 *Ibid.* In these few lines, Locke is proclaiming law's domain as the constraint of power and declaring the state a moral agent.

170 *Ibid.* at para. 142.

171 *Ibid.* at para. 140.

172 See *supra* note 1 at 11.

173 *Ibid.* at 9.

174 *Ibid.* at 8.

175 Which is to say, the matter of principle is not at all empirical. Whether homosexuals are discriminated against in general is besides the point in this regard: at law, they become the discriminated other when they are named as other. Justice McClung — and judging by his comments, respondent counsel too — labours over this point. In certain passages (see *e.g. ibid.* at 8), he appears concerned with empirical evidence of specific discriminatory impact; about this, he finally concludes that any inequality affecting homosexuals "exists independently of the *IRPA*," *ibid.* at 20. In others (see *e.g. ibid.* at 8-9, 20-22), he appears bent on sparring with Queen's Bench and respondent counsel over the entire matter of discrimination against gays; about this, he finally and reluctantly concludes that with the Supreme Court decision in *Egan*, legal history has "overtaken" the debate and that "at least in law," the homosexual community must be taken to be

For Justice McClung, the question of naming is easily resolved: look at the statutory text, and if the words "homosexual" or "lesbian" or "gay" or "sexual orientation" do not appear, then the legislation names not. Now, while this advice is consistent with his down-home view of judicial practice,[176] interpretation, legal or otherwise, is neither so simple nor so silly a matter. For legislation (or poems or plays) may be personalized in the Lockean sense without being grossly obvious in McClung's sense. Though we cannot, for this reason, look to his Lordship for advice in hermeneutics, he does by other means, inadvertently give us direction. For in his initial characterization of the omission — that it was deliberate because debated and considered — he gives us cause for concluding that the omission indeed does name "the homosexual," *sub silentio* surely, but *sotto voce* not at all.

Justice McClung offers two accounts for the result of legislative deliberation in the matter of the *IRPA* and sexual orientation. The first account — which might be dubbed the "social controversy" story[177] — points to the "contentious and morally-laden" nature of the issue[178] and characterizes legislative inaction as a duly-considered[179] and fully competent and ordinary[180] decision "to step back"[181] from such a matter. Under this view, then, the legislature acted with sober reflection (and, apparently, with the wisdom of experience as well)[182] regarding a "morally-eruptive"[183] and "divisive issue."[184] His second account concerns matters much less cerebral. Based on "the record with which [the Court was] provided,"[185] his Lordship concludes that here at least, legislative action is a reflection of "the preference of the Alberta electorate":[186] "rightly or wrongly," he tells us, "the electors of the Province of Alberta ... have declared that homosexuality ... is not to be included in the protected categories of the *IRPA*."[187] This democratic endorsement story[188] carries very different implications

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a discriminated minority, *ibid.* at 22. His Lordship's apparent attitude towards the homosexual is dealt with in part III. For an analysis of discrimination against homosexuals, see R. Mohr, *Gays/Justice: A Study of Ethics, Society, and Law* (New York: Columbia University Press, 1988); and G.M. Herek, "Stigma, Prejudice, and Violence Against Lesbians and Gay Men" in J. Gonsiorek & J. Weinrich, eds., *Homosexuality: Research Implications for Public Policy* (London: Sage, 1991) at 60.

176 See text accompanying *supra* note 143. See also *Vriend*, *ibid.* at 9: "unaltered wording"; *ibid.* at 26: lamenting the prolixity of much judicial interpretation and celebrating the "small, old words" which "all Canadians [can] understand" and to which they can "relate."

177 *Vriend*, *ibid.* at 13.

178 *Ibid.* at 14. See also *ibid.* at 13, 15, and 39.

179 Which is to say — as his Lordship not unimportantly puts it — "after weighing the competing social and political concerns and values behind it," *ibid.* at 39.

180 *Ibid.* at 9. See *ibid.*: "Alberta has simply not exercised its authority." See also *ibid.* at 11-12, 13, 15, 18, and 23.

181 *Ibid.* at 9.

182 *Ibid.* at 13: "The experience of government has shown that many of the day's major social conflicts may well find their own level of community resolution in time without legislative ... prod as the acceptance of wider social mores within Canadian society continues."

183 *Ibid.*

184 *Ibid.* at 15.

185 *Ibid.* at 32.

186 *Ibid.*

187 *Ibid.* at 23.

188 *Ibid.* at 14.

from the first. For if in omitting sexual orientation from the *IRPA*, the Legislature was indeed bowing to majoritarian wishes, the omission was one "born of animosity toward the class of persons affected."[189] And if it was that, then the issue of whether the omission is personalized becomes itself born anew.

Given the preeminence he accords majoritarianism,[190] given too his precept against "intervention into the affairs of the community,"[191] and given finally his overall characterization of social attitudes towards homosexuals,[192] his Lordship's truest story must be his tale of electoral preference. If this is indeed the case, then his semantic claim that because they are not mentioned in it, "the *IRPA* neither subjugates, nor promotes, the homosexual community,"[193] carries much less weight if only because the intention was otherwise. But the matter of personalism in the statute cannot be left hanging on as thin a thread as legislative intent. To overcome "the semantic sting"[194] satisfactorily, it is necessary to show that a statute can be personal — that it can be directed towards a class of persons — without expressly naming them.

I want to propose that by acting on the majority's animosity towards homosexuals, the legislature issued an edict personalized to, and directed against, homosexuals not just because that was the legislature's intention — though its intention is in some respects probative — but because in acting in the fashion it did, it constructed, within and by the *IRPA* omission, a personage or subjectivity for the homosexual as the reviled and denigrated other. This not the place, of course, to offer or defend a theory of legal subjectivity. But since so much of the matter in *Vriend*, both understanding the outcome and recognizing it as so fundamentally unjust, turns on the legal personality which the *IRPA* accords not just the respondent, but the category of which he taken as an instantiation, a brief excursus into the question of law and social identity is unavoidable.

As Justice McClung might put it, that the law, like literature, constitutes as well as reflects the social world, is a "battered old bromide."[195] No one, save perhaps the

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189 See *Romer*, *supra* note 21.

190 See text accompanying *supra* note 47.

191 *Supra* note 1 at 22. See also *ibid.* at 28: "unwelcome, even corrosive, interventions into the equilibrium of the community"; and *ibid.* at 41: "local consensus."

192 *Ibid.* at 19, 22, 23.

193 *Ibid.* at 14.

194 See *Law's Empire*, *supra* note 24 at 45-46.

195 *Ibid.* at 16. And if this were not the case, moral agency and moral goal would be lost to law. In the particular case of the judiciary, this loss would mean that its acting as a morally motivated, countervailing ballast to legislative power would be unthinkable since, in that event, it would necessarily become reduced to that which Justice McClung on other grounds prescribes, a cabined cipher of majoritarian sentiment. As for the constitutive nature of law and legal practice, Ronald Dworkin puts the matter as well as anyone in *Law's Empire*, *ibid.* at viii: "We live in and by the law. It makes us what we are: citizens and employees and doctors and spouses and people who own things.... We are subjects of law's empire, liegemen to its methods and ideals, bound in spirit while we debate what we must therefore do." Incidentally, Dworkin then goes on at *ibid.* to query "how the law can command when the law books are silent or unclear or ambiguous?" Unlike Justice McClung, he takes the first part of this question seriously, and *Law's Empire*, *ibid.* is his book-length response. For some general sources on law and the construction of subjectivity, see

crudest of Marxists and the most ideological of feminists,[196] any longer believes that the relationship between law and social life is at all as simple as correspondence, that law's contribution to social life is merely and exhaustively to consolidate that critical something — be it class or gender or race relations — which exists prior to law and by other ways and means. Because no such simple a rosetta for disclosing the matter is available, jurisprudents have instead directed their attention to the much more complicated and rewarding task of theorizing the co-dependency of law and social formation. Common to the plenitude of positions this undertaking has produced are the following three propositions: that whatever else may be apposite with respect to the relationship and however else it may be described, law and social life are interconstitutive;[197] that in whichever other fashion or fashions law may be said to constitute social life, its central contribution is the production of social identities;[198] and that law's production of social identities and locations is a matter not of simple announcement, but of supposition regarding the categories from which and in terms of which its announcements are made.[199]

That the *IRPA* omission is personalized to homosexuals, that it constructs for them an identity as loathed Other, need not, and indeed ought not, be tested semantically. On any mature understanding of the matter, rather, whether such an identity emerges from the text turns on the categories assumed by the text in constructing the omission. Justice McClung's construction of the omission inadvertently provides a starting point here. "The term 'sexual orientation,'" he begins, "defends nothing more" than homosexuality.[200] And it is sexual orientation in that precise and delimited sense which, in his Lordship's view, the *IRPA* has declared excluded.[201] When he then makes the semantic claim that "'sexual orientation' is not mentioned at all,"[202] he

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B.B. Baker, "Constructing Justice: Theories of the Subject in Law and Literature" (1991) 75 Minnesota L. Rev. 581; P. Schlag, "The Problem of the Subject" (1991) 69 Texas L. Rev. 1627; and M.J. Radin, "Reconsidering Personhood" (1995) 74 Oregon L. Rev. 423. For sources on law and the construction of the homosexual subject, see Stychin, *supra* note 104, c. 1; and L. Moran, "The Homosexualization of English Law," L. Flynn, "The Irish Supreme Court and the Constitution of Male Homosexuality," and M. Eaton, "Homosexual Unmodified: Speculations on Law's Discourse, Race, and the Construction of Sexual Identity," in D. Herman & C.F. Stychin, eds., *Legal Inversions: Lesbians, Gay Men, and the Politics of Law* (Philadelphia: Temple University Press, 1995) at 3, 29, and 46 respectively.

196 Of which, of course, there are some of each. Regarding crude marxism, see H. Collins, *Marxism and Law* (Oxford: Oxford University Press, 1982) at 22-34. For a particularly gruesome version of crude feminism, see A. Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (New York: Harper & Row, 1976). See especially *ibid.* at 48: "We must destroy the very structure of culture as we know it, its art, its churches, its laws...."

197 E.P. Thompson aptly describes this as imbrication: see E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (London: Penguin Books, 1975) at 258-266.

198 See sources mentioned *supra* note 195.

199 For an exploration of this in terms of property law, see R. Zucker, "Unequal Property and Subjective Personality in Liberal Theories" (1993) 6 Ratio Juris 86.

200 See *supra* note 1 at 23. He defends this usage in terms of majoritarian attitudes, *ibid.*: "the electors ... have declared that homosexuality ... is not to be included in the protected categories of the *IRPA*."

201 *Ibid.*

202 *Ibid.* at 11.

must, *per force*, be taken to mean that homosexuals are indeed mentioned; and when he makes the interpretive claim that "[n]othing in the *IRPA* ... purports to draw distinctions between heterosexuals and homosexuals,"[203] he must be condemned for contradiction. For on his own view, the stuff and effect of the omission is at once to distinguish between homosexuals and heterosexuals and on that basis, to name and to exclude the former.

This contradiction arises, of course, from the inconsistency between his thinking the question a semantic one and his dealing with it in terms of the categories which the omission assumes. Yet if he is right about anything in his judgment, he is right — though for so many other reasons, he gets it all so terribly wrong — in grounding his interpretation of the omission in those categories[204] and in concluding that the substance of the omission is the exclusion of the homosexual. In any event, the omission is personal to the homosexual, not because the legislature so intended (though as a historical matter, clearly it did) nor because the term "sexual orientation" necessarily carries one semantic burden rather than another (it doesn't): rather, within the context of the *IRPA*, the omission is personal to homosexuals because it names them and it names them because the categories from which it proceeds and out of which it is constructed compels their being named. Those categories are, of course, "the homosexual" and "the heterosexual," neither merely a classification of social data, but each separately and both together, the constitution of officially recognized places of sexual identity and pleasure. Only because we know this, only because we know that these identities are, in these senses, the bricks and motor of the omission, does the omission deliver to us its unmistakable (and yes, intended) message: that "the homosexual" is named by being excluded and excluded by being named.

Not only, however, does the omission name sexualized identities and practices, it characterizes them as well. Once again Justice McClung provides instruction. As we have seen, in his sexualization of the subject of rights,[205] his Lordship declares that validation of homosexual relations would "[rebut] a millennia of moral teaching"[206] and refers to the long-standing animosity towards homosexuals in Western culture.[207] This characterization is important not for the reason it was proffered — namely, to defend the reasonableness of state regulation of homosexuality — but because it inadvertently speaks to the substance and effect of the characterization of the homosexual carried by the *IRPA* omission. We know that by being named, the homosexual is being excluded precisely because the omission declares, approves, and reinforces the view of homosexuality on which animosity depends. That view need not delay us since it is no more sophisticated than the view offered by his Lordship in his

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203 *Ibid.* at 7.

204 Otherwise the task becomes entirely unmanageable since there exists no other basis for interpretation. Legislative intent is sometimes proffered as a solution to riddles such as these — indeed his Lordship sometimes invokes it — but such an intention, even if it were both relevant and ascertainable, would solve nothing, since it would then itself have to be interpreted and would, in consequence, represent the problem.

205 See Cornell, *supra* note 123 and accompanying text.

206 See *supra* note 1 at 19, citing *Bowers*, supra note 21.

207 *Ibid.*, citing Sullivan, *supra* note 21.

brief consideration of redeemability under the *Charter*, s. 1: "the homosexual" is the repugnant Other, "he"[208] whose sexuality and practices are an abomination, he who, for that reason, is categorically Other, the alien who is necessarily and properly excluded from membership in right-thinking and right-doing *and* right-being community. What has to concern us instead is the character presumed with respect to the homosexual's heterosexual other. For it is there that the final effect of rules like the *IRPA* omission become fully available.

If "the homosexual" is the excluded other, it is so by reason of its not being "the heterosexual." If the homosexual is the abhorred exception, it is so by virtue of its difference from the heterosexual norm. Logic works in both these claims because the heterosexual is taken as the paradigm and homosexuality as the inversion. And if this is true — if homosexual identity is the subordinate reversal of heterosexual identity — then in proclaiming the categories "heterosexual" and "homosexual," the omission is not only approving the relations of domination and subordination which attend the conception and reality of these categories, it is undertaking to police them as well. Which is to say, legislative acts like the act of omitting the homosexual in the *IRPA* both constitute and regulate sexual identities. Viewed in this fashion, the *IRPA* is another initiative to patrol the (always intimate) "border"[209] between the sexualized and eroticized "Us" and "Them."

In his conception of rights, Justice McClung sees and hears the homosexual other, clearly and unmistakably.[210] Yet in his construction of the *IRPA* omission, his sight and hearing fail him. For there, he claims, he hears only silence and sees only neutrality. But the interpretive etiology of this deafness and this partial blindness gives him away. Behind the silence and behind the neutrality lurks, by his own account, the homosexual Other. But this is as it must have been. Once his Lordship succumbed to the illiberal temptation of sexualizing the legal subject, that particular Ulysses was bound to come home again. And despite his best efforts to the contrary, having prepared the hearth, Justice McClung was bound to bid him welcome in the statutory silence of the *IRPA*. For my part, I have tried to show that the very substance of that silence made the encounter inevitable, not only for his Lordship, but for the rest of us as well.

## III. JUSTICE MCCLUNG ON THE WAY OF THE WORLD

In this part, I explore two attitudes which are everywhere on display in Justice McClung's judgment. The first evinces a contempt for the character of the contemporary legal world, and the second, what appears to be, homophobia. I undertake this exploration, not in the spirit of biography, but in order to disclose and to discuss

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[208] I use the masculine deliberately because, in my view (and I cannot defend it here), even where it extends to the lesbian, animosity towards same-sex genital relations originates in erotic imaginings about male-male genital relations. This is *not* to claim that lesbians have not been, and are not now, subject to social animosity and discrimination. See especially Robson, *supra* note 10, c. 2, 3.

[209] See Eaton, *supra* note 195 at 65-66.

[210] See Cornell, *supra* note 123 and accompanying text.

what I take to be the third ingredient of liberal legal practice, namely, an ethic of care for those vulnerable to power. In the conclusion to this comment, I will argue that this ethic, together with the division of powers and rights, is constitutive of the rule of law which his Lordship's judgment has the effect of renouncing.

Justice McClung's judgment expresses longing for the legal past, fear for the legal future, and the deep distrust of the legal present. The object of this nostalgia is the legal world of the period 1875 to 1982, a period bounded by the date of the establishment of the Supreme Court of Canada[211] and by the date of coming-into-force of the *Charter*.[212] According to his Lordship, these were halcyon days because they were characterized, legally, by courts which understood the proper limits of their business and by parties who recognized and honoured the limits of legal and judicial authority. Courts knew that theirs was to settle disputes and not to govern the citizenry.[213] True, the disputes were not always private and sometimes involved conflict between levels of government. But disputes they seamlessly were all the same. And when judicial labour was required on a public dispute, it was applied in a moderate and reasoned fashion which honoured the Britishness of our constitutional heritage.[214]

"[U]ntil lately,"[215] this settled symmetry between honoured courts and honouring parties was the law's defining domain. Then came the *Charter* and with it, the disruption of this tidy and familiar typography. Handed the "*Charter* drum,"[216] the judiciary has become mesmerized by a cadence of its own making. No longer satisfied with merely solving citizen and governmental disputes, the judiciary now takes the "hortatories of the *Charter*"[217] as an invitation to governance. In the result, the whole of law's tradition has been both misused and compromised.[218] Not only has the judiciary arrogated legislative power by so often "substituting [its] vision of the ideal" for that legislatively declared,[219] in its "rights-restless" crusade[220] for a new and better world, it has corroded "the equilibrium of the community,"[221] destroyed "local consensus,"[222] and become hostage to the mistaken view that its primary obligation lies with "Canada's minorities."[223] The seepage from these historic reversals has affected the very minutiae of judicial practice, "the everyday business of interpreting ordinary statutes."[224] Common, "small, old words"[225] are "judge-pummelled"[226]

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211 And, as his Lordship indicates, the date therefore from which Canada's judiciary became fully seized of the jurisdiction to police the constitutional borders separating provincial and federal law-makers.

212 The dates are his. See *supra* note 1 at 26, 33.

213 *Ibid.* at 26.

214 *Ibid.* at 34.

215 *Ibid.*

216 *Ibid.* at 12.

217 *Ibid.* at 26.

218 *Ibid.* at 28.

219 *Ibid.* at 14.

220 *Ibid.* at 35. See also *ibid.* at 31.

221 *Ibid.* at 28.

222 *Ibid.* at 41.

223 *Ibid.* at 27.

224 *Ibid.* at 29.

beyond semantic recognition and the "unaltered wording"[227] of matters no longer carries any burden or establishes any boundaries. In service to its mission to minorities, the judiciary will discover rights where on plain reading and on the record, none can properly be said to reside.[228]

And these "minority rites"[229] do not cease with the judiciary itself. Parties too now appear as supplicants in its liturgy. "Special-interest constituencies" have creepingly commandeered the *Charter*,[230] and with the ready and eager assistance of feckless, "ideologically-determined judges,"[231] have put it to work, not in the fields of law, but with utopian and decidedly antidemocratic purpose, in the "legislative pasture."[232] In consequence, as in *Vriend*, actions are now begun "with the impetus"[233] of ideologically motivated groups intent on using legal process as "platforms"[234] for the pursuit of everything from non-existing, "cost-scoffing"[235] rights to "alternative life-style[s]."[236] Indeed, the legislative power alone has survived this "rights-euphor[ia],"[237] these "heady [days of] human rights elation,"[238] unscathed. It alone appears pledged to the past. For it alone appears ready to decline adventure into every "morally-eruptive social controversy";[239] it alone seems ready to weigh "competing social and political concerns and values"[240] and not "curtsy, endlessly, to minority rites";[241] and it alone seems possessed of the wisdom that in time, "social conflicts" find "their own level of community resolution"[242] and that in the meantime, fragile "local consensus"[243] is best left to its own devices.

Justice McClung takes it to be his burden in *Vriend* to call the judicial branch to its senses by reminding its judges of the honour of their past and by warning them of the horrors which await in the dystopic future if they continue along their present, mistaken, utopian path.[244] Calamity it will be. "Judicial [appetite]" will grow ever more gluttonous.[245] Released from deference, consumed by ideological fervour, and

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225 *Ibid.* at 26.
226 *Ibid.*
227 *Ibid.* at 9.
228 *Ibid.* at 32.
229 *Ibid.* at 38.
230 *Ibid.* at 26.
231 *Ibid.* at 31.
232 *Ibid.*
233 *Ibid.* at 1.
234 *Ibid.* at 14.
235 *Ibid.*
236 *Ibid.* at 41.
237 *Ibid.* at 14.
238 *Ibid.* at 16.
239 *Ibid.* at 13.
240 *Ibid.* at 39.
241 *Ibid.* at 38.
242 *Ibid.* at 13.
243 *Ibid.* at 41.
244 See discussion *supra* note 149.
245 *Supra* note 1 at 15.

armed with "fresh and limitless concepts,"[246] "superior courts ... [will] descend into collegial bodies that meet regularly to promulgate 'desirable' legislation."[247] And once that "spectre"[248] is realized, once "the constitutional envelope"[249] has been "incrementally but steadily,"[250] and then finally, judicially torn, "an overridden public" will seek its revenge.[251] Having so often had its majoritarian "wishes"[252] frustrated and subverted by unruly judicial will, the public will demand an accountability which will diminish, if not kill, "judicial independence."[253] Such is his Lordship's double-edged call to his judicial colleagues. I will now canvass the attitude that his judgment takes towards homosexuality.

At one point in his judgment, Justice McClung comments that "by being made judges, our prejudices cannot always be suppressed" and that "our own stereotypes ... shade our attempts to pronounce ideal laws."[254] Now while this was clearly meant to express his decisionism[255] and to defend his deference,[256] it could have been uttered as a self-description. For throughout his judgment in *Vriend*, his Lordship displays an attitude towards homosexuality which can only be described as homophobic.[257] Homophobia is an instance of the more general cultural practice of stigmatizing individuals, of "disqualif[ying]" them from "full social acceptance," by reason of their representing and occupying a negatively assessed social category.[258] Homophobia, in particular, is defined as "the tendency to react with hostility to lesbians and gay men based on an acceptance of negative stereotypes of diverse individuals."[259] The key,

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246 *Ibid.*

247 *Ibid.* at 28.

248 *Ibid.* at 15.

249 *Ibid.* at 35.

250 *Ibid.* at 29.

251 *Ibid.* at 35.

252 *Ibid.* at 26.

253 *Ibid.* at 35.

254 *Ibid.*

255 See *supra* note 40 and accompanying text.

256 See text accompanying note 42.

257 Though to be absolutely fair, he sometimes appears to caveat and to confuse his attitude regarding even this matter. See *e.g. supra* note 1 at 19 where in the context of a consideration of the *Charter*, s. 1 reasonableness of the omission — and then declaring it indeed reasonable since sodomy contradicts "a millennia of moral teaching" — he declares "the two schools of ... social concern that have forced this case" to be "legitimate" and describes as "far from edifying but still conformable with fact," majoritarian intolerance towards homosexuals. Incidentally, Justice McClung is not the first judge to permit homophobia to surface. See *e.g.* the majority judgment by White J. in *Bowers*. See also the dissent by Matscher, J. of the European Court of Human Rights in *Dudgeon* v. *United Kingdom* (1982), 4 E.H.R.R. 149 at 176, para. 13, declaring it to be "well known" that the "tendency" to have sexual "relations with minors" is "widespread among homosexuals." At issue in *Dudgeon* was the validity of a Northern Ireland statute criminalizing sodomy. The majority found it to violate the privacy guarantees proclaimed in art. 8 of the *European Convention on Human Rights*.

258 See E. Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Englewood Cliffs, N.J.: Prentice Hall, 1963) at i.

259 See Self, *supra* note 21 at 396, citing G.M. Herek, "Beyond Homophobia: A Social Psychological Perspective on Attitudes Towards Lesbians and Gay Men" (1984) 10 Journal of Homosexuality 1.

then, is the refusal to accept diverse individuals as just that, as diverse. Instead, the homophob encounters the gay or lesbian individual as an instantiation of the category "homosexual," and in service to the stereotypes of which the category is comprised, reacts to them negatively and with hostility as embassaries of that abhorrent social identity and practice.

I will not here rehearse my arguments with respect to either Justice McClung's construction of the sexualized legal subject or his sexualized interpretation of the *IRPA* omission.[260] Though both are certainly relevant to any overall appraisal of his judgment's attitude towards homosexuals, I wish instead here to disclose his acceptance of stereotypes about gay men in particular. For in my view, it is this acceptance which led not only to that construction and interpretation, but also — and for present purposes, more critically — to his Lordship's inability morally to hear Mr. Vriend's very individual cry against injustice.

His Lordship appears to accept at least three stereotypes regarding the homosexual other: that beneath the very suspicious complaints[261] they make about individual discrimination, homosexuals are in fact a "special-interest constitutenc[y]"[262] bent on "legislative and judicial recognition of an 'alternative life-style'";[263] that as a special interest group, homosexuals are defined by the practice of sodomy, a practice properly condemned by "millennia of moral teaching";[264] and that that practice may be the basis for other, more "violently aberrant sexual configurations."[265] If there exists a place to take seriously and to rebut such views, this comment is not it. Since my undertaking here is to disclose how attitudes expressed in Justice McClung's judgment so fundamentally violate the ethic of liberal law, I will instead briefly discuss their effects in *Vriend.*

Acceptance of views such as these is homophobia, and homophobia carries consequences. First, of course, views of this sort create the category "homosexual." They are just the means whereby individuals who deviate from the heterosexual norm are stigmatized with a character (and a conduct) which "regulates, contains, and constitutes them";[266] and, more importantly here, they are just (and always) the way and the occasion, for other individuals, including Justice McClung, to encounter the "homosexual," not as an individual, but as a representative of a category. Which is to say, that the "homosexual" is for these reasons, a dangerous execration, both morally

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260 For further discussion, see *supra* note 123 and *supra* note 204 and accompanying text.

261 For expressions of Justice McClung's suspicions concerning the reality of discrimination against gay men and lesbians, see especially *supra* note 1 at 9, 12, and 19-21. For more reliable sources on the matter, see discussion *supra* note 175.

262 *Supra* note 1 at 26.

263 *Ibid.* at 41.

264 *Ibid.* at 19, citing *Bowers*, *supra* note 21.

265 *Ibid.* at 22. For a commentary on the construction of the homosexual as serial killer, see Stychin, *supra* note 104 at 126-27.

266 D. Herman, "The Politics of Law Reform: Lesbian and Gay Rights Struggles in the 1990's" in J. Bristow & A. Wilson, eds., *Activating Theory: Lesbian, Gay, Bisexual Politics* (London: Lawrence and Wishart, 1993) 246 at 250.

and politically, permits Justice McClung to distance himself from the individual reality of the person before him and to turn a deaf ear and a blind eye to his claim. Having thereby forbidden himself empathy for Mr. Vriend, the experience of injustice Vriend claims to have endured, can carry no moral and therefore, no legal significance for his Lordship.[267]

Annoyed and indurate, such are the attitudes his Lordship's judgment takes towards the legal and the homosexual. They need concern us here, not for reasons of personal morality, but on grounds of distinctively, legal principle. In part 1 of this comment, I argued that law is a political morality concerning the constraint of power and that, in consequence, its foundational elements are a structure of governance which divides state power and a regime of rights which saves individuals from intolerable exercises of public and private power. These elements of liberal political morality, I want now to suggest, compel a third, namely, that members of the legal community, and especially judges, be the sorts of persons who side with the vulnerable against the claims of power and who approach power with deep suspicion.[268] Everything in law depends on this being so, on judges (and, yes, lawyers too) being persons possessed of just this character towards power and those vulnerable to power. For otherwise, law itself becomes reduced to power, and instead of "commit[ting] the community to the rights and duties that make up law,"[269] judicial decisions are morally-empty, authoritarian exercises, exercises to which citizens may passively consent if they happen, as a personal matter, to approve, but by which they will never themselves be actively committed as members of polity. I cannot here at all defend these contentions.[270] For present purposes, I have only first very briefly to sketch such an argument, and then to illustrate how Justice McClung's attitudes generally and his views with respect to s. 96 courts in particular, both contradict and violate the ethics of the law.

The calculation to liberal legal ethics can be summarily put as follows: a) because it is committed to the moral equality of individuals, law is a proclamation (and practice) of the priority of justice over power; b) law not only constrains, but subverts, power because it requires power to respond in terms other than power itself; c) for both these reasons — because power is subordinate to equality and because all power is compromised because it may be called upon to justify itself in terms of justice — law approaches power with deep suspicion and in the result, from the very beginning. and

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267 See Shklar, *supra* note 83.

268 For diverse statements of this ethic, see J. Vining, *From Newton's Sleep* (Princeton: Princeton University Press, 1995) at 208: law is "subversive" of power because of its allegiance to the individual; *Law's Empire*, *supra* note 25 at 19, 93, 413, 213; I. Berlin, *Four Essays on Liberty* (Oxford: Oxford University Press, 1969) at 118; and *ibid.* at 165: in the liberal way of life, "no power, but only rights, can be regarded as absolute, so that all men, whatever power governs them, have an absolute right to refuse to behave inhumanly"; Thompson, *supra* note 197 at 266: law places "effective inhibitions upon power" in order to defend "the citizen from power's all-intrusive claims"; and R. Olden, *Hitler* (Amsterdam: Querido Verlag, 1935) at 223: "the mystical process" of liberal law — that the "state fetters, binds itself..., first hands the weak a weapon and then submits to them" — as "the essence of civilization."

269 See *Law's Empire*, *ibid.* at 97.

270 In a forthcoming essay — "The Morality and Ethics of the Academic Lawyer" — I explore and defend liberal legal ethics more fully and as regards the legal community as a whole.

always, sides with the weak, with those vulnerable to power; d) because law is a practice defined by these moral dimensions, it requires ethical actors, actors of the sort capable of doing what the practice requires, namely, preferring equality to power and the weak and vulnerable to the powerful.

I want to suggest that the attitudes expressed in Justice McClung's judgment both towards what he declares to be the topsy-turvy condition of the contemporary legal world and towards homosexuals stand in stark contrast to these moral premises and the ethical commandment which they compel. By decrying the post-*Charter* plurality of bench and litigants and causes, he at once prescribes a continued cabining of equality and forbids the intrusion of justice into waters uncharted by what he takes to be the law's serene and honourable past. Through his judgment's attitudes towards the homosexual, he proclaims that law empathizes and sides not with the vulnerable, not with the stigmatized and the social outsider, but with the powerful, with those who are already and traditionally safely within the borders of established acceptance and power. In both regards, that is, he is taking a stand on the side of the present configuration of things, with its present distribution of powers and identities, and in so doing, he is foreclosing the future and, curiously, demeaning the past.[271] True, he does concede that if a relation of power is "clearly bad," it must be "judicially condemned."[272] But as is the case with his other caveats,[273] this one too seems rarely redeemable. Having pledged himself to a fictive past, after construing the present as an object of contempt and the future as a source of dread, and by suspecting identity rather than power, having thus distanced himself from all alterity, he has forfeited the ethical foundation of legal outrage and condemnation, which is always the condition of character and habits of mind of its officials. His Lordship, of course, would have us take his siding with power as principle. But clearly we cannot. By presuming to speak for the majority, by siding with the majority and denying and degrading the minority, by defending the state at all costs, he has forsaken principle and despite his best intentions, placed himself roundly in the political.

The political nature of this forfeiture is no place better illustrated than in Justice McClung's vision of the role of s. 96 judges. Untaxed by reflection and unburdened by curiosity, it is his Lordship's view that federally-appointed judges are chiefly[274] custodians of local legal culture.[275] His reasoning to this result, though scattered throughout his judgment, arises from a singular source, the view he takes of the nature

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271 Which is to say, and despite his genuflection at the cross of British constitutional history, *supra* note 1 at 34, his Lordship appears unaware that the present configuration is a result not of a past blissfully and statically continued, but of legal struggle, plain and simple. For a recent essay on the legal importance of undertaking struggles which in terms of present arrangements, may appear foolish, see J. Lobel, "Losers, Fools, and Prophets: Justice as Struggle" (1995) 80 Cornell L. Rev. 1331.

272 *Vriend, ibid.* at 36.

273 See discussion at *supra* note 65.

274 The adverb is necessary since here too Justice McClung caveats his position. See *ibid.* and accompanying text.

275 Though his view of the matter backgrounds the whole of his judgment, Justice McClung expressly deals with the role of s. 96 judges at several points. See *e.g. supra* note 1 at 15, 16-17, 18, 22, and 23.

and importance of the *Constitution Act, 1867*.[276] For according to his Lordship, the "scheme of government"[277] proclaimed and structured by that *Act* accords so great a "latitude ... [to] local law-makers, especially the provinces,"[278] that constitutionally, Canada is a string of principalities characterized by a hodgepodge of "legislative regimes"[279] on every matter imaginable, including basic human rights.[280] True, "the Canadian *Charter of Rights and Freedoms* was adopted by the provinces, in part, to restrain the activity of government where that governmental activity encroached upon the freedoms that were declared and protected by it."[281] But the *Charter* "was not adopted by [them] to promote the federal extraction of subsidiary legislation from them, but only to police it once it is proclaimed."[282] Because the provinces are in this critical sense only bound by, and never bound to, the *Charter*, "mere constitutional scrutiny"[283] by federally appointed judges does not change the seminal structure of the federation, and is not an invitation for "federal judges wielding the *Charter* ... [to] dictate provincial legislation"[284] or "to wean competent legislatures from their 'errors.'"[285] Just the contrary: on any inspection, there is nothing in the *Charter* which "transfers this jurisdiction to federally-appointed judges."[286] Because this is so, s. 96 judges would do well to take counsel from the past,[287] exercise "self-restraint,"[288] and forbid themselves "intervention into the affairs of the community" to which they are appointed.[289]

According to Justice McClung, then, there is in a very real sense, a "general jurisprudence of Alberta,"[290] a jurisprudence defined by the priority of the local over the national on all matters, including as in *Vriend*, basic human rights, which the local is competent to proclaim. Section 96 judges cannot, therefore, perform a superintendency role, even with respect to such fundaments of citizenship. Rather, because there is properly an array of provincial jurisprudence on human rights, theirs is not the maintenance of national standards, but the custody of local variations. And if federally appointed judges act on any other understanding of their role, they not only "arrogat[e] ... legislative power,"[291] but in placing the national before the local, involve themselves in acts of "undisguised social engineering."[292]

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276 (U.K.), 30 & 31 Vict., c. 3.
277 *Ibid.* at 16.
278 *Ibid.* at 10.
279 *Ibid.*
280 See his Lordship's approving redaction of the state's argument in this regard, *ibid.* at 9-10.
281 *Ibid.* at 18.
282 *Ibid.*
283 *Ibid.* at 17.
284 *Ibid.* at 16-17. See also *ibid.* at 15: "brandishing the *Charter*."
285 *Ibid.* at 22.
286 *Ibid.* at 23.
287 *Ibid.* at 16-17, 33-35.
288 *Ibid.* at 17.
289 *Ibid.* at 22.
290 *Ibid.* at 17.
291 *Ibid.* at 22.
292 *Ibid.* at 23.

Now, quite apart from the infirmity of the constitutional theory upon which it has to be based — one in which citizenship and rights of the most basic sort are local first and only secondarily and derivatively national — this understanding of the responsibilities of s.96 judges is repugnant ethically. For as it did in spades in *Vriend*, it requires the federally appointed judiciary to disdain national commitments and in so doing, to stand behind the political results of local configurations of power. In consequence, instead of offering political losers a "forum of principle"[293] in which such majoritarian products can be put to the test of equality and tolerance, s.96 judges are to tell those minorities that "constitutional dut[y]"[294] compels their attending first to "the wishes" of the majority[295] and only then, indeed if at all, to "minority interests."[296] And in this, s.96 judges are being instructed to renounce the ethical commandments of law in favour of politics. For they are being instructed to abandon the vulnerable to the demands of power and to defend power against the demands of moral equality. This will not and cannot do as a theory of judicial obligation if only because it is finally a view which prescribes the death of the judicial.

## IV. CONCLUSION

At one point, Justice McClung appraises his "concern" to be "simple."[297] He is very wrong in this. For, as we have discovered, what in fact concerns him throughout *Vriend* is nothing less complicated than the foundational morality and guiding ethics of liberal law. I have argued, of course, that his Lordship's treatment of each of these matters sucks the law dry of its normativity by displacing moral and ethical principle with political power. In conclusion, I wish now to make good my claim that the overall effect of his judgment is the renunciation of the rule of law.

Ronald Dworkin claims that two, very different views of the rule of law enjoy support among members of the legal community, one a "rule-book conception" and the other, a "rights conception."[298] According to Dworkin, the rule book conception "insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all."[299] Dworkin criticizes this conception for being far too narrow, since "it does not stipulate anything about the content of the rules that may be put in the rule book."[300] Rather, the rule book conception "insists only that whatever rules are put in the book must be followed."[301]

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293 See *A Matter of Principle*, *supra* note 80 at 33.

294 *Supra* note 1 at 38.

295 *Ibid.* at 26.

296 *Ibid.* at 38.

297 *Ibid.* at 32. Though his Lordship directed this comment to his views about judicial "reading-up," his ubiquitous display of impatience at the wrong-headedness of many of his judicial colleagues can be taken as a signal that he thinks the whole of the matter ever so simple.

298 See *A Matter of Principle*, *supra* note 80 at 9-32.

299 *Ibid.* at 11. If his Lordship is burdened with a view on the matter, it is clearly just this view. However, so complete and far-reaching is his deference to political power, that it could be persuasively argued that he violates even this minimalist understanding.

300 *Ibid.*

301 *Ibid.*

The rights conception is, in contrast, much more robust. For it "assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole."[302] In consequence, "[i]t insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts ... so far as this is practicable."[303] Under this view, then, the rule of law is "the ideal of rule by an accurate public conception of individual rights," an ideal which requires that "the rules in the rule book capture and enforce moral rights."[304]

I will not parse the details of Dworkin's convincing argument in favour of the rights conception as a guiding political ideal beyond declaring my enlistment with his view that the rule book conception is "plainly not sufficient for justice," since "full compliance will achieve very great injustice if the rules are unjust."[305] I want instead to propose that the political morality of division of powers and of rights and the political ethics of justice over power (and all which that implies) are the minimal and necessary content of the rights conception of the rule of law. I cannot defend this proposition here, though arguments from history and from logic are available in gross abundance for that task. Rather, I will without delay rejoin Justice McClung's views on these matters in order to convince that considered as a whole, they violate and renounce this understanding of the rule of law.

Justice McClung refuses both the state and the judiciary moral goal and agency. He achieves this result only through the reversal of just those matters which I am claiming constitute the rule of law. Under his view, instead of providing a breach in the unity of power, the division of powers serves its consolidation. Under his view of rights, citizens cease to be possessed of "an inviolability founded on justice that even the welfare of society as a whole cannot override."[306] Instead, their rights are fundamentally fungible and rendered vulnerable to majoritarian power and abjection. Under his view of rights, that is, the ethical individualism which alone premises rights — the notion of the freedom of individuals to develop their lives and projects, to nurture what they individually take to be their authenticity, undisturbed — is held perpetually hostage to the contingencies of local power. Under his view of judicial ethics, judges are not impassioned with justice, they are not seized by the spirit of law's promise of social freedom, nor is their concern the outsiders in terms of which alone that promise is either made good or rendered a nullity. Under his view of judicial

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302 *Ibid.*

303 *Ibid.* [emphasis in original].

304 *Ibid.* at 11-12.

305 *Ibid.* at 12. In any event, following the easy complicity of French and German lawyers in the fascist reduction of law to power during the 1930's and 1940's, surely no such argument is any longer required, at least by those who take at all seriously the instruction of the defining events of this century. See R. Weisberg, *Poethics: and Other Strategies of Law and Literature* (New York: Columbia University Press, 1992) at 145 arguing that a retreat to excessive legal professionalism and formalism — and not latent antisemitism — "supported an ardent and dispassionate interpretation of racial laws" by the French legal judiciary and bar. See generally I. Mueller, *Hitler's Justice: The Courts of the Third Reich*, trans. D.L. Schneider (Cambridge, MA: Harvard University Press, 1991).

306 See J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 3.

ethics, rather, judges are instructed to extinguish their consciences and to abdicate their vocation in favour of custodial maintenance of the products of power. Under his view, that is, the judicial is the circumspect and always deferential toady to the powerful.

That these views will not do, that they together constitute a wholesale renunciation of the rule of law, I hope by now is plain. That they are expressed in the way that they are, with all the intemperance and bluster his Lordship can muster, is perhaps the final instruction from the unhappy case of Delwin Vriend. And that is this: that like our freedoms, political language is fragile and that once care is put aside in service to outrage, not only our language, but our freedoms as well, are everywhere diminished.[307]

[307] For an analysis of the fragility of the language of freedom and equality, see P. Ricoeur, "The Fragility of Political Language" (1987) 31 Philosophy Today 35.